

## **CLLS Planning & Environmental Law Committee response to Defra green paper on biodiversity off-setting in England (September 2013)**

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The City of London Law Society (“CLLS”) represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response in respect of the Defra green paper on biodiversity off-setting in England has been prepared by the CLLS Planning & Environmental Law Committee.

**Question 1**      **Do you think the Government should introduce a biodiversity off-setting system in England?**

We consider that there is merit in the introduction of a biodiversity off-setting system to work alongside the planning system.

**Question 2**      **Do you think the Government’s objectives for the system and the characteristics the Government thinks the system would display are right?**

We agree broadly with the Government’s objectives and proposed characteristics of the system.

**Question 3**      **Do you think it is appropriate to base an off-setting system on the pilot metric? If not, is there an alternative metric that should be used?**

No comment.

**Question 4**

**If you think the pilot metric is the right basis for an off-setting system: are there other factors which should be considered when quantifying biodiversity loss and gain? Are the weights given to the different factors appropriate? Are there any other changes you think should be taken into account?**

No comment.

**Question 5**

**Do you think off-setting assessments should be used when preparing a planning application for a project?**

We consider it to be strongly preferable that any off-setting regime is fully integrated with the planning system and that consideration of the off-set and its acceptability should form part of consideration of any planning application.

Two separate regimes would be confusing and it is difficult to see how the objectives would then be achieved.

**Question 6**

**Do you agree that it should be the responsibility of planning authorities to ensure the mitigation hierarchy is observed and decide what off-set is required to compensate for any residual loss? If not, why, and how do you think off-setting should be approached in the planning system?**

We agree that the decision on the mitigation hierarchy should be that of the decision maker on the planning application, whether the local authority or the Secretary of State. There are already procedures in the planning system such that bodies such as Natural England are consulted on proposals - which could naturally extend to a biodiversity off-setting proposal accompanying any planning application.

Much development, including but not limited to greenfield development, inherently involves a loss of habitat. The current system already provides scope for planning authorities, through strategic environmental assessment, to assess the quality of habitat and biodiversity and for that to influence the decision as to where new development should be located. The metrics used in an off-setting regime may help the transparency of such analysis.

In terms of the mitigation hierarchy, this proposes that significant harm is avoided (largely through choice of location), mitigated against (potentially by design) and any residual impacts compensated for. Of course part of scheme design may include new habitats and it is not clear whether those new habitats are considered mitigation or account towards compensation.

It is likely to be a subjective decision as to whether it would be preferable in terms of biodiversity to provide new habitat as part of the scheme (whether

as mitigation or compensation) or off-site compensation. That decision is best taken by the planning authority as part of the overall acceptability of the planning application.

**Question 7**

**Do you think biodiversity off-setting should have a role in all development consent regimes?**

We consider that biodiversity should be fully integrated with the planning system. It should relate to matters for which planning permission or development consent orders are required. Most highway proposals require planning permission and therefore there will be a connection to the planning regime.

It seems to us that the marine environment is quite different and should not be included, certainly at these the early stages of any biodiversity off-setting regime.

**Question 8**

**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?**

Yes, in the early stages at least, it would be sensible to allow developers to choose whether to use offsetting.

As the Green Paper acknowledges, there may be occasions where developers are not currently required to provide off-sets (as compensation for loss of habitat is not required), but would be required to under the new regime. It is acknowledged that a permissive approach may result in some developers preferring to avoid the new regime on particular sites.

However, once a clear metric is in place, it is likely that authorities will quickly move to assessing proposals against that metric. In time, therefore, there may be a case for making off-setting compulsory.

The system needs to be sufficiently flexible to continue to allow developers to secure on-site habitat gains through a s106 agreement. In many cases, there may be specific biodiversity mitigation required to address harm identified through the EIA which must be secured by s106 and cannot be purchased as an offset.

There are also numerous schemes which, at present, cannot afford to meet the many and varied requirements now set by authorities in their policies (CIL, s106, sustainability, infrastructure requirements, exemplar design etc). An assessment of viability is required on many schemes, leading to the LPA having to prioritise what the resulting monies available should be spent on. Requiring a uniform approach where an off-set **must** be purchased will simply reduce flexibility for the LPA to agree that other financial matters should be prioritised in a particular case.

