Biodiversity Offsetting and Conservation Covenants

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There are two potential developments in conservation law which are currently very topical: biodiversity offsetting and conservation covenants. In spring 2012 DEFRA started a two-year pilot on offsetting in conjunction with a number of local authorities, and a further policy paper is expected at the end of this summer, suggesting some enthusiasm for the idea. Meanwhile, the Law Commission's consultation on proposals for conservation covenants closed in late June 2013. Offsetting and covenants are quite separate mechanisms but overlap to some extent since covenants may play a significant role as a means of providing offsets if these do become a feature of our conservation policy.

Biodiversity offsetting

The basic idea of biodiversity offsetting is that where development will cause unavoidable harm to biodiversity, it may still be allowed to proceed so long as compensatory measures are taken elsewhere so as to secure the overall objective of ensuring no net loss to biodiversity (or a higher aim of achieving some net gain). There is an obvious comparison with the offsetting of greenhouse gas emissions, but as discussed later, there are significant differences when this approach is applied to biodiversity.

The idea of offsets for nature conservation is not unknown in the current law, here and elsewhere. It is a fundamental feature of the Habitats and Species Directive that if projects damaging a Natura Site are allowed to proceed because of imperative reasons of overriding public interest, then the state must take compensatory measures to preserve the coherence of the Natura network. Similarly the Environmental Liability Directive calls for "complementary remediation" on other sites if the damage caused cannot be remediated on the spot.[2] There is also experience of offsetting overseas, notably in the USA in the form of "wetland mitigation", where obtaining a permit to develop wetlands may depend on providing wetland protection or enhancement nearby. In Australia there are various Bio-banking schemes, where developers can buy credits to support approved conservation schemes to make up for harm their projects are causing. For offsets, and covenants, such experience abroad is useful, but must be used cautiously since the mechanisms operate against a very different background. Not only is the physical context different in that there may be much more land not already developed or subject to intense management and thus

[1] This paper was presented by Prof. Reid to the Nature Conservation Working Group at the UKELA conference and is based on a project funded by the AHRC, entitled "The Privatisation of Biodiversity?"

[2] Note a complication in the terminology. In the Environmental Liability Directive this is referred to as "complementary" remediation, whilst "compensatory" remediation is the term used for interim measures while more permanent restoration is being established. The offsetting mechanism used in the USA is referred to as "mitigation", a term used here for the reduction of the impact *in situ*.

available to be dedicated to conservation in exchange for development sites, but the legal context is markedly different, especially in the USA where there is much less direct regulation of privately owned land.

DEFRA started a two-year pilot project on offsetting in spring 2012, based on voluntary arrangements linked to the planning system.[3] After the first year, reports were that no offsets had actually been agreed under this project, but DEFRA is pressing on to a further consultation paper. In Scotland there seems to be no such drive to develop the idea, although there are passing mentions in various policy papers. The view in England seems to be that offsetting is an idea whose time has come, since it helps both economic growth and biodiversity conservation, objectives which the government is keen to prioritise. It is felt that at present opportunities, both economic and environmental, are being missed which offsetting could help to realise. Its application would not be in relation to strongly protected sites such as those covered by the Habitats and Species Directive, but would help to redress the continual erosion of biodiversity as greenfield sites are being developed, sites that are often already degraded as a result of intensive agriculture. An effective offsetting scheme would allow projects to proceed where there is a need for this whilst biodiversity would benefit as other sites are enhanced and those with land suitable for conservation projects would be able to secure some reward for this use of their land. In meetings and discussions, the consensus from various perspectives has been that offsetting is neither inherently good nor bad as a concept - everything depends on how it is operated. Consequently there is a desire to move forward the debate about what offsetting could achieve and what sort of offsetting system we need to achieve the chosen goals.

