



australian network of environmental defender's offices

Submission on the Use of environmental offsets under the EPBC Act 1999 - Discussion Paper

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The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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Submission on the Use of environmental offsets under the EPBC Act 1999 - Discussion Paper

The Australian Network of Environmental Defender's offices Inc (ANEDO) welcomes the opportunity to provide comment on the *Use of environmental offsets under the Environment Protection and Biodiversity Conservation Act 1999 Draft Policy Statement*; and the *Use of environmental offsets under the Environment Protection and Biodiversity Conservation Act 1999(EPBC) Discussion Paper*. ANEDO is a network of 9 community legal centres specialising in public interest environmental law.¹

Overview: ANEDO position on the use of environmental offsets under the EPBC Act 1999

ANEDO is of the view that the use of offsets under the EPBC Act needs to be strictly confined. The draft policy needs to be amended to more clearly recognise the many inherent limitations of offsets.

The draft policy emphasises flexibility at the expense of the Act's objective of protecting the environment. While there may in some instances be a need for "flexibility" in the implementation of the Act, we consider that the draft policy emphasises flexibility at the expense of the environmental protection objectives of the Act.

Writing in 1995, Professor David Farrier called for a "paradigm shift" in biodiversity conservation legislation:

Flexibility in the environmental context has traditionally meant placing certain conditions on projects that are allowed to proceed as distinct from simply saying "no" to a project. The focus of regulatory systems addressing environmental problems has been how we can allow development to proceed on a particular site, not whether we should allow it to go ahead. This approach may be appropriate when dealing with land degradation or water pollution, but it may be inappropriate when dealing with biodiversity conservation. It is time for a paradigm shift. We need to base decisions on the level of development compatible with the conservation of biodiversity, rather than asking how we can the maximum level of biodiversity consistent with development.²

An emphasis on offsetting is inconsistent with the first listed object of *EPBC Act 1999* which is "to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance" (section 3(1)(a)). The subsequent provisions identify matters of national significance in recognition of their unique environmental and heritage values and/or serious

¹ Our previous submissions in relation to the EPBC Act are available at <http://www.edo.org.au/edonsw/site/policy.php>.

² Farrier, David *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?* (1995) 19(2) Harvard Environmental Law Review 303-408

conservation status. For example, the Act is designed to protect the internationally-recognised values of Australia's unique world heritage sites, Ramsar wetlands, migratory species and species in peril.

The idea that impacts on such unique matters of national environmental significance can simply be offset, is deeply concerning. In many cases it will not be possible to offset impacts on specific unique places and species.

Despite this fundamental problem, we note that offsetting currently occurs on a case by case basis for controlled actions under the Act, usually through the imposition of conditions of consent.³ There is no standard scientific methodology for assessing quantity, quality or location of offsets, and there is little evidence of success of offsets, as the case studies in this submission indicate. We therefore welcome the opportunity to examine and critique the use of offsets under the Act.

The purported aims of the draft policy are to ensure the consistent and transparent use of offsets under the EPBC Act to ensure that the health, diversity and productivity of the environment is maintained or enhanced; and to provide developers and the community with greater certainty on the use of offsets under the EPBC Act.

We do not believe the draft policy achieves these aims. The draft policy lacks detail, it does not provide clear guidance and is ambiguous on some key issues. The draft policy appears to rubber stamp the current ad hoc discretionary approach. Instead of making the process more transparent and scientifically credible, the draft policy introduces a range of more flexible considerations and variables that give no guarantee of good environmental outcomes. The key message that DEW will apply a flexible approach to the use of offsets is contrary to achieving consistency, scientific rigour and transparency. ANEDO submits that without adequate policy guidance, such an approach does not ensure the consistent and transparent use of offsets, and certainly does not guarantee optimal environmental outcomes under the EPBC Act.

Our specific comments below respond to the goal of offsets under the EPBC Act and the 8 policy principles as set out in the Draft Policy Statement.

The goal of 'maintain or enhance' environmental quality is similar to the goals of the offset policies of New South Wales and Queensland, but is less stringent than the goals of the offset policies of Western Australia and Victoria, which aim to achieve an improvement or net gain in environmental quality.

