

Environmental Law

ALERT

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Greater certainty as to when biodiversity offsets can be recommended as suitable mitigation measures in applications for environmental authorisation

On 23 June 2023 the Minister of Forestry, Fisheries and the Environment published the National Biodiversity Offset Guideline (Guideline) in Government Notice 3569 of Government Gazette 48841. The Guideline comes into immediate effect and is to be implemented with the view to addressing the perceived shortcomings in biodiversity offset practices in South Africa.



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On 23 June 2023 the Minister of Forestry, Fisheries and the Environment published the National Biodiversity Offset Guideline (Guideline) in Government Notice 3569 of Government Gazette 48841. The Guideline comes into immediate effect and is to be implemented with the view to addressing the perceived shortcomings in biodiversity offset practices in South Africa.

The purpose of the Guideline is to indicate when biodiversity offsets are likely to be accepted as mitigation by a competent authority, to establish basic principles for biodiversity offsetting and to guide offset practices within the context of applications for environmental authorisation. Considering the Guideline was published under section 24J of the National Environmental Management Act 107 of 1998 (NEMA), the principles contained therein can only be enforced within the context of applications for environmental authorisation. However, the Guideline recommends that the relevant authorities can defer to the Guideline when considering section 24G NEMA applications, emergency directives contemplated in terms of section 30A of NEMA, applications for licences in terms of the National Water Act 36 of 1998, the National Forests Act 84 of 1998 and the National Environmental Management: Waste Act 59 of 2008, applications for development rights in terms of the Spatial and Land Use Management Act 16 of 2013 and requests for de-proclamation or the withdrawal

of declarations of protected areas in terms of the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPAA).

Offsetting principles

The Guideline confirms that biodiversity offsetting can be considered as a suitable mitigation measure within the context of all applications for environmental authorisation, irrespective of the identity of the applicant, and that the following principles, amongst others, apply:

- Offsetting is a final option after all other possibilities in the mitigation hierarchy (i.e. avoidance, minimisation and rehabilitation) have been considered. In other words, if after applying the mitigation hierarchy there are likely to still be medium to high negative impacts on biodiversity, then such negative impacts must be offset. By contrast, biodiversity offsets are not an option in an application for environmental authorisation when, after applying mitigation, the negative biodiversity impacts of a proposed development remain very high or have been reduced to low or very low.

- When offsets remain the only mechanism to manage medium to high negative biodiversity impacts, then the biodiversity offsets should comprise, or benefit, the same or similar biodiversity components as those components that would be negatively affected if the proposed development is to be granted an environmental authorisation.
- Where there are no options left in the landscape to offset negative biodiversity impacts in accordance with the above like-for-like principle, then such negative impacts cannot be offset. In such instances, the proposed development would have an associated fatal flaw and the impacts should be avoided.
- Biodiversity offsets should contribute to the long-term security of biodiversity priority areas and maintain or improve their ecological condition, thereby resulting in tangible and measurable positive outcomes for biodiversity conservation.

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- Implementation of a biodiversity offset should preferably take place before the impacts of the activity occur, or as soon thereafter as is reasonable and feasible.
- The adequacy of the biodiversity offset must be monitored and audited in terms of clear and measurable management, performance and desired outcome targets, and provision must be made for corrective or adaptive actions where needed to ensure that targets are achieved.

Key biodiversity offsetting steps

Importantly, the Guideline recognises that, where a biodiversity offset may be a suitable alternative to mitigate against the medium to high negative biodiversity impacts of a proposed development, all the steps required to complete the

biodiversity offsetting process can far exceed the strict timeframes for completing an environmental authorisation application as provided for in the Environmental Impact Assessment (EIA) Regulations of 2014 (EIA Regulations). The Guideline therefore identifies when, in the environmental authorisation and development process, the following key biodiversity offsetting steps should be implemented to ensure that the offsetting is workable within the timeframes provide for in the EIA Regulations:

- The need for a biodiversity offset is usually only identified in the EIA phase but could also be identified in the pre-application phase. Where the need for a biodiversity offset is identified then, irrespective of the timing of the identification, the environmental assessment practitioner or applicable specialist must start preparing a biodiversity offset report as soon as possible thereafter.

