



Consultation on the Green Paper on Biodiversity Offsetting

November 2013

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About the RSPB

The Royal Society for the Protection of Birds (the RSPB) is the largest wildlife conservation organisation in Europe with over one million members. We believe that sustainability should be at the heart of decision-making. The RSPB's policy and practical work covers a wide range of issues including planning and regional policy, climate change, energy, marine issues, water and agriculture.

As well as commenting on national planning policy issues, the RSPB's professional conservation and planning specialists engage with over 1,000 cases each year throughout the UK, including development plans and individual planning applications and proposals. We also make over 100 planning applications a year on our reserves and estates.

We manage one of the largest conservation estates in the UK, covering c.143, 000 hectares. Around sixty of our reserves are farmed, covering more than 20,000 hectares, with around 170 tenant farmers, and 200 employees. We protect and enhance habitats such as lowland farmland, heather moorland, lowland heath, wet grassland, estuaries and reed beds, and our reserves help to protect 63 of the 77 most rare or threatened breeding birds in the UK.

The RSPB are also recognised as experts in the field of habitat creation and restoration. Since 1994, we have created or restored 2,350 ha of lowland wet grassland, 1,040 ha of reedbed, 470 ha of intertidal habitat (in partnership with others), and blocked artificial drainage on over 7,660 ha of upland peatlands.

Introduction

It is important to remember that the fundamental rationale for introducing a biodiversity offsetting system is that it can contribute to halting the loss of biodiversity by 2020, in line with the Government's Aichi commitments. A fit for purpose biodiversity offset system should provide a robust and efficient compensatory mechanism that addresses ongoing market failure whereby certain elements of biodiversity loss are not presently accounted for in market transactions. It should ensure those costs of biodiversity loss are fully internalised by the development sector and thereby secure no net loss of biodiversity.

Summary

- Our support for any new biodiversity offsetting system will depend on its ability to optimise potential benefits and minimise potential risks. Our response sets out in detail the criteria needed to do this.
- It has to be fit for purpose at the point of introduction. Whilst the system must allow for refinement and adaptation it is not acceptable to introduce a sub-standard system on the basis that it will be an 'iterative process'. Such a scenario would lead to iterative losses of biodiversity and we would strongly object to the introduction of a system that does not have the requisite legal, policy and guidance framework in place from the outset;
- Offsetting must always respect the mitigation hierarchy. For this to happen, Government needs to produce clear guidance on how to adhere to every stage of the mitigation hierarchy, and developers and decision-makers must be required to clearly justify why offsetting is necessary;
- Public confidence in the planning system depends on independent arbitration. Local planning authorities (LPAs) must therefore have the ecological expertise necessary to determine offsetting proposals. Without ecological expertise, LPAs will also struggle to optimise any potential benefits from the strategic locating of offsets;
- A more systematic approach to assessing potential harm to biodiversity could bring considerable conservation benefits, but only if the new system is mandatory for developers and applicable to all new residential and commercial buildings, as this will capture the smaller developments that currently often fail to compensate for harm;
- A more efficient planning system depends on simplification, and any new biodiversity offsetting system will not significantly simplify the planning system unless it is consistently applied. It has to be mandatory and based on a uniform approach: developers cannot be able to opt out and choose different methods for assessing harm and delivering compensation;
- Offsetting sites must be protected and managed over appropriate timescales. There must be clear legal arrangements that set out liability and secure funding arrangements, and there must be appropriate planning protection for the offsetting site. We would strongly oppose a system that allowed covenants to be broken if planning permission was granted for another use on the site;
- Offsetting must always be additional to any other policy or statutory conservation obligations. In order to avoid double-selling of offsets, all offset provision must be registered in publicly viewable database, to ensure transparency;
- All offsets must be subject to monitoring for the duration of any agreement to ensure that its objectives are being met, and there needs to be a publicly viewable database by Natural England that keeps data from the original site assessment and subsequent monitoring of the offset. These data are crucial to understanding the net impact of

offsetting on biodiversity, and for informing the iterative refinement of metrics for species and habitats.

Question 1: Do you think the Government should introduce a biodiversity offsetting system in England?

1. Our support for any new biodiversity offsetting system will depend on its ability to optimise potential benefits and minimise potential risks. Our criteria for achieving this are set out at paragraph 5 below.
2. The UK National Ecosystem Assessment provides a comprehensive account of how the natural environment and its biodiversity provide us with services that are critical to our wellbeing and economic prosperity¹. Despite this, biodiversity is being continually eroded and fragmented by inappropriate development². The planning system does not adequately guard against biodiversity loss, particularly small-scale losses that may result in considerable cumulative loss. Furthermore, the mitigation hierarchy is inconsistently applied, and where compensation is the legitimate option, it is frequently poor quality and only secured over inappropriately short timeframes³.
3. At the same time, there may be scope to simplify the delivery of, inter-alia, the housing and low-carbon infrastructure that the country needs. It is therefore only right that Government explores ways in which to make the planning system more fit for purpose, so that it can deliver truly sustainable development more efficiently, without compromising the quality of decision-making. In this respect, there is undoubtedly scope for a new system that systematically values more biodiversity, improves the way the mitigation hierarchy is implemented, and increases efficiency in the planning system by virtue of increased consistency and greater simplicity. In this context, a simpler to operate system must be underpinned by robust, ecologically driven metrics that reflect the complexity of ecological systems offsets should be designed to compensate for. Simplicity of operation should not be equated to, as it often is with offsets, with simplicity of the system's underpinnings.
4. However, we will not necessarily support any biodiversity offsetting system. There are many different types of 'system' that could be introduced, and our support will depend on the details of the framework that is adopted. An offsetting system could significantly improve the way the planning system deals with biodiversity, but it could also make the situation considerably worse. We would support a new system that captures currently unaddressed small-scale losses of biodiversity and turns these into strategic gains via offsetting. Conversely, we would strongly oppose a system that fails to capture and offset lower-value biodiversity loss that would not necessarily warrant refusal of a planning application, yet facilitates the risky offsetting of high-value biodiversity where the loss may justify refusal of the planning application.

¹ Watson and Albon, 2011, The UK National Ecosystem Assessment: Synthesis of Key Findings

² Over 40% of England's priority species, 30% of priority habitats² and 30% of ecosystem services are still declining², while eight priority species were lost entirely between 2002 and 2008².

