Submission No 62

INQUIRY INTO INTEGRITY OF THE NSW BIODIVERSITY OFFSETS SCHEME

Organisation: Lake Macquarie City Council

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NSW Legislative Council
Portfolio Committee No 7 – Planning and Environment
Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme

PortfolioCommittee7@parliament.nsw.gov.au

Dear Sir/Madam

Subject: Submission – Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme

Lake Macquarie City Council (Council) wishes to make a submission to the NSW Legislative Council Committee Inquiry into the NSW Biodiversity Offset Scheme.

Background

The NSW Biodiversity Offsets Scheme (BOS) has been fully operational for around three years, and a review of the effectiveness of the scheme is welcome. It is noted that changes to aspects of the scheme have been proposed to improve the calculation of payments to the Biodiversity Conservation Fund in lieu of retiring credit obligations. A broader review of the scheme would be beneficial and may be able to be facilitated through the inquiry process.

Council has extensive experience applying biodiversity offsets within its local government area, at varying stages in the land use planning and development process, including negotiated offsets, the former BioBanking Scheme and the current BOS. Council has two staff accredited under the BOS who have assessed approximately 25 applications that have triggered offsetting requirements.

General comments

Local governments are important participants in the efficient operation of the Biodiversity Offset Scheme (BOS) and have a strong interest in its operation. Key roles for local government are:

1. as a regulatory and consent authority in assessing biodiversity development assessment reports (BDAR) and making determinations of offset credit requirements in development approvals, taking into account the assessment made by accredited assessors
2. as a potential provider of credits and land manager of offset sites
3. as a local strategic land use planning authority implementing local biodiversity policy.

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In addition, local government authorities undertake development and provide community facilities, the carrying out of which may require the provision of offsets under the BOS.

It is important to consider the objectives of the BOS which are primarily to:

1. avoid biodiversity loss, as provided for in the Biodiversity Conservation Act 2016
2. achieve no net loss of biodiversity, as provided for in the Biodiversity Assessment Method (BAM) made under the Biodiversity Conservation Act 2016.

Any review of the BOS must have regard to both the objectives of the Biodiversity Conservation Act 2016, the Environmental Planning and Assessment Act 1979, and the appropriateness of the BAM methodology upon which it is dependent.

A successful BOS is reliant on a framework that is consistent over time, with realistic pricing of biodiversity values, and decision-making transparency. Continuing changes have the capacity to undermine the scheme, and confidence in biodiversity offsetting more generally.

The BOS also needs to work effectively for consent authorities who must properly assess development applications as required under the Environmental Planning and Assessment Act 1979 (EP&A Act). Consent authorities must be confident when determining approvals that offset obligations will be discharged adequately and appropriately in a transparent way, in accordance with consent requirements.

From Council's perspective as an owner and developer, there is significant costs to establishing biodiversity offset sites. This can make securing smaller and lesser value local sites less appealing, or the fixed Biodiversity Conservation Trust credit prices can undercut and make some sites unviable.

Biodiversity offsetting in Lake Macquarie LGA

In the Lake Macquarie local government area (LGA) urban development pressures often impact on native vegetation, and a significant proportion of greenfield development proposals are impacting on listed threatened species and threatened ecological communities. Biodiversity loss is expected to remain a continuing issue for development and land use within the City. This requires a strategic approach to the provision of biodiversity offsets.

Over the last 20 years Lake Macquarie has applied biodiversity offsets as an approach to compensate for the loss of native vegetation. To date, the total area of biodiversity offsets within the LGA is estimated to be 3,488 ha in various securities of tenure. While some of these offsets have been secured as Biobank sites, no biodiversity offsets have been secured under the currently operating BOS.

Where possible, the Council seeks to achieve its strategic land use objectives to maintain local biodiversity and an adequate proportion of the LGA as native vegetation through the provision of local offsets.

Issues identified with the Biodiversity Offset Scheme

The following matters are evident in the operation of the current BOS arrangements:

- It appears the scheme is not operating in the way it was envisaged, which was to prevent the loss of biodiversity. The ability for an applicant to pay into the Biodiversity Conservation Fund rather than retire credits appears to be impacting on the integrity of the scheme.

However, it is acknowledged that paying into the fund aids smaller developments that often do not have the resources to secure suitable offset land. One current issue is that many credit obligations are being paid rather than retired, leaving the market with a deficit of conserved land.

