



Australian Network of Environmental
Defender's Offices Inc

Submission on the draft EPBC Act Environmental Offsets Policy

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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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Introduction

The Australian Network of Environmental Defender's Offices Inc (**ANEDO**) is a network of nine community legal centres specialising in public interest environmental law and policy. ANEDO welcomes the opportunity to comment on the *EPBC Act Environmental Offsets Policy Consultation Draft (Draft Policy)*.¹ In recent years ANEDO has had involvement with a range of law reform and policy matters relating to the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*, including offsets policies.²

ANEDO is also pleased to provide comment on the draft *Environmental Offset Assessment Guide (Assessment Guide)*. The majority of these comments appear at **Appendix A**.

We note the aims of the Draft Policy are to:

1. Ensure the efficient, effective, transparent, proportionate, scientifically robust and reasonable use of offsets under the EPBC Act;
2. Provide proponents, the community and other jurisdictions with greater certainty and guidance on how offsets are determined and applied under the EPBC Act;
3. Deliver improved environmental outcomes by consistently applying offsets policy;
4. Explain the Government's position on a range of issues, including:
 - a. When it is appropriate to consider offsets as part of a project;
 - b. The appropriate nature and scale of offsets;
 - c. The use of market-based instruments for the delivery of offsets.

The Draft Policy would apply to actions likely to have a significant impact on protected matters (including Matters of National Environmental Significance (**MNES**), activities on Commonwealth land, and activities of Commonwealth agencies) under the EPBC Act.³

Accordingly it is important that the Offsets Policy is consistent with the objects of the EPBC Act, the first of 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)).

As ANEDO has previously noted, 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. However, we provide these comments recognising that offsets do form a part of Australian jurisdictions' policies.

¹ See <http://www.environment.gov.au/epbc/publications/consultation-draft-environmental-offsets-policy.html>

² See, for example, ANEDO, *Submission on the Use of environmental offsets under the EPBC Act 1999 – Discussion Paper*, 3 December 2007, http://www.edo.org.au/edonsw/site/pdf/subs/071204epbc_offsets.pdf; and ANEDO, *Submission to the 10 Year Review of the Environment Protection and Biodiversity Conservation Act 1999*, January 2009, <http://www.edo.org.au/policy/090219epbc.pdf>.

³ More specifically, these protected matters are: World Heritage properties; wetlands of international importance (Ramsar wetlands); listed threatened species and ecological communities; listed migratory species protected under international agreements; the Commonwealth marine environment; the whole of environment on Commonwealth land; the whole of environment where it relates to actions carried out by a Commonwealth agency; the whole of environment where it relates to nuclear actions; National Heritage places; the Great Barrier Reef Marine Park.

Executive Summary

To the extent that Australian governments are committed to the use of offsetting, ANEDO seeks to ensure that positive biodiversity outcomes are maximised based on rigorous science, their likelihood increased, and that achieving those biodiversity outcomes is placed at the centre of offsetting schemes and policies.

Underpinning ANEDO's submission is the firm view that the Australian Government should be setting a high bar for the approval of offsets based on best practice, rather than a 'low common denominator' approach that may be designed to gel with various state-based offset schemes.

Strategies to ensure these aims should include:

- Concerted policy action and long-term strategic planning to contextualise offsetting within a broader strategy of environmental conservation;⁴
- Appropriate use of a mitigation hierarchy – with appropriate guidance and emphasis on 'avoid' and 'mitigate' aspects prior to considering offsets;
- The use of 'red flag' areas, to make clear that there are certain matters in relation to which offsetting cannot be an appropriate strategy (particularly important for MNES);
- A goal of *enhancing environmental outcomes* (posited in WA and Victoria), instead of 'improving or maintaining' environmental outcomes – to acknowledge past human impacts on biodiversity loss, and that action is required to halt and reverse this trend;
- A requirement of 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;
- A requirement of 'additionality' based on clear criteria – to ensure that offsets are not approved unless they provide a conservation benefit additional to what would otherwise occur;
- No use, or minimal use, of indirect offsets – due to higher uncertainty of linkages with impacts, and higher risk that biodiversity outcomes may not be achieved;
- Appropriate incorporation of State and other offsetting schemes;
- Strong enforcement and compliance mechanisms, with adequate resourcing, established from the outset.

