

Submission in response to:

Northern Territory Biodiversity Offset Policy

Prepared by Environmental Justice Australia, November 2022

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Submitted to:

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About Environmental Justice Australia

Environmental Justice Australia (EJA) is a national public interest legal centre. We use the law to empower communities, to protect and regenerate nature, to safeguard our climate and to achieve social and environmental justice.

We are proudly non-profit and predominantly funded by donations from the community. Our legal team combines technical expertise and a practical understanding of the legal system to protect communities and our environment.

EJA has a long history in advocating for the protection of ecosystems and has worked closely with people, communities and organisations to do so. We have brought litigation on behalf of brave clients to protect key ecosystems and endangered species.

Overview

1. EJA welcomes the opportunity to provide comment on the Northern Territory Department of Environment, Parks and Water Security (**the Department**) draft Biodiversity Offset Policy (**Offset Policy**) and draft Biodiversity Offset Technical Guidelines (**Offset Guidelines**). We understand the Department hope to finalise the draft Offset Policy and Guidelines before the end of 2022.
2. The Northern Territory's regulatory framework for biodiversity offsetting is found primarily in the *Environment Protection Act 2019* (NT) (**EP Act**). The EP Act requires proponents to follow the mitigation hierarchy, and only use offsets where adverse impacts on the environment cannot be avoided or mitigated (s 26, EP Act). To support the use of offsets, the Northern Territory has developed an Offsets Framework, which, in relation to biodiversity offsetting, consists of the Offset Principles, Offset Policy and Offset Guidelines.
3. This submission addresses three main areas in relation to the Offset Policy:
 - a. Recent reviews of offset schemes at the federal and state levels have revealed major flaws in the operation of offset schemes which should be addressed.
 - b. The lack of biodiversity data, fine scale vegetation mapping and biodiversity targets in the Northern Territory makes it difficult to assess 'net gain', which is the overarching goal of the Offset Policy.
 - c. Key elements of the policy require further clarity, including:
 - i. Additionality principle;
 - ii. Duration of offset projects;
 - iii. Threshold for application of the policy;
 - iv. When offsets might not be appropriate; and
 - v. Reporting and monitoring requirements.
4. EJA submits that:
 - a. The Offset Policy should respond directly to recent criticisms of offset mechanisms, and adopt a more explicitly defined ecosystem-based approach to biodiversity protection in the Northern Territory.
 - b. The Offset Policy and Guidelines should not be introduced until the Northern Territory has developed a biodiversity strategy and fine-scale vegetation and biodiversity data to inform the goal of 'net gain' outlined in the policy.
 - c. The additionality requirement should be more clearly defined.
 - d. Offset sites should be required to exist in perpetuity.
 - e. The Offset Policy and Framework should apply to all land clearing projects to which s 26(1)(c) of the EP Act applies.

- f. 'Unacceptable impact' should be defined and specific actions deemed inappropriate for offsetting.
 - g. The Offset Policy should respond directly to recent criticisms regarding reporting, evaluation, and compliance mechanisms in offset schemes.
5. EJA look forward to the opportunity to engage further on the Offset Policy. Please do not hesitate to contact us if further information is required.

A. Recent Offset Policy critiques and an ecosystem based approach

6. We refer to and welcome the following commitment in the Offset Policy:

"The NT approach to biodiversity offsets seeks to recognise the unique circumstances of the Territory, where there are largely unfragmented landscapes, where land tenure is primarily Aboriginal freehold or pastoral leasehold, and where the primary threats to biodiversity operate and must be managed at landscape scales. Offsets should be applied in a way that can best contribute to broader environmental targets in the Territory, and where possible be delivered by, and maximise any co-benefit to, regional and remote communities. Evidence from poor performance of offset mechanisms in other jurisdictions suggest offsets should focus on restoration offsets rather than averted loss offsets..."