³David Tyldesley Associates (2012) Review of the implementation of PPS9

5. Our criteria for maximising the potential benefits and minimising the risks are as follows. Any new system must:
- Be mandatory so it can consistently capture small-scale biodiversity losses and turn them into cumulative gains through the strategic locating of offsets;
 - Have sufficient local planning authority (LPA) expertise to ensure that: any assessments have properly captured the biodiversity value of the site; proposed compensation is fit for purpose; strategies are in place for the strategic implementation of offsets. This must be in place prior to the implementation of a new system;
 - Be linked to the LPA's strategic approach in its local plan to planning positively for the creation, protection, enhancement and management of networks of biodiversity and green infrastructure (required by para 114 of the NPPF), with further details being provided in a supplementary planning document (SPD), for the strategic delivery of offsets;
 - Ensure that neighbouring LPAs work together, and with local nature partnerships (LNPs) under the Duty to Co-operate to do this;
 - Allow LPAs to collect offset payments (in-lieu) for offsetting smaller-scale losses that do not require direct compensation, and ensure that this money is *ring-fenced* and the cumulative funds are spent on strategically identified habitat restoration and creation to offset those losses, in partnership with LNPs;
 - Funding for the creation and management of offsets is secured prior to the commencement of development, and management agreements are secured for appropriate timeframes;
 - Include clear guidance on how LPAs can more effectively implement *every stage* of the mitigation hierarchy;
 - Have sufficiently strong, evidenced-based multipliers within the metrics system, that strengthen the mitigation hierarchy by acting as a further disincentive to develop sites supporting high-value biodiversity;
 - Ensure that data collected from site assessments and offset monitoring is stored by Natural England and used to continually inform and improve the system
 - Ensure that SPDs reflect the local and national value of species and habitats;
 - Ensure that covenants clearly set out responsibility and liability for the delivery of an offset, and that covenant holders have a duty to enforce the covenant;
 - Ensure that offset providers are accredited and robustly insured against negligence or insolvency;
6. The system must be fit for purpose at the point of introduction, even if there is subsequent refinement and adaptation. It is not acceptable to introduce a sub-standard system on the basis that it will be an 'iterative process'. Such a scenario would lead to iterative losses of biodiversity and we would strongly object to the introduction of a system that does not have the requisite legal, policy and guidance framework in place.
7. It is also important to recognise the limitations of offsetting. For instance, it is important to be clear that offsetting is direct compensation for a specific loss that has only been allowed to occur because it can be compensated for. So whilst there is scope to turn small-scale losses into net-gains through strategic offsetting, there is a limit to the extent to which this can address significant historic losses of biodiversity. Offsetting has a

potential role to play in delivering some of the Government's ambitions for conservation that are set out in *Biodiversity 2020*⁴. The vast majority of the work that is needed to achieve these goals will still, however, require funding that cannot include money from biodiversity offsetting.

8. Furthermore, it is important to recognise that the implications of the different offset mechanisms for system design is a key area that must be subject to further detailed consultation. There are three basic offset mechanisms (compensation banking, in-lieu fees and developer responsible). The objective of any fit for purpose biodiversity offset system must be that whichever mechanism is deployed in a particular case, it achieves the same high standard of biodiversity outcome. Otherwise, there is no level playing field and poor system design and implementation will act to distort the offset market by providing inappropriate incentives, leading to perverse outcomes and net loss of biodiversity. This is the lesson learned in the United States in respect of wetland mitigation and was a central reason for its major regulatory overhaul in 2008 e.g. there was no means to ensure each mechanism delivered the same standard of outcome. Each offset mechanism raises subtle but important differences in how its governance, financing, management, enforcement and so on is structured and embedded in the legal and policy framework to secure that equivalent standard. It is vital these issues are thoroughly explored in consulting on any detailed system design in the future.

Question 2: Do you think the Government's objectives for the system and the characteristics the Government thinks a system would display are right?

'Improving the delivery of requirements in the planning system relating to biodiversity so that it is quicker, cheaper and more certain for developers'

9. The RSPB would welcome any measures that can increase the efficiency with which the planning system can deliver the sustainable development that the country needs, as long as the measures do not compromise the quality of decision-making. Such measures need to be consistently applied. Speeding up the planning system must not be an ultimate criterion of success; success should depend on the delivery of biodiversity objectives.
10. In order to deliver a more efficient, consistent planning system, **the new offsetting system has to be mandatory and based on a uniform approach**. If developers are able to opt out and choose different methods for assessing harm and delivering compensation, there will be no increased consistency.
11. We have also noted with interest that both the National Farmer's Union (NFU) and the Home Builder's Federation (HBF) expressed a preference for a mandatory system at the recent Environmental Audit Committee's (EAC) inquiry, on the basis that a permissive system will not provide the consistency needed to simplify and the planning system and subsequently increase efficiency.

⁴ Biodiversity 2020: A strategy for England's wildlife and ecosystem services. Defra 2011

'Achieving net gain for biodiversity'

12. We strongly support the Government's desire for a new system to address biodiversity losses that are currently ignored. Such a step is fundamental in stemming the net losses of biodiversity that currently result from planning decisions. For this to occur, the new system must capture the losses from smaller scale developments that currently go unaddressed - and this means the new dwellings, commercial buildings, and any other type of developments over certain size thresholds.
13. Large and complex development projects will typically require bespoke biodiversity mitigation and compensation packages. A standard and explicit system for assessing potential harm to biodiversity would only bring marginal conservation benefits if solely applied to major developments - whereas there would be significant benefits if it was applied to all new housing development, new commercial buildings and to large commercial extensions. We would consider the capturing of the small-scale cumulative losses to be the main potential benefit of a new system, and this potential needs to be realised if we are to meet Biodiversity 2020 outcomes.
14. Furthermore, there is significant scope to turn these small-scale cumulative losses into cumulative gains, by strategically locating offsets in a way that improves ecological connectivity and delivers landscape-scale conservation – in line with the Government's ambitions in the Natural Environment White Paper (NEWP).
15. This strategy should be linked to the LPA's strategic approach in its local plan to planning positively for the creation, protection, enhancement and management of networks of biodiversity and green infrastructure (required by para 114 of the NPPF), with further details being provided in a SPD, for the strategic delivery of offsets. In order to optimise this potential, neighbouring LPAs will need to work with each other and with their Local Nature Partnerships⁵, to identify strategic locations where cumulative offsetting could do most to improve ecological connectivity and deliver landscape-scale conservation. Strategic locations should be based on a proper understanding of ecological functional areas, such as water catchments, rather than necessarily local authority boundaries. We recommend that appropriate "service areas" are defined to delimit the geographic area within which offsets should be provided and within which such strategic planning for offset provision can be carried out. This will help guide both investments in compensation banking by independent offset providers, as well as the provision of offsets by public bodies using the in-lieu fees collected in advance of offset provision.
16. Although strategically locating offsets has the potential to deliver ecological gains, distancing communities from biodiversity can also incur a social cost. For instance, taking a small wildlife reserve from an ecologically deprived location could have a significantly negative impact on that community's quality of life. LPAs will, therefore,

⁵ As required by the Duty to Co-operate

need to carefully balance the needs of people and wildlife, with both issues being explicitly addressed when planning for the strategic implementation of offsets.

'Avoiding additional costs to business'

17. As stated above, we would support measures that result in a more efficient planning system that would in turn help to reduce costs for developers. However, there will be times when compensation will come at additional cost to developers, and this is only reasonable as it is the developer benefitting from the development, and it is only because of the development that the damage is taking place. If a developer cannot afford to compensate for the environmental cost of a development, the development should be refused. It is not acceptable for the environment to continue to bear the cost of many developments.
18. The 'polluter pays' principle underpins the Government's commitment in the UK Sustainable Development Strategy to 'achieving a sustainable economy'⁶, and offsetting must adhere to this principle. Guidance must be clear that, after steps to avoid harm and to mitigate significant harm have been taken, applications which are still likely to result in significant harm must be refused unless the LPA is confident that appropriate compensation is likely. It would not, for example, be acceptable for a LPA to accept inappropriate compensation from a habitat bank (either in terms of its type or location), simply because it is the cheaper option for the developer.

'The system must be transparent and consistent'

19. We strongly agree that the system must be transparent and consistent.
20. Paragraph 15 states that the '*system must be easy for the public to understand so that they have confidence it is protecting biodiversity.*' However, we believe that the public would understand that a system dealing with ecology is necessarily complicated, and that they would be more concerned with the protection of wildlife, than their understanding of the system. Furthermore, the public's faith in the system will more likely depend on their knowing that their LPA has the necessary ecological expertise to understand biodiversity offsetting.
21. There must also be a system of accreditation for offset providers that is overseen by Natural England. LPAs should have a duty as part of this system to report any negligence that may become apparent through the monitoring of any offset provision. Only accredited providers should be allowed to provide offsets, and if a provider is found to be negligent, they should be disallowed from doing so.