- Transparency around where offsets are secured in relation to each application could be improved. Currently it is difficult for the public and Council to track where an offset credit has been secured in relation to the associated development approval.
- The scheme's tendency toward a local net loss in biodiversity could be improved. Currently credits can be offset outside the local government area, which is acknowledged as being a preferred option for many smaller developments. For areas that have high growth and high biodiversity, such as Lake Macquarie, it is likely to result in a local net biodiversity loss. Any changes to the scheme needs to ensure local biodiversity gains, but also provides opportunities to develop key growth areas.
- Lack of legislated clarification makes administering the 'avoid and minimise' and 'serious and irreversible impact' requirements difficult and often they are inadequately applied.
- Vegetation clearing from small developments and associated land management activities is not subject to biodiversity offsets. Over time this has significant cumulative loss of important vegetation. The scheme should consider this impact, but also ensure small developments remain viable.
- Separate processes and requirements for urban and rural land lead to inconsistency and inequity.
- Vegetation clearing area thresholds primarily depend on the applicable local environmental plan zoning and minimum subdivision size, with little regard to the significance of the native vegetation or consideration of habitat connectivity. In effect, more land can be cleared in environmental conservation zones than urban zones before the BOS applies.
- Strategic land use issues, such as the protection of biodiversity corridors, local threatened species population viability, long term settlement structure, water catchment protection or bushfire planning, are not a significant consideration in the operation of the BOS.
- Variation rules in the regulatory requirements mean that local offsets close to the development site are unlikely, and may occur in a wide area across the state and species that are relatively more common can be traded for rarer ones.
- Offsetting is not necessarily like for like. A plant can be offset for another plant and an animal for an animal if offsets cannot be found within a set timeframe. The Biodiversity Conservation Trust (BCT) has great flexibility in spending the fund payments. Whilst flexibility is important for the development industry, the outcome may not necessarily be positive for certain species and is subject to time lags.
- Consideration of local biodiversity values and issues is not a requirement of the BAM or BDAR and is an additional development assessment consideration for a consent authority, together with other environmental, social and economic matters. Reducing the complexity of processes and providing greater consistency with the requirements of development consent requirements is preferred.

- Recent and ongoing changes to the Biodiversity Values Map within Lake Macquarie LGA are likely to increase the number of small developments requiring offsets under the BOS.
- There is a tendency for consultants and proponents to downplay the importance or requirement to avoid and mitigate biodiversity impacts prior to offsetting.
- Strict application of the BAM means that species using a site that are not present during a survey under the BAM are not part of the credit calculations and their habitat is not offset. The BAM also does not take into account future habitat requirements that may be required for species to adapt to climate change.
- Biodiversity conservation depends on conservation of biodiversity at all levels. Local conservation is required to support regional and landscape conservation. Without recognition of a hierarchy such as this, biodiversity decline will continue at an accelerated rate. The BOS does not recognise local biodiversity issues.
- The most effective way to mitigate and offset biodiversity impacts is to offset as close as possible to the impact site. Offsetting species on a state-wide basis undermines the conservation of local populations and has the potential to lead to drastic contraction in ranges. The current scheme does not adequately provide for local offsetting in a coordinated way to allow developments with certainty and clarity of the process to pursue their development. This should be a key focus of any review of the BOS.
- Implementation of the BOS has been hindered by ongoing changes to the way threatened species habitat is measured and the way credits are generated between BBAM and BAM-C are complex and confusing.
- The way some species are measured by area of habitat rather than individuals present is detrimental to retention and conservation of these species.
- A significant number of those responsible for implementing the scheme, for e.g. assessment officers within Council and the Department of Planning, Industry and Environment, are unable to obtain accreditation or maintain accreditation. As a consequence, they do not have access to the BAM-C or the same level of information as consultants lodging applications on behalf of proponents. This undermines transparency and accountability in the system.

Current biodiversity offset arrangements are incomplete and inequitable, and do not effectively take into account local biodiversity objectives. Importantly, they apply only in limited instances based on arbitrary thresholds and land zoning and regional scale mapping, and are not based on the full ecological impact. The BAM determination of offset requirements focuses on impacts on threatened species and ecological communities only. It does not consider biodiversity and native vegetation as a whole within a strategic land use and management context. It is also complex, lacks transparency, is time consuming and fails to provide certainty for proponents.

Current gaps with the BOS and BAM are that:

1. Increased focus needs to be given to biodiversity offsets at the planning proposal/ rezoning stage of development. While Council has had a policy and significant success in implementing this approach through negotiated agreements, the BOS focuses on development application requirements in terms of credits, rather than appropriate local offsetting arrangements. Balancing stewardship areas with development impact areas on large land holdings needs to be encouraged to achieve better biodiversity outcomes close to impact sites.

2. Greater attention should be given to avoiding biodiversity impacts so that offsets are not required. Biocertification appears to be an avenue to develop the most environmentally sensitive sites where avoidance should be a priority.

3. Incentives should be provided for local offsetting, linked with a strategic program to identify and protect conservation land within an individual local government area.

4. By being an offset provider and investing in advanced offsets that anticipate future needs, councils may proactively facilitate local offsetting to achieve strategic land use objectives. In contrast, the Biodiversity Conservation Trust which operates the BOS has its focus on other priority areas across NSW as a whole.

