

# WORKING GROUP ON NO NET LOSS OF ECOSYSTEMS AND THEIR SERVICES<sup>1</sup>

## SUB-GROUP ON THE SCOPE AND OBJECTIVES OF THE NO NET LOSS INITIATIVE

### SCOPE AND OBJECTIVES OF THE NO NET LOSS INITIATIVE

FINAL VERSION

12/07/13

#### 1. INTRODUCTION

1. This paper has been prepared for the Working Group on No Net Loss of Ecosystems and their Services (WG-NNL), by the Sub-group on the Scope and Objectives of the No Net Loss Initiative (SG-SONNL). It takes in to account: comment on version 2 of this paper at the WG-NNL 3<sup>rd</sup> meeting of 7 November 2012 and comment submitted in writing following that meeting<sup>2</sup>; comment on version 3 of this paper at the WG-NNL 4<sup>th</sup> meeting of 4 February 2013 and comment submitted in writing following that meeting<sup>3</sup>; comment on version 4 of this paper at the WG-NNL 5<sup>th</sup> meeting of 23 May 2013 and comment submitted in writing following that meeting;<sup>4</sup> and final comment agreed at the WG-NNL 6<sup>th</sup> meeting of 4 July 2013.
2. The paper:
  - provides the mandate of the WG-NNL and of the SG-SONNL (**Part 2**);
  - provides relevant policy context including the proposals of the Commission as made in the EU Biodiversity Strategy to 2020, further insight into Commission thinking on the scope and objectives of the No Net Loss (NNL) Initiative from the Staff Working Paper that accompanied the Strategy, and the views of the Council and Parliament (**Part 3**);

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<sup>1</sup> A number of comments pointed out that it would be better to use the term ‘No Net Loss of Biodiversity and Ecosystem Services’ rather than no net loss of ecosystems and their services, and to keep this consistent throughout this and other WG documents.

<sup>2</sup> Written comments were submitted by: Non Energy Extractive Industry Panel, ProNatura, CEEweb, Kerry ten Kate, Euromines, Spain, Eurelectric, BirdLife International, Swedish Environmental Protection Agency, Secretariat of the Committee of the Regions, Finnish Environment Institute SYKE.

<sup>3</sup> Written comments were submitted by: Bundesamt für Naturschutz, eurelectric, Euromines, Friends of the Earth Europe, IUCN, Non Energy Extractive Industry Panel, Netherlands Ministry of Economic Affairs, PIANC-ICE, Polish General Directorate of Environmental Protection, Spanish Ministry of Environment, Swedish Environmental Protection Agency.

<sup>4</sup> Written comments were submitted by: The Biodiversity Consultancy, BirdLife International, CEEweb, eurelectric, Euromines, Kerry ten Kate, Fabien Quétier (Biotope), The Biodiversity Consultancy, Leibniz Institut für ökologische Raumentwicklung, Copa-Cogeca, PIANC-ICE, Swedish Environmental Protection Agency

- discusses the policy context and the implications for the scope and objectives of the NNL Initiative (**Part 4**);
  - derives, on the basis of the above, a suggested wording for the scope of the NNL Initiative (**Part 5**).
3. This paper is submitted for the consideration of the WG-NNL at its 6th meeting on 3 July 2013, with the intention that the paper will be further amended on the basis of WG comment.

## 2. MANDATE

### 2.1 Mandate of the Working Group on No Net Loss of Ecosystems and their Services

4. The Working Group on No Net Loss of Ecosystems and their Services (WG-NNL) is a working group set up under the Common Implementation Framework for delivery of the 'EU Biodiversity Strategy to 2020'.<sup>5</sup> The outputs of the WG-NNL will be reviewed by the Coordination Group for Biodiversity and Nature (CGBN) as the operational steering group for the EU Biodiversity Strategy to 2020.
5. The objective of the WG-NNL is 'to collect views from Member State representatives, stakeholders and experts on the way forward for the NNL initiative announced for 2015, within the mandate of the 2011 December Council conclusions, taking into account all relevant policies and instruments. The aim is to support the European Commission in its preparation of a NNL initiative<sup>6</sup> (our emphasis).

### 2.2 Mandate and members of the sub-group 'Scope and Objectives of the No Net Loss Initiative'

6. The WG-NNL established, at its second meeting of 4 July 2012, a sub-group 'to work on a definition of the No Net Loss objective' for the consideration of the WG-NNL at its third meeting on 7 November 2012 and, based on comment received from the EG, to develop this definition further for its fourth meeting on 4 February 2013.
7. Following further consultation with the Commission, we have interpreted this remit to mean 'to work on the possible scope and objectives of the No Net Loss Initiative.'
8. The members of the sub-group are:
- Jan Brooke, representing UK Institution of Civil Engineers (ICE) and PIANC (International Navigation Association)
  - Guy Duke, representing Environment Bank Ltd

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<sup>5</sup> COM(2011) 244 final

<sup>6</sup> *Draft Mandate for the EU Working Group on No Net Loss of Ecosystems and their Services*. 3rd revision, 20 July 2012. Downloaded from CIRCABC 17/10/12.