ANEDO submits that the EPBC Act should focus on firstly avoiding and/or minimising impacts on matters of national environmental significance, and second,

³ The activity report for 2006 indicated that 138 of 152 controlled actions were approved with conditions: *Environment Protection and Biodiversity Conservation 1999 Activity Report* 30 June 2006, available at: <http://www.environment.gov.au/epbc/statistics/index.html>.

achieving the goal of ‘enhancing’ rather than merely ‘maintaining’ environmental quality. Such a goal recognises that the environment has been significantly degraded as a result of past human impacts, and that action is required to halt and reverse this trend.⁴ It also gives greater certainty to achieving the minimum goal of maintaining environmental quality, due to the limitations and risks associated with offsets.

Principle 1: “Environmental offsets should be targeted to the matter protected by the EPBC Act that is being impacted.”

The draft policy statement sets out the circumstances where offsets are appropriate or not appropriate to use. The statement notes:

*“Offsets are **not appropriate** when the impacts of a development are minor in nature; or could reasonably be avoided or mitigated.”*

This statement is inadequate. The draft policy statement does not comprehensively address the range of circumstances where offsets are not appropriate to use, and therefore does not recognise the inherent limitations of certain environmental offsets.

The limitations of offsets in the context of environmental protection are not adequately recognised in the draft policy. These limitations have been the subject of analysis and discussion in the scientific literature and should be used to guide the use of offsets under the EPBC Act and the development of the present guidelines. Gibbons and Lindenmayer provide a comprehensive analysis of the limitations of offsets from an ecological perspective:⁵

1. The gain in biodiversity values that can be achieved relative to the loss:
 - a. Offsets that involve the protection of existing good quality vegetation may result in a loss equivalent to the area impacted.
 - b. Offsets that involve the restoration of habitats are subject to significant scientific uncertainty in terms of the gains that can be achieved.
2. The difficulty in measuring the equivalency of any gain in biodiversity values relative to the loss:
 - a. Ecosystems are very complex and biodiversity values are difficult to quantify. No two patches of vegetation have equal biodiversity value.
 - b. Methodologies to quantify biodiversity values must necessarily be relatively simplistic and based on a number of significant assumptions.
3. The time-lag between losses in biodiversity values and gains: offsets almost always involve a short-term loss in exchange for a long-term gain.

⁴ Western Australia Environmental Protection Authority (2006) *Environmental Offsets. Position Statement No. 9.*

⁵ Gibbons and Lindenmayer, 2007.

4. The difficulty in ensuring compliance: offsets have a poor track record of compliance and considerable resources are required to ensure compliance.

The Discussion Paper identifies some limitations with offsetting (page 9) but does not clearly indicate how those limitations are addressed by the draft principles.

Similarly, the Discussion Paper includes a discussion of “what actions are suitable as offsets” (page 12), but fails to explore the crucial issue of identifying what impacts are scientifically impossible to adequately offset. Offset schemes in other jurisdictions include concepts such as ‘red flags’ or ‘no-go areas.’⁶ The logic of the red flag mechanism is that the vegetation or species in question is so threatened that it is simply impossible to offset. Due to the fact that offsetting is subject to significant limitations and does not guarantee improved environmental outcomes, it is essential that the regulatory framework set out clear sites, species and communities where it is simply not appropriate to offset or allow any further detrimental impact.

Limitations of offsets

Case study (EDO Vic)- South Eastern Red-Tailed Black Cockatoo

One key limitation of offsetting schemes is the time lag between losses as a result of an action and the gains delivered by an offset. While the losses from permitted actions are typically immediate, without an insistence on offsets credits already being in place at the time that the loss occurs, the gains from offsets will often not be available for many years.

A good example of this issue can be found in the continuing loss of feeding habitat for the South Eastern Red-Tailed Black Cockatoo. Scientific research has demonstrated that mature bulokes of 100 or more years of age are critical feeding habitat for the RTBC.⁷ The Recovery Plan for the Cockatoo recognises that feeding habitat is the most important limiting factor for the birds.

