

**Submission  
No 93**

## **INQUIRY INTO INTEGRITY OF THE NSW BIODIVERSITY OFFSETS SCHEME**

**Organisation:** Northern Rivers Joint Organisation - Natural Resource  
Management Managers Group

**Date Received:** 14 September 2021

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## **Submission to the Inquiry into the Integrity of the Biodiversity Offsets Scheme**

14 September 2021

### **Organisation background**

The Northern Rivers Joint Organisation (NRJO) Natural Resource Management (NRM) Managers Group welcomes the opportunity to contribute to the NSW Parliamentary Inquiry into the integrity of the Biodiversity Offsets Scheme.

The group provide an advisory role to the General Managers Advisory Committee (GMAC) to develop regional approaches on NRM-related issues, to respond to needs and advice requested by the GMAC, and to respond with a single regional voice to State Government on policy and regulatory matters.

This long-standing arrangement has provided an efficient methodology for addressing regional needs, provided resource sharing opportunities, secured joint funding for regional collaborative projects and influenced State Government policy positions for the benefit of our region. The group has worked across a wide-range of NRM-related activities in the past including river health and water quality, biodiversity conservation, catchment management planning, pest animal management, land use planning/E zones, urban sustainability, sustainable agriculture and a range of species-specific actions such as policy guidelines affecting koalas, flying foxes and wild dogs.

### **Feedback summary**

The group and the member councils have been raising concerns with the biodiversity offsets scheme throughout its introduction, implementation and ongoing review. This submission has been developed by the group and endorsed by the GMAC.

Member councils have also been engaged with Local Government NSW (LGNSW) in the development of the submission.

The NRJO NRM Managers group supports the conservation of biodiversity in the region and acknowledges the positive impact of having a systematic method in the Biodiversity Offset Scheme (BOS). This submission supports the intent of the BOS and considers that the BOS needs to remain, albeit with a number of suggested improvements for its operation and to achieve better outcomes, as per the Recommendations at the end of this submission

The group has identified significant concern that the BOS is not leading to a net improvement in biodiversity in the Northern Rivers region of NSW.

Most significantly, the system currently does not operate well for any user, being overly complex, difficult to administer, inequitable and overall, not delivering outcomes that facilitate sustainable development.

## Previous feedback

The group has contributed various submissions and identified a range of key concerns over the past five years including:

- Weakening of standards for the Biodiversity Assessment Method (BAM) methodology compared to the previous Biobanking Assessment Methodology (BBAM) standards, including significantly reduced offset ratios
- The high level of flexibility available to meet offset obligations including allowing off site and non 'like for like' offsets, and the making of payments instead of actually delivering offsets.
- The fact that plant community type mapping for some regions including the north coast remain unavailable five years into implementation of the scheme
- The ability to compensate for the complete loss of habitat (clearing) by providing marginal improvements in the management of existing habitat leads to a net loss of habitat and should not be permitted. Offsets for habitat removal should require replanting on cleared land with multipliers to account for time, risk and distance factors.
- The predicted uneven distribution of biodiversity loss across the landscape with those areas most subject to high development pressure along the coastal strip being rapidly depleted of biodiversity values.

In these submissions, member councils and the NRJO collectively have made extensive recommendations on the biodiversity legislation reforms generally and the BOS specifically. Some of the key recommendations offered include:

- That the offsets scheme be restricted to the provisions of strict like-for-like offsets prioritising onsite or local offsets
- That should variation rules be retained, that this section be amended to include the requirement for a comprehensive 'reasonable efforts' test prior to allowing variation, that substantial additional credit penalties are applied for the use of this option to act as an effective deterrent to using this process as a first option and that the credits must be shown to be available before habitat is removed.
- That species credit offsets must be like-for-like only and within the same sub-region
- That the payment option be removed from the scheme and the inability to find suitable like-for-like credits operate as a red flag to prevent clearing
- That the requirement to offset all habitats, not only threatened entities are ensured by the scheme

Submissions made have also raised concerns that the offsets scheme is inconsistent with the growing body of published scientific literature documenting the failure of biodiversity offset policies to achieve a no net loss position, let alone net gain. An article published in 2015 by Georgia Garrard, Sarah Bekessy and Brendan Wintle (<http://decision-point.com.au/article/offset-policies-dont-work/>) provides an excellent summary and reference point of the available evidence documenting the fundamental inability of offsets schemes to achieve their stated intent.

There are numerous articles available in the scientific and grey literature from well before 2015, through until the present day, that present similar evidence of an overall decline in biodiversity resulting from offsets schemes, both in Australia and internationally.

## **NRJO Study on Biodiversity Loss**

In response to the NSW land management legislative reforms in 2016, the NRJO commissioned a study into biodiversity loss and potential stewardship sites in the region. This investigation identified the extent of biodiversity loss should all areas identified for potential development in the region be realised and whether this impact could be offset on public land within the region.

This study was finalised in June 2021 and identified a highly significant shortfall with regard to offsets being able to be retired within the region on public land. This confirms a major flaw in the biodiversity offsets scheme, whereby its application will result in the net loss of biodiversity from the region.