We believe the Draft Policy should be amended to better reflect these strategies prior to its finalisation.

⁴ Such that we "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." (Farrier 2005).

Context and strategic priorities of the Draft Policy

Need for strategic context and long term vision

ANEDO welcomes the commitment by the Department of Sustainability, Environment, Water, Population and Communities (**DSEWPaC**) “to move towards a more strategic approach to environmental assessments” to achieve strong environmental outcomes, as set out in the Draft Policy (p 3).

It is important that a Commonwealth Offsets Policy contextualises the use of offsets within a broader strategy of biodiversity conservation. While offsetting is a tool often promoted as providing opportunities for conservation, we caution that the science on offsetting remains uncertain, and as yet there is little scientific evidence to demonstrate its success. In addition, ANEDO notes previous advice to the Minister that:

... land clearance has been the most significant threatening process in Australia since European settlement. [It] continues to be a significant threatening process and ... if it is not controlled it will lead to additional species becoming endangered, to additional species being listed ... and to ecological communities being listed ...⁵.

We note that the objects of the EPBC Act include enhancing Australia’s capacity:

- to ensure the conservation of its biodiversity by including provisions to protect native species, in particular preventing the extinction and promoting the recovery of threatened species, and to ensure the conservation of migratory species;
- to protect ecosystems by means that include the establishment and management of reserves, the recognition and protection of ecological communities and the promotion of off-reserve conservation measures; and
- to identify processes that threaten all levels of biodiversity and implement plans to address these processes.⁶

ANEDO submits that implementation of these objectives in relation to the Draft Policy requires that there be an audit of existing protected matters and their respective conservation statuses. We maintain that not all protected matters should be eligible for offsetting, and that DSEWPaC should clearly define those areas prior to the commencement of the Policy. For example, we believe that any matter with the conservation status “critically endangered” should never be allowed to be offset.

As a related but separate comment, ANEDO is concerned at the lack of strategic planning for a time where offsetting schemes have operated to a point where offsetting is no longer an option, due to a lack of available offset sites. While ANEDO is aware that there is a proposal for review of the Policy every five years,⁷ we nonetheless submit that strategic planning should be implemented from the outset, to create a holistic and forward-looking policy that reflects the overall conservation goals of the Australian Government.

The Draft Policy should acknowledge that, when suitable offset sites are no longer available, serious and difficult decisions regarding land-use and conservation will need to be made. It is our opinion that those difficult decisions need to be addressed sooner rather than later, and that clear long-term strategic planning is needed to ensure that offsetting does not simply result in incremental loss of biodiversity over time, while development continues as ‘business

⁵ <http://www.environment.gov.au/biodiversity/threatened/ktp/clearing.html> Accessed 14/10/2011

⁶ EPBC Act s 2(e)(i), (iii) and (iv).

⁷ See section 1 of the Draft Policy.

as usual'. ANEDO would welcome a more fulsome Offsets Policy with a strategic plan that not only addresses the contemporary issue of offsetting, but also resolves the greater issue of diminishing biodiversity in favour of economic development. This requires a 'paradigm shift'.

As David Farrier has written:

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.⁸

While ANEDO has not made a separate submission on the draft Commonwealth Biodiversity Policy,⁹ the above comments may assist in the further development of that policy as well as the Draft Offsets Policy (and the interaction between the two).

Development of the offset model – combine strategic conservation planning with the 'mitigation hierarchy'

To be valuable, an offsets policy must be scientifically rigorous and be driven by best-available science. In addition, we believe that the primary driver for a successful offsets scheme should be the securing of environmental conservation, not a business-as-usual scenario for development.

