

# Biodiversity offsetting could help protect Britain's wildlife

**DEFRA proposal would inject funds into conservation and give developers flexibility.**  
By Denise Chevin

The speed of policy changes since the election means most developers have missed one environmental proposal that is being mooted.

The Department for Environment, Food and Rural Affairs has been asking for comment on a proposal to protect Britain's wildlife, whereby developers would compensate for any loss of flora and fauna by paying to create or restore an area of habitat elsewhere. This is expected to be a plank in the government's natural environment white paper, to be published this spring.

To its champions, this new trading mechanism known as "biodiversity offsetting" would inject much-needed funds into conservation, while giving developers more flexibility in the way they mitigate against habitat loss. Critics fear it would allow developers to buy their way out of wrecking the environment and concrete over previously untouchable land. The few housebuilders and developers that have been tuned in to the debate are concerned it could add to the planning quagmire or turn into another tax on development.

The scheme would, however, force developers and local authorities to start putting a higher price tag on nature. Neil Harwood, ecologist and associate at consultant Arup, says it would provide "potentially paradigm changes in the way we approach projects".

The UK already has European Union laws that protect endangered species, but this approach

is failing to stop biodiversity decline. Nearly 500 species of animals and plants have become extinct in England since 1800, and Natural England says more are under threat (table, below).

DEFRA estimates that, of the 9,550 ha developed in 2008, half of this would have sustained some sort of biodiversity loss.

Ecologist David Hill has devised a market-driven financial model for biodiversity trading and has set up offsetting company the Environment Bank. This would compile a databank of land, in which developers could buy "conservation credits". It could be made compulsory for them to invest in schemes.

At present, planning laws require developers to carry out environmental impact assessments, which includes biodiversity loss and how they expect to mitigate this, mostly on site.

"Mitigation of habitats within site boundaries is mostly a waste of time and money," says Hill. "Often it amounts to no more than a bit of gardening, or creating habitats for shopping trolleys."

However, Hill says the solutions are often signed off by local planners because the scheme ticks all the other boxes, and nobody checks whether the developer follows through on its plan.

## Natural benefits

Hill believes the system would bring many benefits to developers such as greater net development areas on their sites; reduce delays by removing uncertainty in the planning process; and ensure their money went into genuinely enhancing the environment, rather than token gestures.

Sarah Cary, sustainability officer at British Land, can see the benefits but is cautious that, in practice, it is "very complicated". Janet Kidner, head of sustainability at Lend Lease, says the proposal could provide developers with more flexibility.

John Slaughter, director of policy at the Home Builders Federation, agrees: "If it could provide a service that could easily discharge the mitigation requirement, that would be helpful. But it could end up making the planning system more complicated."

Simon Fox, sustainability officer for Prologis, sees it as an opportunity: "We hope to provide land on which biodiversity credits could be spent. The fear is that the proposal will end up being diluted to just another tax rather than a trading aspect."

Developers are probably right to feel nervous. DEFRA is trying to make biodiversity offsetting attractive, while reassuring the wildlife lobby it is not about to offer developers a licence to throw up houses where ever they want. These plans would not override the existing legislation that protects endangered species or areas of Special Scientific Interest, so developers would not be spared the grief that comes with finding great-crested newts or Dartford Warblers.

It is also going to be difficult to assess the biodiversity loss and what nature is worth. DEFRA has a system that assigns types of habitat into tariff bands that are worth a different number of credits (box, right). Then there is the question of how much conservation credits might actually cost.

Figures on DEFRA's website amount to just £900/ha to restore land to wetland. However, Hill says this

**Loss, depletion and decline of UK wildlife**

Species group	Number of native English species	Number (and percentage) that are now lost	Number of surviving species	Number of surviving species on UK Biodiversity Action Plan list	Number not on list but with historically depleted populations	Proportion of surviving species with historically depleted populations or on list
Reptiles	7	0 (0%)	7	7	0	100%
Aquatic mammals	13	2 (15%)	11	11	0	100%
Amphibians	9	2 (22%)	7	4	0	57%
Freshwater fish	37	2 (5%)	35	13	2	43%
Land mammals	49	6 (12%)	43	15	1	37%
Bumblebees	24	4 (17%)	20	5	2	35%
Butterflies	75	18 (24%)	75	23	2	33%
Breeding birds	185	10 (5%)	175	40	8	27%
Vascular plants	1,307	20 (1.5%)	1297	121	194	24%

SOURCE: NATURAL ENGLAND

## LEGAL CASE NEWS Jonathan Ross

### Law of cause and effect can earn commission

#### PUTTING A PRICE ON NATURE

Defra proposes to allocate “tariff” bands to different types of land on the basis of their conservation value. The tariffs would help a developer to calculate the amount of biodiversity activity it would need to need to pay for – or deliver – to offset the impacts of a development.

