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SUBMISSION ON THE DRAFT NSW BIODIVERSITY OFFSETS POLICY FOR MAJOR PROJECTS

The Nature Conservation Council of NSW (NCC) and the Total Environment Centre (TEC) welcome the opportunity to comment on the *Draft NSW Biodiversity Offsets Policy for Major Projects* ('draft policy') and the *Draft Framework for Biodiversity Assessment* ('assessment framework').

The Nature Conservation Council of NSW (NCC) is the peak environment organisation for New South Wales, representing more than 120 member societies across the state. The Total Environment Centre (TEC) has been campaigning for environment protection in the city and country, changing government policy, advising the community and challenging business for over 30 years.

Our organisations are strongly opposed to the draft policy as it will not provide adequate protection for biodiversity, including threatened species and their habitats, and will lead to poor environmental outcomes. While the proposal to introduce a rule-based and transparent system for offsets was initially regarded as a positive step, it is our view that the draft policy does not provide an adequate framework for protecting biodiversity values in New South Wales.

The draft policy fails to meet accepted standards in relation to biodiversity offsetting, and is not consistent with the government's stated commitment to protect high value conservation land, native vegetation and biodiversity. While we acknowledge that there should be consistency and transparency in assessing biodiversity impacts of major projects and the use of offsets, this does not mean there should be a lowering of existing standards.

We are concerned that the draft policy has been heavily compromised by pressure from industry and fails to provide adequate protection for important wildlife habitat.

SUMMARY OF RECOMMENDATIONS

We are strongly opposed to the draft policy in its current form, and recommend that it be withdrawn, pending an independent scientific review of the use of biodiversity offsets as a conservation tool.

In the event that government resolves to proceed, we recommend that:

Recommendation 1: That the policy clearly states that its primary objective is to achieve 'net positive' biodiversity outcomes, consistent with the NSW Government's announcement in July 2013.

Recommendation 2: That the policy clearly identifies the circumstances in which consent to destroy native flora, fauna or habitat will not be granted, consistent with the government's commitment to protect high conservation value land, native vegetation and biodiversity.

Recommendation 3: That the policy require 'like for like' offsetting, and not permit development that cannot be offset using 'like for like' offsets in particular for red flag, highly endangered areas

Recommendation 4: That restoration of ecological values during mine site rehabilitation be required as a standard condition of consent, but not be permitted as an eligible biodiversity offset.

Recommendation 5: That offset payments only be permitted where it can be demonstrated that the payment will result in the identification and protection of appropriate offset sites before development commences.

Recommendation 6: That research and education not be permitted in place of genuine offsets.

Recommendation 7: That the policy apply a consistent, predictable approach to determining offset conditions, and not provide for 'discounting' of offset requirements.

Recommendation 8: That the policy not be accredited under the proposed bilateral approval agreement between the Commonwealth Government and the NSW Government for the purposes of the *Environment Protection and Biodiversity Conservation Act 1999*.

POLICY CONTEXT

Over the past two centuries, the natural diversity of New South Wales has been severely diminished by human activities, including land clearing, development, over-exploitation of natural resources and introduction of invasive species. The 2012 *State of the Environment* Report confirms that:

The overall diversity and richness of native species in New South Wales remain under threat of further decline. Thirty-five additional species have been listed as threatened under NSW legislation since 2009, including 11 terrestrial vertebrate species...

Currently, 989 species of plants and animals, 49 populations and 107 ecological communities are listed as threatened in NSW legislation, and 45 key threatening processes have been identified. These numbers continue to rise.¹

Government has recognised its responsibility to protect the natural environment in its current State Plan, *NSW 2021*, in which it commits “to protect high value conservation land, native vegetation and biodiversity” (Goal 22).²

In announcing the new biodiversity offset framework in July 2013, former Minister for the Environment, Robyn Parker MP, indicated that a ‘net-positive’ standard would be applied.³

In our view, the draft policy fails to deliver on these policy commitments. We are concerned that the proposed draft policy fails to protect the natural environment, including high value conservation land and biodiversity, and will fail to deliver net-positive outcomes for biodiversity in New South Wales.

OFFSETTING PRINCIPLES

The draft policy does not meet accepted standards in relation to biodiversity offsetting, and represents a substantial weakening of existing state policy, including offsetting rules established under the *Native Vegetation Act 2003* and the *Threatened Species Conservation Act 1995*.