Despite the listing of the RTBC under the EPBC Act (and Victorian and South Australian legislation), habitat in the form of mature paddock trees continues to be lost. Where EPBC Act referrals of tree clearing proposals have occurred, clearing has invariably been permitted subject to conditions requiring a mixture of revegetation and better protection of existing remnants.

While there is no doubt as to the potential of these activities to contribute to the conservation of the RTBC in the long term, the emphasis on long term gains through offsetting rather than immediate protection is exacerbating the already serious “bottleneck” in feeding habitat experienced by the RTBC

⁶ For example, see the NSW Biodiversity Banking Scheme under the Threatened Species Conservation Act 1995.

⁷ See Maron, M (2005) Agricultural change and paddock tree loss: Implications for an endangered sub-species of Red-Tailed Black Cockatoo. *Ecological Management and Restoration* 6, 206-211.

Case study (EDO WA)- Western Ringtail Possum

The Western Ringtail Possum (WRP) is found only in the south west of Western Australia (WA) and is listed as vulnerable under the EPBC Act and threatened under WA law. The main threats to the possum are loss of habitat, introduced predators and changing fire regimes⁸. In coastal areas, habitat is being cleared at a significant rate due mainly to residential and holiday developments. The WRP has been the subject of an informal offsets program under the EPBC Act. Scientific evidence indicates that this “offsetting” is inappropriate in the circumstances and does not result in a net conservation benefit to the species.

The WA Department of Environment and Conservation (DEC) manages a translocation program for WRPs. A number of referred developments under the EPBC Act which require clearing of WRP habitat have been approved subject to WRPs being translocated⁹. Indeed DEC often requires possum translocation for developments that have been assessed at the Federal level¹⁰. Approvals under the EPBC Act have allowed the clearing of habitat on the condition that WRP’s are translocated according to the DEC’s requirements and protocols. DEC’s requirement is that proponents pay DEC to translocate the possums and conduct monitoring for the first 12 months (currently \$41,200 for up to 10 possums, \$45,900 for 11 – 15 possums, etc).

The DEC translocation program has been running since 1991. The program and in particular its monitoring component is largely dependent on payments from developers and therefore, when development decreases, the monitoring program ceases.

It is difficult to state exactly how many WRPs have died after translocation, due to a lack of adequate monitoring and a lack of complete publicly available figures, however the data that is publicly available indicates that translocation results in a very high mortality rate for the translocated possums. Evidence indicates that the majority of WRPs die within 12 months of translocation. This evidence does not support the contention that translocation results in a net conservation benefit for the WRP. However translocation continues as an offset measure.

In relation to cases where offsets may be appropriate, the draft policy statement currently states:

⁸ Department of Environment and Conservation (WA) Fauna Species Profile Western Ringtail Possum *Pseudocheirus occidentalis*

⁹ For example the Cape View development, EPBC 2006/3070; Dalyellup Estate EPBC 2006/3075 (if recommended by DEC); Lowe development EPBC 2006/3023 (if recommended by DEC); Dawson’s Beach Estate EPBC 2005/2153 (if recommended by DEC); Novacare Lifestyle Village EPBC 2001/311; South Busselton Primary School EPBC 2001/290

¹⁰ For example Ray Village Busselton EPBC 2007/3533 (57 WRPs so far)

“Environmental offsets may be appropriate when they:

- *Are necessary or convenient to protect or repair impacts to a protected matter...*
- *Relate specifically to the matter (for example, species) being impacted; and*
- *Seek to ensure that the health, diversity and productivity of the environment is maintained or enhanced.”*

The language of this principle is weak. The draft policy does not define what “necessary or convenient” mean and whether they are overriding factors (ie, if offset is considered to be inconvenient it will not be required?).

The nexus between matter impacted and matter offset is discussed in relation to the ‘like for like’ principle below.

Offsets should only be considered after thorough scrutiny of the possibility of avoiding impacts (including the possibility of not proceeding with the action) and, if impacts cannot be avoided, only after every effort has been made to minimise those impacts. If it is appropriate to consider offsetting, far more detailed guidance is required. In particular, the draft policy must address the environmental limitations of offsets by providing clear guidance on the circumstances where the use of offsets can actually achieve a ‘maintain or enhance’ goal.

