

Department for Environment, Food and Rural Affairs

Biodiversity Offsetting Pilots

Information note for Local Authorities

March 2012



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Introduction

1. Biodiversity offsets are conservation activities designed to deliver biodiversity benefits in compensation for losses, in a measurable way. Biodiversity offsets are distinguished from other forms of ecological compensation by the requirement for measurable outcomes: the losses resulting from the impact of the development and the gains achieved through an offset are measured in the same way.
2. As announced in the Natural Environment White Paper¹, biodiversity offsetting is being piloted in England for 2 years, from April 2012. Developers in pilot areas required to provide compensation for biodiversity loss under planning policy can choose to do so through offsetting.
3. This note is aimed at local planning authorities in the pilot areas, and at local authorities that are working with us on complementary projects. Separate notes are available for developers, and for organisations that would like to provide offsets. If you decide to use the offsetting approach outside one of the pilot areas or complementary projects, we would be interested to hear about your experience – please contact us at bio.offsets@defra.gsi.gov.uk.
4. This note is not a comprehensive and authoritative guide to planning policy and its interpretation, as that is ultimately a matter for the courts. Rather, it seeks to signpost relevant legislation and guidance which need to be considered in relation to biodiversity offsetting, and to flag up key considerations which local planning authorities will need to take into account. It does not seek to define or redefine the balance between biodiversity and other material considerations within the planning process. That, again, will be a matter for local planning authorities to consider on a case by case basis as development proposals come forward for consideration.

Other useful sources of background information

5. If you would like more general information about what biodiversity offsetting is and why it is being piloted, please see our key publications and documents about offsetting on Defra's website². These papers explain the thinking on various issues, and the approach we have taken to designing the pilot, including:

- the rationale and explanations behind the approach to biodiversity offsetting we are testing in the pilot
- why offsetting as proposed focuses on habitat

¹ <http://www.official-documents.gov.uk/document/cm80/8082/8082.pdf>

² <http://www.defra.gov.uk/environment/natural/biodiversity/uk/offsetting/>

- the principles we have used to design the approach to the offsetting pilot

What does this information note cover?

- Key relevant legislation and guidance
- Background on planning and planning policy relevant to biodiversity offsetting
- The Offsetting Strategy
- Section 106, the Community Infrastructure Levy and Planning Conditions
- Support offered in pilot areas from Natural England
- Other useful sources of information on managing the impacts of development on biodiversity
- Recording information

Key relevant legislation and guidance

6. Key pieces of legislation that local planning authorities using biodiversity offsetting need to be aware of include:

- Part 1 of the Wildlife and Countryside Act 1981³ as amended
- The Conservation of Habitats and Species Regulations 2010 as amended⁴
- Sections 40 and 41 of the Natural Environment and Rural Communities Act 2006⁵

7. Administrative guidance on the application of some of these statutory obligations is provided in a circular “Biodiversity and geological conservation – Statutory obligations and their Impact within the planning system” (ODPM Circular 06/2005; Defra Circular 01/2005⁶).

8. When looking at duties under Part 6 of The Conservation of Habitats and Species Regulations 2010, relevant European Commission guidance includes:

³ <http://www.legislation.gov.uk/ukpga/1981/69/contents>

⁴ <http://www.legislation.gov.uk/uksi/2010/490/contents/made>

⁵ <http://www.legislation.gov.uk/ukpga/2006/16/contents>

⁶ <http://www.communities.gov.uk/publications/planningandbuilding/circularbiodiversity>

- Managing Natura 2000 Sites - The provisions of Article 6 of the ‘Habitats’ Directive 92/42/EEC⁷
- Assessment of plans and projects significantly affecting Natura 2000 sites
- Guidance document on article 6(4) of the Habitats Directive

9. We would not normally expect the biodiversity offsetting mechanism to be used on designated sites and species protected under legislation. For such sites, existing policies and procedures will apply.

Background on planning and planning policy relevant to biodiversity offsetting

10. This section sets out some background on planning and planning policy, in so far as it is relevant to biodiversity offsetting.

Where is current planning policy for biodiversity set out?

11. Current planning policy for biodiversity and geological conservation interests is set out in the National Planning Policy Framework (NPPF)⁸ which was published and came into force on 27 March 2012. Biodiversity policies in Local Plans should be consistent with the principles and policies set out in the NPPF. Section 11 of the NPPF on Conserving and enhancing the natural environment, paragraphs 109 to 119, is particularly relevant.