There are numerous biodiversity offsetting regimes around the world which are based on various ecological and regulatory principles. For the purposes of this submission, a number of schemes and

¹ NSW State of the Environment Report, NSW EPA, 2012

² *NSW 2021 – A plan for to make NSW number one*, NSW Government, p 43

³ Media Release, *Boost for Biodiversity, New fund to support the environment*, Robyn Parker MP, Minister for the Environment and Minister for Heritage, 20 July 2013, www.environment.nsw.gov.au/resources/MinMedia/MinMedia13072001.pdf

principles were reviewed to provide a basis for assessing the adequacy of the draft policy and assessment framework.

Conservation International has worked in partnership with government agencies, companies, scientists and environmental organisations from around the globe to develop the **Business and Biodiversity Offsets Program**.⁴ This included the development the following *Principles for Biodiversity Offsetting*:

1. **No net loss:** A biodiversity offset should be designed and implemented to achieve *in situ*, measurable conservation outcomes that can reasonably be expected to result in no net loss and preferably a net gain of biodiversity.
2. **Additional conservation outcomes:** A biodiversity offset should achieve conservation outcomes above and beyond results that would have occurred if the offset had not taken place. Offset design and implementation should avoid displacing activities harmful to biodiversity to other locations.
3. **Adherence to the mitigation hierarchy:** A biodiversity offset is a commitment to compensate for significant residual adverse impacts on biodiversity identified after appropriate avoidance, minimization and on-site rehabilitation measures have been taken according to the mitigation hierarchy.
4. **Limits to what can be offset:** There are situations where residual impacts cannot be fully compensated for by a biodiversity offset because of the irreplaceability or vulnerability of the biodiversity affected.
5. **Landscape context:** A biodiversity offset should be designed and implemented in a landscape context to achieve the expected measurable conservation outcomes taking into account available information on the full range of biological, social and cultural values of biodiversity and supporting an ecosystem approach.
6. **Stakeholder participation:** In areas affected by the project and by the biodiversity offset, the effective participation of stakeholders should be ensured in decision-making about biodiversity offsets, including their evaluation, selection, design, implementation and monitoring.
7. **Equity:** A biodiversity offset should be designed and implemented in an equitable manner, which means the sharing among stakeholders of the rights and responsibilities, risks and rewards associated with a project and offset in a fair and balanced way, respecting legal and customary arrangements.
8. **Long-term outcomes:** The design and implementation of a biodiversity offset should be based on an adaptive management approach, incorporating monitoring and evaluation, with the objective of securing outcomes that last at least as long as the project's impacts and preferably in perpetuity.

⁴ http://www.conservation.org/sites/celb/fmg/articles/Pages/070199_business_biodiversity_offset_program.aspx

9. **Transparency:** The design and implementation of a biodiversity offset, and communication of its results to the public, should be undertaken in a transparent and timely manner.
10. **Science and traditional knowledge:** The design and implementation of a biodiversity offset should be a documented process informed by sound science, including an appropriate consideration of traditional knowledge.

The *Environment Outcomes Assessment Methodology* which governs the use of offsets under the *Native Vegetation Act 2003* includes the following principles:

1. *the benefits of the offset persist for at least the duration of the negative impact of the proposed clearing ;*
2. *the benefits from any offset will improve or maintain environmental outcomes for each environmental value;*
3. *the offset vegetation is of equal or greater regional conservation significance as the site proposed for clearing;*
4. *management actions are likely to be deliverable and enforceable;*
5. *permanent conservation measures are given greater value than other management actions;*
6. *benefits of offset are assessed using the same methodologies used to assess impacts of the proposed clearing;*
7. *the offset is additional to actions or works carried out using public funds or to fulfill regulatory obligations; and*
8. *only benefits from the management action or permanent conservation action may comprise the offset.*

These principles are implemented by a consistently applied assessment methodology, which aims to provide clear, predictable environmental outcomes and ensure equitable treatment of landholders.

The NSW Government has previously published the following biodiversity offsetting principles

1. *impacts must be avoided first by using prevention and mitigation measures.*
2. *all regulatory requirements must be met.*
3. *offsets must never reward ongoing poor performance.*
4. *offsets will complement other government programs.*
5. *offsets must be underpinned by sound ecological principles.*
6. *offsets should aim to result in a net improvement in biodiversity over time.*
7. *offsets must be enduring - they must offset the impact of the development for the period that the impact occurs.*
8. *offsets should be agreed prior to the impact occurring.*
9. *offsets must be quantifiable - the impacts and benefits must be reliably estimated.*
10. *offsets must be targeted.*
11. *offsets must be located appropriately.*
12. *offsets must be supplementary.*
13. *offsets and their actions must be enforceable through development consent conditions, licence conditions, conservation agreements or a contract.*⁵

⁵ Office of Environment and Heritage, *Principles for the use of biodiversity offsets in NSW*, www.environment.nsw.gov.au/biocertification/offsets.htm

In our view, the draft policy represents a significant and unacceptable departure from established offsetting principles, including principles previously adopted by the NSW Government.