The best-case scenario for the Northern Rivers is a shortfall of a minimum of 40,546 ecosystem credits. This figure is highly qualified with a range of limitations arising from the desktop, regional application of the methods. Reconciling these limitations however, can only result in an increase in the shortfall, including because species credits were not able to be included in the impact analysis, which will certainly result in a much higher credit obligation.

In order to ascertain an understanding of the status of the current and previous (Biobanking) offset schemes in the region, the group reviewed the status of existing sites. Based on the data available:

- A total of 13 Biobank sites were established over the three IBRA subregions which encompass the 6 NRJO local government areas (LGA).
- 6 of 13 Biobanks sites were project specific sites established by NSW Roads and Maritime Services (RMS) to offset and/or receive credit payments from RMS for the upgrade of the Pacific Highway.
- The 6 LGA's have a total landmass of 10,302 km<sup>2</sup>. of which the 13 Biobank sites occupy a combined area of 12.4 km<sup>2</sup> or 0.12% of the 6 LGA's total land area.
- Privately owned Biobanks occupy 5.7 km<sup>2</sup> or 0.06% of the 6 LGA's total land area.
- Despite development pressure throughout the region, no Biobanks are located within 3 of the 6 LGAs.
- Whilst 7 private Biobanks were established prior to February 2019, only 33% of the credits available from those sites have been acquired. Consequently, given active biodiversity management actions are only activated once 80% of the Total Fund Deposit (TFD) is paid into the Biobank, it is likely the majority of the bank sites are not being actively managed as was intended by the scheme.
- No credits have been sourced from 2 of the Biobank sites.

## **Local experience on Biodiversity Offset Scheme**

With regard to the current scheme, when one goes to the Biodiversity Conservation Trust (BCT) webpage for registered Stewardship sites, the majority of the information regarding the location and status of the registered stewardship sites cannot be accessed by local government or the general public. Under the old Biobanking offset scheme, signed agreements minus any sensitive information were publicly available for review from the relative departmental web page.

Given developments within the region have retired credits for biodiversity impacts as financial payments into the BOS, the lack of transparency on where the funds have been expended is of concern. While the BOS was designed to retire credits within the subject or adjacent IBRA subregion, it is clear from the above analysis that this is not occurring.

There are also a wide range of issues for councils arising from the additional assessment and administrative burden associated with our role as a consent authority. Councils effectively become a 'case manager' on behalf of the state government for developments that trigger the scheme with impacts to council including:

- Requirement to assess Biodiversity Development Assessment Reports (BDARs) for validity and technical accuracy within 14 days of lodgement
- Relying on systems and processes that are unreliable and difficult to implement
- Ongoing submission of BDARs that do not meet the minimum standards despite the stated accreditation and quality assurance processes of the scheme
- No certainty that our statutory decision-making role as a consent authority in relation to environmental impact is being met, where there is a reliance on offsets being made by others and where they are non-traceable or accountable.

## **Biodiversity Offset Scheme Assessors**

Member councils have also identified a range of concerns in relation to the accreditation and authorisation of assessors under the BOS. Despite the accreditation process, BDARs have on a number of occasions not complied with the requirements of the BAM.

Issues arising from submitted BDARs include:

- Purporting to have undertaken detailed surveys when from the timeframes specified in the BDAR, it would appear improbable that the assessor could have undertaken the survey.
- Using the results of the BAM-C outputs to determine what species occur on site rather than predicting species and undertaking surveys based on the habitat at the site.
- Failing to understand that Serious and Irreversible Impact (SAII) can occur to other threatened species entities other than those listed as SAII species on the DPIE webpage.

On at least three occasions, deficient BDARs have in part resulted in those development applications being heard in the NSW Land and Environment Court. Such outcomes have come at great financial expense to the council and the local community. While individual councils have lodged formal complaints with the Department of Planning, Industry and Environment (DPIE), any investigation into the assessor has been delayed until the outcome of the court case is known.

Given matters in the NSW Land and Environment Court occur over an extended period of time (a minimum of 12 months), these delays have allowed the same assessor to lodge deficient BDARs with councils for different development sites. In other cases, when councils have received a formal response from the investigating body, the conclusion of that enquiry has been ineffective in bringing about longer term improvements to the assessments.

Given the accreditation scheme was designed to ensure accredited assessors complied with a Code of Conduct, delays in investigating breaches of the BOS until the finalisation of a court matter is unacceptable and comes at great expense to council and the local community.

### **Biodiversity Offset Scheme Complexity and Ambiguity**

One of the key themes of the BOS is the hierarchy concept of avoid, minimise and offset. However, the BOS fails to define what the above terms mean. The lack of clear definitions and/or principles around these key themes is a problematic issue when reviewing a BDAR and processing a development application.

For example, if a development site of 10 hectares contains 3 hectares of Threatened Ecological Community (TEC), does 'avoid' mean retaining 100% of the TEC on the development site or does avoid mean retaining 50 or 20% of the TEC? Again, the lack of clear guidance on these terms has resulted in matters being heard in the NSW Land and Environment Court. It is concluded that the BOS needs to be updated to clearly establish what is meant by the key terms.