'Adhering to the mitigation hierarchy'

22. We welcome the Government's clear statement that biodiversity offsetting must observe the mitigation hierarchy. Recreating complex natural processes is inherently difficult and full of risk. Essentially, you are consenting to immediate ecological loss in return for uncertain gains in the future. Where offsets are successful, there will, in many instances, still be a temporal loss of biodiversity that can never be retrieved, particularly if reliance

⁶ Securing the Future: delivering UK sustainable development strategy, HM Government, 2005

is placed on an in-lieu fee approach. We have considerable experience of restoring and creating habitats and they will often take significant lengths of time before they support associated species. For instance, based on our experience of restoring native pine in Abernethy it takes at least 10 years to reduce deer levels to sufficient numbers to allow the natural regeneration and survival of planted trees. The second cohort of pine trees is only likely to establish around 60 years later, alongside capercaillie. As such, in-situ conservation is always preferable.

23. It should be recognised that, to date, there are no offset systems in the world that have been able to demonstrate no net loss of biodiversity, and the wealth of studies showing (often considerable) net- losses⁷. Indeed, we would seriously question the repeated statements in the Impact Assessment, that offsetting will ‘improve biodiversity’, given the absence of any evidence to support this statement.
24. It is because of the uncertainty and risk associated with offsetting that the mitigation hierarchy must be adhered to, as required by the National Planning Policy Framework (NPPF). Offsetting of high-value habitats should only ever be undertaken when all attempts to avoid harm or mitigate it have been exhausted, and the development is absolutely necessary. We welcome the statements in the Green Paper that the mitigation hierarchy is adhered to, but this assertion is undermined and contradicted by the explicit desire for offsetting to free up more land on site for development (because mitigation will no longer be necessary). This is a blatant disregard of the mitigation hierarchy, to which we strongly object.
25. We would consider the failure of LPAs to avoid and mitigate significant harm from development to be a far more serious problem for biodiversity than the poor implementation of any necessary compensation. This is largely due to a culture of not valuing biodiversity and not giving due weight to policies concerned with biodiversity – a point supported by Defra commissioned research into the implementation of PPS9⁸. If the introduction of an offsets system, intentionally or otherwise, further encourages a culture of not avoiding or mitigating significant harm, it would be a far greater problem for biodiversity than the existing problem of poorly implemented compensation.
26. LPAs need better guidance on how to avoid and mitigate harm, and it is crucial that a single guidance document covering each stage of the mitigation hierarchy is published, as it is important not to isolate any aspect of the mitigation hierarchy in the mind of the decision-maker, and LPAs currently implement the first stages of the mitigation hierarchy

⁷ Merono-Mateus et al (2012) Structural and functional loss in restored wetland ecosystems, *PLOS Biology*; BenDor (2009) A dynamic analysis of wetland mitigation process and its effects on no net loss policy, *Landscape Urban Planning* ; Hossler et al(2011) No net loss for nutrient function in salt marshes, *Ecosphere*; Bull et al (2013) Biodiversity offsets in theory and practice, *Oryx*; Suding (2011) Towards restoration in ecology: success, failure, and opportunities ahead, *Annual Review of Ecology, Evolution and Systems*; Gibbons (2010) The case for biodiversity offsets, *Decision Point*. Matthews & Endress (2008) Performance criteria, compliance success, and vegetation development in compensatory wetlands, *Environmental Management*; Quigley & Harper (2006a) Compliance with Canada’s Fisheries Act: a field audit of habitat compensation projects; Quigley & Harper (2006b) Effectiveness of fish habitat compensation in Canada in achieving no net loss, *Environmental Management*

⁸ David Tyldesley Associates (2012) Review of the implementation of PPS9; POST note on planning and biodiversity (2012)

poorly⁹. Further to this, Government must ensure that LPAs and the Planning Inspectorate give appropriate weight to biodiversity policies, just as they do, for example, with housing policies.

Question 3: 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?

27. The pilot metric provides an acceptable base from which to build the actual metric system. In particular we would agree with the following **principles**¹⁰:

Offsetting should:

- *'not change existing levels of protection for biodiversity;*
- *expand and restore habitats, not merely protect the extent and condition of what is already there;*
- *contribute to enhancing England's ecological network by creating more, bigger, better and joined areas for biodiversity (as discussed in Making Space for Nature);*
- *be managed at the local level as far as possible;*
- *be as simple and straightforward **as possible** (emphasis added), for developers, local authorities and others;*
- *be transparent, giving clarity on how the offset calculations are derived and allowing people to see how offset resources are being used.'*

The key challenge is to develop a metric system that is relatively simple to operate yet which is founded on sound ecological foundations so as to give confidence that both the impact assessment and offset credit requirements are robust. In this respect, we consider the pilot metrics require considerable work. A particular area of weakness concerns species metrics.

Assessing the value of an existing site

28. We would also agree with the basic concept of defining the value of habitats by distinctiveness and condition. Distinctiveness should include the parameters identified¹¹: species richness, diversity, rarity (at local, regional, national, and international scales), and the degree to which the habitat supports species with limited distribution or which have specialised requirements. Even then, we consider it will be necessary to develop species metrics to deal with those species where the habitat-hectares approach is insufficient to address their ecological requirements. .

29. However, we would consider the method used for SSSI Common Standards Monitoring (CSM) to be a more appropriate base from which to build the actual criteria for assessment, as opposed to the criteria used for the Higher Level Stewardship (HLS) condition assessment tool. The HLS method is too limited in scope and does not allow a proper assessment of the quality of the site.

⁹ DTA research

¹⁰ Page 3: Technical Paper: The metric for the biodiversity offsetting pilot in England

¹¹ Paragraph 21: Technical Paper: The metric for the biodiversity offsetting pilot in England

30. Taking heathland as an example, unlike CSM, HLS monitoring does not include a measure of bare ground. Bare ground is considered to be one of the most important features on heathland for invertebrates and reptiles (e.g. Kirby, 1992¹²; Edgar et al., 2010¹³). Unlike CSM, HLS monitoring also fails to provide any measures of plant species composition, other than for plant species considered to be negative indicators of habitat condition. Other than these negative indicators, HLS monitoring provides no measure of the frequency or cover of different species of dwarf shrubs, grasses, forbs, lichens or bryophytes on a heathland, all of which are important in assessing the value of heathland for wildlife (for example, including invertebrates which use these plants as sources of nectar and pollen).
31. Furthermore, we would disagree with the justification set out in the Technical Paper for using the HLS method instead of the CSM method. While the CSM method has indeed been devised specifically for monitoring SSSIs, it is difficult to see how this means it only represents a *'subset of the most important habitats'*,¹⁴ given that the SSSI network is designed to represent our most important habitats.
32. We would also disagree that the CSM method is inappropriate on the basis that when it is applied to SSSIs it results in a final categorisation of 'favourable', 'favourable recovering' or 'unfavourable'. These categories are simply a way of expressing the outcome of a *detailed assessment of habitat condition* (some of which is also used in the HLS method), and they could easily be amended to reflect a more appropriate means of categorisation for an offset system. The Technical Paper also states that *'HLS is based on site condition, rather than management'*, with the implication that CMS looks at management. This is incorrect. The CSM assessment is based purely in the condition of the site, and this may or may not be a consequence of management practises.
33. The most important consideration is the need to accurately capture the quality of the habitat and CSM is the better method for doing so, besides which it is no more difficult to categorise results derived from CSM criteria than it is from HLS criteria.