7. A common criticism of offsets is that they are limited in their effectiveness and generally result in an overall decrease in habitat. A 2010 article found that ecosystems-based approaches are more effective than habitat-based offsets in protecting flora and fauna,¹ and a more recent article notes the importance of target setting as a pre-requisite for offset implementation.² These propositions have generally been supported by a number of recent reviews of offset mechanisms in Australia.
- a. The 2020 Graeme Samuel Review recommended immediate changes to the application of environmental offsets under the EPBC Act to ensure offsets do not contribute to environmental decline³; and
 - b. A 2022 NSW Audit Report recommended changes to reporting lines, collation of data and evaluations, implementation of a long-term strategic biodiversity plan and an intervention framework that includes reporting on offsets that cannot be met, to avoid continued ecosystem decline.⁴

¹ Martine Maron et al, 'Can Offsets Really Compensate for Habitat Removal? The Case of the Endangered Red-tailed Black Cockatoo' (2010), 47, *Journal of Applied Ecology*, 348, 354.

² Jeremy Simmonds et al, 'Moving from Biodiversity Offsets to a Target-based Approach for Ecological Compensation' (2019), 12, *Conservation Letters*, 1, 3.

³ Graeme Samuel, *Independent Review of the EPBC Act – Final Report* (Commonwealth of Australia, 2020), Recommendation 27, Box 28.

⁴ Auditor General NSW, Parliament of NSW, *Performance Audit: Effectiveness of Biodiversity Offset Scheme*, (Final Report, 2022), pp 15-16 (**NSW Audit Report**).

8. Despite these reviews, the Offset Policy states that if an offset is required in the Territory under the EPBC Act, the Territory will not require additional or different offsets.⁵ In light of the Samuel review, we consider the Territory should not accept Commonwealth offsets until the recommendations of the review have been implemented.
9. We also submit that the Northern Territory Offset Policy should respond directly to recent criticisms of offset mechanisms in Australia and adopt a specific and explicitly defined ecosystem-based approach to biodiversity protection in the Northern Territory.

B. Lack of fine-scale vegetation mapping and monitoring of conditions means that assessment of ‘no net loss’ is meaningless

10. The Offset Policy recognises that fine scale vegetation, environmental mapping and biodiversity data does not exist in the Northern Territory.⁶ We note further that there is no biodiversity or conservation strategy in the Northern Territory.
11. The Offset Policy requires that offsets are in areas that are in moderate to poor condition, and that offsets lead to ‘net gain’ in ecological condition of natural habitat in an area. There is no requirement for ‘like for like’ matching. The Offset Framework also requires that proposals identify Territory targets and the expected environmental outcomes arising from the offset.⁷ As noted above, we welcome the commitment to a ‘target-based’ approach, and management at a landscape level to achieve net gain⁸, but are concerned that without further baseline ecological data, the success of an offset program will be difficult (potentially impossible) to monitor and evaluate.
12. It is unclear: (a) how proponents will determine key factors to design an effective offset program; and (b) how decision-makers will assess and monitor proponent proposals to ensure that offsets are achieving their legislative intention more generally. There is scarce data about threatened species and their habitats in many areas of the Northern Territory, making it difficult to identify key biodiversity values requiring protection, as well as key threats. General threats such as fire, weeds and feral animals are referred to in the Offset Guidelines but exactly how management of these threats will impact biodiversity values, and which values they will impact is unclear. Biodiversity values are not defined or specified in the Offset Policy or Guidelines.
13. Conservation biology expert Martine Maron, in a chapter titled ‘Is “no net less of biodiversity” a good idea?’, states that without an explicit frame of reference and quantified counterfactual scenario, terms like ‘no net loss’ are meaningless and potentially misleading.⁹ A recent audit of the NSW Biodiversity Offsets Scheme stated, “there are no biodiversity-specific outcome measures for the Scheme, such as measures

⁵ Northern Territory Government, ‘Draft Biodiversity Offset Policy: Northern Territory Offsets Framework’ (2022) p 7 (**Draft Offset Policy**).

⁶ *Ibid*, p 8.

⁷ Northern Territory Government, ‘Northern Territory Offsets Principles: Northern Territory Offsets Framework’ (2022) (**Offset Principles**), p 8; and ‘Draft Offset Policy’ (n 4), p 7.

⁸ Draft Offset Policy (n 5), p 7.

