



## FERN's response to 'Biodiversity Offsetting in England' Green Paper

FERN would like to thank Defra for giving stakeholders the chance to respond on this important issue. Unfortunately, we must begin by raising a number of concerns regarding the way Defra have formulated the consultation.

The Green Paper seems to make an implicit assumption that biodiversity offsetting should go ahead in the UK: *"The decisions that are taken will affect how it might be implemented"*<sup>1</sup> not whether it should be implemented. This is implicit in some of the questions asked, and we believe this may have been misleading for members of the public and stakeholders responding to this consultation.

However, this goes against the spirit of a genuine public consultation where all options are open. No request is made to look at alternative ways of achieving economic growth while protecting the environment, which seems to be at the core of this green paper. Nor is there a request to look at the important steps that are needed to protect biodiversity. This is a serious flaw in this consultation, which leads us to wonder how genuine this consultation is. For this reason, we have chosen not to respond directly to a number of the questions asked, giving additional background information where relevant instead.

We urge the government not to rule out the option of deciding not to proceed, as ruling it out would not be in accordance with a genuine consultative process.

Furthermore, there is an assumption in the Green Paper that biodiversity offsets should be provided by a market, but there is no question explicitly asking this, despite the fact that there was scope to answer this question in the last section on 'implementing biodiversity offsetting' (p. 31 of the Green Paper). If the government is considering the use of a specific market to provide offsets, it should have been specified as a question in this consultation. We can only deduce that the absence of this question means that the government has no specific market in mind.

Finally, we would like to make a comment about the way in which biodiversity offsetting has been developed so far in the UK. Of particular concern is the role that the Environment Bank is playing in the pilots and in advising the UK government over offset policy. Since the Environment Bank is a private company, this poses a conflict of interest, compounded by the fact that David Hill, the chairman of the Environment Bank is also the deputy chair of Natural England, the government's advisor of the natural environment.

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<sup>1</sup> P.8 of Green paper, paragraph 16.



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

No.

There are a number of reasons why we believe the UK should not introduce a biodiversity offsetting system in the UK:

1. Biodiversity is not an object, and asset, or an item that can be seen in isolation. It cannot be 'bought off the shelf' as stated in the Defra Green Paper (p.5, paragraph 11). Biodiversity is life itself - it is part of an ecosystem, a whole, that is also essential and a fundamental part of human existence. Biodiversity is unique, complex and rich. You cannot talk about biodiversity without talking about landscapes and land and people. It is intrinsically problematic to assume that 'biodiversity' can be moved around (offset) from one place to another – such an assumption is erroneous biologically (indeed, since restoration ecology is very much in its infancy, there is little evidence that ecosystems can ever be recreated to a specific state; see below). By counting the species and assessing the habitat in a particular area, one is taking a very narrow view of the damage that development or other serious land-use change will have on the wider ecosystem and landscape. Biodiversity is not something that one can count; it is therefore not something that one can offset. Impacts from development can be *compensated* for, which is a far humbler proposition; however, they can never be replaced, as offsetting suggests.
2. Biodiversity involves other issues linked to health and human wellbeing<sup>2</sup>: biodiversity offsetting ignores this. Sites of biodiversity are often areas where people enjoy leisure activities such as walking or bird watching. Or such sites might form an integral part of a cherished landscape. There are therefore fundamental ethical concerns with biodiversity offsetting: be it a specific habitat, a natural feature, a particular species or the landscape as a whole, damage done cannot be offset in the eyes of a community. It cannot even be compensated. Biodiversity offsetting is problematic for communities on three accounts. As well as losing what is destroyed, they have to deal with a new development and communities in the location of the actual offset can lose access to that area. The habitat bank in the South of France managed by CDC Biodiversite is now considered private land that people are not allowed to visit or enjoy. Reports show that in practice, market based mechanisms to tackle biodiversity loss, such as mitigation banking, has led to the displacement of nature away from people.<sup>3</sup>
3. It is a **dangerous distraction** from what needs to be done to protect nature, thereby curbing biodiversity loss. Defra is marketing this policy as a catch-all solution to biodiversity loss, but it does not tackle the drivers of biodiversity loss, such as an undemocratic planning system that permits development on sensitive areas, pollution, alien invasive species, industrial agriculture etc. Even if offsetting were to work, it is a side-issue in comparison to the things that England should be doing to change the way it builds, where it builds and in whose interest it builds. For this reason, it is a dangerous distraction from policy interventions that actually get to the root cause of biodiversity loss.