**Question 9**

**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?**

We do not consider that a uniform approach is currently advisable.

Assuming a uniform approach is adopted in time, the benefits of the system will be maximised if it applies to all sizes of development. However, many smaller developments do not currently contribute to biodiversity (other than in a small-scale way e.g. bat or bird boxes) and the outcome would be an additional cost on development. The viability implications of such an approach would need to be considered and the consequences of increasing the complexity of the planning system for non-professional users.

**Question 10**

**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?**

This goes to the heart of the proposal – is the concept that the offsetting regime should provide net gain for biodiversity for the entire country or to compensate the local community for the specific impacts of development?

It would be in the spirit of localism for offsets to be located close to the development site and provide compensation of benefit to the affected community.

If that is not reasonable or practical, then the provision of offsets further afield of relevance to the particular biodiversity to be compensated for may be considered.

If that is not reasonable or practical, then any offset may be considered.

This is why we think that LPAs should ultimately decide as to whether a proposed off-set is appropriate as part of the planning balance. LPAs could therefore invite local proposals for off-sets and identify priority projects in their plans. This could be done in conjunction with neighbouring authorities under the duty to co-operate.

There should be flexibility for the developer to come up with an appropriate proposal as to offsetting and for it to be agreed with the Council.

**Question 11**

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

No comment

**Question 12** Do you think biodiversity off-setting should have a role in all development consent regimes?

See answer to question 7 above.

**Question 13** 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 as to compensation already occurring where there is residual biodiversity loss which cannot be avoided or mitigated; method for estimating costs / benefits / savings and their magnitude; how to capture 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

No comment.

**Question 13** Do you think offsetting should be a single consistent national system without scope for local variation?

We consider that there should be a national system in terms of how habitats are assessed. Local authorities should explain any deviations in their local plans, which should be exceptional.

**Question 14** 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?

There are numerous sites affected by the constraints identified in paragraph 31, particularly larger development sites, and it would be beneficial to have flexibility in application of offsetting, rather than an over-engineered system that tries to be compliant with the identified legal requirements.

Compensatory habitat for protected species (whether under European or English law) may be required and biodiversity offsetting may not be appropriate in that scenario. We note however that this is addressed through the questions below.

**Question 15** Which habitats do you think should be considered irreplaceable?

If a habitat is not already protected expressly by policy in the NPPF or legislation, it should be for the LPA in their plans to determine and justify at examination why it is considered irreplaceable. There may be local circumstances at play in that regard.

**Question 16**      **Do you think offsetting should in principle be applied to protected species?**

We see merit for developers in an offsetting system applying to protected species to give greater clarity, particularly in relation to species such as great crested newts which are relatively widespread.

However, this is a complicated area of law and the implications for the criminal offences applicable in this area of law will need careful thought to ensure that compliance with any offsetting system is an adequate defence.

Such a system may not be appropriate for all protected species and detailed consideration of this is required.

**Question 17**      **Has the Government identified the right constraints and features that need to be addressed when applying offsetting to protected species?**

**Question 18**      **Do you agree that great crested newts should be the first area of focus?**

The relatively widespread appearance of great crested newts mean that they are an appropriate target for further detailed consideration. However, as noted above, the principles of a system designed for great crested newt may not be appropriate for all species, particularly those which are less widespread.

**Question 19**      **Do you have any comments on the Government's thinking on how to apply offsetting to great crested newts?**

**Question 20**      **Should offsetting be considered for any other species in the near future taking account of the constraints on species offsetting?**

It would be appropriate for the offsetting system also to be considered in respect of an extremely rare and valuable species in England too, by way of comparison.

**Question 21**      **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?**

There is merit for flexibility here. First, however, the parameters for what constitutes a conservation covenant will need to be agreed. A s106 obligation to use land in a certain way will secure the continued protection for the land and be binding against successors. An LPA can also secure management plans by way of s106 – and frequently do. Where compensation is provided on-site, a s106 agreement may sweep up the necessary requirements. The LPA should be responsible for agreeing the

s106 in that scenario, although Natural England or another national public body may input as a consultee to the process.