⁹ Martine Maron, ‘Chapter 22: Is “no net loss of biodiversity” a good idea?’ in *Effective Conservation Science* (October 2017), pp 141-146.

of its expected contribution to maintaining biodiversity at a State and regional level”¹⁰ and that the lack of clarity around what the Scheme should be achieving meant that it was difficult to determine what an acceptable level of ‘compensation’ would be.¹¹ The report was labelled ‘utterly damning’ by the NSW Nature Conservation Council and the scheme was noted by the Opposition to be unable to fulfil its purpose without substantial reform.¹² Without further clarity on how net gain is measured and what specific biodiversity outcomes are expected, the Offset Policy is likely to face similar issues as the recent audit found in NSW.

14. Further, the 2021 State of Environment Report similarly stated that it is becoming clear that some types of impacts can be difficult to offset and that the underlying principle of ‘no net loss’ can often not be demonstrated.”¹³ Not being able to demonstrate, or even evaluate, whether no net loss is being achieved in offsetting represents a significant information gap between policy goals and outcomes, leaving governments and societies without knowledge about the impacts of biodiversity offsetting schemes and unable to improve them.¹⁴
15. According to a 2022 article by Kujala et al, some of the minimum requirements for a credible offset register include:
 - a. Spatial and temporal information about the area;
 - b. Estimated biodiversity losses and metrics used;
 - c. Linkage to other relevant databases; and
 - d. Metrics on how developments and offsets affect biodiversity at landscape level.¹⁵
16. Scientific and policy thinking on compensatory arrangements for loss or destruction of biodiversity is moving beyond offsetting transactions to ecosystem-based target-setting.¹⁶ And while the Offset Principles appear to recognise that a target-based approach is required¹⁷, the reality is that without a biodiversity strategy or fine-scale biodiversity data or mapping, an offset policy is unlikely to achieve a ‘net gain’ result.
17. In a context where mammal populations are in sharp decline, with many at risk of extinction;¹⁸ where climate change is projected to have significant impacts on biodiversity of the Northern Territory as early as 2030, and extreme impacts by 2070;¹⁹ and where three of the Northern Territory’s ecosystems – the tropical savanna, the arid

¹⁰ NSW Audit Report (n 4), p 8.

¹¹ Ibid, p 33.

¹² Lisa Cox, ‘Utterly damning’ review find offsets scheme fails to protect NSW environment, *The Guardian*, (online, 30 August 2022).

¹³ Helen Murphy and Steven van Leeuwen, ‘Biodiversity’ in *Australia State of Environment* (Independent Report, 2021), 142 (**Commonwealth State of the Environment Report**).

¹⁴ Kujala H, et al, One Earth 5, ‘Credible biodiversity offsetting needs public national registers to confirm no net loss’, (June 2022) p 651

¹⁵ Ibid, p 652

¹⁶ Jeremy Simmonds et al, ‘Moving from Biodiversity Offsets to a Target-based Approach for Ecological Compensation’ (2019), 12, *Conservation Letters*, pp 1-11.

¹⁷ Offset Principles (n 7), p 5.

¹⁸ See for example Fitzsimons, J., Legge, S., Traill, B., & Woinarski, J., ‘Into Oblivion? The Disappearing Native Mammals of northern Australia’ (2010) *The Nature Conservancy, Melbourne*; and Preece, N., Fitzsimons, J. ‘Gaps in Monitoring Leave Northern Australian Mammal Fauna with Uncertain Futures’ (2022), 14, *Diversity*, 158.

¹⁹ Webb, L., & Hennessey, K., ‘Climate Change in Australia: Projections for Selected Australian cities’ (2015), *CSIRO and Bureau of Meteorology Australia*, p 8.

zone and its coastal mangroves meet the criteria of “collapsing”,²⁰ we submit that the Offset Policy should not be implemented until:

- a. further baseline data about biodiversity values is obtained;
- b. a territory wide biodiversity strategy is implemented that clearly defines targets and outcomes to inform the Offset Policy; and
- c. a direct response is provided to the findings and recommendations outlined in the audit report of the NSW Biodiversity Offset Scheme.