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<sup>2</sup> [http://www.naturalengland.org.uk/about\\_us/news/2013/041013.aspx](http://www.naturalengland.org.uk/about_us/news/2013/041013.aspx)

<sup>3</sup> [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=878331](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=878331)

- **What is causing loss and where should the UK Government's attention be if not on compensating the residual loss of development?** Much of species' decline is interconnected with habitat loss<sup>4</sup>: separate EU wide data assessing rates of change in the 2001 to 2010 period indicates a growing 'concretisation' of lands, with a near eight per cent growth in what are termed artificial surfaces – from paved over gardens in urban areas to roads in rural environments - while there have been significant declines in marsh and bog land, agricultural lands and natural grassland areas.<sup>5</sup>
- The overuse of fertilizers and pollution by waste of agricultural lands is also causing significant habitat loss. Meanwhile, a marked growth in invasive or alien species has caused a great deal of harm to native flora and fauna within the EU.<sup>6</sup>
- Not only are a wide variety of natural habitats being lost – others are also becoming heavily degraded. This is particularly evident in forests. Forest areas are critical for safeguarding overall biodiversity: the scale of the decline and degradation of forests within the EU is therefore particularly serious.
- Data from the European Environment Agency (EEA) on the conservation status of forests habitats shows that only 21 per cent are classed as being in a favourable state while 63 per cent are in an unfavourable condition. The EU is also damaging forests worldwide: Europe is now more dependent on imports of natural resources than any other region and has the biggest deforestation 'footprint' in the world, due to its consumption of such products as soybeans and palm oil – often grown on lands which were once areas of rich tropical forest.
- Along with climate change, the spread of alien invasive species, pollution, changes in land use and resource depletion, there are other more indirect factors driving biodiversity loss.
- The reality is that humankind – particularly the developed world - is consuming too much. The dominant economic system stresses increasing capital accumulation which depends, in turn, on the continuing – and unsustainable - exploitation of natural resources.
- Coupled with over-consumption, resource inefficiency is also a serious problem, since it is putting pressure on wildlife in Europe. The EU is also causing resource problems abroad. Europe is now more dependent on imports of natural resources than any other region.<sup>7</sup> It also has the greatest deforestation footprint in the world, causing more deforestation than any other region due to its consumption of soybean and oil palm (63 per cent) followed by stimulants such as coffee and tea (11 per cent), and fibre crops (8 per cent).<sup>8</sup>
- Perhaps the greatest indirect driver is the weak position of local communities and the strong position of financial and corporate interests in environmental decision-making means business development is often favoured over

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<sup>4</sup> Habitat loss can be outright loss (when a natural habitat type is removed and replaced by another habitat type), habitat fragmentation (the breaking-up of habitats into discontinuous, isolated patches) and habitat degradation (the diminishment of habitat quality which results in a reduced ability to support biological communities). See <http://www.cbd.int/kb/Results?q=glossary#1011>

<sup>5</sup> CORINE data, the EU's land inventory <http://www.eea.europa.eu/publications/COR0-landcover>

<sup>6</sup> CBD, 2010 Examination of the outcome-oriented goals and targets (and associated indicators) and considerations of their possible adjustment for the period beyond 2010 [www.cbd.int/doc/meetings/sbstta/sbstta-14/official/sbstta-14-10-en.pdf](http://www.cbd.int/doc/meetings/sbstta/sbstta-14/official/sbstta-14-10-en.pdf).

<sup>7</sup> [http://www.foeeurope.org/sites/default/files/publications/measuring\\_resource\\_use.pdf](http://www.foeeurope.org/sites/default/files/publications/measuring_resource_use.pdf)

<sup>8</sup> <http://ec.europa.eu/environment/forests/pdf/1.%20Report%20analysis%20of%20impact.pdf>

protecting landscapes in the community interest. To safeguard resources and land, FERN believes that good governance has a strong role to play, particularly a strong involvement of civil society – communities and local NGOs.

- These issues point to sensitive political factors at play. Having the EU nature directives - which serve as the main tool for halting biodiversity loss – adopted in all member states has been, no doubt, a considerable achievement. Unfortunately some EU member states have been less conscientious than others in implementing environmental legislation. Also, even when directives have been followed through, supervision and monitoring has often been far from satisfactory.
  - Too often, powerful financial and corporate interests in the EU take precedence over local community interests, with consequent negative impacts on levels of biodiversity. Economic growth, particularly in the present recessionary or post recessionary climate too often takes precedence over the interests of nature in decisions making. A developer can use corporate financial resources to argue and lobby a case.
  - The UK should tackle these issues if it wants to tackle biodiversity loss. Biodiversity offsetting cannot tackle this.
4. Defra has been clear that biodiversity offsetting must be part of a mitigation hierarchy (p.4 of Green Paper) which would mean that only ‘residual impacts’ would be compensated for. However, there has been no detail on what this mitigation hierarchy actually looks like. In the EU, the habitat directive has an in-built mitigation hierarchy of sorts under Article 6(4). However, Defra has proposed a biodiversity offsetting system that pays only lip service to the mitigation hierarchy. The mitigation hierarchy are not words; they are a process. Unless Defra is planning to impose much stricter conditions on how England’s environment is treated, biodiversity offsetting can rightfully be called a **‘license to trash’**, and should not be introduced in the UK.
5. There is little to no evidence that biodiversity offsetting has been effectual in the countries where it has been tested for the longest, whether in the USA, Australia or Canada.<sup>9</sup> (We enclose a critical review of academic literature on restoration ecology and biodiversity offsetting that we have undertaken; or see link in footnote 9). There is considerable evidence to show that restoration ecology is not able to restore or recreate lost ecosystems to a specific state. There is considerable uncertainty surrounding the results of offsetting and it would therefore be advisable that the UK does not introduce this into our environmental laws.

