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Dear Director-General and Honourable Minister for Climate Change and Sustainability,

**DRAFT BIODIVERSITY OFFSETS POLICY 2011**

This is the submission of the Environmental Defender's Office-Queensland ("EDO") on the Draft Biodiversity Offset Policy 2011 ("**Draft Policy**").

The EDO is a community legal centre which specialises in public interest environmental law in Queensland. The primary goal of the EDO is to protect and enhance the environment in the public interest through the use of the law, by and on behalf of the community. The EDO is active in law reform and we welcome the opportunity to comment on this important Draft Policy.

EDO and the World Wide Fund for Nature ("WWF") compiled a comprehensive submission on the previous Draft Queensland Biodiversity Offset Policy released in 2009. Some of the issues raised in that submission have been addressed as a result of significant changes to the policy. However, there are still some significant issues with the Draft Policy which will be outlined in the below submission.

## Summary

- The EDO would prefer that the habitat is protected from development and that offsetting not be permitted.
- Recognising that every square centimeter of the planet is unique, biodiversity offsets can never exactly replace what is lost and are rarely, if ever, an ecologically appropriate response to biodiversity loss.
- The EDO supports a number of the initiatives that the Draft Policy introduces including:
  - a web-based register of offsets;
  - the ‘last alternative’ approach;
  - the introduction of a mandatory management plan;
  - more detailed ecological equivalence methodology.
- We need clear legislative and policy tools that will, when put into practice against the uncertainties of a rapidly changing global climate, be effective in reversing biodiversity decline, and will, with adequate certainty, increase biodiversity in Queensland over ecological time (200+ years).
- Achieving no net loss requires a scientifically robust method for calculating biodiversity values and determining ecological equivalence – but it must go further, and minimise the risks of the offset failing as a consequence of ongoing threats from pest and diseases and natural events like bushfires and drought.
- There is a particular need for biodiversity offset to be buffered against the consequences of human induced climate change.
- The Draft Policy should incorporate a clear definition that is consistent with international and national law, and the recently released Biodiversity Strategy.
- The EDO does not believe there are currently sufficient safeguards incorporated into the Draft Policy to ensure protection of offsets from the common threats posed by transferring responsibility to a third party. It is vital that the legal liability remain with the proponent!
- The EDO opposes the inclusion of financial contributions and they should be removed from the Draft Policy as they allow developers to buy their way out of their

obligations and transfer those obligations onto the government and therefore the tax payer.

- Using offsets to fund the purchase of new protected areas that will contribute to the Biodiversity Strategy targets undermines the purpose of the Strategy. It undermines the purpose of the Biodiversity Strategy because there will be ‘no net gain’ which is the very essence of the protected area targets.<sup>1</sup>
- An acceptable biodiversity offset is one that:
  - Is ecologically equivalent to (preferably greater than) the biodiversity values impacted (arguably impossible);
  - Increases the state-wide stock of biodiversity in Queensland; and
  - Endures over ecological time (200+ years).
- Whilst the EDO discourages the use of offsets generally, if the government continues to pursue the idea, the EDO encourages an increased use of advance offsets.
- All offsets must have a strong level of legal protection to ensure that the offset is safe from mining, petroleum and other harmful activities that could jeopardise the viability of the biodiversity value retention.
- The EDO is supportive of requirements to have an offset management plan but we would like to see ALL management plans available on the DERM website.
- The only confident way to avoid a legal challenge (and, address the issue of time-lag) is to ensure that a biodiversity offset is secured, and its ecological equivalence and permanence independently verified, prior to a development approval being granted. If the proponent cannot secure and verify the offset then the development approval should NOT be granted.
- The Draft Policy should list more ‘out of bounds’ areas where offsetting must be prohibited. For example offsetting of biodiversity that is isolated in a few locations or is of special value, rarity, uniqueness.
- The EDO strongly advocates for tough enforcement mechanisms for government and the community regarding the developer’s requirements under the Draft Policy.
- The EDO recommends that offsets be open to public comment, and decisions to approve offsets open to merits review in a Court with own costs provisions.

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<sup>1</sup> Queensland Government (2011) Building Nature’s Resilience: A Draft Biodiversity Strategy for Queensland.

- It is wholly inadequate that the Draft Policy only aims for no net loss of biodiversity, which in our opinion cannot be guaranteed. The Draft Policy should stipulate that all offset policies must provide *positive 'net gains'* for biodiversity.
- All direct, indirect and cumulative impacts on biodiversity from the proposed development must be accounted for in the Draft Policy.