ANEDO is concerned that the Draft Policy (and Assessment Guide) has been constructed with a focus on the 'mitigation hierarchy' of avoid, mitigate then offset (we discuss the 'avoid and mitigate' aspects of this hierarchy below). We recommend that the Policy (and its underpinning methodologies) be developed using a combination of mitigation hierarchy and strategic conservation planning. We also recommend that the hierarchy include the concept of 'minimise'; to respond to situations where total avoidance may be impossible, but there is potential for minimisation of some impacts before mitigation efforts are entered into.

Strategic conservation planning in the context of offsetting recognises that there are elements of the landscape that are critical to the success of existing DSEWPaC conservation policies,¹⁰ as well as developments that are critical to the function of the national economy.¹¹

ANEDO believes that prior to the commencement of an offsetting scheme, a strategy needs to be developed that clearly identifies:

1. at a regional scale:¹²

⁸ Farrier, David *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?* (1995) 19(2) Harvard Environmental Law Review 303-408.

⁹ <http://www.environment.gov.au/epbc/publications/consultation-draft-biodiversity-policy.html>

¹⁰ For example, Recovery Plans, Register of Critical Habitat, Key Threatening Processes, Threat Abatement Plans, Conservation Agreements and Listed Threatened Species and Ecological Communities. Source: <http://www.environment.gov.au/biodiversity/legislation/index.html> Accessed 14/10/11

¹¹ Kiesecker, J. M., H. Copeland, et al. (2009). "Development by design: blending landscape-level planning with the mitigation hierarchy." *Frontiers in Ecology and the Environment*, 8(5): 261-266.

¹² Setting priorities strategic conservation goals at a regional scale recognises that ecosystem functions at a large scale and that policies adopted at a property-scale should reflect the needs of the larger ecosystem, eg: Dan, v. d. H. (2011). "Adoption of payments for ecosystem services: An application of the Hågerstrand model." *Applied Geography* 31(2): 668-676.

- a. areas of natural habitat that are unable to be offset (for example, species or ecological communities listed as critically endangered, or that have reached their threshold of ‘minimum viable need’¹³),
 - b. areas of natural habitat, the conservation of which is crucial to the perseverance of species or ecological communities,
 - c. areas of natural habitat that are adequately conserved within the region, and
 - d. areas of high development potential;
2. scientifically quantified risk in terms of the spatial and temporal requirements (location and timing) for the offset to achieve its conservation goals; and
 3. benchmarks (or indicators) that can be used as a proxy to indicate the offset is currently (or is on track to) achieve its conservation goals.

Identifying these areas allows for strategic offsetting that results in maximum conservation benefits. Best-available science indicates that offsets that are specifically selected on the basis of their spatial appropriateness (so for example the offset area is located close to the development site so as to share ecological attributes) are more successful in offsetting the loss from development than offsets that are randomly chosen, or chosen because of reasons other than environmental suitability.¹⁴

In addition, temporal suitability is considered to be a key factor in the success of offsets.¹⁵ Determining temporal suitability is discussed later in this submission.

If offsetting is to provide an opportunity to deliver conservation goals, the best chance of this occurring is if it proactively seeks to protect critical habitat. It is our opinion that an offset policy that does not begin with a frank appraisal of remaining biodiversity, coupled with an analysis of present and future conservation and development goals, is sub-optimal. In contrast, a policy that addresses and applies those aspects would be more likely to achieve substantial gains for the environment, and reduce the risk of further degradation and destruction of Australia’s MNES.

The Avoidance and Mitigation Hierarchy

Avoidance

We submit that the Draft Policy lacks clear guidance around when offsetting is not (and never will be) appropriate, and guidance for industry about avoidance. ANEDO is concerned at the lack of appropriate direction for proponents who may seek to avoid an environmental impact, and notes that without such guidance, an attempt by DSEWPaC comprehensively to assess the appropriateness of ‘avoidance’ measures might be construed

¹³ See further ‘Red flag areas’, below. The concept of ‘minimum viability needs’ is related to strategic conservation planning. ANEDO is of the view that the minimum viability needs of Australia’s matters of environmental significance should be well known prior to the commencement of an offset policy that will administer the destruction or conservation of these matters. It would be counterproductive for a policy that aims to achieve conservation goals to inadvertently approve the destruction of biodiversity which would result in that biodiversity being unable to function in the landscape.