#### Evidence from USA

An examination of the data which is available indicates that offsetting schemes have led to a loss of wetlands in many areas. For example when scientists looked at 12 of the longest established wetland mitigation banks in the state of Ohio, they found that many failed to meet the standard of stringent scientific criteria – even though these schemes had been studied and monitored over the

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<sup>9</sup> [http://www.ceeweb.org/wp-content/uploads/2011/12/Critical-review-of-biodiversity-offsets\\_for-IEEP\\_Final.pdf](http://www.ceeweb.org/wp-content/uploads/2011/12/Critical-review-of-biodiversity-offsets_for-IEEP_Final.pdf)

years by both the Army Corps of Engineers and the Environmental Protection Agency.<sup>10</sup>

Only three banks scored in the successful category, while five were rated a pass in some areas but failed in others. The remaining four failed nearly every assessment, having become more like 'shallow dead pools' than wetland habitats, in the words of the report. Despite these failings, none of the managers of these banks were censured, nor were any fines attributed.

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

No.

The Government's **stated objectives** are to speed up planning applications, thereby reducing the cost to business due to delay, while maintaining biodiversity. We do not believe these are the right objectives. The aim of Defra is to protect the environment, forests and rural affairs, and any policy issued by Defra should be focused on these priorities, first and foremost.

We do believe that economic growth is indeed important, and we agree that this can be achieved while protecting nature. We therefore agree with Owen Paterson's statement that for too long, economic growth and environmental protection has been opposed.

However, this will not be achieved by speeding up planning applications and developing in the same way. We believe it is possible to achieve economic growth and protect the environment, but this does require that we make some shifts in how we do things, and integrate environmental protection across all parts of the economy. Housing, for instance, is badly needed, but much of the supply can be achieved through making existing towns, villages and cities denser and through renovating empty buildings. This reduces urban sprawl, which has negative impacts on climate change and social well-being, as well as on the land it is eating up.

Doing things differently requires that we reconsider what we mean by economic growth, particularly the question, economic growth for who? If we continue to build housing in the way it is proposed in Rodborough Fields in Gloucestershire<sup>11</sup> or in North Tyneside<sup>12</sup>, it will create wealth for a few large housing developers, in this case Bellway Homes and Lioncourt Homes, but if we approached the way we provide housing differently, such as by renovating existing buildings or making towns more dense, i.e. a more de-centralised and bottom-up approach to providing housing, this could create wealth for smaller building firms. This would still create economic growth, but would make sure it is in the pockets of many more people.

The proposed system for biodiversity offsetting will indeed achieve a speedier planning process, and it will lead to more development. If this is what the Government is intending to achieve, then they will achieve their stated objectives.

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<sup>10</sup> Mack, JJ, and M. Micacchion. 2006. An ecological assessment of Ohio mitigation banks: vegetation, amphibians, hydrology and soils. Ohio EPA technical report WET/2006-1

<sup>11</sup> <http://www.bbc.co.uk/news/uk-england-gloucestershire-23301393>

<sup>12</sup> <http://saveourwoods.co.uk/articles/nppf/biodiversity-offsetting-permits-previously-rejected-housing-development/>



However, we do not believe that it would lead to the restoration of biodiversity, nor lead to a 'no net loss' of biodiversity. Since it would greatly increase the number of planning applications being made and accepted, the Business as Usual baseline scenario of development trends will therefore increase relative to today's levels. This means it will lead to a net loss of biodiversity.

We do not believe that the characteristics the government thinks biodiversity offsetting would display are correct. The Green Paper states that the government aims for a system that is easy for the public to understand, but currently the public does not understand the system as there has been very little transparency about the pilot projects. Local groups in the UK that FERN has been working with are on the whole very critical of biodiversity offsetting and do not trust the system, but on the whole, few even know the pilot is happening.

The Green Paper states that it would like biodiversity offsetting to be considered within a strong mitigation hierarchy. There is no evidence that the UK is pursuing a mitigation hierarchy.