12. For biodiversity offsetting, the most relevant of principles and policies in the NPPF are:

“The planning system should contribute to and enhance the natural and local environment by minimising impacts on biodiversity and providing net gains in biodiversity where possible, contributing to Government’s commitment to halt the overall decline in biodiversity, including by establishing coherent ecological networks that are more resilient to current and future pressures”. (Para 109)

“When determining planning applications, .. if significant harm resulting from a development cannot be avoided (through locating on an alternate site with less harmful impacts), adequately mitigated or, as a last resort, compensated for, then planning permission should be refused.” (Para 118)

13. This policy reflects the ‘mitigation hierarchy’, whereby compensation for residual harm is a last step and comes after consideration of how harm can be avoided in the first place and then, if that is not possible, how harm can be minimised through mitigation.

⁷ http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf

⁸ <http://www.communities.gov.uk/documents/planningandbuilding/pdf/2116950.pdf>

Some key terms

14. The NPPF does not define the following key terms, but generally accepted definitions are:

Harm – Any impact, direct or indirect, that may have an adverse effect on a biodiversity interest.

Avoid – Ensuring that negative impacts do not occur as a result of planning decisions by, for example, locating development away from areas of ecological interest.

Mitigate – Measures to mitigate are ones taken which reduce negative impacts. Examples of mitigation measures include changes to project design, construction methods or the timing of work, or enhancing or restoring other interests or areas on a site so its overall ecological value is retained.

Compensate – Measures which are taken to make up for the loss or of, or permanent damage to, biodiversity. Where some harm to biodiversity is reduced through mitigation, compensation will represent the residual harm which cannot or may not be entirely mitigated. Compensation measures may be on or outside the development site.

15. Developers may provide a combination of both mitigation and compensation. Maximising mitigation can reduce the need for, and scale of, compensation measures, in line with para 109 of the NPPF which states that local planning authorities should aim to minimise impacts on biodiversity. It is good practice to work on the principle of 'no net loss' of biodiversity, and to aim for a 'net gain' as a result of the development proposal.

16. There is no definition of significance. However, the term relates to the magnitude of impacts, either alone or in combination, including those which may be temporary during construction, rather than the size of the development under consideration. Small developments can have significant impacts on biodiversity.

17. Factors that local authorities may wish to consider when deciding whether or not the impacts of a development are significant include:

- Sensitivity of biodiversity interests to likely impacts from development
- Relative abundance and importance of biodiversity interests which will be negatively affected
- Loss of habitats and/or species and the proportion that these losses constitute of the international/national and/or local resource
- Permanent or temporary changes to natural processes which are necessary to support habitats and species
- Loss of the integrity of a site or viability of a population

- Wider contribution that particular interests make to the wider value of ecological networks

18. Local planning authorities, when granting planning permission, may use planning conditions or obligations (the latter under Section 106 of the Town and Country Planning Act 1990) to deliver some of the policy requirements of NPPF. Paragraphs 203 to 206 of the NPPF detail policy on use of planning obligations and conditions. Circular 05/2005 has been revoked.

The Offsetting Strategy

19. Local authorities will agree and publish a strategy for using offsetting in their pilot area with their partners. This should set out the types of habitats the local authorities would like to see created through offsetting, and target areas for offset projects (e.g. linking together valuable wildlife sites, buffering watercourses etc). This information will be used by offset providers, to make sure they are proposing projects the local authority is likely to accept as compensation. Having a strategy should help make sure offsets make the greatest possible contribution to improving and enhancing the ecological network, as outlined in the Natural Environment White Paper and *Making Space for Nature*⁹.

20. Local authorities and their partners should not need to create new strategies specifically for the pilot, although where several authorities collaborate in a pilot area, they may need some kind of overarching statement. Existing strategies which could provide a basis for an offsetting strategy include plans for Nature Improvement Areas, Biodiversity Action Plans, or biodiversity opportunity areas. Local authorities in pilot areas, working with their partners, could decide to add conditions to the national metric to reflect their particular circumstances and priorities, as part of the development of their offsetting strategy. For example, they may decide that a particular habitat is especially important in their area, and therefore would like any offsets provided to compensate for loss of that particular habitat to comprise expansion or restoration of that habitat. They may decide that in their area a particular habitat is in a higher distinctiveness band than that suggested by the national guidance. Where changes to the standard approach are made, the rationale would have to be clearly set out, and the information about the difference available to all potential participants, at the start of the process.

Section 106, Community Infrastructure Levy and Planning Conditions

Considering development applications

21. When considering development applications, the local authority would decide whether or not to grant planning permission for a development, in line with relevant

⁹ <http://archive.defra.gov.uk/environment/biodiversity/documents/201009space-for-nature.pdf>

planning policies and any other material considerations relevant to the proposal, in accordance with Section 38(6) of the Planning and Compulsory Purchase Act 2004. Even where development plans do not contain policies on biodiversity offsetting specifically, other policies may be relevant. They would also consider, as they do now, whether impacts on biodiversity had been appropriately avoided or mitigated.