¹⁴ Gordon A., Langford W.T., Todd J.A., White M.D., Mullerworth D.W, Bekessy S.A. (in press) "Assessing the impacts of biodiversity offset policies", *Environmental Modelling and Software*.

¹⁵ Bekessy, S. A., B. A. Wintle, et al. (2010). "The biodiversity bank cannot be a lending bank." *Conservation Letters* 00: 1-8.

as being merely a theoretical process. Transparent assessment of whether appropriate avoidance measures have been undertaken is essential – particularly for MNES. Otherwise, it is too easy for proponents to place undue reliance on offsetting in order to obtain project approval. The development and implementation of an Offsets Policy therefore requires clear and transparent instruction on how proponents should be seeking to undertake avoidance measures.

Red Flag Areas'

The Draft Policy states (at 4) that '[o]ffsets are not intended to make proposals with unacceptable impacts acceptable.' ANEDO submits that further clarity is required on this statement. The Policy should provide further guidance on what is meant by unacceptable impacts. Some species or vegetation may be so threatened that it is impossible to apply an offset. As we have previously submitted, it is essential that the regulatory framework set out clear sites, species and communities ('red flag areas') where it is simply not appropriate to offset or allow any further detrimental impact.¹⁶

Mitigation

ANEDO understands that at present, DSEWPaC does not provide guidelines on when it will be appropriate to mitigate biodiversity impacts, and how mitigation should be undertaken. In the absence of such guidelines, it would seem very difficult to assess adequately and consistently whether reasonable mitigation attempts have been made by a proponent. In this circumstance, as noted above in relation to 'avoidance', it is too easy for a proponent to progress to the offsets stage in a development approval process.

Further specific wording suggestions in this area

The Draft Policy states at 4.1 that '[o]nly after all reasonable avoidance and mitigation measures have been identified will an offset be considered'. ANEDO believes that this should be emphasised much more forcefully in the Draft Policy, including being explicitly stated at the following points:

- In 'Box 1' on page 4 of the Draft Policy;
- At 5.2 (Assessment stage), there should be a further bullet point, headed '**Should the proposal be rejected at this stage?**' between 'How severe are the impacts likely to be?' and the following point, 'Are offsets a suitable approach?' The addition of this bullet point, when considered with the point that follows it, will make clear that there are some impacts that, if they cannot be avoided or mitigated, will render the proposal inappropriate; and that the appropriate approach for the decision-maker will be to reject the proposal at this stage.

¹⁶ ANEDO, *Submission on the Use of environmental offsets under the EPBC Act 1999 – Discussion Paper*, 3 December 2007, http://www.edo.org.au/edonsw/site/pdf/subs/071204epbc_offsets.pdf.

Appropriate conservation goals

Improve or maintain' standard – or something better?

The third of the four key aims of the Draft Policy is to 'deliver improved environmental outcomes by consistently applying offsets policy'. Box 1 of the Draft Policy states that suitable offsets must 'deliver an overall conservation outcome that improves or maintains the viability of the aspect of the environment that is protected'. At 4.2.1, the Draft Policy states that direct offsets involve 'maintenance or improvement of [the relevant] land through positive conservation actions'. Similarly, at 6, the Draft Policy states that '[o]ffsets must deliver an overall conservation outcome that *improves or maintains* the viability of the aspect of the environment that is protected by national environmental law and affected by the proposed development'.

ANEDO submits that the 'improves *or maintains*' standard is insufficient, and that an offsets policy should have the goal of *enhancing* environmental quality. The 2008 Discussion Paper on an Environmental Offsets Policy of the Environment Protection Authority in Victoria proposes a 'net environmental benefit' standard.¹⁷ Similarly, the Environmental Protection Authority in Western Australia has proposed a 'net environmental benefit' standard, stating that 'this policy position recognises that the environment has been significantly compromised in the past and that halting and reversing the decline of the environment is now a priority'.¹⁸ ANEDO supports adoption of a standard of 'net environmental benefit' or 'enhancing environmental quality'.

