



Environmental
Defenders Office

**Submission on the Draft Northern Territory Biodiversity
Offsets Policy and Draft Biodiversity Offsets Technical
Guidelines**

16 November 2022

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EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

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Environmental Defenders Office is a legal centre dedicated to protecting the environment.

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Department of Environment, Parks and Water Security

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1. Introduction

The Environmental Defenders Office (**EDO**) welcomes the opportunity to provide this submission on the draft Biodiversity Offsets Policy (**draft Offsets Policy**) and the draft Biodiversity Offsets Technical Guidelines (**draft Technical Guidelines**).

While EDO supports the need for biodiversity offsets in the Northern Territory to compensate for unavoidable impacts on biodiversity, we believe further consideration should be given to the specific rules surrounding biodiversity offsetting which, whilst meeting best practice standards, should result in legitimate improvements for the environment.

EDO has concerns about how biodiversity offsetting will be implemented in the Northern Territory, and some of the assumptions that appear to underpin the draft Offsets Policy.

We make 8 recommendations for strengthening the draft Offsets Policy to ensure that it aligns with best practice science-based offsetting principles and delivers improved biodiversity conservation outcomes for the Northern Territory.

2. Summary of Key Recommendations

The EDO makes the following recommendations:

- 1) 'Red flag' or 'no go' areas should be determined to make it clear when offsetting is not an appropriate strategy.
- 2) A biodiversity offset plan must be approved prior to the commencement of works or activities.
- 3) Clear and measurable requirements should be established for the delivery timeframe of biodiversity offsets.
- 4) Parameters regarding what percentage of the offset requirement can be satisfied through compensatory measures should be developed.
- 5) Criteria should be developed to ensure offsets are not approved unless they provide a conservation benefit additional to what is already required by law.
- 6) The Environment Protection Authority must be properly resourced to enforce offset arrangements.
- 7) Minimum reporting criteria and thresholds should be included in biodiversity offsets plans including the requirement to review plans annually.
- 8) Implications of climate change should be built into the offsets policy and technical guidelines.

3. Best practice science-based offsetting principles

There are a number of fundamental principles that must underpin any ecologically sound biodiversity offsetting scheme. Best practice biodiversity offsetting should align with fundamental principles aimed at delivering genuine environmental outcomes.

These include:

1. **Offsets must be designed to improve biodiversity outcomes:** Offset schemes must be designed to *improve* biodiversity values.
2. **Biodiversity offsets must only be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts:** The hierarchy should be clearly set out in legislation as a mandatory pre-condition before any offsetting option is considered, and properly implemented and enforced.
3. **Offsets must be based on genuine ‘like for like’ principles:** Any ecologically credible offset scheme must enshrine the requirement of genuine ‘like for like’ offsets, to ensure that the environmental values of the site being used as an offset are equivalent to the environmental values impacted by the proposed action. Otherwise, the resulting action is not an offset. A like for like requirement is fundamental to the ecological integrity and credibility of any offset scheme. Variations to offset rules that allow impacts to be offset with alternative species, or in a far-removed geographical location should not be allowed.¹ Any concerted policy action and long-term strategic planning to contextualise offsetting within a broader strategy of environmental conservation, must be based on sound landscape conservation principles, without eroding the like for like principle.
4. **Legislation and policy must set clear limits on the use of offsets:** Offset schemes must have clear parameters. The use of ‘red flag’ or ‘no go’ areas is essential to make it clear there are certain matters in relation to which offsetting is not an appropriate strategy. This is particularly relevant to critical habitat and threatened species or communities that cannot withstand further loss.
5. **Time lags in securing offsets and gains should be minimised:** If offsets are not secured before biodiversity is destroyed, a net loss of biodiversity occurs. Offsets should be secured and improvements achieved before any loss occurs.
6. **Indirect offsets must be strictly limited:** There should be extremely minimal use of indirect offsets under any offset scheme, including, for example, research and education activities. This is due to significant uncertainty regarding any link between an indirect offset and relevant environmental outcomes, and higher risk that biodiversity outcomes may not be achieved at all.
7. **Discounting and exceptions should not be permitted:** Rules that allow offsetting requirements to be discounted when taking into account non-ecological considerations, or exemptions for certain types of projects, should not be allowed.
8. **Offsets must achieve long-term protection**
9. **Offsets must be additional:** Any offset action must be additional to what is already required by law. The requirement of ‘additionality’ must be based on clear criteria, including in relation to land tenure and existing protections on types of land, to ensure that offsets are not approved unless they provide a conservation benefit additional to what would otherwise occur. Certain