The starting point for offsetting is the hierarchy set out in the planning framework: development causing harm to biodiversity should be avoided and steps taken to mitigate any harm caused. Where development is justified but there is still some unavoidable harm, then compensatory steps should be taken, on the same site if possible, but if not elsewhere.[4] The objective is to ensure no net loss to biodiversity, as opposed to allowing the continual erosion which has marked past decades. At a time of growing pressure for development, the attraction of this mechanism in some quarters is obvious as a means of allowing developments to go ahead on sites that might otherwise be "sterilised" by biodiversity concerns.

For the pilot project DEFRA produced guidance for developers and offset providers that sets out how to calculate what is an appropriate offset. This looks first at the site being damaged, specifically the area of land affected, the distinctiveness of the habitat concerned and its existing condition, both of the latter elements allocated values on a three-point scale. The offset being provided is also considered, looking first at the same factors of area, distinctiveness and condition, but subject to a limitation that there must be no "trading down" to a less distinctive habitat or one in poorer condition. A number of discounting factors are then applied, considering the difficulty of restoring or creating the proposed habitat, the length of time before good habitat can be provided and how well the site fits with wider biodiversity strategies. This fairly straightforward approach contrasts with the scheme in New South Wales where candidates must complete a four-day training course on the BioBanking Credit Calculator to become an assessor under the BioBanking Scheme.

Issues

[3] See https://www.gov.uk/biodiversity-offsetting
[4] National Planning Policy Framework (2012), para.118.

Whilst the potential for this mechanism to improve the recognition of biodiversity is clear, applying offsetting to biodiversity, as opposed to things such as emissions, raises a number of issues. The basic problem is one of equivalence, because biodiversity is not a fungible like greenhouse gas emissions; creating new wetland sites does nothing for the snakes and lizards whose habitat is destroyed if areas of heathland are built on. Equivalence has a number of aspects. Should we allow only "like-for-like" offsets, so that the habitat being provided must be of the same sort as that being lost? This may provide stronger protection for biodiversity but limits the flexibility which is an attraction of offsetting. It may be desirable to use offsetting schemes to achieve gains for particularly rare habitat at the cost of something more "run of the mill", but not everyone is happy in comparing the worth of different sorts of habitat. Effective conservation of biodiversity also requires a coherent programme and cannot be achieved in a fragmented way, whereas the main concern in relation to greenhouse gases is simply the overall global concentration. There is no point in creating an offset that will support only one stage of a species' life-cycle, and habitat is more valuable when connected with other suitable areas as opposed to being located in isolation. The need for coherence must thus be taken into account in any offsetting scheme.

A further aspect is that habitat restoration or creation is not an instant or guaranteed process. There is growing evidence that steps to create even some of the apparently simpler habitats such as salt-marshes do not deliver sites of the same richness as the natural ones that we are losing. It is certainly the case that a much bigger area of newly created or restored habitat is needed to achieve equivalent biodiversity value, and it may need a very long time for habitats such as woodland to become established. Moreover any projections of what will happen are rendered uncertain by the prospect of climate change. This temporal dimension raises the question of how much credit a developer should get today for measures to establish an offset that may (or may not) provide equivalent biodiversity benefits only in several decades' time

Judgments on value and equivalence are also affected by the human factor. Scientific assessments have to be viewed alongside the public preference for "cuddly" animals over those that are not so "cuddly" but may be endangered - the response to culling proposals would be very different if it was snakes and lizards, not badgers that suffer from tuberculosis. There is also the dimension of human engagement. A small woodland in an urban setting may be scientifically less valuable than the same area connected to a larger forest in an area remote from human disturbance, but it will have much more value in terms of human interaction of all sorts. A danger with offsetting is that it ends up relocating all biodiversity sites away from the areas of development pressure, leaving the population in urban areas even more removed from the natural world.

A further issue is that of additionality. Any offset must be providing something more than would be provided in any case and developers should not gain any credit unless they are providing something genuinely additional. Judging this can be difficult, especially against what is an ever-changing background of reforms to the Common Agricultural Policy, rural support and planning policies, which alter the priority given to conservation.