Where mitigation is to be secured off-site, then the offsetting regime will need to establish requirements for landowners to enter into a covenant whether under s106 or specific statutory powers to deliver the long-term benefits. It may be appropriate for a national public body to be responsible in that regard, once the off-set project is designated by an authority.

**Question 22**     **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. The objectives the Government seeks to deliver will not be achieved without management plans. There should be flexibility for the LPA to approve management plans connected to a planning application and for the relevant national public body to approve them in relation to off-set projects designated by an authority.

**Question 23:**     **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?**

Yes. An appropriate national public body. S106s should make it clear whether they secure an off-set.

**Question 24:**     **How long should offsets be secured for?**

The use of the site for the proposed off-set purpose should be presumed to be in perpetuity, or else the weight to be attached to such an off-set must be limited accordingly. It may be that management arrangements are funded only for a limited time, depending upon the circumstances.

If it is appropriate for sites subject to off-set to be developed or used for alternative purposes in the future, then if secured by a s106, that agreement may be subject to variation in accordance with the TCPA 1990 and the usual tests will apply. Likewise, similar provisions should be included in any legislation securing conservation covenants. This should provide sufficient flexibility if circumstances change.

**Question 25:**     **Are there any long term factors, besides climate change, that should be taken into account when securing assets?**

No comment.

**Question 26:** 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. The offsetting system should not affect planning applications that are already in the system - that would lead to further delay and some schemes may need to be revisited.

In addition, there should be a window between the scheme being introduced and it applying to planning applications to give those working up applications time to consider the consequences.

**Question 27:** Do you think an off-setting system should take a national approach to the question of significant harm and if so how?

National guidance should be provided, but there should be flexibility at a local level.

**Question 28:** 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.

Off-set providers should be required to demonstrate how the long term future financial liabilities will be secured, but there should be flexibility.

**Question 29:** 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?

No. Please see our answer to question 10 above. This should be a matter for the LPA.

**Question 30:** 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 strategy?

We consider that the strategy as to the creation of net ecological gain should be set locally and each area has its own offsetting, linked to local plans. Offset should then have to comply with that strategy.

**Question 31:** 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?

We consider that the strategies for off-setting should be set locally. Where off-set proposals comply with that local strategy, we see no reason why habitat banking should not be allowed.

The confirmation as to the creation of a habitat bank should be sought before the works are undertaken and agreement reached to its off-set value and how long the off-sets are valid for, taking account of the likely timescale of development coming forward from which the costs will be reimbursed.

**Question 32:** 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?

This should be considered at a local level when setting the strategy as to priorities for what off-setting is best used for.

**Question 33:** 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?

Any biodiversity that is created as an incidental benefit of another regulatory or planning requirement in connection with a planning application and which is adequately secured by a Section 106 Agreement or compensation covenant, should be taken into consideration and considered as an offset - if it does not qualify as mitigation (see above).

**Question 34:** How do you think the quality of assessment should be assured and who by?

Individual applicants for planning permission should be responsible for ensuring the robustness of assessments. There is merit for suitably qualified individuals to become accredited assessors which would give added weight, particularly on sensitive sites.

If an assessment is not submitted by an accredited assessor, the LPA would need to consider whether or not it was acceptable. It would be up to the LPA whether or not to seek a second opinion.

**Question 35:** How should differences of opinion over assessments be addressed?

There could be flexibility regarding this. If it is one of a number of reasons for refusal, it could be a matter to be addressed alongside others at appeal. If it is the sole matter, there may be an alternative simpler route, perhaps

administered by the Planning Inspectorate that allows the decision to be appealed.

**Question 36:** 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.

No comment.

**Question 37:** Do you think it should be possible to offset the loss of hedgerows by creating or restoring another form of habitat?

This could be a decision that is taken on a local basis by each LPA in setting the strategy. LPAs may have reasons to be particularly resistant to a loss of hedgerows in a particular area.

**Question 38:** If conservation covenants are put in place, do you think providing for off-setting through planning guidance will be sufficient to achieve national consistency? If not, what legislative provision may be necessary?

Legislation is likely to be required to make biodiversity off-setting compulsory and including conservation covenants - to the extent these cannot be secured through Section 106 Agreements.

The system should however be kept as simple as possible and as much as possible should be contained in guidance.

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