¹ Research indicates that delivering offsets at close proximity to the lost habitat increases the chances of contributing to the conservation and integrity of the same ecosystem, as well as the needs of local people. See, for example Gonçalves, Bárbara et al, ‘Biodiversity Offsets: From Current Challenges to Harmonized Metrics’ (2015) 14 *Current Opinion in Environmental Sustainability* 61.

areas of land should not be used as offset areas where conservation gains are unlikely to be additional.

10. **Offset arrangements must be transparent and legally enforceable:** To ensure offset schemes are legally enforceable, they should be established in legislation (rather than policy), and be underpinned by strong legislative enforcement and compliance mechanisms, with adequate resourcing, established from the outset. Legislation should also include clear monitoring and reporting requirements. There should be a publicly available register of all offsets that allows third parties to see what clearing has been permitted and where, when and how such clearing has been offset.
11. **Offset frameworks must include monitoring and reporting requirements to track whether gains and improvements are being delivered:** Approval conditions could be strengthened so that failure to appropriately secure offsets or deliver gains would be a breach of approval.
12. **Offset frameworks should build in mechanisms to respond to climate change and stochastic events:** Climate change and associated impacts (such as more frequent and intense weather events), as well as spatial and temporal shifts in 'normal' weather patterns have a significant impact on biodiversity. Any biodiversity offsets scheme must build in mechanisms for responding to climate change and stochastic events.

4. Assessment of draft Biodiversity Offsets Policy and Technical Guidelines

We are pleased that the Northern Territory Government is taking steps to implement an offsetting system, to compensate for impacts from development projects to biodiversity and the environment that cannot be avoided or mitigated.

We now provide comment on the draft Offsets Policy and Technical Guidelines in the context of the principles listed above.

We submit the draft Offsets Policy should be re-considered and revised to take into account the matters raised below, and ensure that it complies with best practice science-based offsetting principles.

a. Offsets must be designed to improve biodiversity outcomes

The draft Offsets Policy must be based on requirements to maintain or improve environmental outcomes, consistent with the principles of ecologically sustainable development as integrated into the *Environment Protection Act 2019* (NT) (**EP Act**). This acknowledges that positive action is required to halt and reverse current declines in biodiversity.

EDO supports the draft Offset Policy's general target that biodiversity offsets should contribute to a *net gain* in the ecological conditions of natural habitats in the Northern Territory.

However, the draft Offsets Policy does not provide detail of the mechanisms by which a net environmental gain will be measured. Further, the Policy is dependent on the existence of NT-wide biodiversity conservation targets being in place, which do not currently exist.

The draft Technical Guidelines explain how improvement in habitat condition to ‘good’ (the offset objective) will be achieved through threat management. The percentage gains proposed in the draft Technical Guidelines (15 - 20% in monsoon biome and 10 – 15% in arid biome) are difficult to assess as they are based on expert opinion of what can be achieved through threat management over a 15-year period.² It is unclear how this relates to what should be achieved for biodiversity gain. In particular, how does this translate to biodiversity gain in terms of the habitats’ carrying capacity and ability to increase population abundances, which are critical in biodiversity recovery and resilience.³ Additional details are required to understand whether 15 years is adequate and whether the definition of ‘good’ adheres to best practice science-based offsetting principles. The details of the habitat condition continuum, which contains the scale of poor to good, lacks specificity.