- The biodiversity offset report, which must, amongst other things, contain the biodiversity outcomes that must be achieved in implementing a biodiversity offset and the candidate biodiversity offset sites where those outcomes can be achieved, should be completed either during the pre-application or the EIA phase. The timing is important as the offset report would need to undergo the required 30-day public participation process and should be submitted to the competent authority together with all other reports and documents required for the competent authority to make an informed decision on the application for environmental authorisation.

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- To the extent that the competent authority agrees that a biodiversity offset is suitable to mitigate against the medium to high negative biodiversity impacts of a proposed development, then the environmental authorisation to be issued must include relevant conditions which must specify the biodiversity outcomes that must be achieved in implementing a biodiversity offset, that the holder of the environmental authorisation must be required to enter into a biodiversity offset implementation agreement with a third party and further that the holder must select a biodiversity offset site, secure that site and prepare a biodiversity offset management plan for that site.
- A biodiversity offset site must be selected on the basis that it meets the biodiversity offset requirements specified in the biodiversity offset report and/or the conditions of the environmental authorisation. Considering the selection of an appropriate biodiversity offset site could take years, it is likely that the preferred biodiversity offset site will only be selected, from a possible portfolio of options, once the environmental authorisation requiring such offset has been granted.
- Ideally, once an environmental authorisation has been granted and a preferred site has been selected, then the offset site should be secured to prevent it being lost to another development. There are various means for securing a site, including the declaration of the site as a protected area in terms of the NEMPAA, which declaration would secure the site against any mineral rights being granted in relation thereto, or by the registration of a conservation servitude in respect of such land if the declaration of a protected area is not possible or appropriate under the circumstances. The Guideline further recommends that the Department of Forestry, Fisheries and the Environment establishes and maintains an electronic register of biodiversity offset sites in South Africa to ensure that a concise record of all offset sites and the status thereof is kept.
- A biodiversity offset management plan confirms the specific measures that must be undertaken to achieve the required biodiversity outcomes on the biodiversity offset site and would usually be undertaken once the environmental authorisation has been granted and a suitable offset site has been selected.
- The final step in the process would be the conclusion of a biodiversity offset implementation agreement between the holder of the environmental authorisation and the party that will implement the biodiversity offset management plan. This step can only be taken once the site has been selected and secured and the management plan has been finalised.

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Not automatically a means for granting environmental authorisation

Chapters 6, 7, 8, 9, 10, 11 and 12 of the Guideline provide greater detail on each of the above key steps in the biodiversity offsetting and environmental authorisation application processes. It is worth noting that the Guideline includes numerous confirmations that biodiversity offsetting is not a means to justify the application for and the granting of an environmental authorisation where fatal flaws with the proposed development exist. In other words, fatal flaws with a proposed development cannot be justified via biodiversity offsetting.

Even though the Guideline is a new legislative development, biodiversity conservation is not novel in South Africa. The impacts on biodiversity will, however, become increasingly prevalent as a result of increased infrastructure development needs to support economic and population

growth and climate change. The World Economic Forum's Global Risks Report for 2023 lists biodiversity loss and ecosystem collapse as the risk with the fourth highest impact (in terms of severity) over the next decade, with six environmental risks featuring in the top 10 risks over the next 10 years. In South Africa, we are seeing an increase in developments having to factor biodiversity offsets into their initial feasibility assessments, design and planning, whether it be for greenfield developments or brownfield expansion projects. The response to increased integration of biodiversity impact mitigation measures is stemming from corporate sustainability initiatives backed by ESG metrics. We are also seeing an increase in the inclusion of conditions to environmental authorisations, environmental management programmes and biodiversity permits for the establishment of biodiversity offsets by various competent authorities.

The success of biodiversity offsets will depend on robust environmental impact assessments with the inclusion of climate change impacts; thorough stakeholder engagement and co-operation at various levels; and the development of biodiversity offset implementation agreement precedents, which historically have been known to take many years to finalise. A conflict of rights can be anticipated, especially in the mining and energy development sectors (which require large tracts of land) where there is likely to be an increase in an overlap of rights to secure land for different purposes and where one of those purposes is the establishment of a biodiversity offset area.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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