C. Lack of clarity in key areas of the Offset Policy

18. In addition to significant difficulties that are likely to be faced to achieve a policy objective of ‘net gain’, there are also specific elements of the policy that are inadequate or require further definition (outlined below). This is not an exhaustive list.

C1. Additionality principle

19. The Offset Policy states that offsets must be ‘additional’ but does not state specifically what this means.
20. For example, the Offset Guidelines indicate that weeds are a ‘key threat’ to biodiversity in several habitats, and that management of key threats is intended to ‘improve habitat condition’ and contribute to the objective of net gain.²¹ It states further that management benchmarks for weeds in a ‘Zone A area’ includes ‘eradication, to align with legislative weed management requirements.’²²
21. We note that landowners are already required to take reasonable measures to prevent weed infestations and, in some cases, follow statutory weed management plans. It is unclear how management of weeds under the Offset Policy would be additional to requirements under the *Weeds Management Act 2001* (NT). The Offset Policy also states that preferred areas for offsetting may be areas that are already marked as high priority conservation areas under Healthy Country Planning.²³
22. In offsetting, additionality generally must satisfy three requirements:
 - a. Newness – project must not have been commenced prior to registration of the offset project.
 - b. Regulatory – project must not already be required by law.
 - c. Government – project must not be likely to be carried out under an alternative government program in the absence of the offset project.²⁴

²⁰ Bergstrom, D, et al. ‘Combating ecosystem collapse from the tropics to the Antarctic’, (2021) 27 *Global Change Biology*, 1692-1702.

²¹ Northern Territory Government, ‘Draft Biodiversity Offset Guidelines: Northern Territory Offsets Framework’ (2022), p 7 (**Draft Offset Guidelines**).

²² *Ibid*, p 34.

²³ *Ibid*, p 8.

²⁴ Andrew Macintosh et al, ‘The Emissions Reduction Fund’s Landfill Gas Method: An Assessment of Its Integrity’ (Australian National University, 2022).

23. It appears that management of weeds as contemplated by the Offset Policy and Offset Guidelines in many circumstances will already be required by law, and that offsets in areas already marked as high priority in Healthy Country Plans may be carried out under alternative programs. It is generally not clear how the Offset Policy interacts with existing regulatory and policy requirements.
24. We submit that the use of the term 'additional' in the policy should be more clearly defined, and specifically exclude actions that are already required by law or policy.

C2. Permanence of offset requirements and projects

25. The Offset Policy states that projects will generally be carried out for a minimum of 15 years in the arid biome, and 25 years in the monsoonal biome.²⁵ We consider offset sites should be permanent.
26. It has been demonstrated that lack of permanence leads to insecurity at offset sites, and can decrease the survival of planted trees or other species.²⁶ For example, in south east Australia, it took 100 years for trees to reach the threshold size to feed a particular cockatoo species and this was also the age at which the trees were no longer likely to die.²⁷ Temporary offset sites naturally pose a risk to the ongoing protection of biodiversity and reduces the effectiveness of a project.
27. Furthermore, and as noted above, without data about the biodiversity values that require protection, it's difficult (almost impossible) to assess what an appropriate length of time to protect those values at another site might be.
28. We note that in both NSW and Victoria offset projects require landholders to manage the land 'in perpetuity' to preserve or improve biodiversity.²⁸
29. We submit that offset sites should require a change in tenure to conservation site, or on title covenants to ensure permanence and ongoing protection.

C3. The threshold for application of the policy is narrow

30. The Offset Policy states that it only applies to actions that are referred for assessment under the EP Act, or to any other Act prescribed under the *Environment Protection Regulations 2020* (NT).²⁹ We note that no Northern Territory Acts appears to have been prescribed under the Regulations.
31. Relatively few actions with environmental impacts are referred for assessment under the EP Act. For example, land clearing applications under 5,000 hectares are generally not

²⁵ Draft Offset Policy (n 5), p 12.

²⁶ Maron, 2010 (n 1), p 4.

²⁷ Ibid.

²⁸ NSW Audit Report (n 3), p 19; and Victorian Auditor General's Office, *Offsetting Native Vegetation Loss on Private Land* (Interim Assurance Report, May 2022), p 19.

