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No net loss of biodiversity or paper offsets? A critical review of the French no net loss policy

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ARTICLE INFO

Article history:

Received 6 August 2013

Received in revised form

18 November 2013

Accepted 19 November 2013

Available online xxx

Keywords:

No net loss

Biodiversity offsets

Ecological compensation

EU Habitats Directive

European biodiversity strategy

Environmental impact assessment

Ecological equivalencies

France

ABSTRACT

French regulations concerning the mitigation of development impacts have been progressively strengthened with offsets now required for impacts on forests, wetlands, and protected species, among others. In 2012, following a national consultative process called *Grenelle de l'Environnement*, legal requirements in terms of monitoring and effective implementation of measures aimed at avoiding, reducing and offsetting impacts were strengthened. This has created strong “demand” for offsets.

The workability of these new requirements has come under scrutiny, not least because of their strong legal and financial implications for developers. In this context, official government guidance on implementing the mitigation hierarchy was published in 2012. Under this guidance, the aim of the mitigation hierarchy is to achieve no net loss (NNL) of biodiversity, and preferably a net gain for currently threatened biodiversity and ecosystems. We discuss what NNL means in this context, and highlight some of the technical and governance issues raised by the French approach to NNL.

Our analysis shows that the French guidance, in spite of its laudable ambition, does not address the institutional arrangements and science base needed to reach the policy's objective of NNL. The burden of designing and building adequate institutional arrangements is shifted down to local and regional permitting authorities, and even developers themselves. Consequently, and in spite of the increasing demand for offsets, the result is a highly variable and often ineffective project by project approach to offset supply, with minimal commitments. Unless the institutional and scientific challenges are tackled, the likely outcome will be an expansion of “paper offsets”.

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1. Introduction

The headline objective of the EU's most recent Biodiversity Strategy (European Commission, 2011) is to halt the loss of biodiversity and the degradation of ecosystem services by

2020, and to restore them as far as feasible. In this context, the European Commission announced an initiative under Target 2 of the Biodiversity Strategy ‘to ensure there is no net loss of ecosystems and their services (e.g. through compensation or offsetting schemes)’ (EC, 2011). Determining what no net loss (henceforth NNL) actually means and how offsetting can contribute to it

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<http://dx.doi.org/10.1016/j.envsci.2013.11.009>

will be critical to designing appropriate policy instruments for reaching the strategy's goals.

Offsets are defined as the last step in a sequence of avoiding, reducing and offsetting or repairing impacts on the environment that is known as the mitigation hierarchy. This hierarchy is central in much of the environmental legislation of the European Union (Jiricka and Pröbstl, 2009; McGillivray, 2012). In France, the mitigation hierarchy was incorporated into environmental law in 1976 but offsets remained, for the most part, ignored or ill-applied until EU Directives were progressively transposed into French legislation from 2007 onwards. This has drawn the attention of both developers and public authorities to previously neglected “ecological compensation” requirements. Following various changes in the corresponding legislation, the French government published guidance on the mitigation hierarchy which explicitly outlines NNL as its goal (MEDDE, 2012a, 2013). Valuable lessons could be learned from this process.

Experience shows that effective implementation and enforcement of offsets is at least as important for achieving NNL as appropriate offset design, if not more so (Hough and Robertson, 2009; Morandeau and Vilaysack, 2012; Bull et al., 2013). Our assumption is that if no ambitious institutional arrangements are adopted in parallel with the new requirements for offsetting spelled out under the French NNL policy, this could lead to “paper offsets” – akin to “paper parks” where protected areas are not actually enforced on the ground, but with added twist of areas being protected as offsets that were not actually threatened.

To address this question, we describe France's most recent environmental policy developments around the NNL principle. Following a review of official policy documents, we critically discuss the coherence between these legal developments and the institutional and organizational needs for effective implementation and enforcement. Our analysis identifies some of the missing design elements for an effective NNL policy based on offsets, which is applicable to France as well as other jurisdictions.

2. The path to NNL in France

2.1. The slow transposition of EU directives into French law (1992–2010)

As outlined above, the transposition of European directives has been a major driver in the recent reinforcement of the mitigation hierarchy in France. The EU directive 92/43/EC of May 21st 1992 (known as the ‘Habitats Directive’) was a major step for nature conservation in Europe (Ledoux et al., 2000). Through its articles 12 and 16, the Directive conditions the possibility of impacting protected species of plants and animals (those listed in Annex IV of the Directive) to a set of requirements: that the impacting project be justified by reasons of overriding public interest (these reasons are listed in article 16 [1]), that no alternatives exist to the project, and that allowing the impacts does not preclude the reaching or maintaining a favourable conservation status of the impacted species (European Commission, 2007a). European Commission (2007a) guidance states that “the net result

of a derogation should be neutral or positive for a species” (page 62).

It follows that maintaining a favourable conservation status of the impacted species fits the definition of NNL, and offsets are in fact suggested by the guidance as a way of achieving NNL: “even though compensation measures are not mentioned in Article 16, and are as such not obligatory” they may be envisaged under Article 12(1)(d) “in case of deterioration or destruction of breeding sites and resting places” and they “would have to (i) offset the negative impact of the activity under the specific circumstances (at population level), (ii) have a good chance of success and be based on best practice, (iii) guarantee a species' prospects of achieving [favourable conservation status], and (iv) be effective before or at the latest when deterioration or destruction of a breeding site or resting place starts to take place” (page 63).

In France, article 16 of the Habitats Directive was only transposed through article 86 of Law 2006-11 of January 5th 2006 and, until 2007, no specific procedure existed in France for legally allowing impacts on species of ‘community interest’, and their habitats (except for scientific purposes). Impacts on biodiversity were only considered through generic EIA procedures. The introduction of derogations into French law was a political response to wolves (*Canis Lupus*, L.), a protected species, preying on domestic flocks in the French Alps (Conseil Constitutionnel, 2012). The subsequent decree of February 19th 2007 set up a procedure to grant derogations to the strict protection of species whereby, if necessary, mitigation and offset measures must be taken in favour of the impacted species to ensure there is no decrease in its conservation status. Many species that are protected under French law are not listed in Annex IV of the Directive. For some of these, only individuals are protected, not their habitat. A national consultative body on nature protection (Conseil National de la Protection de la Nature) gives an opinion on the requests for derogations, and in practice it acts as an independent third party regulator in the granting process. As shown in Fig. 1, the 2007 Decree has led to a steady increase in the number of derogation procedures under article 16 of the Habitats Directive.

The Habitats Directive also conditions consent for impacts on the Natura 2000 network to a two-step process described in its articles 6(3) and 6(4): on the basis of an appropriate

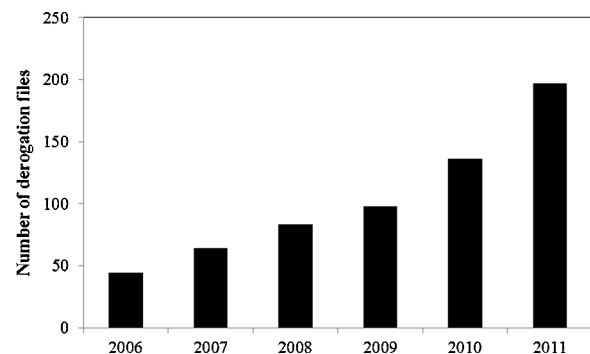


Fig. 1 – Number of derogation requests filed with the French Ministry of Ecology between 2006 and 2011. From data provided by the French Ministry of Ecology, 2012.

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