Calculating any necessary compensation

34. We strongly agree with the position outlined in paragraph 22 of the Technical Paper, that states, *'Where development is taking place on habitats in the low distinctiveness band, the offset actions should result in expansion or restoration of habitats in the medium or, preferably, high distinctiveness band. At no time should an offset result in "trading down", for instance in the replacement of habitat of high distinctiveness with creation or restoration of a habitat of medium distinctiveness. Habitats that are of high distinctiveness would generally be expected to be offset with "like for like" i.e. the compensation should involve the same habitat as was lost.'*
35. We suggest a more nuanced approach is taken to "like for like". We strongly agree this should normally be the same habitat as was lost as that will generally give the best chance of providing the ecological functions to support the species/species communities dependent on the impacted habitat. However, where creation or restoration of that habitat is not possible within a defined 'service area', then "like for like" should include

¹² Edgar, P., Foster, J. & Baker, J 2010. Reptile Habitat Management Handbook. Amphibian and Reptile Conservation, Bournemouth.

¹³ Kirby, P. 1992. Habitat management for invertebrates: a practical handbook. RSPB, Sandy.

¹⁴ Paragraph 30: Technical Paper: The metric for the biodiversity offsetting pilot in England

consideration of whether the ecological functions necessary to support the impacted species/species communities can be provided by a similar or different habitat.

36. In line with the above, an appropriate strategy within each LPA's supplementary planning document on offsetting could enable the currently unaddressed small-scale cumulative losses of biodiversity to be turned into strategic gains that could help deliver landscape-scale conservation. However, for this considerable potential to be realised, it is crucial that LPAs have the necessary ecological expertise needed to develop their strategy, and ensure that appropriate weight is given to each habitat, taking into account local context.
37. Paragraph 23 states that '*some very valuable habitats are either very rare, difficult/impossible to recreate, or both. Whilst development on these habitats would be unlikely, if a local planning authority did decide that a development should go ahead on this type of habitat, any compensation would have to be bespoke, and managed on a case by case basis. It would be for the local planning authority to decide if the offsetting mechanism could be used.*'
38. Paragraph 119 of the National Planning Policy Framework allows for development in exceptional circumstances. As such, there may be merit in LPAs setting out the multipliers that would be used to calculate the necessary 'compensation' in the exceptional circumstances that permission is granted. Government guidance should be clear that any such multipliers should exceed those used for any other type of habitat and should be purposely prohibitive. Setting this out clearly and up-front, would act as a disincentive to developers that would further direct development towards less sensitive locations.
39. We would accept that fraction multipliers may be acceptable in some circumstances, but only where higher value habitat is replacing lower value habitat. The exact fraction multipliers to be used will need to be the subject of further consultation on metrics. It is also crucial that sufficiently robust multipliers deal with delivery risk, spatial risk and temporal loss of biodiversity.
40. Where uncertainty is high, multipliers may need to be very large (e.g., an order of magnitude increase in basic offset size) if they are to provide adequate protection against failure to deliver no-net loss (Moilanean et al. 2009). The Technical Paper for the offset pilot metrics states that '*the work of Moilanean provides a basis for different multipliers of various levels of risk*', yet this is only really true insofar as the multipliers used are higher than those that Moilanean et al state are too low. Moilanean et al go on to add that multipliers far in excess of the caps proposed in the Technical Paper (e.g., a spatial multiplier of 300:1 for some habitats) may be justified. Ultimately, it does not matter how large your multiplier is, if the habitat is irreplaceable (for whatever reason) it will result in a net loss. Ultimately, it does not matter how large your multiplier is, if the habitat is irreplaceable (for whatever reason) it will result in a net loss.
41. It is true that the multipliers are broadly in line with some of those used in other countries such as the United States, Canada and Australia, but none of these countries have been able to demonstrate no-net-loss from their schemes, and the multipliers are likely to have to be higher in many cases. It is crucial that more time is allowed to develop and test the metrics as part of a further consultation, to ensure that they are able to deliver no-net-losses of biodiversity.
42. Given the lack of scientific underpinning to the metrics and the untested nature of offsetting in this country, it is especially crucial that delivery is robustly monitored and analysed, so that any deficiencies in the metrics are rapidly addressed. Moreover, multipliers do not represent a silver-bullet for dealing with uncertainty and they cannot in

themselves overcome risk or prevent failure. For instance, if a restoration project uses untested techniques and fails to secure any measurable biodiversity benefits, increasing the size of the offset area will contribute little or nothing towards improving the chance of success¹⁵. Legal agreements must place a clear burden of responsibility on the offset provider, and if they are deemed to have failed to deliver because of negligence, they must be liable to punitive measures that enable the compensation to be delivered.

Question 4: 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 gain?

43. The pilot metrics provide a suitable basis from which to develop the actual metrics, but they still require further development and testing to ensure that they are fit for purpose. Although we have identified in questions 3 and 4 some obvious areas for improvement, the complexity of the subject necessitates more time to develop the metrics and they will need to be the subject of a further consultation.

Potential value of an offsetting site

44. Metrics must ensure the explicit consideration of the *potential* value of a site. This is particularly important with regard to sites that may have considerable potential to improve ecological connectivity, or sites that possess irreplaceable soils that uniquely allow for the restoration of priority habitats.

45. For instance, lowland heathland or ancient woodland can only be realised on specific soils that are now essentially finite, by virtue of the length of time they take to develop the necessary qualities to host that habitat. These sites must be attributed the same value as an actual heathland or ancient woodland, even if they are currently under conifer plantations that in themselves could not be considered a high value habitat. Such an approach is the only way to allow the widespread restoration of these exceptionally high-value habitats on land that should be considered critical natural capital.

46. In the case of the UK's lowland heathland, around 80% has been lost to development, agriculture and forestry. Whilst it is not possible to create new sites, it is feasible to restore former sites. Areas lost to plantation forestry are the most practical and effective areas to repair these rare and threatened habitats, but if they are developed they will be lost forever. The preserved seed bank, coupled with the maintenance of soil conditions under conifer plantations, rather than agricultural land subject to annual fertiliser inputs, provides us with a unique opportunity for habitat restoration. This is especially true as many first rotation tree crops come to their felling dates, and this coincides with the need for urgent action to help our most threatened wildlife to adapt to climate change.

47. Furthermore, soils that are currently under conifer plantations are likely to lose their special qualities in the next 100 years or so, and sites that are not in public ownership (in order to ensure additionality) should be targeted for restoration to either ancient woodland (following the Plantations on Ancient Woodland model) or lowland heathland where appropriate, as part of strategic plans for offsetting. Sites in public ownership

¹⁵ http://www.forest-trends.org/documents/files/doc_3103.pdf (section 3.2)

should be restored to lowland heathland as part of the Government's contribution to Biodiversity 2020 outcomes.

Access to nature

48. While strategically locating offsets has the potential to deliver ecological gains, distancing communities from biodiversity can also incur a social cost. For instance, taking a small wildlife reserve from an ecologically deprived location could have a significantly negative impact on that community's quality of life. LPAs will need to carefully balance the needs of people and wildlife, and these trade-offs should be explicitly addressed when planning for the strategic implementation of offsets, even they cannot be directly incorporated into the biodiversity metrics.
49. The value of a habitat may vary depending on local context. While there must be a consistent framework that LPAs must adhere to, there must be scope to adjust scores so that they reflect the local value of a habitat. For example, woodland may be extremely rare in an urban authority and this would need to be reflected in the 'score' used to express its value.
50. It is crucially important that offsetting is not seen as an excuse not to provide appropriate green infrastructure for people and wildlife¹⁶ in and around the development. Offsetting is required to deal with specific harm, but green infrastructure is in itself required to make a development sustainable, irrespective of specific harm resulting from development. Offsetting must therefore be additional to green infrastructure requirements for people and wildlife, within new developments.