²⁹ Draft Offsets Policy (n 5), p 4.

referred for assessment,³⁰ and land clearing proposals under 5,000 hectares are routinely approved without thorough environmental assessments or offsetting.³¹ This is despite the obvious cumulative impact of large-scale land clearing on biodiversity.³² In fact, land clearing in the Northern Territory continues to increase at a rapid rate.

32. By way of comparison, we note that in Victoria, all land clearing that is not exempt or unauthorised requires offsetting if impacts cannot be avoided or mitigated. There are also circumstances where clearing is not permitted due to the potential for environmental harm, for example where there is a threatened 'ecological vegetation class' or where there is a localised habitat for a rare or threatened species.³³
33. If the mitigation hierarchy and offset requirements apply only to actions that are referred for assessment under the EP Act, land clearing will continue to have a major impact on biodiversity loss in the Northern Territory unchecked.
34. Section 26 of the EP Act outlines the 'environmental decision-making hierarchy', and states this hierarchy applies to decision-makers, proponents and approval holders in making decisions in relation to all actions that affect the environment. This provision has potentially broad application to projects in the Northern Territory.
35. We submit that the Offset Policy should state explicitly that the decision-making hierarchy in s 26 of the EP Act applies broadly, and that all land clearing proposals to which s 26(1)(c) of the EP Act applies, should also be subject to the Offsets Framework and Policy.

C4. When offsets might not be appropriate

36. The Offset Policy states that offsets are not always an appropriate response, and that offsets cannot be used to make acceptable an activity with unacceptable impacts. Offsets may also be inappropriate where the magnitude of a residual impact cannot be determined.³⁴
37. The Offset Policy does not define the meaning of unacceptable impact, nor is this term defined in the EP Act. By way of comparison, in Victoria, Guidelines state the inability to secure a species offset can indicate that the proposed removal of native vegetation will have an unacceptable impact on habitat for that species and that an alternative to offsetting must be implemented.³⁵

³⁰ Northern Territory Government, Department of Environment, Parks and Water Security, 'Land Clearing Guidelines: Northern Territory Planning Scheme', (2021) p 13.

³¹ For example, see permit to clear 3,729 hectares of land at Newcastle Waters Station dated September 2022 and permit to clear 3,691.91 hectares of land at Vermelha Station dated May 2022.

³² See Commonwealth State of the Environment Report (n 12); and NSW State of the Environment Report both of which note that land clearing continues to have one of the most significant impacts on biodiversity.

³³ Department of Land, Water and Planning, 'Guidelines for the removal, destruction or lopping of native vegetation' (2017), pp 8-10 (**Victorian Guidelines for Removal of Native Vegetation**).

³⁴ Draft Offset Policy (n 5), p 6.

³⁵ Victorian Guidelines for Removal of Native Vegetation (n 33), p 36.

38. We submit that further detail is needed to define ‘unacceptable impact’ and that specific impacts or no-go zones are identified and defined.

C5. Reporting and monitoring requirements are inadequate

39. The Offset Policy states that delivery of offsets must be monitored, adjusted if required and reported as specified in the biodiversity offset approval condition. Reporting is required at specific intervals and compliance will be monitored by the regulator.
40. Monitoring, reporting and compliance were identified as key issues in recent reviews of offset mechanisms at both the state and federal level. In NSW, the audit report found that the Department failed to collate data on biodiversity development assessment reports for local development, as well as other reports³⁶, and that there was no escalation process to deal with quality issues.
41. The Offset Policy does not identify what factors should be reported on, or what methods will be used to evaluate an offset program. It states that enforcement will be carried out by the regulator, and the EP Act provides that where an offset is not being appropriately implemented, an environmental approval can be amended (s 106, EP Act). The Offset Policy does not provide an escalation process where non-compliance is identified.
42. We submit that substantially more detail is required in relation to the reporting, evaluation and compliance mechanisms associated with the Offset Policy and Guidelines, and that the Offset Policy should directly respond to the findings of the recent reviews of state and federal offset schemes.

³⁶ NSW Audit Report (n 4), p 48.