Even so, there is evidence to show that despite the existence of the 'mitigation hierarchy' in countries where offsetting already exists (USA, Australia, Canada and Germany are the most advanced systems) most jurisdictions do not properly implement an avoidance hierarchy, which should include 'no development' as an option. Furthermore, studies show the difficulty of proving whether projects have properly consulted alternative options, or have proved overriding public interest (two key elements of the mitigation hierarchy in Article 6(4) of the Habitat Directive). Studies show that it is extremely rare that projects have ever been refused due to the difficulty of offsetting biodiversity.

To add one further point: the Green Paper seems to make the assumption that 'avoidance' relates to avoiding damage done by a development with the assumption that it goes ahead. However, real avoidance should also mean that on occasion development does not go ahead in that area at all, and that a different development is proposed. This should be made more evident, as this is what is truly meant by the mitigation hierarchy.

**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?**

No.

Biodiversity is unique, in terms of what it is, where it is. Biodiversity offsetting requires making biodiversity in one place equivalent to biodiversity in another place, which is essentially impossible. Since biodiversity is highly complex and place specific, this makes it, by definition, irreplaceable. To justify offsetting requires making a number of simplifications. However, through these simplifications, they no longer reflect the reality on the ground.

The metric, devised in part by Treweek Consultancy is entirely inappropriate and unscientific, and creates such simplified results as to be meaningless. Jo Treweek,



director and founder of this consultancy, has said that she does not believe that her metric was ready to be used in the pilot, as reported by the Ends report

*“The sad thing about the pilot is they decided not to test the metric with data from the ground. I never imagined they would run with the metric without testing it.”*

*Treweek also points to the fact the metric is entirely based on habitats: it says nothing about the important species living in those habitats. It is silent too on the location of offsets in relation to the habitat lost.”<sup>13</sup>*

The metric produces ‘units of biodiversity’ with no thought for where it is, the type of ecosystem it is, what species are present etc. This is over simplified and does not reflect reality. It is worth noting that the use of single metrics such as ‘area of habitat’ to represent biodiversity losses and gains has been widely discredited.<sup>14</sup> If compensation (please note that we do not condone offsetting, do not believe it is possible, and therefore do not refer to it) is to be credible, there must be a far more detailed and credible methodology that attempts to reflect as closely as possible what is on the ground. This does mean that the assessment takes far longer, and is far more cost-intensive, which leads us to believe that this metric is politically motivated in its simplification. In its current form, the proposed metric is dangerously misleading as it implies that a study has been done, when only the lightest of box-ticking has been done.

Most of the planning officers in the six pilot counties that we have spoken to admitted that they had not yet used the metric in the field. We believe that the metric proposed is a liability, and discredits any UK proposals to compensate for damaged nature from the outset.

Offsets ostensibly rely upon the accurate quantification of losses and gains, and therefore require robust metrics.<sup>15</sup> If these metrics do not capture what is there, this puts into question the ability to claim to be able to offset biodiversity.

A number of case studies discuss the difficulty of measuring biodiversity<sup>16</sup>. This means it is hard to know if what is lost is being replaced. There exists no single metric that objectively captures the full extent of biodiversity, which itself has no universal, unambiguous definition. This poses the question of what exactly is being measured.

If – as discussed earlier – biodiversity is connected as part of wider ecosystem, at what scale should you measure and offset? Offsets ostensibly rely upon the accurate quantification of losses and gains, and therefore require robust metrics.<sup>17</sup> If these metrics do not capture what is there, this puts into question the ability to claim to be able to offset biodiversity.

**If you think the pilot metric is the right basis for an offsetting system are there any other factors which should be considered when quantifying biodiversity loss and**

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<sup>13</sup> <http://www.endsreport.com/38602/biodiversity-offsetting-pilots-one-year-on>

<sup>14</sup> TEEB (2010) TEEB for local and regional policymakers report. <http://www.teebweb.org>

<sup>15</sup> BURGIN, S. (2008) BioBanking: an environmental scientist’s view of the role of biodiversity banking offsets in conservation. *Biodiversity and Conservation*, 17, 807–816.

<sup>16</sup> Hilderbrand, R. H., A. C. Watts, and A. M. Randle 2005. The myths of restoration ecology. *Ecology and Society* 10(1): 19. [online] URL: <http://www.ecologyandsociety.org/vol10/iss1/art19/>

<sup>17</sup> BURGIN, S. (2008) BioBanking: an environmental scientist’s view of the role of biodiversity banking offsets in conservation. *Biodiversity and Conservation*, 17, 807–816.

**gain? Are the weights given to the different factors appropriate? Are there any other changes you think should be taken into account?**

No comment

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

No.