Further detail and explanation is needed to provide additional comments.

b. Biodiversity offsets must only be used as a last resort

EDO agrees offsets should only be considered where all reasonable steps have been taken to avoid, minimise or mitigate potential impacts to the environment.

However, this hierarchy should be clearly set out in the EP Act as a mandatory pre-condition before offsetting options are considered. In addition, detail should be provided as to what constitutes “reasonable steps.”

c. Offsets must be based on genuine ‘like for like’ principles

The draft Offsets Policy is not based on the principle of like for like and instead adopts a targets-based approach to biodiversity offsetting to enable improved environmental outcomes at landscape or regional scales.

We understand the target-based method can be considered a broadly defined like for like approach in that it applies offsets in the same biome and broad habitat type.

We understand the need to consider a different approach to offsetting, noting the “unique circumstances of the Territory,” however, any ecologically credible offset scheme must enshrine the requirement of like for like offsets, to ensure that the environmental values being used as an offset are equivalent to the environmental values impacted by the proposed action. Otherwise, the resulting action is not an offset and will cause a net loss of the impacted species or community.

The implementation of the current target-based (or broad like for like approach) presents some concerns, which we submit should be considered to ensure the adoption of a robust framework.

² Draft Biodiversity Offsets Technical Guidelines, Northern Territory Offsets Framework, section 4.

³ Williams et al. ‘A robust goal is needed for species in the Post-2020 Global Biodiversity Framework’ (2020) 14(3) *Conservation Letters*.

- **Mapping** - The draft Offsets Policy explains implementing a like for like approach is challenging due to the Territory's lack of fine-scale ecosystem mapping and habitat integrity metrics. However, EDO notes there are many satellite-based geospatial tools which are publicly available that can guide habitat fine-scale ecosystem mapping and habitat integrity. Publicly available software also exists for large-scale, high-resolution conservation-priority ranking.⁴ These tools can be used effectively as preliminary investigations to targeted on-site surveys and data collection by accredited assessors.
- **Life cycle of species** - To preserve like for like principles, offset sites should be considered for available habitat and for the movement potential among focal habitats, thereby incorporating landscape connectivity. The draft Policy does not include information regarding how these factors are unlikely to be incorporated, eroding the implementation of a like for like principal.

d. Legislation and policy must set clear limits on the use of offsets

We recommend the legislation and the draft Offsets Policy be amended to explicitly provide for the upfront development of 'red flag' or 'no go' areas to make it clear when offsetting is not an appropriate strategy. This could be achieved, for example, through the use of the 'protected environmental areas' mechanism established under the EP Act.

e. Time lags in securing offsets and gains should be minimized

Under the draft Offsets Policy, a biodiversity offsets plan is required only after a project has been approved under the EP Act with a biodiversity offset condition attached. Although the draft Policy is clear that a biodiversity offset plan must be approved by the decision maker, it is unclear who that decision maker will be – the Environment Protection Authority (**EPA**), the Department of Environment, Parks and Water Security (**DEPWS**) or another body.

If unavoidable residual impacts are identified in an application, the applicant should be required to include a proposed biodiversity offset plan as part of their initial application process. Alternatively, if a biodiversity offset condition is attached to an environmental authority, the provision of a biodiversity offset plan and approval by the EPA should be a pre-condition to the commencement of any works or activities.

Currently, the draft Offset Policy states “[I]n general, the plan must be approved prior to the impacts which are being offset occurring.”⁵ The inclusion of a requirement to be met “in general,” is not appropriate. EDO recommends the Policy include a clear requirement that a biodiversity offset plan be approved prior to the commencement of works or activities on the land.

⁴ Moilanen A. 'Planning impact avoidance and biodiversity offsetting using software for spatial conservation prioritisation' (2013) 40 *Wildlife Research*, 153-162.