#### How it might work

A developer proposes a housing scheme that will result in the loss of 6 ha of arable field. The grassland is of low distinctiveness so the habitat score is 8 credits/ha. This means the developer needs to offset 48 units (6 ha x 8 units/ha). Each type of land is allocated a tariff, which tells a developer how much of that sort of land they would need to improve to meet its obligation. The developer would then select their preferred option based on the price.

cost is wildly out. He says it could be more like £50,000/ha and that the lower figures are based on volunteers doing the work and materials being donated.

This is the start of what will be a long and heated debate, but it will force developers to think more about ecology than they do now. ■

Denise Chevin is a former editor of Property Week's sister magazine, Building

**The message** Commission agreements need to be carefully worded.

**The case** A long-running dispute over a £1m commission claim has been resolved (*Glentree Estates, Beauchamp Estates and Savills v Favermead* (21.12.10)).

In 1995, a company owned by Professor Khalili bought 18-19 Kensington Palace Gardens, central London. It sold it for £50m in September 2001 to a trustee company that advised Bernie Ecclestone's family on the basis it would receive a share of any profit on a resale for more than £70m. The house was sold in 2004 to the Mittal family for £57m.

In April 2001, the claimants – Glentree Estates, Beauchamp Estates and Savills – had been jointly instructed by Favermead, another company of Khalili, to act as sole agents on the basis they would receive a fee of £1m on completion of the sale if one of the agents introduced the purchaser. A reduced fee of £200,000 was payable if Favermead introduced the purchaser.

There was a dispute about whether the claimants were entitled to any commission on the 2001 sale as they did not introduce the purchaser. It was decided they had been entitled to £200,000 on this sale, but had waived their right to this sum by agreeing to new arrangements in connection with the onward sale of the property thereafter. The case thus centred on whether commission was payable on the 2004 sale.

In November 2001, the claimants were instructed by Favermead in connection with an onward sale of the property. Notwithstanding the purchase by the Ecclestone trust, Favermead was still involved because of its profit share arrangement.

It aimed to sell it for £85m.

The claimants were instructed to seek a purchaser on the same basis as the fees that had been agreed in April 2001.

In February 2004, Glentree

drew the attention of Mrs Mittal to the property at the asking price of £85m. The Mittals viewed it and offered £65m, which Savills rejected on the basis that any offer had to be more than £70m.

The claimants were not involved further, but later learnt the Mittals had bought it for less than £70m. At first they failed to claim their £1m commission, but later received it.

Favermead argued that no commission was payable as the claimants had to be an effective cause of the sale and were not. It also argued that commission was only payable if the claimants secured a profit share for it by achieving a sale of more than £70m.

The court will ordinarily hold that merely introducing a purchaser is not enough to earn an agent commission, because the agent has to be the effective cause of the sale. However, the Court of Appeal made clear that an agent does not have to be the effective cause if the commission agreement does not require this.

In this case, the commission arrangements were favourable to the claimants, as they were the sole agents who would be entitled to a fixed fee, whatever the price achieved. It would therefore be odd if they introduced the purchaser, but did not even receive £200,000.

The court noted this was an unusual commission agreement, as Favermead no longer owned the house and could not control any sale or the price, which proved to be the case because it was sold for £57m. So, Favermead received no profit share.

The court found the claimants only had to introduce the purchaser to earn commission. The court held that, although another agent finalised the sale, the claimants were the effective cause because they made the introduction. Where an agent makes an introduction and a sale proceeds, the burden is on the paying party to establish the agent was not the effective cause.

Although Favermead received nothing from the 2004 sale, the court held it had to pay the £1m commission, as it had never sought to introduce any term that any sale had to be at any particular price.

**Jonathan Ross is head of property litigation at Forsters**

#### Summing up: *Glentree, Beauchamp and Savills v Favermead*

- An agent has to be an effective cause of a sale to earn commission.
- The Court of Appeal found this does not apply if the contract does not require it.
- Sellers must ensure agents only receive commission when they are the effective cause.