We do not believe that offsetting should be approached in the planning system. If compensation is to be considered, this must be done after a planning proposal has gone through its process, as is the case in Sweden.

*“In Sweden, compensation for natural values should not influence the decision making regarding exemptions and permits. The decision to grant a permit should be based on the rules that allow the development to be implemented (e.g. overriding public interest, limited impacts, avoidance of impacts to priority species/habitats) and not on expected positive impacts of compensation measures. Compensation measures are proposed once the development is permitted to ensure no net loss, but not as part of the permitting procedure as such. Thus, the fact that compensation can or will be undertaken, and the extent to which this might reduce negative effects, shall not be taken into account in the decision-making.”<sup>18</sup>*

Deciding whether a local planning office accepts a development should not, under any circumstances, be based on whether it can be compensated or not. In the first instance, it should be based on a local development plan, i.e. whether it is in accordance with existing planning rules for the area. Developments should also be based on a consultation with the community, as well as on the merits of the development and what alternatives are. Offsetting is under no circumstance part of this process, since it may influence a decision in favour of a development, which is undemocratic. If offsetting is permitted to influence a planning process, this is where biodiversity offsetting has a potential to become a ‘license to trash’.

There are further ethical problems related to who decides what happens to our landscapes. Currently we have democratically decided laws that define what is and is not acceptable impact on nature. Offsetting implies that the destruction of habitats depends not on what regulation says, but on whether the developer can meet the price of restoring alternative habitat elsewhere. If a developer’s project is posing an unacceptable danger to the environment, offsetting promises to right that wrong. It is harder to assess whether there has been a violation of law. This challenges basic notions of democracy, that you can bring wrong-doing before a court and means that on the ground, there is likely to be more destruction.

**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?**

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<sup>18</sup> [http://ec.europa.eu/environment/enveco/taxation/pdf/Habitat\\_banking\\_annexes.pdf](http://ec.europa.eu/environment/enveco/taxation/pdf/Habitat_banking_annexes.pdf)



Only public bodies have competency on land-use issues. Planning is a matter for local authorities, though there should be increased implication of local communities in this process. If planning authorities had more environmental expertise, we would probably have an improved biodiversity situation in the UK. This should be a first step of any plan to reduce biodiversity loss in the UK.

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

No.

Proposals for compensation should under no circumstances be part of development consent regimes. Land-use decisions must be made on the basis of a local development plan, on a community consultation, and on the merit of the development. If compensation is proposed during the development consent process, this could put undue pressure for the development to go ahead. As such it would interfere in the development consent process, which would be inappropriate and undemocratic. If this is permitted, this is where biodiversity offsetting has a potential to become a 'license to trash'.

One particular case in the UK shows early on how biodiversity offsetting has served to facilitate the successful appeal of a developer and ultimately, to gain approval and permission to start building. It reveals ethical issues related to how biodiversity offsetting is undermining local communities, who in this case mounted a successful campaign against a large-scale housing development.

It is the case of a development of 366 (originally 600) houses that was originally rejected at the planning application stage due to its proximity to a Site of Special Scientific Interest (SSSI) at Gosforth Park and adjacent to a Site of Local Conservation Interest. They have been declared a wildlife corridor by conservationists. In the appeal documents, there is significant evidence that the provision of biodiversity offsetting played a strong role in facilitating a positive response from the appeal.

Bellway, the housing developer, and the Environment Bank have been working together on proposing offset sites. Despite significant evidence in the appeal that biodiversity offsetting had no track record and no scientific grounds, the inspector decided to provide permission. The Secretary of State, Eric Pickles, whose department is in charge of reviewing such appeals, gave his approval on the condition that there was enough evidence that the biodiversity offsetting would sufficiently offset residual impact. Whatever offset is proposed (apparently there is currently one estate that is interested in providing an offset), this will do nothing to mitigate the damage on local wildlife sites nearby.

### **Do you think developers should be able to choose whether to use offsetting?**

We do not believe that the government should take any steps to encourage developers to use offsetting. This could be used as a form of green washing to condone developments that are unwanted or unneeded, or have an adverse impact on nature or communities.

### **If so what steps could Government take to encourage developers to use offsetting?**



No comment.

**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?**

We do not wish to comment on this question since we do not believe that the UK should introduce an offsetting provision. However, it is self-evident that, the larger a development, the harder it is to avoid impact in the first place.

**What level should the threshold be?**

No comment.

**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?**

No comment as we do not believe offsets are viable.

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

This impact assessment did not sufficiently look at alternatives to offsetting.