As the references to the work of ecologists such as Gibbons and Lindenmayer above shows, there is considerable doubt about the capacity of offsets such as those proposed here to actually offset impacts in an ecologically meaningful sense. In the absence of clear evidence that biodiversity offsets work, ANEDO recommends the urgent identification of ‘red flag’ ‘no go’ areas and species that should not be subjected to the risk of being inadequately offset. ANEDO recommends that examination and development of more ecologically credible criteria is warranted.¹¹

Principle 2: “A flexible approach should be taken to the design and use of environmental offsets to achieve long-term and certain conservation outcomes which are cost-effective for proponents.”

¹¹ For example, given the limitations of offsets noted above, Gibbons and Lindenmayer (2007) have set out principles that provide guidance on the circumstances where biodiversity offsets can be consistent with a ‘maintain or enhance’ goal, as follows:

1. The biodiversity values to be lost are unviable in the long-term under the current land-use or management regime and that regime is unlikely to change.
2. The functional value and habitat value of the vegetation to be lost can be adequately restored elsewhere with confidence.
3. The impacts of a development do not cause an unacceptable temporary risk to biodiversity values or cause an irreversible impact.
4. The offsets are protected and managed in perpetuity.
5. The offsets are monitored and subject to adaptive management to ensure that predicted gains translate into actual gains.
6. There is adequate compliance, involving mandatory compliance audits and a risk assessment regarding likely compliance prior to approval.

The draft policy statement requires that a developer show how the impacts of a development are intended to be avoided and/or mitigated, at the same time that DEW will consider the use of offsets. It is suggested that if it can be demonstrated that better conservation outcomes can be achieved by offsetting, avoidance and minimisation of impacts may not be required.

ANEDO strongly opposes this approach. Avoidance and mitigation of impacts must always be undertaken as the first step, and offsets only used as a last resort. As noted, DEW will only be considering offsets in relation to impacts on matters of national environmental significance already deemed to be 'significant' through the referral process under the EPBC Act.

As noted above, a number of key limitations apply to offsets (particularly biodiversity offsets), which in our view mean that their widespread use for significant impacts on matters of national environmental significance is subject to significant risk. Therefore the first step of avoiding and/or minimising impacts is fundamental. As such, we do not support the proposed approach in the draft policy.

Other jurisdictions have adopted clear process hierarchies or sequencing (eg. Western Australia, Victoria, New South Wales), which require a developer to avoid and/or minimise impacts prior to consideration of the appropriateness of offsets. The hierarchy is:

First, avoid impacts.

Second, where impacts cannot be avoided, minimize impacts through mitigation measures.

Third, offset remaining impacts where appropriate.

Consistent with the principles contained in the Convention on Biological Diversity and other international agreements mentioned in the EPBC Act, this decision making hierarchy recognises that biodiversity is best conserved 'in situ', and that offsets are subject to significant limitations such as the effective irreversibility of biodiversity losses and the need for a precautionary approach .

ANEDO submits this decision making hierarchy be insisted upon in relation to EPBC Act approvals. We also submit that there needs to be clear guidance in the draft policy on how DEW will make a decision on whether a development has avoided and/or mitigated impacts to the greatest reasonable extent. (eg. requirements for best practice on-site measures).

Finally, the draft policy statement refers to conservation outcomes "which are cost effective for proponents." Offsets with the highest likelihood of achieving environmental outcomes may have significant costs (for example, protection and management of a significant area in perpetuity). While cost effectiveness may be an

appropriate criterion to choose between offsets that are equivalent in terms of their conservation outcomes, cost considerations must not lead to a preference for cheaper and less effective offsets.

Principle 3: “Environmental offsets should deliver a real conservation outcome.”

The draft policy statement requires that an offset must deliver a conservation outcome that would not otherwise be achieved (ie. the outcome must be ‘additional’).