Suitability of offsets

Like-for-like offsetting

The Policy should clarify, in Box 1 as well as elsewhere, that all offsetting should be 'like-for-like'. This means that any impact on land of a particular environmental value must be offset through a site of the same environmental value. The Draft Policy should make clear that a proposal to offset an environmental impact through a greater amount of land with lower environmental values will not be accepted. At present, the Draft Policy simply states (at 6) that a like-for-like approach will be adopted 'wherever possible'. ANEDO submits that offsets should always be like-for-like, in order to ensure that protected matters are not systematically degraded over time. If like-for-like offsets are not available, it should be questioned whether offsetting is appropriate, given the significance of the matters that are protected under the EPBC Act.¹⁹

Additionality of the offset

The principle of 'additionality' is a key principle in relation to the use of offsets.²⁰ At present, the Draft Policy states (at 6, emphasis original):

¹⁷ Environment Protection Authority Victoria, (June 2008) *Discussion Paper: Environmental Offsets* <[http://epanote2.epa.vic.gov.au/EPA/publications.nsf/2f1c2625731746aa4a256ce90001cbb5/cfa2d441a0e31fb7ca2574670004b739/\\$FILE/1202.3.pdf](http://epanote2.epa.vic.gov.au/EPA/publications.nsf/2f1c2625731746aa4a256ce90001cbb5/cfa2d441a0e31fb7ca2574670004b739/$FILE/1202.3.pdf)>

¹⁸ Environmental Protection Authority Western Australia (January 2006) *Environmental Offsets, Position Statement No 9*

¹⁹ See *Caruso and Ors v Sydney Water Corporation* [2008] NSWLEC 320.

²⁰ See ANEDO's *Submission on the Use of environmental offsets under the EPBC Act 1999 – Discussion Paper*, 3 December 2007, http://www.edo.org.au/edonsw/site/pdf/subs/071204epbc_offsets.pdf.

an *improved overall conservation outcome* is not achieved by an offset that simply increases the amount of habitat or ecological community that is *protected* by covenant or other mechanism. Protection must be matched by management of the protected matter that is impacted.

At 6.11, the Draft Policy states '[o]ffsets must deliver a conservation outcome that would not otherwise occur'. Despite these statements, the Draft Policy does not provide clear decision-making criteria for determining when an offset is additional.

(The Assessment Guide allows for offset points to be earned where land tenure is secured and the offset maintained in current condition. This factor is discussed further below. For the present point on additionality, we note that such activity is unlikely to be additional.)

In ANEDO's view, protecting existing habitats only provides an additional conservation outcome:

- if habitat is good quality – where it is under a *real threat* of clearing or significant decline in quality;
- if habitat is not of good quality – where it is *actively managed* in perpetuity to achieve a *gain in biodiversity values* equivalent to the loss.

Examples of appropriate decision-making criteria for determining when an offset is additional include:

- 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.

ANEDO emphasises that offsets must not be used as a substitute for management and conservation practices that should rightly be the responsibility of government, for instance the development and implementation of recovery plans. For example, allowing points to be earned for recovery actions, as is currently permitted in the Assessment Guide, risks undermining the EPBC Act by making funding for recovery actions contingent on the destruction of other areas of conservation significance.

Use of indirect offsets

ANEDO continues to oppose the use of indirect offsets to achieve the goal of enhancing, or even 'improving or maintaining', environmental quality.²¹ Four reasons support this position.

1. It is very difficult, if not impossible, to measure the environmental gains when the results of indirect offsets are balanced against the losses occasioned by a development. ANEDO submits that in order for an offsets policy to be viable, the gains must be measurable with a reasonable degree of certainty. This is simply not the case when indirect offsets are deployed.

²¹ See ANEDO's *Submission on the Use of environmental offsets under the EPBC Act 1999 – Discussion Paper*, December 2007, http://www.edo.org.au/edonsw/site/pdf/subs/071204epbc_offsets.pdf.