## Part One – General Comments

### 1. LEGAL DUTY TO CONSERVE AND PROTECT BIODIVERSITY

Queensland has an obligation under international, national and state law to conserve and protect biodiversity, properly described as biological diversity.

Article 2 of the *Convention on Biological Diversity*, entered into force in Australia 29 December 1993, defines biological diversity to mean “the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.”

The Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* reflects this international obligation by recognising, as one of the principles of ecological sustainable development, that conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making. The Act describes the components of biodiversity as including species, habitats, ecological communities, genes, ecosystems and ecological processes.<sup>2</sup>

In Queensland, a patchwork of legislative schemes is directed towards protecting the ecological services on which our life support systems depend, including biodiversity. These schemes have, in practice, failed to prevent ongoing decline of state-wide biological diversity. Over time the evolutionary pattern of biodiversity is that it is continually becoming more diverse and complex. However, the State of the Region Report released by the Queensland Government in 2008 rated South East Queensland’s biodiversity in the red - getting worse, in poor condition, or not sustainable.<sup>3</sup> The State of the Environment Report 2007 portrays a similar picture at a State level.

The reasons for these failures are various. However, development for human purposes, including activities like extractive industries (mining and gas), infrastructure projects, broad-scale agricultural activities and urban activities, are the major drivers. Human induced

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<sup>2</sup> Section 171(3) *Environment Protection and Biodiversity Conservation Act 1999*

<sup>3</sup> Biodiversity as measured by “Population of Selected Species” and “Back on Track Species Prioritisation Framework” under Desired Regional Outcome 2 – Natural Environment. Queensland Government, *SEQ State of the Region Report 2008*, 2008a, Online Available at: <http://www.dip.qld.gov.au/regional-planning/state-of-region-report.html> pp. 3 & 82-83.

climate change will make state and national efforts to protect biodiversity more difficult into the future.

**We need clear legislative and policy tools that will, when put into practice against the uncertainties of a rapidly changing global climate, be effective in reversing biodiversity decline, and will, with adequate certainty, increase biodiversity in Queensland over ecological time (200+ years).**

## **2. OFFSETTING AS AN ENVIRONMENTAL POLICY INSTRUMENT HAS LIMITATIONS**

The draft biodiversity offsets scheme represents an environmental policy instrument designed to create a price for biodiversity. Putting a price or creating a market is one technique for internalising costs of biodiversity decline in decision making. Market-based approaches to biodiversity conservation are not new.<sup>4</sup>

In principle, no net loss is the central tenet of offsetting schemes. In the context of biodiversity protection, offsetting allows continued clearing of land (taking into account the subsequent, cumulative impacts on biodiversity) on the proviso that on a state-wide basis the overall stock of biodiversity is improved. Due to the inherent uncertainties associated with quantifying biodiversity, this method has serious limitations.

## **3. OFFSETTING GENERALLY**

There is significant doubt about the capacity of offsets to deliver meaningful ecological outcomes in the short term, and, more importantly, over ecologically significant timeframes (200+ years). *Offsetting biodiversity must be discouraged.* There remains no evidence<sup>5</sup> that offsetting, as an environmental policy instrument, actually delivers no net loss of biodiversity values, especially in terms of genetic diversity – whether for marine fish habitats, vegetation, koala habitat or, as the current issue-specific offset draft proposes, biodiversity. Recognising that every square centimeter of the planet is unique, biodiversity offsets can never exactly replace what is lost and are rarely, if ever, an ecologically appropriate response to biodiversity loss.

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<sup>4</sup> Curnow, P & Fitz-Gerald, L 'Biobanking in New South Wales: Legal Issues in the design and implementation of a biodiversity offsets and banking scheme' (2006) 23 EPLJ 298, 300-303.

<sup>5</sup> Gibbons, P & Lindenmayer, D "Offsets for land clearing: No net loss or the tail wagging the dog?" (2007) Ecological Management & Restoration, Volume 8(1), p30.

**Achieving no net loss requires a scientifically robust method for calculating biodiversity values and determining ecological equivalence – but it must go further, and minimise the risks of the offset failing as a consequence and ongoing threats from pest and diseases and natural events like bushfires and drought.**

#### **4. CLIMATE CHANGE**

Fundamentally the Draft Policy fails to address the serious risks that an uncertain climate future presents to the longevity and viability of biodiversity offsets over ecological time. Nothing in the Draft Policy gives Queenslanders any confidence that, for the next 200 years at least, an approved biodiversity offset will continue delivering the values it is supposed to protect especially considering that no allowance for climate change is made.