An effective monitoring regime to enable adaptation of metrics in accordance with changes in biodiversity

51. All offsets must be subject to monitoring for their lifetime, although the nature of that monitoring may be adjusted over time to reflect the need for more intensive monitoring in the initial implementation phase followed by a less intensive regime following maturation of the habitat. There needs to be a nationally held and publicly viewable database that keeps biological data of the developed site and the offset site. Such data is also crucial to understanding the cumulative impacts of development on environmental limits.

Question 5: Do you think offsetting assessment should be used when preparing a planning application for a project?

52. We strongly believe that there should be a mandatory 'biodiversity assessment' that is submitted alongside a planning application. This should always include an assessment of existing biodiversity and the potential harm resulting from the proposal. A more systematic approach to assessing potential harm to biodiversity could bring considerable conservation benefits, but only if the new system is mandatory for developers and applicable to all new residential and commercial buildings, as this will capture the smaller developments that currently often fail to compensate for harm.

¹⁶ In accordance with policy 118 of the NPPF

53. However, only under certain circumstances will the biodiversity assessment contain proposals for offsetting significant harm, when it cannot reasonably be avoided or mitigated. An 'offsetting assessment' implies a presumption that offsetting will occur. Such an assumption is unacceptable and undermines the fundamental principle that biodiversity offsets must always adhere to the mitigation hierarchy.

Strategic planning

54. Development plans have a potentially strong role to play in establishing a strategic framework for offset planning and for increasing the confidence of potential private investment in an offset market.

55. Assuming an LPA strictly adheres to the mitigation hierarchy in preparing its development plan (making full use of SEA) and complies with relevant NPPF biodiversity protection policies, then the development plan has the potential to identify strategic requirements for habitat compensation where it is not possible for the development proposed in the plan to avoid residual biodiversity loss. This would have the following benefits:

- it reinforces the need to adhere to the mitigation hierarchy
- - it allows for advance assessment of offsets needs
- it benefits potential offset providers by identifying potential markets and thereby gives greater confidence to invest.

56. However, we warn against LPAs undermining the mitigation hierarchy through their development to justify unsustainable developments that cannot be compensated for.

Question 6: 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?

57. Yes, 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.

58. The metric applied to offsetting is merely a simple articulation of what will often be a complex decision. It takes significant ecological expertise to be able to assess the 'value' of a site and to understand how, or if, its loss can be compensated. Such an exercise will necessarily require a degree of judgement, and while it is the responsibility of the developer to provide the initial assessment, the LPA cannot fulfil its role as a competent decision-maker if it is unable to verify the information.

59. The world of land use planning is highly contested by a myriad of different interests, and the integrity of the planning system depends on independent arbitration. Moreover, the public's faith in the system depends on independent arbitration. The decision to approve an application may hinge on matters relating to biodiversity and it would be unacceptable for a LPA to have to simply accept the developer's recommendation on offsetting – even if the report is written by an 'accredited' expert. Accredited or otherwise, a consultant is ultimately being paid by a developer - who will have a clear vested interest in obtaining

planning permission. Likewise, we would not consider a broker to be independent, as they would also have vested commercial interests in a development proceeding.

60. We would strongly recommend a system of accreditation for consultants carrying out assessments (as well as offset providers) but this cannot be a substitute for LPA ecological expertise. Many planning consultants are 'accredited' by the Royal Town Planning Institute (RTPI), but no-one would seriously suggest that this negates the need for local authority planning officers. It is equally unacceptable for LPAs not to have sufficient ecological expertise, simply because consultants are accredited.

61. Given the critical importance of local authority ecological expertise in both reducing risk and maximising potential benefits associated with offsets, it is highly alarming that less than 30% of local authorities have any ecological expertise. All local authorities must have ready access to ecological expertise, that is independent of any vested interest in the development, before a biodiversity offsetting system can be reliably implemented.

Question 7: Do you think biodiversity offsetting should have a role in all development consent regimes?

62. A standard system for assessing potential harm to biodiversity, and calculating, delivering and securing any subsequent compensation, would be beneficial for all development consent regimes. As per any system for dealing with biodiversity, it is crucial that all development consent regimes adhere to the mitigation hierarchy.

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?

63. No, in order to optimise any benefits associated with the introduction of a new system, it must be a mandatory for developers.

Consistently dealing with smaller scale losses

64. Developers must compensate for residual losses in accordance with the NPPF, so this is really a question of whether or not they should use a new system for assessing harm and calculating and delivering any subsequent compensation. In this respect, we strongly support the Government's desire for a new system to address biodiversity losses that are currently ignored. Such a step is fundamental in stemming the net losses of biodiversity that currently result from planning decisions. For this to occur, the new system must capture the losses from smaller scale developments that currently go unaddressed - and this means the new system has to be applied to all new dwellings, commercial buildings, and any other type of developments over certain size thresholds (see response to Q?).

65. . It also means that the new system has to be consistently applied, and it will only be consistently applied if it is mandatory.

Better data as a result of consistent site assessments and monitoring of offsets

66. One benefit of introducing a standard system is that the data collected during site assessments and the monitoring of offsets would be immediately comparable, thereby

enabling the effective monitoring and analysis of the current state of biodiversity and any net changes resulting from offsetting.

67. If the right data are used effectively, it could enable the successful formulation of range of policies and their subsequent monitoring and re-evaluation – leading to a cycle of continual improvement. In the case of offsetting, it would allow for metrics to be revised in accordance with changing proportions of habitats, both locally and nationally.
68. Furthermore, such a potentially rich data source would be invaluable in helping to define favourable conservation status for species. Being able to assess and define favourable conservation status at the national and other appropriate spatial scales for European Protected Species, is a prerequisite for the effective conservation of these species, and for the development of a more streamlined and less precautionary approach to development impacts.
69. Critical to understanding favourable conservation status is better data, and we wholeheartedly agree with the statement in the Green Paper that there *‘needs to be an investment in underlying data to generate a better picture of the distribution and trends of protected species’ populations. This will ensure a clear understanding of the species’ conservation status and the importance of individual sites to the national population’*. Again, this is why it would be so beneficial to have a consistent framework that is used for both assessing existing sites and for monitoring subsequent offsets. If this data are stored centrally by Natural England, it would hugely beneficial in helping to define favourable conservation status and to understand how this might be affected by impacts on a local population.

A more efficient planning system

70. We share the Government’s desire for a simpler planning system that can more efficiently bring forward the sustainable development that society needs. A more efficient system depends on increased simplicity, and the system will only become simpler for all users, if all users are using the same system. In the context of this consultation, it will only be sustainable if this “simpler” system fully accounts for and addresses the losses to biodiversity (see comments on metrics above). It is very difficult to reconcile the Government’s contradictory desire for a simple system, and for developers to be able to opt out and use a different system. A new method will only make the planning system simpler if everyone in the planning system uses it.
71. A more efficient planning system depends on simplification, and a new system will not significantly simplify the planning system unless it is consistently applied. As such, **the new system has to be mandatory and based on a uniform approach**. If developers are able to opt out and choose different methods for assessing harm and delivering compensation, there will be no increased consistency.