KEY CONCERNS

Failure to deliver on commitment to achieve ‘net positive’ biodiversity outcomes

The draft policy does not set out a clear environmental outcome standard that is consistent with government’s public commitment to apply a ‘net positive’ standard.⁶

The draft policy does not have a clear objective to protect biodiversity, and is primarily focused on providing guidance and practical offset solutions to proponents. Given the ongoing decline of biodiversity in New South Wales, it is imperative that the policy has the protection of biodiversity as one of its primary objectives.

Recommendation 1: That the policy clearly states that its primary objective is to achieve ‘net positive’ biodiversity outcomes, consistent with the NSW Government’s announcement in July 2013.

Failure to identify and protect ‘red flag’ areas, including areas of high conservation value

We are concerned that the policy does not use ‘red flags’ to identify and protect species, ecological communities and habitats with high conservation value.

While the policy adopts the ‘avoid, mitigate and offset’ hierarchy, which provides that offsetting is a ‘last resort’ in circumstances where impacts cannot be avoided or minimised, the policy fails to recognise that in some instances, such as in the case of areas of high conservation value, offsetting is not appropriate.

The policy fails to recognise that there are situations where residual impacts cannot be fully compensated for by a biodiversity offset because of the irreplaceability or vulnerability of the biodiversity affected.

If we are serious about biodiversity conservation in this state, then we must give proper protection to biodiversity by identifying ‘red flag’ areas, and mandating that impacts must be avoided in these areas.

⁶ Media Release, *Boost for Biodiversity, New fund to support the environment*, Robyn Parker MP, Minister for the Environment and Minister for Heritage, 20 July 2013, www.environment.nsw.gov.au/resources/MinMedia/MinMedia13072001.pdf

Recommendation 2: That the policy clearly identifies the circumstances in which consent to destroy native flora, fauna or habitat will not be granted, consistent with the government's commitment to protect high conservation value land, native vegetation and biodiversity.

Weakening the 'like for like' requirement

We are concerned that the draft policy proposes to fundamentally depart from the principle that offsets should be targeted towards the conservation values being lost ('like for like' offsetting).

This undermines the purpose of setting up a structured framework for offsetting impacts in order to counter biodiversity loss. In particular, we are concerned that measured biodiversity loss will not be appropriately ameliorated by similar vegetation types in the locality that have been more highly cleared, or by species that are under the same or greater level of threat.

Weakening the requirement to secure 'like for like' offsets exposes the offsetting system to public ridicule, facilitates the net loss of certain threatened species and communities, and may result in perverse landscape outcomes (i.e. large intact areas of vegetation being cleared and fragmented in exchange for protection of fragmented patches of highly cleared vegetation).

Recommendation 3: That the policy require 'like for like' offsetting, and not permit development that cannot be offset using 'like for like' offsets in particular for red flag or highly endangered areas.

Multiple pathways to offsetting, including supplementary measures and mine site rehabilitation

Our organisations are concerned that the draft policy provides multiple pathways to approval, including supplementary measures and mine site rehabilitation, which do not provide credible offset solutions. Proponents will normally opt to use the fastest, least expensive pathway to approval. We note that there has been poor uptake of the BioBanking scheme established under the *Threatened Species Conservation Act 1995*, as proponents opt to use the 'seven part test', which is seen as easier and more likely to result in approval.⁷

In order to be effective, any proposed policy on biodiversity offsets must provide pathways that deliver real and effective biodiversity outcomes. The use of supplementary measures fundamentally compromises the credibility of the draft policy. The use of indirect offsets or supplementary measures

⁷See, for example, Robinson, David, *Biodiversity Banking in NSW: A Critique*, Australasian Journal of Natural Resource Law and Policy, Vol.14, No.2 2011

severs the nexus between the loss of biodiversity and the required compensatory measures, and should not be permitted.

We do not believe the use of supplementary measures is appropriate as they do not adequately compensate for biodiversity loss, and do not lead to an overall net-positive outcome for biodiversity. If the biodiversity impacts of a proposed development cannot be avoided, mitigated or offset, the proposal should not be approved.