**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: compensation already occurring where there is residual biodiversity loss which cannot be avoided or adequately mitigated, the method for estimating costs and their magnitude, the method for estimating benefits and savings and their magnitude, how to capture the wider social and environmental benefits of maintaining England's stock of biodiversity and delivering a coherent ecological network, likely take up of offsetting under a permissive approach.**

We do not wish to comment on this question since we do not believe that the UK should introduce an offsetting provision.

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

We do not wish to comment on this question since we do not believe that the UK should introduce an offsetting provision.

**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? Which habitats do you think should be considered irreplaceable?**

We believe that all nature is irreplaceable, whether for its biological, social, or landscape functions. We recognise that some areas contain more species richness and diversity than others, and that some habitats take longer to establish themselves than others. However, thanks to the European Nature Directives, much endangered, fragile or ecologically special habitat and species already receives protection, so exemption is not legally necessary by any scheme that the UK introduces, since they are already by definition exempt under EU law.

In addition, if these protected habitats and species are impacted due to a development or other land-use change, there are very strict guidelines regarding what is permissible. The development or harmful land-use change can only happen if alternatives cannot be found, there are reasons of overriding public interest and the development does not harm the integrity of the habitat or species.

### **Do you think offsetting should in principle be applied to protected species?**

As explained above, species protected under the EU Nature Directives are protected: they cannot be impacted, and doing so can mean the European Commission may take the Member State in question to the European Court of Justice for contravention of EU law. This threat is a strongly dissuasive one.

There are provisions for derogations if protected species and habitats are to be impacted by a development. In this regard, Member States may apply for derogations to destroy protected species or habitat and must prove that alternatives cannot be found, there are reasons of overriding public interest and the development does not harm the integrity of the habitat or species.

Compensation therefore already exists as part of EU law; no further requirements are needed in this regard for protected species. Any attempt to supercede or alter existing requirements for compensation under EU law would be illegal and would be legally challenged.

Given these strict conditions, it would be almost impossible for compensation requirements under the Birds and Habitats Directive to be provided for by a market, as implied by the Green Paper, given how specific the requirements would be.

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

Thanks to the European Nature Directives, much endangered, fragile or ecologically special habitat and species already receives protection, so exemption is not legally necessary by any scheme that the UK introduces, since they are already by definition exempt under EU law.

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

Unless the Government's proposals are the same as existing provisions under the EU Nature Directives and the relevant guidance documents, any application of offsetting on great crested newts would be illegal.

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

Unless the government's proposals are the same as existing provisions under the EU Nature Directives and the relevant guidance documents, any application of offsetting on great crested newts would be illegal.

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

We do not wish to comment on the specifics of this question, however, we would like to point out that it is impossible to reduce the impact of a development on one specific species. The impact of development or adverse land-use change has repercussions on whole ecosystems, on landscapes as well as on local communities. Any attempt to compensate for specific species without looking at its wider impacts is extremely narrow-minded.

This question is biased in the way it is posed; we object to the way this question has been phrased, inviting respondents to 'take into account constraints'. If the Government is concerned with constraints of offsetting on species, it should also recognise that all offsetting is technically difficult, even impossible.

**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?**

We do not wish to comment on the specifics of this question, however we would like to point out that unless land is publically owned, it cannot be considered secure.

**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?**

We do not wish to comment on the specifics of this question, however any roles with regards public goods must be within the public domain.

**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?**

We do not wish to comment on the specifics of this question, however given the fact that land-use is currently registered by the Land Registry, any change in land-use would automatically be recorded there.

The Environment Bank would not be an acceptable register since it is a private company, and only public bodies are competent on land registry issues.

**How long should offsets be secured for?**

We do not wish to comment on the specifics of this question, however common sense would say that if offsets are truly offsetting impact and replacing with what was there

(which we do not believe is possible, which is the reason why we are not commenting on the specifics of this question) then offsets must be secured for as long as the impact lasts, which in some cases may well be in perpetuity.

It is important to highlight a governance reality that relates to the longevity of the offset. The ‘wished for’ result is to offset loss in perpetuity. On paper, this is often interpreted as 50-75 years<sup>19</sup>, and in practice this can amount to less than a few decades. The UK’s first offset has been guaranteed for only 15 years through a management plan. Previous ecological compensation activity in the UK, such as the compensation secured after the building of the Twyford Down road was later paved over to build a car park.<sup>20</sup> As with carbon offsets, which have been dogged with problems related to longevity of offsets, it is simply impossible to say that an offset can be secured in the long-term, let alone in perpetuity. Whereas biodiversity losses are guaranteed, future gains may be realised late or not at all.<sup>21</sup> Past implementation shows that there is a generalised failure to ensure that offsets are properly implemented, that biodiversity is properly measured and that offset interventions are sufficient and appropriate.