⁵ Draft Biodiversity Offsets Policy, Northern Territory Offsets Framework, section 4.2.

In addition, developments relying on offsets should not be approved until appropriate offsets have been identified. Otherwise, there is no guarantee that the offsets will be delivered, despite the impact it is intended to have offset, already having taken place.

The draft Offsets Policy explains the delivery timeframes for biodiversity offsets will be specified in the biodiversity offset plan which must demonstrate that ecological gains will occur as “close in time as possible” to the impact and threats must be managed as “quickly as is feasible.”⁶

These requirements are too broad and cannot be measured. We recommend the Policy include clear and measurable requirements for the delivery timeframe of biodiversity offsets, to ensure time lags in securing offsets and gains will be minimized.

In addition, conditions on an approval should be clarified to ensure biodiversity offsets have been secured and improvements achieved before any loss occurs, to ensure a net gain of biodiversity outcomes.

f. Indirect offsets

Eligible offset activities under the draft Offsets Policy include: direct habitat management activities, alternative direct measures and other compensatory measures.

Although the Policy states “the preferred type of offset is a habitat-based offset with direct habitat management activities,” the draft Policy does not provide clear criteria as to how to determine direct habitat management activities have been used to deliver “as much of an offset requirement as possible.”

EDO supports direct habitat management activities as the preferred method of offset activity. However, the draft Policy includes capacity building for land managers as an example of direct habitat management activities. It is our view capacity building, although needed, is not a form of direct habitat management and instead should be reported as education under “other compensatory measures” (noting our concerns with compensatory measures listed below).

The draft Offsets Policy permits alternative direct offsets which involve “targeted interventions other than landscape scale threat management.”⁷ The Policy explains “alternative direct offsets may be used where there is credible evidence that habitat-based offsets cannot be applied or are unlikely to be effective.”⁸ The draft Policy further explains alternative offsets could include translocation or area based protection like fencing.

The use of alternative direct offsets (or indirect offsets) should be strictly limited. The draft Offsets Policy should clarify in what circumstances alternative direct offsets may be used. If habitat-based offsets cannot be applied or are unlikely to be effective, offsets should not be considered an acceptable method to compensate for a significant residual impact. Moving species or building fences should not be considered appropriate offsetting arrangements.

⁶ Ibid, section 7.6.

⁷ Ibid, section 6.2.

⁸ Ibid.

The draft Offsets Policy also permits “other compensatory measures” which include research, engagement and education. However, indirect offsets should be strictly limited and there should be extremely minimal use of indirect offsets under any offset scheme, including for research and education activities. This is due to significant uncertainty regarding any link between an indirect offset and relevant environmental outcomes, and higher risk that biodiversity outcomes may not be achieved at all.

If “other compensatory measures” such as research, engagement and education are to be included in the draft Offset Policy, EDO recommends setting clear parameters regarding what percentage of the offset requirement can be satisfied through compensatory measures. For example, the Environmental Offsets Policy under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), permits 10% of the total offset requirement to be made up by other compensatory measures.⁹

g. Offsets must be additional

The draft Offsets Policy explains offsets must be additional and states “management activities supported by the offset must not already be required or committed to under other statutory requirements, management plans or funding programs.”¹⁰

The target-based offset model will “prioritize offsets projects that improve habitat condition to deliver ecological gains, through supporting activities that manage key threats to Territory landscapes and environments, such as poor fire regimes, feral animals and weeds.”¹¹

However, management of these threats is already required by law. Weeds in the Northern Territory are primarily managed under the *Weeds Management Act 2001* (NT), feral animals are managed under the *Territory Parks and Wildlife Conservation Act 1976* (NT) and fire risk and prevention is managed under the *Fire and Emergency Act 1996* (NT) and the *Bushfires Management Act 2016* (NT).

These legislative frameworks impose duties on landholders to manage weeds, feral animals and fire risk. The draft Offsets Policy seeks to create the same or similar duties for proponents by implementing an offsets regime focused on management of these threats.