When it comes to thinking about the operation of an offsetting scheme, the practicalities for the participants need to be considered, as revealed in the pilot project. A key issue is timing since the reality is that gaining planning permission for a development that requires an offset is just part of extended process. The developers cannot have all the details of the offset in place until

they know what is to be required of them[5] and there are difficulties in finding and making formal arrangements with offset providers and over the formulation of planning conditions to provide an enforceable guarantee of the offset. How offsets fit with applications for outline planning permission is another issue.

Such concerns highlight the potential role for brokers, such as the Environment Bank. Brokers can help to find potential offset sites and assist negotiations between developers and providers, supplying expertise and experience to ease the process. This links to the concept of biobanks, based on conservation projects being identified in advance and under way so that a developer in need of an offset can simply "buy in" to a project that is already running. This makes life easier for the developer than trying to find wholly new projects and offers greater flexibility than can be achieved simply through a scattering of one-off deals. At the same time it allows larger scale and long-term projects to be used and to be supported in accordance with coherent strategies, with the potential for greater gains for biodiversity.

The mechanism to deliver offsets is also an issue. Offset requirements already can be, and are being, created through the use of planning conditions and obligations, but there are concerns over the drafting and enforcement of these. Hence the interest in conservation covenants as a means of providing a long-term guarantee that offset sites will be protected.

Conservation covenants

A conservation covenant is an enduring restriction on the use of land to serve a conservation purpose. The crucial elements are that it runs with the land, binding successive owners, and is enforceable by the covenant holder even though they have no interest in nearby land. In other words, it is akin to an easement "in gross", something generally not allowed in English land law. Broadly similar mechanisms exist as conservation burdens in Scotland and as conservation easements in the USA, where there has been a huge growth in their use in recent decades, driven largely by the absence of strict land use regulation and significant tax breaks for land owners creating such easements.

The Law Commission's consultation which closed in late June[6] proposed a model based on creating statutory covenants in many ways similar to the conservation burdens created in Scotland in the last decade as part of the wholesale reform of land law.[7] These covenants would be created for the purpose of conservation in the public interest, covering the cultural as well as the natural heritage (in practice the Scottish experience has been mainly in the context of historic buildings). Only a limited number of bodies would be eligible to hold these covenants: Ministers, local authorities, statutory bodies and not-for-profit bodies. Limiting the scheme in this way to bodies subject to degree of control and accountability avoids the need for separate detailed regulation of all aspects of covenants since the broader scrutiny and control mechanisms over this limited class of holders already provide significant safeguards. Covenants would be created to run in perpetuity unless a shorter term were agreed and be registered as a local land charge. The terms would be enforceable by the holder by means of an injunction, with exemplary damages in some cases. Covenants would be capable of being amended or extinguished by the holder or by the land owner through recourse to the Lands Chamber of the Upper Tribunal.

[5] The aim is that local planning policies and the DEFRA guidance on measuring loss and gain will enable parties to work out fairly quickly and predictably what is required.
[6] Law Commission, *Conservation Covenants: A Consultation Paper* (Consultation Paper No 211, 2013).
[7] Abolition of Feudal Tenure etc (Scotland) Act 2000, ss. 26-32; Title Conditions (Scotland) Act 2003, ss. 38-48.

Several issues have arisen in the discussions during the consultation period. One is striking the balance between permanence and flexibility. The whole point is that the covenants are meant to be enduring, but changing circumstances could leave them pointless or counter-productive. The proposal tries to balance these considerations by allowing some scope for termination or amendment but concern has been expressed at the proposal to allow holders to amend or give up a covenant without any specific scrutiny or restrictions. This is not an issue for bodies whose statutory or charitable purpose means that they are dedicated to conservation, but it is of concern in the case of others such as Ministers and local authorities, who have many responsibilities, some of which may conflict with conservation, creating the temptation to give up a covenant when pressure for economic development grows. The potential cost to a holder of contesting repeated attempts by a land owner to overturn a covenant has also been identified as a concern.