2. Further to the above, the relationship between many types of indirect offsets and the environmental gain sought to be achieved is dependent on many contingent and uncertain factors. The assessment guide currently contemplates, for instance, that funding for research may comprise part of an acceptable offset. In order to achieve an effective environmental outcome, however, research must not only be performed to an acceptable level, but it must also be implemented and there must be systems in place for evaluation of its impacts. This in turn is dependent on adequate funding. The uncertainty inherent in this process renders such forms of indirect offsetting ill-suited to achieving enhanced environmental outcomes.
3. Effective offsets must be additional to activities that would have been undertaken in the normal course of events. It is difficult to demonstrate that indirect offsets comprise the requisite degree of additionality.
4. The use of indirect offsets contradicts the principle of ‘like for like’ offsetting that, in ANEDO’s view, should be a fundamental component of any offset strategy.

ANEDO emphasises, therefore, that indirect offsets should play no part in an offsets policy. To the extent that indirect offsets are nonetheless included, ANEDO has specific comments on the indirect offsets proposed as part of the Assessment Guide. These are set out in the discussion of the Assessment Guide contained in Appendix A to this submission.

Relationship with State offsetting and other biobanking schemes

ANEDO notes that the Draft Policy supports the use of market schemes for biodiversity offsetting, and also notes DSEWPaC’s intention to continue to negotiate, via the Council of Australian Governments (COAG), a set of national standards for biodiversity banking.²²

ANEDO urges DSEWPaC (and COAG) to adhere to the highest possible standards when determining these national standards – even in circumstances where State policies might differ from such standards.

ANEDO also notes the findings of the Hawke Review²³ in relation to biodiversity banking schemes. Of particular relevance is the emphasis on a systematic approach to biobanking, which would help to alleviate some of the pitfalls of ad hoc mitigation and offsetting measures.

The Hawke Review also discusses a strategy ‘that the loss of biodiversity values should only be compensated by sites on which the biodiversity offset has already been rehabilitated or re-established’ (at 3.93). The Review goes on to note that in this strategy, biobanking would be used as a savings bank, such that trading of credits would only be possible once it was demonstrated that assets had matured. ANEDO strongly supports this approach.

Compliance, enforcement and responsibilities of proponents

In 2007, ANEDO noted its support for Principle 8 of the Government’s previous draft offsets policy: “*Environmental offsets should be enforceable, monitored and audited.*” Despite this direct language, we understand that data on monitoring and auditing of offsets to date is limited, and not readily available.

²² Draft Policy, p 3.

²³ *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, Final Report, October 2009, <http://www.environment.gov.au/epbc/review/publications/pubs/final-report.pdf>

The language of the current Draft Policy has shifted. It is more detailed, but less directive:

6.1.5 A suitable offset must have transparent governance arrangements, including being able to be readily measured, monitored, audited and enforced (emphasis added)

More detail is needed on monitoring, auditing, enforcement and compliance measures. ANEDO strongly believes that such measures must form a part of the Policy from the outset.

The Draft Policy states: '[p]roponents, or their contractors, must report on the success of the offsets so that conditions of approval can be varied if the offsets are not delivering the desired outcome.' ANEDO supports a mechanism that will allow revisiting conditions of approval. As illustrated in the case study below, compliance can obstruct the effectiveness of an offset strategy.

Case Study: *Gerroa Environment Protection Society Inc v Minister for Planning & Anor* [2008] NSWLEC 173

The EDO(NSW) acted in this proceeding for the Gerroa Environmental Protection Society Inc against the Minister for Planning's approval of the Gerroa sand mine, under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW). In the NSW Land and Environment Court, Preston CJ made orders to improve the conditions of approval. The proponent was required to maintain a vegetation corridor until it could be established that functionality had been achieved on an approved offset site.

Contrary to these orders, the proponent commenced clearing activity on the corridor.

Gerroa Environmental Protection Society is now seeking advice on its enforcement options.