22. Where a local authority is minded to grant consent but there are requirements for compensation for biodiversity loss under planning policy, the developer can choose to use the offsetting mechanism. They could provide the offset themselves, or source an offset from a provider. In the pilot areas, Natural England will be on hand to assess the quality of the offset projects proposed. The local authority would consider the proposed offset project in the light of the advice from Natural England, and would need to satisfy themselves that the offset proposals were acceptable in planning terms.

23. If they are content that the proposed offset is acceptable, Local Planning Authorities will need to use one of the existing mechanisms available to them in the planning system in order to provide a certain and enforceable requirement to provide compensation.

24. In many cases Section 106 obligations are likely to be the most suitable of the existing mechanisms available to local authorities. However, depending on circumstances in other cases it may be more appropriate to use planning conditions, or in some cases CIL might be the best way to achieve the outcome the authority wishes to see. The pilots will provide important further evidence about what works effectively in practice.

25. In considering which mechanism to use, and how best to use it, local authorities will need to comply with relevant legislation and policy guidance for that.

26. The following paragraphs set out some background on the mechanisms available and flags up some key considerations for local planning authorities. They are not a comprehensive and authoritative guide to the requirements or their interpretation.

Section 106 Planning Obligations

27. Paragraphs 203 to 206 of the NPPF provide guidance to local authorities in England on the use of planning obligations under Section 106 of the Town and Country Planning Act 1990.

28. 'Section 106' (S106) allows a local planning authority (LPA) to enter into a legally-binding agreement with a landowner in association with the granting of planning permission. The obligation is termed a Section 106 Agreement. Obligations under S106 can also be secured through unilateral undertakings by developers.

29. It is Government policy that, if there is a choice between imposing conditions and entering into a planning obligation, the imposition of a suitable condition (see section below) is preferable.

30. Key considerations are that a planning obligation should only be sought where it is:

- necessary to make the development acceptable in planning terms
- directly related to the development; and
- fair and reasonable, related in scale and kind to the development¹⁰

31. Planning obligations can require contributions either in kind or in the form of a financial contribution, but cannot breach the fundamental principle that planning permission may not be bought or sold. Neither should planning obligations be so onerous that they would undermine the viability of development proposals. It is for LPAs to satisfy themselves as to the appropriateness of using planning obligations in any specific case, and whether imposing an obligation to secure compensation for biodiversity loss required under the planning policy could meet the statutory tests.

32. Section 106 agreements (or planning conditions) could be used to implement biodiversity offsetting, as they can be tailored to respond to the biodiversity impact on a specific site.

33. The Community Infrastructure Regulations (SI 2010/948) restrict the use of planning obligations to ensure that individual developments are not charged for the same thing through both mechanisms (though different elements of the same project could be funded separately).

34. Community Infrastructure Levy (CIL) is also the Government's preferred mechanism for collecting pooled contributions. LPAs will need to consider on a case by case basis the extent to which the CIL regulations may constrain use of planning obligations to secure compensation for biodiversity loss. It will not be possible for any local authority to operate a S106 tariff to fund any infrastructure item after April 2014.

Planning Conditions

35. LPAs have wide powers under the Town and Country Planning Act to impose conditions on the granting of planning permission. DOE Circular 11/95 provides detailed advice on use of planning conditions including 6 key tests, namely that each condition must be:

- necessary;
- relevant to planning;
- relevant to the development to be permitted;
- enforceable;
- precise; and

¹⁰ See regulation 122 of the Community Infrastructure Regulations 2010

- reasonable in all other respects.

36. The Circular also states that planning conditions cannot require the payment of money or other consideration when granting planning permission. This may not, however, preclude in some circumstances requiring the developer to commission works through a third party.

37. It may not be possible to enforce a planning condition that requires agreement of third parties, such as offset providers¹¹. If LPAs wish to use a condition to secure biodiversity offsetting, the condition should be framed so as to require that the development authorised by the permission should not commence, or proceed beyond an agreed stage, until the specified offsetting requirement has been secured and/or the necessary funding provided. The LPA will need to consider carefully which elements of the requirement can be secured through enforcement of the condition. This will need to include consideration of whether the long term delivery of the biodiversity offset after the development has been completed needs to be guaranteed in some other way.

Community Infrastructure Levy (CIL)

38. The Community Infrastructure Levy was established by Section 205 of the Planning Act 2008 and empowers local authorities to charge a levy on most types of development in their area. The money raised can be used to support development by funding infrastructure that the council, local community and neighbourhoods want. The detailed provisions for implementing the Community Infrastructure Levy (CIL) are set out in the Community Infrastructure Levy Regulations 2010 (as amended by the Community Infrastructure Levy (Amendment) Regulations 2011). The CLG publication 'Community Infrastructure Levy: An overview'¹², provides further information.