The enduring nature of a covenant also raises issues over drafting. The covenant is meant to be a long-term restriction on the use of the land, therefore it is not appropriate to include detailed management prescriptions which may not be desirable in a few decades' time. It may therefore be best to make use of a double provision, with a long-term covenant setting objectives accompanied by a short-term management agreement with the detailed provisions specifying what is to be done on the ground over the next few years. A different kind of overlapping provision has been prevalent in Scotland where conservation burdens for historic buildings have tended to be short-term obligations, connected with financial support for restoration work and supported by securities to provide for repayment if the terms are broken (in one example there were four securities to protect the interests of different funding partners, as well as a burden).

Enforcement is also an issue with questions whether the current procedure for obtaining an injunction offers an appropriate and proportionate remedy, and whether the covenant holder should have rights of entry to be able to monitor the state of the land. There is also some support for there being a residual body which can step in if for any reason the holder is not enforcing a covenant, but a distinct reluctance on the part of the likely candidates to take on this role.

In terms of covenants being used as part of an offsetting scheme, such questions raise the question of what covenants would add to the present position when a lot can already be done by planning conditions and agreements. As well as allowing a role for bodies other than the planning authority, one key point is that covenants would allow for consideration to be given to offsetting over a much wider geographical spread and scale than can be provided for under the planning system. Yet many of the issues of drafting, actually finding a suitable offset and long-term monitoring and enforcement would remain.

Nevertheless, covenants also have potential for wider use beyond offsetting. There is some interest in the idea from the users of ecosystem services, from bodies who want to restrict the use of land, not for conservation, but to ensure the continuing provision of services that they benefit from. For example, a water company may want to put in place a long term arrangement to restrict land use in order to protect its catchment area, in exchange for payments to the land-owners affected. This would involve a wider range both of purposes and of covenant holders, e.g. commercial, profit-making bodies, than the Law Commission is envisaging, but shows another possible means of recognising and protecting the benefits gained from nature. Such applications are unlikely to be included in the current proposal for conservation covenants since it would entail too big a departure from more narrowly focussed model which relies on limited covenant holders to avoid explicit regulation on all aspects of the scheme, but may be worth returning to as part of

the wider interest in payment for ecosystem services as a means of giving economic value to land that is left in its "natural" state.

Wild Law

That last sentence, of course, raises a concern that is much deeper and more ethically based than the technical, legal questions discussed above. Is it ever acceptable to see biodiversity as something that can be traded? Especially for offsetting, accepting any such scheme views our shared natural heritage as a commodity that can be exchanged just like economic goods. Even for those who accept the dominant world view based on capitalist economies, there are issues over the limits of a market approach, such as those explored in Michael Sandel's book *What Money can't Buy* published last year. Much more vigorous dissent would come from those who favour a Wild Law perspective. Offsetting can be seen as epitomising the wrong-headed views that separate humans from nature and that treat nature as simply a resource for us to handle as we wish for selfish human gains. It marks the final triumph of the anthropocentric view when nature is reduced to a commodity to be traded like anything else, a view fundamentally at odds with the holistic basis of Earth Jurisprudence and the ecosystem approach.

At a more pragmatic level, the implementation of offsetting may present challenges for conservation bodies. On the one hand getting involved in offsetting schemes may be viewed as "selling out" to the development lobby, allowing the countryside to be sacrificed for economic gain. On the other, the new source of funding for valuable conservation work and the opportunity to ensure that the "polluter is paying", as opposed to ecological losses just being ignored, may be viewed as fully justifying engagement. Some lively discussions can be expected.

The Future

Both biodiversity offsetting and conservation covenants are very much on the agenda at present, but with nothing as yet set in stone. In the coming months there will be opportunities to contribute to the debate on whether, and in what form, either should become part of our approach to conservation law. There is a lot to think about, at every level from the technical legal issues, to the practicalities of their operation and the fundamental ethical acceptability of the underlying concepts. The opportunities to contribute to the debate should not be missed.