The ‘additionality’ principle is a key issue in relation to the use of offsets. We do not believe this issue has been adequately addressed in the draft policy statement. The draft policy statement does not provide clear decision-making criteria for determining whether an offset is additional. Three examples of appropriate criteria are:

- An offset must be additional to current regulatory requirements.
- An offset must be additional to best practice on-site environmental management.
- An offset must not be currently funded/potentially funded in the future under another program.

The draft policy statement and discussion paper identify examples of offsets, including the preparation and implementation of management plans and the protection and management of existing habitat in perpetuity. We are of the view that such offsets are unlikely to be additional. Management plans are likely to be required under current regulatory requirements, while protecting existing habitat only provides a conservation outcome where:

1. In cases where the habitat is good quality (eg. at benchmark), where it is under a real threat of clearing or significant decline in quality.
2. In cases where the habitat is not of good quality, where it is actively managed in perpetuity to achieve a gain in biodiversity values equivalent to the loss.

As noted in previous submissions on the EPBC Act,¹² ANEDO supports increasing funding and resources for DEW to better implement current core functions, such as developing and implementing recovery plans. These core functions should not be dependent on offset funding programs. Using offsets to fund research or recovery plan implementation, while superficially attractive, will ultimately undermine the Act by making funding contingent upon the permitted destruction of biodiversity or sites of conservation significance. Such an approach is fundamentally inconsistent with the protection objectives of the Act.

¹² Previous ANEDO submissions on the EPBC Act are available at: <http://www.edo.org.au/edonsw/site/policy.php>.

Principle 4: “Environmental offsets should be developed as a package of actions, which may include both direct and indirect offsets.”

The draft policy statement classifies offsets into two main types – direct offsets and indirect offsets – and states that both types of offsets are appropriate to use, with a package of offsets delivering the best results in some cases. The draft policy also states that direct offsets are preferable and are more likely to lead to a long-term conservation outcome.

While there may be some broad potential benefits of some indirect offsets, we oppose the use of indirect offsets to achieve the goal of maintaining or enhancing environmental quality for the reasons mentioned above.

Our main concerns with the use of indirect offsets are:

1. It is very difficult or impossible to measure the gains in environmental quality achieved by many types of indirect offsets against the loss due to a development. To achieve a ‘maintain or enhance’ goal, the gains achieved by an offset must be equivalent to the loss due to a development and this must be measurable with a reasonable level of certainty.
2. The link between many types of indirect offsets and a gain in environmental quality is too uncertain and dependent on too many outside factors (eg. new research may increase knowledge, but any outcomes must be implemented to achieve a gain in environmental quality, which is dependent on adequate funding).
3. It is questionable whether many indirect offsets would deliver a conservation outcome that would not otherwise be achieved (ie – the outcome may not be ‘additional’, as discussed above).

Case study: Mission Beach Cassowary population

A resort development at Mission Beach in Far North Queensland was allowed to proceed on the condition that appropriate riparian habitat for the highly endangered Cassowary was revegetated and preserved as an offset. The overall result has been a net loss of habitat and further decline in the EPBC-protected species. Well known Cassowary research Les Moore has observed that the coastal population in the Mission Beach area is declining rapidly. The reasons for this decline include long-term loss of habitat, fragmentation, unviable isolated populated sizes and road fatalities. In particular, the development has led to increased traffic in the area which has had a significant negative impact on the species. Mr Moore observes:

“30% of all the animals that die at Mission Beach are run over by cars. The survival rate of Cassowary chicks is currently 46%”.

As a condition of consent, money was given to a Queensland government agency

for research into traffic impacts. This money has yet to be spent, with no research being undertaken and no funds dispersed. Furthermore, the revegetated riparian area required as an offset has not yet delivered any viable Cassowary habitat. It will be some time before the revegetated area is ready to support Cassowary populations. Thus, in the short term there has been no discernible gain in habitat, while the development has led to a clear loss of viable habitat.

This example highlights why offsets should not apply to habitat that is critical to the survival of a species. Development cannot be justified in this circumstance on the basis that the impacts could be offset elsewhere. The Mission Beach habitat should have been categorised as a 'no go' or 'red flag' area incapable of being offset.