ANEDO supports the use of sanctions that will prevent non-compliance with offset conditions from becoming a cost-effective strategy for proponents. In ANEDO's opinion, the Policy should make reference to a scale of appropriate sanctions.²⁴

ANEDO understands that DSEWPaC is investigating the options for monitoring compliance and enforceability, and that it intends to strengthen its enforcement mechanisms. As always, the extent to which DSEWPaC will be able to undertake enforcement and compliance measures will depend on its resource constraints – hence the current consultations and policy development on cost recovery options.

In ANEDO's view, a policy that cannot be adequately enforced is a policy that should not be approved. This is especially the case for offsets under the EPBC Act, considering that these are designed to protect MNES, and that failures to comply with offset requirements can be expected to have a deleterious effect on the nation's environment.

As ANEDO has previously noted,²⁵ the preferable approach to offsetting is that an offset should be fully implemented and verified prior to a development proposal going ahead. Absent prior implementation, ANEDO submits that performance bonds should be used to guarantee that proponents will deliver environmental outcomes. It should also be made clear that any risk of failure of an offset should rest with the proponent.

Additionally, the Policy should provide guidelines on:

²⁴ ANEDO notes that the EPBC Act presently contains an offence provision for non-compliance with the conditions of an approval – see s 142A.

²⁵ ANEDO, *Submission on the Use of environmental offsets under the EPBC Act 1999 – Discussion Paper*, 3 December 2007, http://www.edo.org.au/edonsw/site/pdf/subs/071204epbc_offsets.pdf

- The period over which monitoring will be required;
- The funding for monitoring activities – in ANEDO’s view, funding should be built into project cost from the beginning, including on a ‘cost recovery’ basis as necessary;
- Circumstances in which remedial actions will be required;
- Types of remedial actions that may be appropriate;
- Liability issues for failed offsets.

Duration of Offset

The Draft Policy states that an offset must be enduring. Figure 2 on page 12 states: ‘[i]s the proposed offset enduring? That is, will the benefit last as long as the impact (*not* as long as the activity)?’

ANEDO notes that in many cases, impacts will be permanent. There will therefore be a concomitant obligation to ensure that any offset site is maintained in an appropriate form, in perpetuity. There is a lack of discussion in the Draft Policy as to any legal mechanism which would assure that this outcome is obtained. ANEDO understands that the availability of enforcement mechanisms may vary between jurisdictions; for example, as to whether there is provision to note that land is used as an offset on the Certificate of Title for the site. ANEDO urges that all available mechanisms be used to ensure that users of sites are aware that they are protected as offsets. ANEDO also understands that DSEWPaC proposes to enact a register of offset sites. ANEDO encourages this initiative and supports measures to ensure that future users of offset sites are sufficiently informed about the existence of the register to consult it before undertaking any activities on the site.

Unanticipated Outcomes

The Draft Policy does not address the risk of unanticipated events that destroy the value of the offset site, such as bushfires. The Policy should make clear the responsibilities of the various parties if such an event were to occur; and note whether alternative biodiversity management strategies would be entered into at this stage. Consistently with its stated objective of avoiding perverse environmental outcomes, the Policy should ensure that it does not (inadvertently or otherwise) provide incentives for proponents to fail to take appropriate or reasonable precautionary measures against ‘acts of God’.

The consideration of these events should also take account of increased likelihood of extreme events as a result of climate change.²⁶ In these circumstances it is all the more important that the legal and practical mechanisms in place to respond to those events are effective, particularly with regard to biodiversity outcomes.

²⁶ Diffenbaugh et al have found that “extreme temperature and precipitation events are likely to respond substantially to anthropogenically enhanced greenhouse forcing and that fine-scale climate system modifiers are likely to play a critical role in the net response. At present, such events impact a wide variety of natural and human systems, and future changes in their frequency and/or magnitude could have dramatic ecological, economic, and sociological consequences.” See: Diffenbaugh, N. S., J. S. Pal, et al. (2005). "Fine-scale processes regulate the response of extreme events to global climate change." *Proceedings of the National Academy of Sciences of the United States of America* **102**(44): 15774-15778.

Appendix A – Comments on the draft Environmental Offset Assessment Guide