One of the major shortcomings of the Draft Policy is that it does not incorporate insurance against an ecologically equivalent offset failing, over time. A biodiversity offset must be buffered against the consequences of human induced climate change. We understand that the Draft Policy provides some protection against bushfire, drought etc. but it does not go far enough especially considering current data regarding the effect of human induced climate change. DERM needs to be able to ascertain whether an approved biodiversity offset will still be performing the relevant biodiversity functions for the next 200 years, as a minimum 200+ years is an appropriate ecological timeframe. This invariably requires a buffer against the effect of climate change such as sea level rise, ocean acidification and desertification that has been predicted. The Draft Policy should incorporate a clear statement that only ecologically equivalent offsets that will endure over 200 incorporating a buffer for the effect of climate change will be approved by DERM.

**There is a particular need for biodiversity offset to be buffered against the consequences of human induced climate change.**

## **Part Two – Shortcomings of the Draft Policy**

This section will provide a critique of the policy, highlighting the major deficiencies of the Draft Policy in its current form and then providing recommendations for improvement.

### **1. INTRODUCTION TO BIODIVERSITY OFFSETS**

#### **a. Biodiversity must be a defined term in the Draft Policy consistent with international and national law**

Nowhere in the Draft Policy is the term biodiversity defined. It cannot be assumed, nor implied, that the term biodiversity is uniformly understood by all stakeholders. Without a clear definition, that is consistent with international and national law, and the recently released biodiversity strategy, the subject matter of the Draft Policy is unclear. This ambiguity flows through the entire Draft Policy.

We recommend the Draft Policy include a definition of biological diversity in the following terms:

*In this policy, biodiversity or biological diversity refers to the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems. The components of biodiversity include species, habitats, ecological communities, genes, ecosystems and ecological processes.*

#### **b. the final offset package must satisfy all the requirements of this policy even when another State or Federal offset schemes applies**

The Draft Policy is confusing in this regard. The Draft Policy provides that where another offset policy applies to a relevant biodiversity value, an additional offset under the Draft Policy is not required. We do not support this approach. It invites a proponent to ‘shop around’ and find the least onerous policy.

Where a project requires an offset under the Draft Policy as well as under another state offset policy, then the Draft Policy should only permit, one offset package, “so long as the requirements of this policy are met”. Those minimum requirements include that the biodiversity offsets account for the different biodiversity attributes, to enable ecologically equivalent sites to be located, restored and protected in perpetuity.

The Draft Policy provides that where a project triggers offsets under the Draft Policy and the Federal *Environment Protection and Biodiversity Conservation Act 1999* (EPBC), an additional offset under this policy is not necessary. We do not support this approach. The final offset package must satisfy the Queensland requirements in conjunction with any Federal requirements.

### **c. Offset Brokers**

The Draft Policy has created a category of offset known as ‘offset obligation under contract’ which allows the use of third party offset brokers. Of greatest concern to the EDO is that the legal responsibility for the offset will be transferred to a third party. The Draft Policy states that a list of approved offset brokers will be compiled on the basis that sufficient evidence is supplied regarding fund management, legal liability etc. The Draft Policy must provide more detail regarding what specific information is required and what criteria the broker will have to meet to be classified as approved and suitable.

The major threat would undoubtedly be the risk of bankruptcy of the broker. Another major threat is that the broker, in an effort to maximise profits, may not do all that is required to protect the biodiversity value. The EDO does not believe there are currently sufficient safeguards to ensure protection of offsets from the common threats posed by transferring responsibility to a third party. It is vital that the legal liability remain with the proponent!

### **d. Financial Contribution**

Another one of the major changes that were introduced in the Draft Policy was the inclusion of a section that outlines the method for calculating an offset payment (this includes the Offset Payment Management Costs table that is not currently included in the body of the policy – it should be). The management costs are worked out according to a formula and capped at 20 years. 20 years is an insufficient amount of time and the EDO suggests an ecologically significant timeframe is more appropriate.

The applicability of financial payments seems to be particularly aimed at instances of large state infrastructure projects. In this regard it seems to further strengthen the Queensland Government's power in regards to ‘significant projects’, which have already resulted in the relaxation of environmental protection laws.