5. Current biodiversity offset arrangements are not able to link with a mechanism to offset carbon emissions from vegetation clearing and achieve other social and community benefits.

6. The quantity of the offsets and species offset depends heavily on the expertise and integrity of accredited assessors, and the species they detect, in very short-term surveys on sites.

7. There is no clear point at which loss of a particular, ecological feature, TEC or threatened species is unacceptable as there is little of it left, declines are extremely rapid or ability to offset this is not available – this might be the case for critical native vegetation corridors or for very rare species/species not well known.

8. Serious and irreversible impacts are not applied to all proposals in the same way and are not resulting in conservation (avoidance) of important biodiversity.

9. There are no incentives to offset impacts as close as possible to the site of impact – there is no encouragement to do this and there appear to be no systems in place to even trace/links credits with impact sites so this can be monitored. This is an important approach for any review of the BOS.

10. The disparity of access and information available to accredited assessors lodging applications and assessment officers responsible for assessing them is significant.

11. The Biodiversity and Assessment Method (BAM) appears to:

    a. have a number of loop holes that, if used, can inaccurately reflect the biodiversity value of a site (for e.g. species credits were avoided at one site where the species had historically been recorded on the basis that it was not detected in the current survey)

    b. include generic formulas, calculations and monetary contributions that are not always comparable to land prices and the value of biodiversity lost

    c. require high administrative costs (e.g. assessment, monitoring and compliance) that could be spent delivering better on ground outcomes.

12. The BAM has recently been updated to provide a more comprehensive decision making process to determine if a site can be assessed using a streamlined module, including for small areas, scattered trees and planted native vegetation. Regarding planted native vegetation there is a lack of definition within the BAM for the identification of what should be considered ‘remnant’ native vegetation to determine the appropriate use for the planted native vegetation module. Currently, the lack of definition allows for matters to be determined within a court setting rather than the BAM providing explicit direction upfront. This could be improved by providing a comprehensive list of definitions, including acting as triggers when determined by the appropriate assessment. Previously, such triggers relied on the Native Vegetation Act 2003 (now repealed) where they identified pre and post 1990 vegetation as a threshold.

13. The BAM allows for three modes of assessment for candidate species: expert report, targeted survey or assumed presence. The BAM currently allows for assessors to assume presence of candidate species that are then offset with credit obligations. It appears that for some larger developers this is seen as an opportunity for financial gain as it is more cost and time effective for them to pay the credits rather than undertake the targeted survey. There seems to be no threshold for when targeted surveys are mandatory and where consideration of assuming presence may occur, meaning that best practice for ecological assessment is not being widely undertaken for candidate species. This could be improved by identifying certain key thresholds for candidate species that determine if assuming presence can be used or not. It will also need to ensure this is considered in line with development viability.

14. Threatened species survey considerations within a LGA have not been considered when the small area streamlined assessment module of the BAM was refined. Although it does make mention of use of local data where appropriate, it has identified only incidental survey is required (unless a threatened species is recorded on site). The BAM-C and BioNet Threatened Species Database could be refined to identify required targeted surveys for small area assessments based on the LGA and identified PCT, and the local planning and management guidelines that occur within that LGA.

Conclusions

While biodiversity offsets are an important tool and should continue, the existing BOS is highly complex, confusing, and not equitable in dealing with compensation for loss of biodiversity. It also lacks consistency and certainty, which are important elements for the development industry. It is also not strategic in achieving broader landscape scale conservation objectives. Landscape scale outcomes depend upon achieving local conservation objectives.

Experience in Lake Macquarie LGA indicates that the BOS is not effective in preventing loss of biodiversity values. A broad review of the operation of the scheme would be beneficial, and should focus on enabling the provision of local biodiversity offsets as close as possible to the location of the biodiversity loss.

Recommendations

Having regard to the Committee's terms of reference, the following recommendations are made:

Effectiveness of the BOS in preventing loss of biodiversity values

1. The biodiversity offset scheme should enable closer integration with local strategic planning objectives, and support the provision of local offsets.

2. The current operation of the BOS should be reviewed in consultation with local government to improve its effectiveness and equity in avoiding and compensating for biodiversity loss.

3. Options for improving the BOS should be considered, including appropriate fixed price payments, and supporting the creation of advanced offset credits established prior to anticipated development.

Role of BCT in administering the BOS

1. Operation of the BOS should avoid the potential for conflict of interest where the BCT is both the regulator of market prices as well as the main purchaser in the market.
2. Effective operation of the BOS requires full public transparency and accountability.
3. Public access to the offset credit calculator should be retained, especially to inform consent authorities and proponents, and to facilitate development feasibility assessments for development and stewardship sites.

Council welcomes the review of the operation of the NSW Biodiversity Offset Scheme and would be happy to provide further advice to the inquiry if required.

Should you require further information, please contact Council's Environmental Planner, Martin Fallding, on .

Yours sincerely

David Hughes

Director Built and Natural Assets