Mine site rehabilitation

The draft policy allows for mine site rehabilitation to be attributed biodiversity offset credits. We are strongly opposed to the use of mine site rehabilitation as an acceptable compensatory measure for the following reasons:

- the mining industry has a very poor record of successfully restoring ecological values during mine site rehabilitation – mining has profound impacts on geology, hydrology and ecology that are inherently difficult to rehabilitate, making rehabilitated sites entirely inappropriate as offset sites;
- the NSW Government has a poor track record of monitoring and regulating mine site rehabilitation;
- mine site rehabilitation is inherently difficult to regulate as an offset, due to the time lag between approval, development and rehabilitation; and
- the mining industry has a long history of using modification applications to vary consent conditions, including rehabilitation and offset requirements, once the biodiversity loss has already occurred.

Recommendation 4: That restoration of ecological values during mine site rehabilitation be required as a standard condition of consent, but not be permitted as an eligible biodiversity offset.

Offset Fund

We are strongly opposed to the proposal to establish a biodiversity offset fund, as it will permit the destruction of biodiversity values before any appropriate offsets have been identified and secured. Biodiversity offsets should be identified and secured before development commences.

We recognise that use of trading mechanisms and third party offset managers can provide useful efficiencies and improved management outcomes, but this is not a legitimate basis for permitting development to proceed before offset sites have been identified and secured.

Recommendation 5: That offset payments only be permitted where it can be demonstrated that the payment will result in the identification and protection of appropriate offset sites before development commences.

Research and Education

While research and education on biodiversity is important and does require adequate resourcing, it does not directly compensate for overall loss with equivalent gains. We do not support this as an offset credit option.

Recommendation 6: That research and education not be permitted in place of genuine offsets.

Proposal to allow discounting

We do not support the proposal to allow 'discounting' of offsets based on claimed social and economic benefits. This proposal has the potential to allow biodiversity impacts to be overridden by socio-economic considerations. Economic prioritisation policies are likely to contribute to the incremental and permanent loss of significant biodiversity in NSW, and completely undermine the credibility of the policy.

The proposal to allow discounting will create uncertainty for proponents, is likely to lead to inequitable outcomes and will encourage proponents to seek case-by-case exemptions, rather than applying a consistent and predictable methodology to determine whether a proposal will be permitted and the offset conditions to be required.

Recommendation 7: That the policy apply a consistent, predictable approach to determining offset conditions, and not provide for 'discounting' of offset requirements.

Other key concerns

Finally, we note our following concerns with other fundamental aspects of the draft policy:

- The draft policy will use a number of existing databases including the Threatened Species Profile Database and Vegetation Benchmarks Database. We note the significant concerns of the NSW Scientific Committee on the inadequacies of these databases.⁸
- The draft policy provides that biodiversity in very poor condition need not be offset. This is open to exploitation by proponents who can poorly manage land under their ownership.
- The draft policy does not provide a clear explanation of the distinction, and interaction with the, the existing BioBanking Scheme under Part 7A of the *Threatened Species Conservation Act 1995*.
- The Policy applies to terrestrial biodiversity and does not adequately address impacts on aquatic biodiversity.
- The draft policy does not require appropriate monitoring and evaluation procedures, particularly in order to determine whether environmental outcomes are being achieved and whether the framework has been successful on delivering a net-positive outcome for biodiversity.

FEDERAL ENVIRONMENTAL ASSESSMENT

Given the clear inadequacies of the current draft policy, we note with alarm the proposal to accredit the draft policy under the draft bilateral agreement on approvals under the *Environment Protection and Biodiversity Conservation Act 1999*, released by the federal government in May 2014.

We do not support accreditation of the draft policy for the purposes of the *Environment Protection and Biodiversity Conservation Act 1999*, as the draft policy represents a substantial weakening of existing federal offsets standards and will not provide adequate protection for matters of national environmental significance.

Recommendation 8: That the policy not be accredited under the proposed bilateral approval agreement between the Commonwealth Government and the NSW Government for the purposes of the *Environment Protection and Biodiversity Conservation Act 1999*.

⁸NSW Scientific Committee, *Submission on Biodiversity Banking and Offsets Scheme Review* (2012)

CONCLUSION

Biodiversity loss is one of the key challenges of our generation. The challenge is difficult and requires strong leadership in order to deliver positive environmental outcomes and reverse the continuing decline in our state's biodiversity.

The draft policy does not provide adequate protection for biodiversity and does not deliver on the government's promise to protect the environment and apply a net-positive standard for biodiversity.

Please do not hesitate to contact Cerin Loane, Policy and Research Coordinator, on (02) 9516 1488 if you have any questions or require any additional information.

Yours sincerely,

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