39. CIL is set as a standard contribution, dependent on the size of the development rather than its impact. The metric set out in the guidance for the biodiversity offsetting pilots aims to assess the impact of a development, and then secure the equivalent amount of compensation. CIL is a flat rate levy, on buildings that people normally use. Some development which may cause significant harm to biodiversity will therefore not fall within the scope of CIL. Whether and how a calculation reflecting the impact of development on biodiversity could be made to work in practice as part of CIL can be considered by LPAs, in line with their particular circumstances.

40. Biodiversity offsetting as proposed for the pilot, implemented through Section 106 or planning conditions, could be used alongside CIL.

41. Local authorities are required to spend CIL funds on the infrastructure needed to support the development of their area. They will decide what infrastructure is needed. Using new powers to be introduced under the Localism Act 2011, the Government will

¹¹ See para 28 of Circular 11/98

¹² <http://www.communities.gov.uk/publications/planningandbuilding/communityinfrastructurelevymay11>

require charging authorities to allocate a meaningful proportion of levy revenues raised in each neighbourhood back to that neighbourhood. This will ensure that where a neighbourhood accepts a new development, it receives sufficient money to help support development of its area .

42. The Planning Act 2008 provides a wide definition of the infrastructure which can be funded by the levy, including transport, flood defences, schools, hospitals, and other health and social care facilities. This definition allows the levy to be used to fund a very broad range of facilities such as play areas, parks and green spaces, cultural and sports facilities, district heating schemes and police stations and other community safety facilities. This gives local communities flexibility to choose what infrastructure they need to deliver their development plan. Local authorities may indicate in advance which sorts of infrastructure will be funded through CIL. If a certain type of infrastructure is funded through CIL, it may not then also be funded through a Section 106 agreement.

43. Local authorities would need to consider carefully whether a proposed biodiversity project falls within the ambit of 'infrastructure'. It may be that some proposals could be funded through CIL whilst others would not be eligible.

Support offered by Natural England in the pilot areas

44. Natural England local advisers can provide advice on:

- The offsetting project in general.
- The development of the 'offsetting strategy'. As noted above, Local Authorities and their partners should not need to create new strategies specifically for the pilot, although where several authorities collaborate in a pilot area, they may need some kind of overarching statement. Where helpful, NE can advise on which existing strategies could provide a basis for this, and can provide some support and advice to local authorities and their partners.
- Individual development proposals falling within the scope of the project. This might include:
 - Advice on assessment of biodiversity impacts, and whether they have been assessed correctly. This is a local authority responsibility, but advice or confirmation may be sought from Natural England to ensure that biodiversity impacts have not been undervalued.
 - Similarly, whether the biodiversity metric has been applied correctly by the developer. (Advice on the biodiversity 'Metric' is contained in the Defra information note for Developers).

- Advice on offset provider capability to deliver biodiversity offsets, the viability of their specific offset proposals (habitat extension (creation) or enhancement), and the fit of specific proposals with the authorities' offsetting strategy.

45. Local authorities will consider Natural England's advice, and the ultimate decision on whether the offset project is acceptable will be for local authorities to make.

Other sources of guidance

46. Other useful guidance on these matters has been published by a number of organisations. These include:

- Planning for Biodiversity and Geological Conservation – A Good Practice Guide¹³ (Published by ODPM/Defra/English Nature – March 2006).
- Ramsar Sites in England – A policy statement¹⁴ (Published by Defra in November 2006)
- PAS2010 – Planning to halt the loss of biodiversity – Biodiversity conservation standards for planning in the United Kingdom – Code of Practice (Published by the British Standards Institute in August 2006) Guidelines for Ecological Impact Assessment in the United Kingdom¹⁵ (Published by the Institute of Ecology and Environmental Management in June 2006).

Recording information

47. The aim of the pilot is to gather a body of information and evidence that will allow the Government to decide whether, and how, to support greater use of biodiversity offsetting in England. An independent evaluation will be assessing the pilots – how they work and what we learn from them. It will also be necessary to gather some information centrally, so Defra has an ongoing oversight of some key facts, for example, how many projects were proposed as offsets, and how many were then actually taken forward and used as compensation for the impacts of development.

48. Participating local authorities are therefore asked to work with the Natural England advisers to provide regular updates to Defra on

- which developers have chosen to use the biodiversity offsetting mechanism to deliver compensation required under planning policy.

¹³ <http://www.communities.gov.uk/publications/planningandbuilding/planningbiodiversity>

¹⁴ <http://archive.defra.gov.uk/rural/documents/protected/ramsar-policy.pdf>

¹⁵ <http://www.ieem.net/ecia/Ecia%20Approved%207%20July%2006.pdf>

- the development site(s) involved - where it is, size and type, number of biodiversity units lost. Planning application reference number(s).
- which offset project(s) have been used to provide the compensation required.