72. We have also noted with interest that both the National Farmer's Union (NFU) and the House Builder's Federation (HBF)¹⁷ have expressed a preference for a mandatory system, on the basis that a permissive system will not provide the consistency needed to simplify and increase efficiency up the planning system.

Creating sufficient demand necessary to make the system viable

73. A mandatory system is needed in order to create the necessary certainty for offset providers to enter the market.

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?

74. We strongly support the Government's desire for a new system to address biodiversity losses that currently go ignored. Such a step is fundamental in stemming the net-losses of biodiversity that currently result from planning system. For this to occur, the new system must capture the losses from smaller scale developments on non-protected sites and species that currently go unaddressed - and this means the new dwellings, commercial buildings, and any other type of developments over certain size thresholds (see response to Q?).

75. A standard and explicit system for assessing potential harm to biodiversity would only bring marginal conservation benefits if solely applied to major developments - whereas there would be significant benefits if it was applied to all new housing development, new commercial buildings and to large commercial extensions. We would consider the capturing of the small-scale cumulative losses to be the main potential benefit of a new system (though losses to large scale developments will still need to be offset), and this potential must be realised.

76. While there may be scope for a developer to buy 'credit' from a compensation bank, in order to enable the strategic offsetting of small-scale losses, it may be preferable for a developer to make a necessary payment to the LPA in respect of any compensation. This money would then need to be **ring-fenced** (unlike the monies collected as part of the Community Infrastructure Levy), with this requirement set out in legislation, and it would then be the responsibility of the LPA to use the cumulative funds to deliver the vision for ecological restoration that should be set out in their local plan.

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?

77. Strategic delivery of offsets should be based on a proper understanding of ecological functional areas, such as water catchments, rather than necessarily local authority boundaries. While delivering actual ecological compensation should be the priority, wherever possible, LPAs should also try to compensate for the social impacts of losing biodiversity. This is an issue that needs to be considered in greater detail before any

¹⁷ Oral evidence to EAC committee 23 October 2013

<http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidenceHtml/3165>

regime is introduced, and further consultation will be needed on the extent to which the loss of social amenity values should be considered in:

- a) The level of compensation payment
- b) The type of offset permissible
- c) The proximity of the offset site to the development site

78. It will of course be up to the LPA to decide where the offset is delivered but it would be unacceptable for the offset site to be located on a less costly site to deliver and manage, if this compromised the fundamental requirement for an offset to compensate for the lost biodiversity.

Question 11: Do you have any comments on the analysis set out in the impact assessment?

79. We are seriously concerned by the repeated assumption that 'offsetting will benefit biodiversity' - given the complete lack of any clear, referenced, peer reviewed evidence to support this claim.

Question 12: 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:

- The amount of 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

80. The pilots provided very clear evidence that there will be a poor take up of a 'permissive system'.

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

81. A national system that sets the parameters for local administration has the best prospects for efficiency gains and achieving conservation outcomes at lowest cost. There must be national guidelines that set minimum values for nationally important priority habitats and species¹⁸, so that, for example, a local authority in Dorset could not set a low score for nationally rare heathland, on the basis that it is not considered rare in that district.

82. However, the value of a habitat may vary depending on local context. While there must be a consistent framework that LPAs must adhere to, there must be scope to adjust values within that framework so that they reflect the local value of a habitat. For example,

¹⁸ This should, initially, be based on the BAP lists for priority habitats and species, but will need continual revision to reflect changes in conservation status

woodland may be extremely rare in an urban authority and this would need to be reflected in the 'score' used to express its value. It will be important that LPAs have a sufficient evidence to justify at appeal, any decision to elevate a non-nationally important habitat or a habitat of low-quality in to a higher tier. Such evidence will require a proper assessment of the ecological characteristics of the local authority, and it may be appropriate in some circumstances to take into account population densities and access to nature.

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?

83. We would strongly agree that any system must not cut across the provisions of the Birds and Habitats Directives and applications affecting the integrity of the Natura 2000 network must be determined in accordance with Article 6 (4) of the Habitats Directive. Likewise, any compensation for development adversely affecting SSSIs or irreplaceable habitats only occurs if the decision to grant approval has met the strict tests that are set for development affecting these sites, in policy 118 of the NPPF.

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

84. The following priority habitats are in effect impossible to replace:

- Aquifer fed naturally fluctuating water bodies
- Ancient woodland
- Lowland raised bog
- Blanket bog
- Chalk rivers
- Limestone pavement
- Inland rock outcrops and scree
- Maritime cliff and slopes

85. In addition, there are many other habitats where we have little or no practical knowledge or ability to restore or create them consistently and successfully. Therefore part of the development of any offsetting system must include a systematic, evidence-led assessment of our ability to restore or create habitats successfully, including for the species/species communities dependent on them.

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

86. Developing robust species metrics is essential. The habitat-hectares approach has limitations in this respect and, even with greater refinement to incorporate species elements, there will remain a need to develop robust species metrics when dealing with impacts on those species with limited distribution or which have specialised requirements and where the broad habitat categorisation fails to reflect the true value e.g. nightingales dependent on the so-called medium distinctive habitat of scrub woodland. Incorporating species in to the metric will be important for ensuring that the value of a site is adequately captured. Furthermore, given that the developer has a legal obligation to

ensure the conservation of protected species, it seems logical to try to enable them to factor in all considerations into a single assessment. However, further consideration will need to be given as to whether there should be a discrete 'score' for species, or whether it should be a criteria for determining the value of a site, and this will need to be the subject of development, testing and further consultation.

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

87. Yes, we strongly agree with all of the statements in paragraph 34 of the Green Paper.

88. The current process for dealing with protected species is unsatisfactory and can result in unnecessary burden for developers. This is because of a failure to assess and define favourable conservation status at national level, or at the spatial levels appropriate for different species. Without a handle on what favourable conservation status looks like, and therefore what is required to achieve it, a precautionary approach must be adopted and this leads to the 'every newt is sacred' approach. Therefore, steps to assess and define favourable conservation status at the national and other appropriate spatial scales for European Protected Species, is a prerequisite for the effective conservation of these species, and for the development of a more streamlined and less precautionary approach to development impacts.

89. Critical to understanding favourable conservation status is better data, and we wholeheartedly agree that there *'needs to be an investment in underlying data to generate a better picture of the distribution and trends of protected species' populations. This will ensure a clear understanding of the species' conservation status and the importance of individual sites to the national population'*. Again, this is why it would be so beneficial to have a consistent framework that is used for both assessing existing sites and for monitoring subsequent offsets. If this data are stored centrally by Natural England, it would hugely beneficial in helping to define favourable conservation status and to understand how this might be affected by impacts on a local population.

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

90. Given the persistent controversy associated with dealing with great-crested newts, it seems sensible to pilot any new system on them. However, it is crucial that a system is fit for purpose and that the mitigation hierarchy is adhered to, and that where uncertainty persists that the precautionary principle is applied. The fact that great-crested newts are an EPS is helpful, as the current licensing/ derogation regime should provide the necessary checks and balances to ensure that any trial does not lead to costly error.

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

91. Modelling and eDNA could play a useful role in assessing the potential impact of a scheme on great-crested newts, but they are not a substitute for data obtained from actual surveys. The effectiveness of any model is ultimately dictated by the underlying

data. Any models will need to be continually assessed and tested against actual survey data.

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

92. This depends on whether any proposed system is fit for purpose, and the extent to which species are incorporated into any general metrics.

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?