The Draft Policy includes more information than the previous policy about when an applicant can make an offset payment and when an offset payment will not be accepted. However, the EDO opposes the inclusion of financial contributions and they should be removed from the Draft Policy as they encourage development at a cost to environmental protection. We strongly oppose the use of financial contributions in lieu of direct biodiversity offsets. The Draft Policy must prohibit them.

We understand that the funds will be used to purchase strategic patches of habitat such as protected area estates or biodiversity corridors that will contribute to the overall retention of biodiversity in Queensland. However, the EDO strongly opposes financial contribution in lieu of a direct offsets for two reasons. Firstly, proponents (including government departments) should not be able to buy their way out of their obligation to secure and deliver an ecologically equivalent biodiversity outcome. If the proponent is unable to deliver the relevant offset (whether through lack of suitable sites, difficulties in negotiating with landowners, management and insurance costs for the period of time it takes to deliver the relevant biodiversity outcome) the proposal must be refused. Secondly, the responsibility to deliver the offset should not fall to the government (Ecofund). As the Draft Policy now stands, Ecofund carries the burden of locating, securing and reporting on the offset. This is unacceptable.

The risk to government, and to the community, is unacceptable if the amount paid by a proponent does not accurately reflect the 'real costs' (in today's dollars) of protecting and managing offset areas. From the Draft Policy as it now stands, the proponent will not be paying the 'real costs' and this burden will fall to government and consequently the community. As mentioned above, the Draft Policy contains a method for assessing the present and future costs for delivering a biodiversity offset but the timeframe of 20 years is unsatisfactory and a more appropriate ecological timeframe is required.

Furthermore, the Draft Policy contemplates that Ecofund Queensland will be the recipient of financial contributions paid under this part. While we actively support funding for Ecofund to make strategic purchases of new protected areas, funding from offsets must not contribute to the targets set by the Queensland government for increasing protected areas because this undermines the purpose of the targets and the purpose of conservation laws in Queensland.

**The EDO opposes the inclusion of financial contributions and they should be removed from the Draft Policy as they allow developers to buy their way out of their obligations and transfer those obligations onto the government and therefore the tax payer.**

**e. Quantification of Biodiversity Value and Ecological equivalency**

The aim of an effective biodiversity offset is to ascertain the overall ‘value’ of the area and then quantify, and weigh and balance the loss and gains.<sup>6</sup> There are three specific problems associated with quantifying biodiversity value; they include variation in space (different locations), type (substitutability between abundance of animals, plants etc) and time.<sup>7</sup> Curnow & Fitz-Gerald argue that the identification and measurement of a biodiversity “unit” is vital in achieving effectiveness of any biodiversity offset scheme.<sup>8</sup>

If you cannot accurately identify ‘like for like’ then how can offsetting occur?<sup>9</sup> This inability to measure with precision and then replicate biodiversity values is termed non-fungibility and is often held as a shortcoming of biodiversity offsetting.<sup>10</sup> The EDO argues that biodiversity is unique and any attempt to decipher its ‘environment value’ is misleading and extremely difficult.<sup>11</sup>

Undoubtedly the biggest difference between the previous draft biodiversity offset policy and the current one is the new ecological equivalence methodology (“EEM”). The EEM aims to provide far more detail about how ‘like for like’ will be measured. The EDO does not have the expertise to evaluate the adequacy of the EEM and has not had the opportunity to consult with those persons how may be able to assist. Consequently, our comments are limited to a rudimentary examination.

The EEM goes some way in correcting the deficiency in the former policy by ensuring that any offset is supported by up-to-date scientific research in regards to that specific

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<sup>6</sup> Curnow, P & Fitz-Gerald, L ‘Biobanking in New South Wales: Legal Issues in the design and implementation of a biodiversity offsets and banking scheme’ (2006) 23 EPLJ 298, at 303.

<sup>7</sup> Salzman, J & Ruhl, JB, ‘Currencies and the Commodification of Environmental Law’, 2000, 53 *Stanford Law Review*, p. 637.

<sup>8</sup> Curnow, P & Fitz-Gerald, L ‘Biobanking in New South Wales: Legal Issues in the design and implementation of a biodiversity offsets and banking scheme’ (2006) 23 EPLJ 298, at 303.

<sup>9</sup> Farrier, D, Kelly, A & Langdon, A, ‘Biodiversity offsets and native vegetation clearance in New South Wales: The rural/urban divide in the pursuit of ecological sustainable development’, 2007, 24 *Environmental and planning law Journal* at 432.

