
Appendix two – Like-for-like, variation and ancillary rules

Like for like

Section 6.3 of the Biodiversity Conservation Regulation 2017 contains the like-for-like rules for biodiversity credits.

6.3(2) states that, in the case of impacts on threatened ecological communities, like-for-like biodiversity credits represent:

- a) the same threatened ecological community located in:
 - i) the same or an adjoining Interim Biogeographic Regionalisation of Australia subregion as the impacted site, or
 - ii) any such subregion that is within 100 kilometres of the outer edge of the impacted site, and
- b) if the threatened ecological community contains hollow bearing trees—vegetation that contains hollow bearing trees.

6.3(3) In the case of impacts on the habitat of threatened species that are ecosystem credit species or other native vegetation (other than impacts on threatened ecological communities), like-for-like biodiversity credits represent:

- a) the same class of native vegetation located in:
 - i) the same or an adjoining Interim Biogeographic Regionalisation of Australia subregion as the impacted site, or
 - ii) any such subregion that is within 100 kilometres of the outer edge of the impacted site, and
- b) the same or a higher offset trading group, and
- c) if the impacted habitat contains hollow bearing trees—vegetation that contains hollow bearing trees.

6.3(4) In the case of impacts on threatened species that are species credit species, like-for-like biodiversity credits represent the same threatened species.

Acquittal options for proponents

Under section 6.2 of the Regulation, proponents are permitted to meet their offset obligation by:

- retiring credits based on the like-for-like rules, or
- funding a biodiversity conservation action that benefits the threatened entity impacted by the development. The action must be listed in the 'Ancillary rules: Biodiversity conservation actions' and meet the other requirements set out by these rules, or
- committing to deliver mine site ecological rehabilitation that creates the same ecological community or threatened species habitat (available for major mining projects only). The ecological rehabilitation must meet the requirements set out in the 'ancillary rules for mine site ecological rehabilitation' which will be published by the Environment Agency Head, or
- making a payment to the Biodiversity Conservation Fund calculated using the offsets payments calculator.

If a proponent can demonstrate they were not able to find like-for-like credits and chooses not to use the other offset options, they can seek approval to offset with a broader suite of biodiversity using the variation rules.

BCT acquittal hierarchy

BCT's hierarchy of options available to acquit its obligations (under section 6.6 of the Regulation) are:

- retire credits under the like-for-like rules or fund a biodiversity conservation action that benefits the entity impacted and is listed in the ancillary rules
- retire credits under the variation rules (noting the variation rules can be applied to all threatened entities, unlike for proponents where impacts on entities identified in the ancillary rules are excluded from the variation rules)
- fund a biodiversity action that benefits the entity impacted, but this action does not need to be listed in the ancillary rules
- retire credits under the variation rules, but these credits can be generated from anywhere in the State i.e., the location requirement in the variation rules does not apply
- use any other conservation measure approved by the Minister for the Environment.

Under the Regulation (6.6) the order in which the Biodiversity Conservation Trust is to consider the appropriate option is the descending order in which those options are set out above.

Variation rules

Variation rules under biodiversity offsets scheme are contained in section 6.4 of the Regulation.

6.4(1) The circumstances in which the ordinary offset rules for the determination of the like-for-like biodiversity credits required to be retired as a biodiversity conservation measure may be varied are as follows (the variation rules)—

- a) The proponent who is to retire the biodiversity credits has taken reasonable steps to obtain the requisite like-for-like biodiversity credits and requests the variation of the ordinary offset rules.
- b) In the case of impacts on threatened ecological communities or on the habitat of threatened species that are ecosystem credit species or other native vegetation—the biodiversity credits to be retired need not represent the same threatened ecological community or the same class of vegetation or represent a location in the same or adjoining Interim Biogeographic Regionalisation of Australia subregion, so long as—
 - i) they represent the same vegetation formation, and
 - ii) they are in the same or a higher offset trading group, and
 - iii) they represent a location that is in—
 - (A) the same Interim Biogeographic Regionalisation of Australia region as the impacted site, or
 - (B) a subregion that is within 100 kilometres of the outer edge of the impacted site, and
 - iv) if the impacted habitat contains hollow bearing trees—they represent vegetation that contains hollow bearing trees or artificial hollows.
- c) In the case of impacts on threatened species that are species credit species—the biodiversity credits to be retired need not represent the same threatened species, so long as—
 - i) if the impacted species is a plant—they represent a plant, and
 - ii) if the impacted species is an animal—they represent an animal, and
 - iii) they represent a species that has the same or a higher category of listing under Part 4 of the Act as a threatened species, and
 - iv) they represent a location that is in—
 - (A) the same or an adjoining Interim Biogeographic Regionalisation of Australia subregion as the impacted site, or
 - (B) any such subregion that is within 100 kilometres of the outer edge of the impacted site.

6.4(2) The variation rules do not apply in relation to impacts on threatened species or ecological communities that are excluded by the Environment Agency Head.

Ancillary rules

Under section 6.5 of the Regulation, the Environment Agency Head is to publish ancillary rules for the purposes of the interpretation and application of the offset rules and variation rules.

Under the 'Ancillary rules: Biodiversity conservation actions', to use a conservation action as a measure to offset or compensate for impacts on biodiversity values, the action must:

- benefit the threatened species or ecological community impacted by the development or clearing of native vegetation
- be selected from the list in these ancillary rules (note this only covers 23 species)
- be delivered through the NSW Government Saving our Species program to ensure biodiversity benefits are achieved, including the management of funding and implementation of the action
- be of an equivalent value to the amount calculated by the offsets payment calculator (as in force from time to time) for the retirement of the number of like-for-like biodiversity credits for which the action is intended to be a measure to offset or compensate. Before seeking approval from the consent authority or Native Vegetation Panel, applicants must seek written agreement from the Office of Environment and Heritage (now part of DPE) to the proposed action being delivered through the NSW Government Saving our Species program.

Examples of biodiversity conservation actions include targeted surveys, research and threat identification.

Before applying the variation rules, the proponent must demonstrate to the decision-maker that they have been unable to find like-for-like credits after following the reasonable steps, set out in the Ancillary rules: Reasonable steps to seek like for like credits. In summary, these steps are:

- checking the credit register for the required credits
- contacting landholders on the landholder expression of interest register
- lodging an expression of interest on the credits wanted register.

The variation rules can't be applied by proponents for impacts on some threatened entities listed in the Ancillary rules: impacts on threatened entities excluded from variation. All critically endangered entities are included on this list. This restriction does not apply to the Biodiversity Conservation Trust.