93. Yes. Conservation covenants will have a critical role to play in ensuring that offsets are delivered and properly managed over the long term in recognition of what is likely to be a permanent loss of biodiversity from the development. Covenants are fundamental in ensuring that appropriate compensation is delivered, and that it is acceptable to grant planning permission. As such, the LPA must be satisfied that a covenant will secure the delivery and management of compensation, and if they are not, planning permission should be refused. Given the potential requirements for enforcement and the need for transparency, it would also make sense for the LPA, or in some cases Natural England, to be the holder of the covenant.

94. The covenant must also be agreed and signed prior to granting of permission. It would not be acceptable to grant permission subject to a condition that requires a legally binding compensation agreement to be put in place. If permission was agreed subject to such a condition, the LPA would be under undue pressure to agree to an unsatisfactory agreement if a length of time had passed without being able to find, for example, a more appropriate site or provider. That the covenant should be secured prior to the granting of permission must be clearly set out in any guidance. This guidance should also include model terms.

95. There may be occasions where the original covenant details need to be modified to allow adaptive management practice to secure ecological objectives. Such modification can only be agreed by the LPA. From this perspective, it again seems logical for the LPA to be the holder of the covenant.

Financial arrangements must be paid prior to the commencement of development

96. In order to overcome the danger of either the developer or the offset provider ceasing to operate (NB there is a danger this could be premeditated) it is critically important that monies are collected prior to the commencement of development and this money is paid into a trust fund, rather than allowing a spread of payments over time. We recommend that this trust fund is operated by the LPA or one of Defra's agencies – preferably Natural England. This would enable additional oversight and the ability to withhold funds if the offset provider was not meeting the conditions of their agreement.

97. A recent high profile example from Scotland, involving a European protected site and Scottish Coal, highlights the dangers: Scottish Coal and ATH Resources were both granted consents to mine, on the condition that they restore the site after use, only for both subsequently to declare bankruptcy. Scottish Coal alone has restoration liabilities of

around £73m that are not being covered by their liquidators, after the bonds that were supposed to secure restoration were no longer equal in value to the cost of restoration. The collapse of the two major mining companies has left thousands of hectares of excavated and polluted land across central Scotland, some of which is within protected areas for wildlife.

98. The only way to avoid such risk is by collecting monies or paying the developer for the delivery and management of the offset prior to the commencement of development. Developers will already borrow money to build a development prior to its commencement, and they should be required to do so for the development of any offsetting. If this compromises the viability of the scheme, the application should be refused.

Clear responsibility and the ability to enforce

99. Without clear legal and financial arrangements in place at the outset, there is no guarantee that an offsetting provision would be reliable. There must be a robust legal agreement that sets out clear responsibility for the implementation and management of an offset. Critically, this has to enable enforcement to be taken against a specified party at any time, for the duration of the agreement. In particular, it must also be possible to take punitive action against a third-party that fails to fulfil its obligations. As such, it is inconceivable that a third-party would not be bound by a legal agreement at the planning stage, as the delivery of the offset is integral to the decision to grant planning permission. It is, therefore, alarming that the Green Paper suggests¹⁹ that provision of an offset by a third-party could avoid the need for detailed requirements regarding compensatory measures in s106 or similar agreements. Planning permission should not be granted subject to a legal agreement, if the legal agreement does not secure all of the measures necessary to make the development acceptable.

100. If the granting of planning permission is dependent on satisfactory offsetting, there must also be a clear legal responsibility on the competent authority to enforce the offset for the duration of the agreement, with this being the LPA in most cases. However, it may be advantageous from a conservation perspective for the offsetting to take place outside of the local authority where the development takes place and permission is granted. Clarification would be needed as to how enforcement action could be taken in such circumstances, if, for example, a management agreement was not being adhered to.

101. Furthermore, if commuted sums are taken by LPAs for smaller developments (to enable cumulative funding for strategic offsetting) in lieu of any offset provision, the monies must be ring-fenced and used for conservation, and there must be a robust legal agreement in place with the subsequent offset provider - that can be enforced through a civil mechanism. Ideally, any such in lieu fee system should be against an agreed strategic offset plan (see above). This is necessary to guard against the situation that occurred in the United States during the 1990s/early 2000s in respect of in-lieu fee offsets for wetlands and which was partly responsible for the major regulatory overhaul in

¹⁹ Second bullet point on p.11

2008. Scandals arose to do with public bodies/NGOs collecting millions of dollars in in-lieu fees and failing to spend them to deliver the required offsets, thereby presiding over a net loss. This strongly suggests that where the LPA is responsible for overseeing the collection and spend of such in lieu fees the Secretary of State will need to retain enforcement powers against the LPA to ensure the monies collected are used to implement and manage the required offsets.

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?

102. Yes. Natural processes require very large areas of natural land that are seldom found in England. Unfortunately, this renders most habitats in need of appropriate management and this would be the case for most offset sites, thus making the cost of ongoing management a prerequisite in addition to upfront costs associated with land acquisition and the creation/restoration of offset habitat.

103. There may be occasions where the original covenant details need to be modified to allow adaptive management practice to secure ecological objectives. Such modification can must have the agreement of the LPA. From this perspective, it again seems logical for the LPA to be the holder of the covenant.

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104. In order to overcome the danger of either the developer or the offset provider ceasing to operate (there is a danger this could be premeditated) it is critically important that monies are collected prior to the commencement of development and this money is paid into a trust fund. We recommend that this trust fund is operated by one of Defra's agencies – preferably Natural England. This would enable additional oversight and the ability to withhold funds if the offset provider was not meeting the conditions of their agreement.

105. A recent high profile example from Scotland, involving a European protected site and Scottish Coal, highlights the dangers: Scottish Coal and ATH resources were granted permission to mine, on the condition that they restore the site after use, only for both to them declare bankruptcy. Scottish Coal alone has restoration liabilities of around £73m that are not being covered by their liquidators, after the bonds that were supposed to secure restoration were no longer equal in value to the cost of restoration. The collapse of the two major mining companies has left thousands of hectares of excavated and polluted land across central Scotland, some of which is within protected areas for wildlife.

106. The only way to avoid such risk is by collecting monies needed to deliver and manage the offset prior to the commencement of development. Developers will already borrow money to build a development prior to its commencement, and they should be required to do so for the development of any offsetting. If this compromises the viability of the scheme, the application should be refused.

Clear responsibility and the ability to enforce

107. Without clear legal and financial arrangements in place at the outset, there is no guarantee that an offsetting provision would be reliable. There must be a robust legal agreement that sets out clear responsibility for the implementation and management of an offset. Critically, this has to enable enforcement to be taken against a specified party at any time, for the duration of the agreement. In particular, it must also be possible to take appropriate action against a third-party that fails to fulfil its obligations. As such, it is inconceivable that a third-party would not be bound by a legal agreement at the planning stage, as the delivery of the offset is integral to the decision to grant planning permission. It is, therefore, alarming that the Green Paper suggests²⁰ that provision of an offset by a third-party could avoid the need for detailed requirements regarding compensatory measures in s106 or similar agreements. Planning permission should not be granted subject to a legal agreement, if the legal agreement does not secure all of the measures necessary to make the development acceptable.

108. If the granting of planning permission is dependent on satisfactory offsetting, there must also be a clear legal responsibility on the competent authority to enforce the offset for the duration of the agreement, with this being the LPA in most cases. However, it may be advantageous from a conservation perspective for the offsetting to take place outside of the local authority where the development takes place and permission is granted. Clarification would be needed as to how enforcement action could be taken in such circumstances, if, for example, a management agreement was not being adhered to.