<sup>10</sup> Curnow, P & Fitz-Gerald, L ‘Biobanking in New South Wales: Legal Issues in the design and implementation of a biodiversity offsets and banking scheme’ (2006) 23 EPLJ 298 at 303; Farrier, D, Kelly, A & Langdon, A, ‘Biodiversity offsets and native vegetation clearance in New South Wales: The rural/urban divide in the pursuit of ecological sustainable development’, 2007, 24 *Environmental and planning law Journal* at 432.

<sup>11</sup> Gibbons, P & Lindenmayer, D, ‘Offsets for Land Clearing: No net loss or the tail wagging the dog?’ 2007, 8 *Ecological Management & Restoration*, p. 30.

'biodiversity value'. The EDO argues that the threshold for scientific research should be high and reflected as such in the Draft Policy as well as the EEM document. We would also encourage the use of independent experts and on-site visits to verify any analysis done by the EEM.

However, achieving ecological equivalence in the context of biodiversity is operationally difficult even with the EEM outlined by DERM because natural ecosystems are complex. Individual species and habitats represent very different, for the most part unique, combinations of ecological attributes. As discussed briefly above, the ecological equivalence of biodiversity values impacted by development activities vary depending on factors like species composition, population dynamics, vegetation types, location, rarity, presence of other threatening processes and, effect of disturbance on the continuity of biodiversity services. In short, it is difficult to compare the relative value of different biodiversity.

The EDO recognises this difficulty and acknowledges that DERM's EEM goes further than the previous policy, but Queensland's biodiversity has already been overdrawn. We cannot risk losing biodiversity in circumstances where there is no equivalent patch available by way of offset and therefore we reiterate that the EDO is opposed to offsetting generally.

**An acceptable biodiversity offset is one that:**

- **Is ecologically equivalent to (preferably greater than) the biodiversity values impacted (arguably impossible);**
- **Increases the state-wide stock of biodiversity in Queensland; and**
- **Endures over ecological time (200+ years)**

**f. Securing the biodiversity offset**

i. Time delay between implementation and attainment of biodiversity offset

One of the major criticisms with biodiversity offsets is that there is often a considerable delay between the implementation of the proposed offset and the ability to monitor the success of the offset and determining whether the biodiversity value has been secured.<sup>12</sup> If the development proceeds before the offset is secured then, depending on the type of offset, such a time delay could result in unpredictable impacts for the biodiversity value in question.

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<sup>12</sup> Curnow, P & Fitz-Gerald, L 'Biobanking in New South Wales: Legal Issues in the design and implementation of a biodiversity offsets and banking scheme' (2006) 23 EPLJ 298 at 303; Gibbons, P & Lindenmayer, D (2007) "Offsets for land clearing: No net loss or the tail wagging the dog?" Ecological Management & Restoration, Volume 8(1) at 29.

It is argued by DERM that the offset will not be accredited under the Draft Policy if it is not already equal to or greater than the value lost, thus arguably nullifying the time-lag argument. Often offsets are thought of as an obligation of developer to regenerate a degraded patch of ecologically similar habitat and bring it up to the level of the area being destroyed. It is this situation that poses the biggest threat from time-lag associated risks.

The Draft Policy as it now stands does not completely nullify the time-lag argument, though we recognise a significant improvement in this regard from the previous policy. The Draft Policy does not distinguish between the time period necessary to secure an offset (i.e. from identifying a suitable site to the formal dedication as protected area or final agreement regarding conservation management regime) and the period of time before an offset site provides the same or better biodiversity outcomes (when the offset site prospers, and is found to meet the ecological equivalence of the cleared site). The Draft Policy must make it clear that the offset must be independently assessed, secured and delivered BEFORE any works are allowed to commence! This is the only way of being absolutely certain that attainment of the biodiversity value is achieved before any works commence.

The EDO suggests that the Draft Policy be amended to provide for the implementation of an ex post verification system<sup>13</sup> so as to correct the time-lag deficiency in the current policy. An ex post verification system provides that the offset must be established for a period of time and independently verified as operational before it can be used as an offset.<sup>14</sup> This would go some way in ensuring the 'biodiversity value' is secured before commencement of the project<sup>15</sup> and therefore remove the uncertainty and discretion that is inherent in the Draft Policy as it now stands.