Furthermore, the draft policy suggests that the availability of direct offsets may influence how appropriate it is to use indirect offsets. We strongly oppose this approach. The appropriateness of any offsets must be determined on the basis of first, whether all options to avoid or minimise impacts have been taken, and second whether the offset is likely to adequately achieve a gain in environmental quality (eg. taking into account factors such as measurability, etc) and not simply on the basis of the availability.

Principle 5: “As a minimum, environmental offsets should be commensurate with the magnitude of the impacts of the development and ideally deliver outcomes that are ‘like for like’.”

The draft policy states that offsets should be 'like for like' where possible (ie. the offset should ensure the relevant protected matter that is impacted is 'maintained or enhanced'), but suggests that flexibility should be allowed where better outcomes can be achieved. It also states that offsets should be of equal quality and quantity to the area impacted and that offset ratios may be applied when available.

At the outset, we note that there are inconsistencies with this position and the broader functioning of the EPBC Act. For example, the Discussion Paper indicates that in relation to World Heritage or Ramsar sites, precise 'like for like' offsetting may not be possible and therefore “the best outcome might be achieved by developing offsets that relate to the holistic conservation of the relevant World heritage area but not the specific values that are being impacted” (page 13). This is inconsistent with case law that has upheld the role of the Act to assess impact on specific values in relation to World Heritage areas.¹³

The 'like for like' principle is a key issue in relation to the use of offsets, and how it is implemented is fundamental to the credibility of any offset scheme. It is an essential principle to follow to ensure that protected matters are not systematically degraded over time through individual and cumulative impacts.

¹³ For example, see *Booth v Bosworth*.

The draft policy does not provide clear guidance on what ‘like for like’ means, apart from it including consideration of quantity and quality. For example, does ‘like for like’ include potential habitat for a threatened species, or the landscape value (eg. as a habitat corridor or as a large patch) or functional value (eg. a riparian corridor or recharge zone) of vegetation that is important to a threatened species?

The draft policy does not provide any detail as to how the quality and quantity of an offset will be assessed and how it will be ensured that the gains in environmental quality will be equivalent to the losses. Jurisdictions such as NSW and Victoria have developed sophisticated methodologies to assess a range of variables, which generally provide a more objective, comprehensive, and transparent method for determining the adequacy of offsets than other approaches.¹⁴ While these tools are by no means perfect, there is at least an attempt to develop a consistent methodology rather than leaving the matter to be determined on a case by case basis as is proposed by the present draft policy. Assessment tools are also being developed and used to determine offset ratios, factoring in variables such as the conservation significance of a protected matter to be impacted and the risk of failure of the offset. In the absence of a transparent, scientific methodology, the ‘like for like’ principle is applied in an ad hoc, discretionary manner which may yield perverse environmental outcomes.¹⁵

If offsets are used as a last resort once avoidance and mitigation measures are taken, a scientific methodology should be used to determine the scale and quality of the requisite offset. For protected matters that are of higher conservation significance (such as matters of national environmental significance under the EPBC Act), a larger offset ratio should be used, reflecting the significance of the matter being impacted. Offset ratios can also be seen as an insurance policy against the failure of an offset to achieve the predicted outcomes. This means that for offset projects where there is uncertainty regarding whether the conservation objectives will be achieved, a larger ratio should be required (eg. where an offset comprises the rehabilitation of low quality habitat to compensate for impacts on an high quality habitat, the offset ratio should be large to reflect the high risk that rehabilitation will not result in the same quality habitat that is being lost). If the methodology determines an unacceptable risk, that offset should be red flagged (as noted above).

Principle 6: “Environmental offsets should be located within the same general area as the development activity.”

The draft policy states that offsets should generally be located in the same bioregion/sub-region, but that this may not always be possible or desirable.

As noted above, where offsets are considered (once avoidance and mitigation has been undertaken) the nexus between impact and offset must be determined on a

¹⁴ We note the assessment methodology for the NSW Biobanking scheme is still being finalized.