It is worth pointing out that the first offset in the UK will be ‘managed’ for only 15 years. This is typical of a ‘governance’ problem, where it is impossible to be sure of the long-term viability of the offset. The Environment Bank, which acted as broker in the scheme, defended the management timescale saying that as a trusted NGO had agreed to undertake the project, “*we feel there is minimal risk the habitat would not be managed for longer.*” This seems to indicate a rather cavalier approach to environmental planning – the long term management of the site is not certain. The on-going ecological coherence of the scheme is by no means secure – and such a lack of rigour poses serious questions about the integrity of other offsetting schemes in the UK.

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

We do not wish to comment on the specifics of this question, however it seems the right opportunity to discuss the uncertainty surrounding offset results. Those involved in biodiversity offsetting talk in terms of targets rather than of certainties. The trouble is that if the target is not achieved, an area’s biodiversity is lost, never to be regained.<sup>22</sup> In reality, most biodiversity offsets are little more than a promise of future results. Offsets, especially if based on ‘restoration or creation’ provide no certainty as to their final outcome. Studies shows that offsets more often than not provide ‘equivalent biodiversity’ that is inferior to that which was destroyed.<sup>23</sup>

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<sup>19</sup> LIPTON, J., LE JEUNE, K., CALEWAERT, J.B. & OZDEMIROGLU, E. (2008) Toolkit for Performing Resource Equivalency Analysis to Assess and Scale Environmental Damage in the European Union. REMEDE toolkit. eftec, London, UK.

<sup>20</sup> <http://www.independent.co.uk/news/second-battle-of-twyford-down-looms-over-plan-for-car-park-1104427.html>

<sup>21</sup> BEKESSY, S., WINTLE, B., LINDENMAYER, D.B., MCCARTHY, M., COLYVAN, M. & BURGMAN, M. (2010) The biodiversity bank cannot be a lending bank. Conservation Letters, 3, 151–158.

<sup>22</sup> Suding, K.N., 2011. Toward an era of restoration in ecology: successes, failures and opportunities ahead. Annu. Rev. Ecol. Evol. Syst. 42, 465–487.

<sup>23</sup> There are a number of case studies in the 2001 [report by the National Research Council](#) that show that in a number of cases, offsetting sites have not reached a satisfactory level of equivalency.

Uncertainty is often accounted for simplistically by increasing the amount of compensation required; i.e. using multipliers.<sup>24</sup> A multiplier increases the amount of biodiversity gains required for biodiversity lost. But it is widely accepted that these are not rooted in any biological reasoning. In effect, the use of multipliers increases the costs for developers and is meant to be dissuasive. However, if it means that a developer can go-ahead with a much wanted project, this is no obstacle. The end result is that we are leaving our nature legislation to be guided by prices rather than democratically decided rules.

**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?**

No comment.

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

We do not wish to comment on the specifics of this question, however it should be recognised that the impact of development extends beyond the impact on nature, into community life and also landscape integrity.

**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.**

We do not wish to comment on the specifics of this question; however any roles with regards public goods must be within the public domain.

We would like to take the opportunity here to register our concern over the role that the Environment Bank has played in developing offset policy in the UK, which we believe poses a serious conflict of interest, given their financial interest in such a policy going ahead. The Environment Bank proposes to fulfil a number of roles which could again pose a significant conflict of interest. They would like to provide an online Environmental Markets exchange where landowners, NGOs and other stakeholders can register land where they have done, or wish to undertake conservation activities. The Environment Bank also propose to be the stakeholder that calculates the impact a development will have on a wildlife site, that measures the number of credits an offset provides and that monitors this offset in the long term, to check it is doing what it should. The Environment Bank have a clear financial interest in the development of new policy on biodiversity offsetting so it should be unacceptable that they play such a major role in developing policy on biodiversity offsetting in the UK.

It also seems appropriate to take the opportunity to discuss the governance realities of implementing offset systems. Experience of offsets reveal a number of governance realities that must be acknowledged. Governance problems relate to how well a system is implemented. A key problem that has been observed in practice is that of compliance. Non-compliance with offset requirements is a significant challenge and takes a variety of forms. Experience shows that problems can mean non-compliance with the mitigation

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<sup>24</sup> KUJALA, H., BURGMAN, M.A. & MOILANEN, A. (2012) Treatment of uncertainty in conservation under climate change. Conservation Letters. <http://dx.doi.org/10.1111/j.1755-263X.2012.00299.x>

hierarchy, which is frequent.<sup>25</sup> Alternatively, non-compliance can lead to offset projects being implemented partially or not at all. This has long occurred in the case of wetlands in the USA, but also in Brazil, with its Forest Code<sup>26</sup> and Canadian fish habitat.<sup>27</sup> These compliance problems are particularly problematic because in the past, public authorities have failed to penalise or deal with failed offsets.<sup>28</sup>

**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?**

We do not wish to comment on the specifics of this question, however logically, if the Government is proposing an offset system (which we do not believe is possible, which is the reason why we are not commenting on the specifics of this question) then any replacement must be exactly what was lost. This is popularly known as 'like for like' or 'in kind' offsetting.