Advance offset proposal may be the most appropriate method of ensuring the biodiversity value is secured prior to commencement of the works. The Queensland Government Environmental Offsets Policy ("**QGEOP**") states that an advance offset provides an

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<sup>13</sup> Curnow, P & Fitz-Gerald, L 'Biobanking in New South Wales: Legal Issues in the design and implementation of a biodiversity offsets and banking scheme' (2006) 23 EPLJ 298 at 306; McKenny, B, *Environmental Offset Policies, Principles and Methods: A Review of Selected Legislative Frameworks: Biodiversity Neutral Initiative*, 2006, Online Available at:

<http://biodiversityneutral.org/EnvironmentalOffsetLegislativeFrameworks.pdf>, p. 40.

<sup>14</sup> Curnow, P & Fitz-Gerald, L 'Biobanking in New South Wales: Legal Issues in the design and implementation of a biodiversity offsets and banking scheme' (2006) 23 EPLJ 298 at 304.

<sup>15</sup> Curnow, P & Fitz-Gerald, L 'Biobanking in New South Wales: Legal Issues in the design and implementation of a biodiversity offsets and banking scheme' (2006) 23 EPLJ 298 at 304

opportunity to “create a supply of offsets for potential future use, transfer or sale”.<sup>16</sup> This is similar to the banking model, whereby areas are restored and then commercially sold to developers. This would be a form of ex post verification system as it would allow proponents to establish verified offset areas in anticipation of a proposed development. This would reduce the delay between determining the need for an offset for a development and establishing the offset. As stated by the QGEOP, this provides an “opportunity to establish larger, more viable and strategically located offset sites”.<sup>17</sup> Whilst the EDO discourages the use of offsets generally, if the government continues to pursue the idea, the EDO encourages an increased use of advance offsets. However, we would caution the effectiveness of this method and reference WWF’s submission in support of this caution.

#### ii. Level of protection for Offset

Fundamental to securing the offset is the legal mechanism by which the offset is formalised. Direct offsets have four months to *legally* secure the offset after the development approval has been issued and offset obligations under contract have 12 months to *legally* secure the offset after the development approval has been issued. The Draft Policy suggested three methods of securing the level of protection for an approved offset, including:

- Declaration as a protected area under the *Nature Conservation Act 1992*;
- Declaration of an area of high nature conservation value under the *Vegetation Management Act 1999*;
- Use of a covenant under the *Land Title Act 1994* or the *Land Act 1994*.

Whilst the EDO is supportive of the offset attaching to the title, all offsets should also have a strong level of legal protection to ensure that it is safe from mining, petroleum and other harmful activities that could jeopardise the viability of the biodiversity value retention. Many forms of ‘protected land’ are afforded only limited protection from development activities. Inadequate legal protection of the offset could jeopardise the entire intention of the offset, that being no net less.

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<sup>16</sup> Appendix A, Queensland Government Environmental Offsets Policy 2008

<sup>17</sup> Appendix A, Queensland Government Environmental Offsets Policy 2008

### **g. Information requirement and management plans**

The Draft Policy now incorporates provision for mandatory information requirements. The information required must demonstrate how the offset meets the Draft Policy criteria and how it will be achieved and implemented. The information requirement necessitates a management plan.

The EDO is supportive of the requirement to have an offset management plan but we would like to see ALL management plans made available to the public via the DERM website.

The EDO is also very supportive of DERM's requirement that the management plan incorporate an analysis of risk to achieving the management objectives of the offset. This essentially means that the developer must make allowances for the threat of ensuring a fire and drought which should go some way in protecting the biodiversity value in the long run. We would encourage DERM to go further than this and require the management plan to incorporate actions to minimise the risk posed by human induced climate change and ensure an ecological timeframe.

### **h. An offset condition requiring future compliance with the Draft Policy is open to challenge for “unreasonableness” or lack of finality**

Requiring, as a condition of a development approval, a biodiversity offset to be secured and delivered by some future date, gives rise to complex legal questions regarding the lawfulness of the condition. For example, will a requirement to secure and deliver a biodiversity offset, in satisfaction of the Draft Policy, be a reasonable and relevant condition of a development approval. If it is not, then it will be invalid.<sup>18</sup> Merely referring to a policy applied by a concurrence agency is not, of itself, sufficient basis for satisfying the requirements of the *Sustainable Planning Act 2009* as they relate to valid conditions of approval.

In our opinion if a proponent is unable to meet its obligations to secure and deliver a biodiversity offset in accordance with a condition of its approval, rather than take further remedial action, it is extremely likely that the proponent will challenge the validity of the condition in Court. If an offset condition can be lawfully severed from a development approval, the legitimacy of the Draft Policy will be jeopardised. The final policy must avoid

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<sup>18</sup> Section 345(2) *Sustainable Planning Act 2009*

any situation where the validity of an offset condition, requiring future compliance with the policy, is challenged.