The complexity and inscrutability of the legislation relating to the scheme has led to the discovery of legal loopholes that are regularly exploited by developers and assessors. Despite repeated submissions to the Department, amendments have not been made to address these issues. These exploits speak to the overwrought nature of the scheme, which foregoes simple and strict protections for biodiversity in place of labyrinthine clauses that give the impression of comprehensive regulation but in fact provide numerous pathways to approval for development that impacts biodiversity.

One example is provided by cl7.3(4) of the Biodiversity Conservation (BC) Regulation. Due to its poor wording, this clause has become a common exploit for proponents to avoid entry into the scheme. The clause, which relates to the Biodiversity Values Map trigger, reads as follows:

*(4) Despite anything to the contrary in this Part, proposed development (other than subdivision) does not exceed the biodiversity offsets scheme threshold merely because it is to be carried out on a lot included in the Map if the lot was the result of a subdivision carried out before the commencement of the Act and the lot is within land zoned R1 to R4, RU5, B1 to B8 or IN1 to IN3 under an environmental planning instrument.*

Guidance from DPIE explains that the purpose of this clause is to prevent development within subdivisions that were approved prior to the scheme and have not yet realised their purpose (e.g. residential development) from triggering entry into the scheme:

*“This clause applies in circumstances where subdivision approval has been granted on land within the nominated zones and the purpose of the approved subdivision has not yet been realised. For example, the clause will apply if a subdivision was approved for the purpose of creating residential lots and the dwellings on those lots have not yet been developed. If the purpose of the subdivision has been realised, this clause will not apply. For example, if a dwelling has already been developed, the clause will not apply to a development application for a secondary dwelling or other ancillary use.”* (DPIE Land Management and Biodiversity Reform Bulletin 2019).

When reading the clause itself, there is clearly no mention of the provision only relating to approved subdivisions that have not yet realised its purpose. This has led to proponents and accredited assessors arguing that the Biodiversity Values Map has no effect on any lot created at any time prior to the commencement of the Act in the nominated zones. In these cases, Councils have been reluctant to refuse applications based on the lack of a BDAR because the clause does not state that one is required. In effect, this means that the Biodiversity Values Map trigger has no relevance to development across all land zoned R1 to R4, RU5, B1 to B8 or IN1 to IN3, collectively representing a large land area that contains critical biodiversity refugia and that is subject to increasing development pressure.

The following general observations are also offered, having been collated from the collective experience of the group in the application of the scheme:

- The BOS scheme rules that facilitate payments in lieu of on ground offset actions, variation rules that result in non like for like offsets and the capacity to meet offsets outside of the impacted region, all combine to contribute to highly significant biodiversity loss.
- Implementation of the current scheme also indicates a significantly high likelihood that these credits will not ever actually be retired. There is no transparency or accountability evident to guarantee that credits are being retired at all.
- The inclusion of the capacity to make financial payments in lieu of on ground actions also transfers risk from proponents to the government and creates a perception that development proponents can buy environmental approvals
- The position of offsetting as a last resort, only considered when all options to avoid or mitigate loss are fully explored and proven unachievable, is far removed from the general opinion of most development planners and proponents.
- Many landholders, when offered the opportunity to participate in habitat restoration programs funded by offsetting, choose not to participate due to ethical reasons.
- There is a general lack of understanding in the community about the risks associated with the use of offsets with regard to achieving a measurable net gain.
- Application of small-scale offsets are highly problematic, either as a series of individual offset actions, or compiled into a larger body of work. Offsetting small scale impacts under the scheme are difficult to quantify net benefit, track and report and administer.

## Recommendations

Based on the range of issues identified through application of the scheme in the Northern Rivers Joint Organisation region, the following recommendations are offered:

1. That opportunities to simplify the scheme are further considered and implemented in order to make the use of the scheme more practical, achievable and effective for all users.
2. That the focus on 'avoid and minimise', and better guidance on application of these terms, is significantly increased.
3. That there is a much stronger emphasis on 'like for like' offsets that are required to be retired locally.
4. That non-additional offsetting practices are discouraged through the application of significantly higher offset ratios and direct, like for like, local, on-ground offset options are encouraged through offset credit discounts.
5. That transparency and accountability of the scheme is improved through providing publicly available information, including mapping, on offset credits generated and retired.
6. That consent authorities are provided the basis on which to prohibit clearing in situations in which offsets cannot be genuinely achieved and demonstrated as delivering a net biodiversity benefit.
7. That determination of Serious and Irreversible Impacts is clarified such that all entities (including TECs) have quantifiable impact thresholds beyond which development cannot be approved. These thresholds should be based on current knowledge and be regularly updated to respond to changes in the entity's conservation status.
8. That education and understanding of the scheme by accredited assessors is improved and that accreditation of assessors is paused when complaints are made against them.
9. That the Biodiversity Conservation Trust work more closely with local government to achieve local offsets and extinguish credits where they were generated.
10. Assist councils in their role administering the BOS through providing accredited training for BDAR reviewers and assessors and improving education and support materials for all users of the scheme.

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On behalf of the General Managers Advisory Committee to the Northern Rivers Joint Organisation and the Natural Resource Management (NRM) Managers Group