Monitoring

109. Covenants must require ongoing monitoring of any offset provision. Monitoring data must be submitted to, and verified, by the LPA so as to ensure that the offsetting agreement is being adhered to. All data must then be transferred to Natural England to hold centrally. Such data will be critical in understanding the net-impacts of offsetting on biodiversity, and in enabling the refinement of offsetting policies. This should lead to a cycle of continual improvement, that would, for example, allow for metrics to be revised in accordance with changing proportions of habitats, both locally and nationally.

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?

110. Yes. Additionality is crucial to ensuring that offsetting does not result in net-losses to biodiversity, and it will not be possible to ensure additionality without a nationally held and publicly viewable database of offset providers. Essentially, it should only be acceptable to use offsets that have been registered with that intention. The system of registration should therefore ensure that the offset was not required as part of any other statutory or policy requirement.

111. Natural England should be responsible for a national register. This register should keep records of the intention to offset and any agreements to offset, so as to avoid any

²⁰ Second bullet point on p.11

'double-selling'. Data collected as part of monitoring arrangements should also be linked to this database.

Question 24: How long should offsets be secured for?

112. Fundamentally, an offset must, at least, compensate for the biodiversity that will be lost due to the development and be guaranteed to be in place for the lifetime of the development's impacts. Appropriate management measures must be put in place that secure and maintain the biodiversity value that is required to be offset. Further consultation will be needed on how to make this complicated principle work in practice.

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

113. Offset sites may be buffeted by a range of unforeseen external factors, such as changes in water levels. In this respect, there are likely to be occasions when management arrangements need to be modified to allow adaptive management practice to secure ecological objectives. Management agreements must therefore allow flexibility, but any modifications to the management agreement must be at the discretion of either the LPA or Natural England.

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?

114. The requirement to respect the mitigation hierarchy is already in place, so the introduction of any new 'system' should not alter the decision-making process.

115. In respect of whether a developer should retrospectively be made to submit an assessment in the prescribed manner of a new system, this would seem unreasonable.

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

116. Guidance should be very clear that development of a higher value site should constitute significant harm and the site must be protected accordingly. This means that permission should only be granted on sites that have a higher value in exceptional circumstances. The bar for what constitutes necessary development should rise commensurate with the value - and the likelihood of granting permission should decrease. Furthermore, if a high value habitat is lost, we would expect that habitat to be replaced like-for-like, wherever possible.

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.

117. Holding a trust in perpetuity for the management of the land provides some protection since if the offset manager is found to be negligent this management payment can be shifted to an alternative manager. If the offset is small and fails in spite of the best efforts of the provider then the risk metrics should be sufficient to offset the harm.

118. However, if the individual offset is large, it will need to be covered by liability insurance for instances in which it fails despite the best efforts of the provider. If the offset failure is due to negligence then some form of insurance to recover the lost costs, and transfer these and the remainder of the funds to a new offset provider.

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?

119. Higher value habitats must always be replaced with the same type of habitat, wherever possible. In exceptional cases where this is not possible, the habitat must be replaced with a habitat of equal 'value'.

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 the strategy?

120. There is significant scope to turn cumulative losses of lower and medium value biodiversity into cumulative gains, by strategically locating offsets in a way that improves ecological connectivity and delivers landscape-scale conservation – in line with the Government's ambitions in the Natural Environment White Paper (NEWP). In order to optimise this potential, neighbouring LPAs will need to work with each other and with their Local Nature Partnerships²¹, to identify strategic locations where cumulative offsetting could do most to improve ecological connectivity and deliver landscape-scale conservation. This strategy should then be embedded in the LPA's supplementary planning document on offsetting.

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?

121. Habitat banking has the potential to reduce the risks associated with offsetting. As such, we do not object to habitat banking in principle and consider it to be the preferred approach in a properly designed and functioning offset system, and where there is sufficient demand for offsets to justify the necessary upfront investment. However, it is crucial that the availability of banked habitat does not distort the decision-making process and why it is vital that bank credits can only be released for tightly controlled purposes i.e. like for like. It would, for example, be completely unacceptable for a LPA to agree to inappropriate compensation of the wrong type or in the wrong location, on the basis that there was not a preferable offset available. Guidance must be very clear that if an appropriate offset cannot be secured, the application must be refused. The market must be dictated by the decision, not vice-versa.

122. If a site has been registered with the intention of offsetting, it would seem unreasonable to prevent it being sold as such at any point in time. A requirement to

²¹ As required by the Duty to Co-operate

'retire' the site after a specified period may also act as a disincentive to create the habitat. Furthermore, there may be no obligation to continue to manage the site to maintain its ecological value, and depriving the provider of future funds may simply result in them ceasing to manage the site.

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?

123. Assuming that there was no legal or policy obligation to maintain the environmental gain, we would consider it acceptable for that site to be registered and then sold as an offset. For example, it would not be acceptable for aftercare from a minerals site (that was a condition of the permission) to be used to offset harm from another development for the duration of the planning obligation to manage the site, as the aftercare was necessary to offset the harm from the mineral extraction. However, in some circumstances we would be comfortable for the site to be sold as an offset once the planning obligation had expired, if this would secure additional funding necessary to manage the site.
124. It would be unacceptable for Government to generate funds needed to fulfil its existing obligations for managing protected sites through offsetting. Likewise, it would be unacceptable for the Government to use offset funds to restore former conifer plantations to priority habitats on government land, as they have already committed to doing so. Neither would it be acceptable to use agri-environment funded work to offset harm elsewhere, during the timeframe of the agreement.
125. The integrity of the system depends on additionality and without additionality we will end up with severe net-losses of biodiversity. As stated earlier, it is also important to avoid offset provision being 'double-sold'. This will require a central register, preferably maintained by Natural England, holding details of all offset provision.
126. Value should be ascribed to the site using the same criteria that would be used for assessing any other site, such as in a habitat bank.

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?

127. It should only be acceptable to use offsets that have been registered with that intention. The system of registration should ensure that the offset was not required as part of any other statutory or policy requirement.

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

128. We would strongly recommend a system of accreditation for assessment providers, as this would help to provide the necessary training and drive up professional standards. However, this does not negate the need for LPA ecological expertise so that the LPA can verify the assessments. The highly contested world of land use planning includes a myriad of different interests, and the integrity of the planning system depends on

independent arbitration. Moreover, the public's faith in the system depends on independent arbitration. The decision to approve an application may hinge on matters relating to biodiversity and it would be unacceptable for a LPA to have to simply accept the developer's recommendation on offsetting – even if the report is written by an 'accredited' expert.

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

129. Differences of opinion should be addressed in the same way that they are for any other planning application. If the developer does not like the decision of the LPA, they have a right of appeal to the Planning Inspectorate. The appeal should then be determined by the Planning Inspectorate or the Secretary of State.

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?

130. We think hedgerows should be included in the metric, the approach taken with the pilot metric is broadly right. However, we think there should be more explicit recognition of the importance of trees within hedgerows.

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

131. No. Hedgerows are a habitat of high distinctiveness. As with any other type of high value habitat, they must be replaced with the same type of habitat.

Question 38: 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?

132. The following areas are likely to require legislation:

- A requirement for Natural England to maintain a register of offset providers and to accredit those providers;
- A requirement for LPAs to report data from site assessments and offset monitoring to Natural England, and for Natural England to host this data on publicly available database;
- A requirement for offset providers to have robust insurance against negligence or insolvency;
- A requirement for LPAs to produce a SPD on ecological restoration;
- A requirement for payments to LPA in-lieu of compensation to be ringfenced and spent on or ecological restoration or creation, in line with their SPD on ecological restoration;
- A requirement for funding for the creation and management of offsets is secured prior to the commencement of development