Stipulating fixed periods of time within which a developer must *legally* secure and verify an offset (4 or 12 months) is an improvement on the previous policy but will not prevent a legal challenge. The only confident way to avoid this possibility (and, address the issue of time-lag) is to ensure that a biodiversity offset is secured, and its ecological equivalence and permanence verified, prior to a development approval being granted. Verification by an independent expert is the appropriate way to assess whether an offset has, in fact, achieved its planned outcome.

**The only confident way to avoid a legal challenge (and, address the issue of time-lag) is to ensure that a biodiversity offset is secured, and its ecological equivalence and permanence independently verified, prior to a development approval being granted.**

**i. Offsets must provide additional protection to environmental values at risk**

The QGEOP, principle six states that the “offsets must provide additional protection to environmental values at risk, or additional management actions to improve environmental values”.<sup>19</sup> The EDO is supportive of this being clearly reiterated in the Draft Policy for direct offsets and offset obligation under contract and ideally this should be legislatively enshrined. It is vital to the objective of the Draft Policy, namely protecting Queensland’s biodiversity, that the offset not be comprised of habitat that is already protected by other means.

**j. When should this policy be used?**

**i. No approval if no ecologically equivalent and enduring offset cannot be obtained**

In line with EDO’s previous arguments, we support:

- The ‘avoid and minimise’ hierarchy (this must be clearly demonstrated by the proponent as a requirement of a properly made application).
- The position that offsetting will NOT be used to facilitate development otherwise prohibited through existing legislation or other policies (only permitted where approval would have been given anyway); and
- The position that there will be no offset approval if there is a high risk of the offset failing.

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<sup>19</sup> Section 2.1 Queensland Government Environmental Offsets Policy 2008

As a minimum, the Draft Policy should require an independent scientific evaluation of any offset proposed, both in terms of its ecological equivalence and its capacity to endure over 200+ years. This safeguard must be imported into the Draft Policy's risk assessment process. A requirement for independent expert evaluation will ensure decision making under the Draft Policy is accountable and transparent.

ii. No offsetting in out of bounds areas

Whilst the Draft Policy already lists a number of instances when offsetting cannot be used, the Draft Policy should increase the number of 'out of bounds' zones, areas that *cannot* under any circumstances be subject to offsetting. These areas should include:

- biodiversity that is isolated in a few locations or is of special value, rarity, uniqueness;
- highly irreplaceable areas;
- threatened ecosystems;
- critical habitats of threatened species (including critical connections);
- areas with ARI 50 years rainfall as this land cannot be developed anyway and is therefore essentially protected already; and
- areas with a slope of greater than 10% as this land cannot be developed anyway and is therefore essentially protected already.

**k. Stricter powers of enforcement and accountability**

The Draft Policy is deficient in the way it addresses enforcement and the question of penalties, and long term responsibility for non-compliance with the offset packages.

We understand that amendments to the *Sustainable Planning Act 2009* and the *Environmental Protection Act 1994* have provided that environmental offset conditions CAN be imposed on development approvals and environmental authorities. The EDO supports this and commends the government for providing legislative force; however more needs to be done.

The EDO does not have any problem with a third party providing or managing the offset on behalf of a proponent, as is the case under the offset obligation under contract. However, liability for meeting the legal obligations under the offset agreement must remain with the proponent. The QGEOP states that's "responsibility depends on whether the proponent has retained ongoing management of the offset".<sup>20</sup> The EDO does not support this proposition and the Draft Policy does not provide any further clarification on the issue. The EDO argues that

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<sup>20</sup> Section 2.5 Queensland Government Environmental Offsets Policy 2008

the Draft Policy must make it mandatory for ALL offsets (even offset obligation under contract and developments required by the Coordinator-General under the *State Development and Public Works Organisation Act 1971* ) to be included as binding development conditions. The legal responsibility for the offset must remain with the proponents even if the management does not (refer offset broker section).

The literature<sup>21</sup> highlights the very poor track record of compliance regarding offset schemes in other jurisdictions. Clear definition of the responsibilities and liabilities of the different partners in a biodiversity offset is critical to the Draft Policy achieving its objective.

Many of the main monitoring issues involved in any offset scheme involve who retains responsibility:

- should the offset not deliver the biodiversity outcomes – whether due to human or non-human processes (like bushfire, flooding, drought, climate change);
- for remedial action should the offset fail to deliver positive biodiversity credits;
- for liability for failed offsets.