**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?**

We do not wish to comment on the specifics of this question, however it should be recognised that the impact of development extends beyond the impact on nature, into community life and also landscape integrity.

We would also like to comment that this question is seriously misleading, since it is phrased in a way that makes it hard for someone who is not familiar with offsets to say 'no'. No-one wants 'un-strategic' application of policy. It is also misleading because it does not make the trade-offs clear, which is that a so-called 'strategic' approach means that local communities lose out. This question highlights a key tension in priority setting for compensation: either it is 'strategic' as this question puts it (i.e. it puts biodiversity first) or it is 'ethical' (i.e. it puts communities first). There is no win-win, or rarely.

This question is also heavily biased in favour of creating a habitat bank: the green paper states:

*"This cannot come at the expense of unnecessary bureaucracy or happen in a way that would unnecessarily distort the market e.g. if the strategy is too inflexible and the rewards for complying with the strategy are disproportionate."*

These biases have no place in a genuine consultation. The aim should not be to accommodate a market, the aim of this paper is to assess whether the UK should implement biodiversity offsetting (and we believe the aim of the paper should be broader: how can the UK reduce biodiversity loss).

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<sup>25</sup> [http://navinderjsingh.weebly.com/uploads/1/1/2/2/11224342/bull\\_etal\\_2013\\_oryx.pdf](http://navinderjsingh.weebly.com/uploads/1/1/2/2/11224342/bull_etal_2013_oryx.pdf)

<sup>26</sup> HIRAKURI, S.R. (2003) Can law save the forest? Lessons from Finland and Brazil. Centre for International Forestry Research, City, Q3 Indonesia.

<sup>27</sup> QUIGLEY, J.T. & HARPER, D.J. (2006a) Compliance with Canada's Fisheries Act: a field audit of habitat compensation projects. *Environmental Management*, 37, 336–350.

<sup>28</sup> <http://onlinelibrary.wiley.com/doi/10.1111/j.1755-263X.2009.00061.x/abstract>

If a market based mechanism is used to provide offsets, the reality is that offsets will neither be strategic nor ethical/local, since developers almost always offset where it is cheapest to buy and restore land.<sup>29</sup>

**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?**

No comment.

**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?**

We do not wish to comment on the specifics of this question, however we would like to highlight some experience we have with regards ‘averted loss’ offsets. The difficulty is that it is very hard to prove that such an environmental gain would have been lost. Our experience with monitoring forest carbon offsets is that often ‘baselines’ for what would have been lost are fictitious. In other words, offset providers fictively present an area as ‘under threat’ when it is not. If these fictitious offsets are used to compensate for the loss of biodiversity, this clearly leads to a net loss in biodiversity.

A recent report by the Court Auditor in British Columbia, Canada, ruled that the forest carbon offsets that the company in British Columbia was providing were not genuine, because the activities to save the forests would have happened anyway.<sup>30</sup> This is not an isolated case and is unfortunately, a problem that is difficult to resolve.

**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?**

We do not wish to comment on the specifics of this question, however we believe this question could have been phrased more clearly, and as it stands, is misleading. The issue at the heart of this question is additionality: should offsets be additional? Logically, if the UK would like to achieve no net loss, then offsets must be additional actions rather than existing restoration activities. As with the previous question, there is a problem with proving additionality, which is a problem that has dogged offsetting systems in the past, without resolution.

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

We do not wish to comment on the specifics of this question, however any roles with regards the management of public goods, i.e. land and biodiversity etc. must remain within the public domain.

The Environment Bank is not an acceptable provider as it is a private company with vested interests in the volume of trade

**How should differences of opinion over assessments be addressed?**

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<sup>29</sup> <http://wetlandsnewsletter.org/pdf/28.02/Ruhl.pdf>

<sup>30</sup> [http://www.bcauditor.com/files/publications/2013/report\\_14/report/OAG%20Carbon%20Neutral.pdf](http://www.bcauditor.com/files/publications/2013/report_14/report/OAG%20Carbon%20Neutral.pdf)



No comment.

**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?**

This question makes the unhealthy assumption that the metric chosen will not reflect the habitat type and that compensation should not be like for like.

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

Logically, if the government is proposing a system of offsetting (which we do not believe is possible to achieve), then compensation must be 'like for like'. Logically, it cannot be any other way, or it is not 'offsetting' a loss.

**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?**

We do not wish to comment on the specifics of this question; however we believe it is dangerous to start adapting legislation to include offsetting, especially where it would weaken existing requirements to protect.