¹⁵ For example, flexibility on ‘like for like’ under the US Wetlands Mitigation scheme resulted in perverse outcomes whereby complex wetlands would be impacted, and offset by less complex ponds that were easier and more cost-effective to recreate.

robust and transparent scientific basis. Offsets must be located within the same bioregion/sub-region for the scheme to have ecological credibility.

Other jurisdictions are exploring the limited circumstances where except it can be demonstrated with a reasonable level of certainty that an offset outside the same bioregion/sub-region will achieve a better conservation outcome for the value being impacted. This is consistent with the current focus by governments on biodiversity conservation at a regional scale, but is requiring the development of detailed scientific methodology to propose ecologically justified offset locations.

The draft policy does not include a methodology or decision-making criteria for determining the location of an offset site relative to a development site. Rather it uses the phrase “same general area.” This is vague, lacks scientific rigour and is not likely to address the net loss of specific biodiversity values at the impacted site. As noted, criteria should be based on the conservation significance of the protected matter impacted, and not the availability of offset sites. Availability of offset sites must not be an overriding consideration in determining offset location as this would function to further undermine the principle of ‘like for like.’

Principle 7: “Environmental offsets should be delivered in a timely manner and be long lasting.”

The draft policy states that offsets should preferably be implemented prior to development and should generally compensate over the period that impacts occur.

As most impacts due to a development are in perpetuity, in most cases offsets will need to be protected and managed in perpetuity. We make the following points:

1. The draft policy does not require consideration of the long-term viability of an offset site and should provide decision-making criteria to assist DEW assess the adequacy of a site in this regard.
2. The draft policy is not clear as to how DEW intends to ensure funding is available for the management of offset sites in perpetuity. It is vital that on-going management of offset sites occurs to ensure long-term gains are achieved, particularly in relation to biodiversity offset sites.
3. The draft policy is not clear as to how DEW intends to ensure that an offset is maintained in perpetuity in cases where an offset site is unavoidably impacted in the future (eg. by a major infrastructure project).

Principle 8: “Environmental offsets should be enforceable, monitored and audited.”

The draft policy statement requires that offsets be enforceable, monitored and audited, and requires that measures of success are clearly articulated to ensure the success of an offset can be adequately determined.

Security of environmental outcomes is a critical issue that the draft policy must address. In our submission the preferable approach would be an insistence that an offset be fully implemented and verified prior to an impacting action being undertaken. In the absence of insistence on *a priori* implementation of offset gains, legal mechanisms such as performance bonds should be used to guarantee the delivery of environmental outcomes. A guiding principle should be that the risk of offset failure where outcomes are deferred should rest with the proponent.

We support this principle. Adequate compliance is vital to ensure that gains in environmental quality at the offset site are at least equivalent to the loss at the development site. The importance of compliance has been highlighted by studies of the United States' wetland mitigation banking scheme, which have showed that lack of compliance has contributed to the decrease in wetland quality and quantity in the US.¹⁶

The draft policy does not currently provide clear guidance on important considerations such as:

- The general period over which monitoring will be required.
- The funding for monitoring to be undertaken. In our view it is critical that the necessary funding for monitoring and auditing is built into the project cost from the outset.
- The circumstances where remedial actions will be required.
- The types of remedial actions that may be appropriate, including additional offsets.
- Liability issues regarding failed offsets. As noted above, a guiding principle should be that the risk of offset failure rests with the project proponent.

Conclusion

ANEDO has serious concerns about the use of environmental offsets. The draft policy statement and discussion paper seem to endorse the current case by case approach to offsetting. This lacks transparency and scientific rigour. The draft policy lacks detail and the proposed principles are vaguely worded and open to broad interpretation. The principles therefore do not substitute for a scientific methodology. The EDO offices in each state have been made aware by concerned individuals and community groups of offset packages under the EPBC Act that are failing to delivering environmental outcomes. This is unacceptable in relation to identified matters of national environmental significance.

For further information, please contact Rachel Walmsley, Policy Director EDO (NSW) on 02 9262 6989 or rachel.walmsley@edo.org.au.

¹⁶ Race, M. and Fonseca, M. (1996) Fixing compensatory mitigation: what will it take? *Ecological Applications* 6(1) 94-101