The Draft Policy lacks clear provisions outlining when the developer will be held responsible. The EDO strongly advocates for robust enforcement mechanisms for government and the community and for clarification that the developer retains legal responsibility in all the above outlined instances.

#### **1. There must be opportunity for public comment on the draft offset agreements**

There must be clear provisions enabling independent expert assessment and public comment on the draft offsets agreement (with rights of appeal), with the final offset agreements being incorporated into the terms of the development approval. As mentioned above, the Draft Policy needs to make it mandatory for ALL offsets to be included as development conditions.

We are supportive of DERMs initiative to ensure all biodiversity offset are entered onto a web-based register but we advocate that all relevant offset information be posted on the DERM website along with all management plans and monitoring reports for public viewing. This material would support strong enforcement mechanisms.

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<sup>21</sup> Gibbons, P & Lindenmayer, D (2007) “Offsets for land clearing: No net loss or the tail wagging the dog?” Ecological Management & Restoration, Volume 8(1).

Given the community-wide importance of the biodiversity offset achieving the objectives of the Draft Policy, there must be an opportunity for public involvement in this decision making process. The inclusion of the offset as a development condition provides rights of appeal to community members in certain situations<sup>22</sup> but this is insufficient. The EDO recommends that all draft offsets made under the Draft Policy be open to public comment, and decisions to approve an offset be open to merits review in a Court with own costs provisions.

**m. Retention of the Status Quo – no net loss**

The fact that the Draft Policy aims to retain the status quo and not improve biodiversity is inadequate. It is suggested that instead of the Draft Policy stating that there will be no net loss, which in our opinion cannot be guaranteed, the Draft Policy should stipulate that all offset policies must provide *positive 'net gains'* for biodiversity.<sup>23</sup> This provides a twofold benefit. Firstly it provides a buffer for any and all risks to the attainment of the offset value and secondly it aligns with the State governments target under the Biodiversity Strategy, that there needs to be a reverse in the decline of biodiversity in Queensland.<sup>24</sup>

A biodiversity offset package must compensate for the all the biodiversity losses caused by development, with an adequate buffer to minimise the risks of the offset failing (endurance buffer). The amount of gain must, in other words, exceed the level of impacts caused by the removal of habitat. The only confident way to ensure that a biodiversity scheme overcomes these limitations is for the Draft Policy to be amended to require a proponent to provide an offset, that delivers a greater than ecologically equivalent biodiversity outcome that will endure over ecological time (200+ years) and that is verified by an independent expert/s prior to a development impact occurring. Again, we repeat our position that failing to provide an offset that delivers the relevant outcome must be a ground for refusing a development application.

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<sup>22</sup> Appeal rights under the *Sustainable Planning Act 2009* arise for third parties when a properly made submission is made regarding an impact assessable development. Refer section 2.4 Queensland Government Environmental Offsets Policy 2008.

<sup>23</sup> Robinson, David, 'Strategic planning for biodiversity in New South Wales', 2009, 26 Environmental and Planning Law Journal at 220; Webb, Rachael, 'Victoria's Native Vegetation Framework – achieving "net gain" at the urban growth boundary?' 2009, 26 Environmental and Planning Law Journal at 236/239.

<sup>24</sup> Queensland Government (2011) *Draft Biodiversity Strategy for Queensland*.

**n. Cumulative and indirect impacts on biodiversity must be accounted for**

The Draft Policy is restricted to accounting for direct losses to biodiversity that occur on the development site. We oppose this restriction.

Cumulative or indirect impacts, particularly with respect to development impacts on endangered, vulnerable and rare fauna species, have a significant impact beyond the development footprint. For example, impacts outside the development site arise through:

- Fragmentation (breaking connectivity) and edge effects (net out-flow of feral animals; overabundance of species that thrive in urban spaces);
- Micro climate changes; and
- Provision of supporting infrastructure (roads, transmission lines, stormwater).

These impacts must be accounted for in assessing a project and must not be approached in a piecemeal way. Failing to take the indirect/cumulative impacts into account will vastly underestimate the projects impact on biodiversity.

**All direct, indirect and cumulative impacts on biodiversity from development must be accounted for.**

The EDO appreciates this opportunity to comment on the Draft Policy. Our recommendations are included throughout this letter and are summarised at the beginning of our submission.

Please do not hesitate to EDO Qld if you wish to discuss any aspects of our submission further.

Yours faithfully



Sarah Wilson  
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