The draft Offsets Policy explains the supplementation of existing threat management programs may be a valid offset delivery program where “significant additional outcomes can be achieved.” No criteria or detail has been provided to explain how it will be determined that an offset program satisfies this threshold and can provide “significant additional outcomes.”

Furthermore, it is unclear if the target-based, habitat-focused approach to biodiversity offsets proposes using the same offset area to offset more than one value. If so, that approach is risky because it is difficult to determine additionality for each value and to separate the benefits to evaluate the effectiveness of the offset.¹²

⁹ Environmental Offsets Policy, *Environment Protection and Biodiversity Conservation Act 1999* (Cth), section 7.2. <https://www.dcceew.gov.au/sites/default/files/documents/offsets-policy_2.pdf>

¹⁰ Draft Biodiversity Offsets Policy, Northern Territory Offsets Framework, section 6.5.

¹¹ Ibid, section 5.

¹² Sonter et al. ‘Offsetting impacts of development on biodiversity and ecosystem services.’ (2020) 49(4) *Ambio* 892-902.

EDO recommends the development of clear criteria to ensure that offsets are not approved unless they provide a conservation benefit additional to what is already required under these legislative frameworks.

Without further detail regarding the proposed implementation of the offsetting program, there is a clear risk that the proposed targets-based approach to offsetting in current circumstances would simply be used to displace or shift the resourcing of biodiversity conservation and management activities that should be undertaken separate to any offsetting activity.

h. Offset arrangements must be transparent and legally enforceable

Although the draft Offsets Policy explains offset arrangements “will be subject to compliance monitoring by the regulator,”¹³ we understand the EPA will monitor compliance of a biodiversity offset approval condition through reliance on self-reporting.

We acknowledge that the EP Act does contain relatively comprehensive compliance and enforcement provisions. However, a reliance on self-reporting of non-compliance with the biodiversity offsets plan and therefore a breach of an environmental approval, is an unsatisfactory approach.

We understand the reliance on self-reporting is due to the limited resourcing of the EPA. In the absence of proper resourcing, we cannot see how any Offsets Policy can deliver effective outcomes that genuinely provide ‘compensation’ for the environmental impacts of development in the Northern Territory.

We recommend the regulator be properly resourced to enforce offset arrangements.

We strongly support the draft Policy’s commitment to the development of a publicly available Offsets register, which will ensure transparency of the offsets system.

i. Offset frameworks must include monitoring and reporting requirements to track whether gains and improvements are being delivered

EDO supports the need for greater disclosure and transparency around offsetting in the Northern Territory (including monitoring and reporting on implementation).

The draft Offsets Policy explains further reporting details and particular requirements, like the results of monitoring and evaluation, will be established through biodiversity offset plans.¹⁴ Although, the draft Policy provides details of what should be included in a biodiversity offset plan in relation to reporting requirements, EDO recommends minimum reporting criteria and thresholds be developed and included in the Offsets Policy, including annual reviews of biodiversity offset plans.

j. Offset frameworks should build in mechanisms to respond to climate change and stochastic events

The draft Offsets Policy does not include reference to climate change and potential impacts to biodiversity offsetting arrangements. Climate change and associated impacts (such as more frequent and intense weather events), as well as spatial and temporal shifts in ‘normal’ weather patterns have a

¹³ Draft Biodiversity Offsets Policy, Northern Territory Offsets Framework, Section 8.

¹⁴ Ibid, Section 7.7.

significant impact on biodiversity. EDO recommends the draft Offsets Policy be amended to build in mechanisms for responding to climate change and stochastic events. For example, the offset calculator could be amended to include settings that build climate change risks into offsets calculations.

5. Conclusion

In conclusion, we re-iterate our 8 recommendations listed above and submit the draft Offsets Policy should be further revised and amended to ensure that it aligns with best practice science-based offsetting principles and delivers improved biodiversity conservation outcomes for the Northern Territory.