- Kerry ten Kate, representing Forest Trends
- Edward Pollard, representing The Biodiversity Consultancy
- Fabien Quétier, representing Biotope
- Jim Rushworth, representing the Non Energy Extractive Industry Panel.
- Jorgen Sundin, representing the Swedish Environmental Protection Agency

### 3. POLICY CONTEXT FOR THE NNL INITIATIVE

#### 3.1 Commission proposals

9. The EU biodiversity strategy to 2020<sup>7</sup> contains 6 mutually supportive and inter-dependent targets contributing to the headline objective to halt the loss of biodiversity and the degradation of ecosystem services by 2020, and to restore them as far as feasible.
10. Target 2 in particular requires that *'by 2020, ecosystems and their services are maintained and enhanced by establishing green infrastructure and restoring at least 15% of degraded ecosystems.'* As part of a list of actions to reach this target, the Commission announced (Action 7b) ***'The Commission will carry out further work with a view to proposing by 2015 an initiative to ensure there is no net loss of ecosystems and their services (e.g. through compensation or offsetting schemes).'***<sup>8</sup>
11. Target 2 is presented in the Strategy under the heading 3.2 'Maintaining and enhancing ecosystems and their services', which states:
 

*'In the EU, many ecosystems and their services have been degraded, largely as a result of land fragmentation. Nearly 30 % of the EU territory is moderately to very highly fragmented. Target 2 focuses on maintaining and enhancing ecosystem services and restoring degraded ecosystems by incorporating green infrastructure in spatial planning. This will contribute to the EU's sustainable growth objectives and to mitigating and adapting to climate change, while promoting economic, territorial and social cohesion and safeguarding the EU's cultural heritage. It will also ensure better functional connectivity between ecosystems within and between Natura 2000 areas and in the wider countryside. Target 2 incorporates the global target agreed by EU Member States and the EU in Nagoya to restore 15% of degraded ecosystems by 2020.'*
12. Further insight into the Commission's thinking in this regard is provided in the

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<sup>7</sup> COM(2011) 244 final

<sup>8</sup> This suggests that the No Net Loss Initiative is designed to contribute to the 15% restoration target and is not intended to achieve additional restoration beyond that target. (EEB, FoE, CeeWEB, IUCN and BirdLife disagreed with this suggestion).

related Staff Working Paper,<sup>9</sup> which states as follows:

***'No net loss of biodiversity and ecosystem services***

*Beyond the toolbox needed to establish green infrastructure, there may also be a need for a wider no-net-loss approach to ensure no further loss or degradation of ecosystems and their services overall. Whereas compensation for displaced habitats is a legal requirement of the Habitats directive, and also of the Environment Liability Directive (ELD) in the case of damage to Natura 2000 and biodiversity, there is no requirement for systematic compensation outside Natura 2000<sup>10</sup>, which leads to net losses. There is a need for, on the one hand, a clear hierarchical framework whereby degradation is avoided as far as possible, and on the other hand, where degradation cannot be avoided, a requirement for compensation. Options, which are not necessarily mutually exclusive, include:*

- *A clear decision-making framework, to ensure degradation is avoided wherever possible before compensation is envisaged. Avoiding damages to biodiversity and ecosystems is already included in the Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA) directives, and these elements could be further strengthened. There should be **better guidance** on how to apply this in practice in light of biodiversity objectives, similar to current practice for climate change.<sup>11</sup> To avoid damages to biodiversity, the Commission will develop a methodology for the assessment of the impact of EU investments by 2014.<sup>12</sup>*
- *An overall non-binding framework at EU level providing **guidance and exchanges of best practices** for Member States who have adopted voluntary or mandatory biodiversity offset policies. This could involve for example guidance on the scale at which no net loss should be measured, on the equivalency methodology and the time scale for compensation, and using a prioritisation framework to ensure overall no net loss at EU level.*
- *An EU level **legal framework** for no net loss of ecosystems, which could make some of the above elements mandatory.*

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<sup>9</sup> Sec(2011)540 final, p43

<sup>10</sup> It may be pointed out that this statement is not strictly correct: where species protected under EU or Member State law occur outside Natura 2000 areas, negative impacts on these species may be subject to mitigation and/or compensation measures under either EU or national legislation.

<sup>11</sup> <http://ec.europa.eu/environment/eia/pdf/EIA%20Guidance.pdf>.

<sup>12</sup> As an example of good practice, Forest Trends has been using a pre-feasibility stage risk assessment tool which can alert developers at an early stage to which steps in the mitigation hierarchy might be straightforward, challenging or extremely difficult/impossible. This enables detailed consideration of 'avoid, minimise' and possible project redesign or even re-siting, if needed, very early in the development process.

*These options will be reviewed and further analysed in the context of a Commission initiative on the no net loss of ecosystems outside Natura 2000, and the services they provide, by 2015.'*

13. The roadmap to a Resource Efficient Europe<sup>13</sup> reiterates this commitment to a 'No Net Loss' (NNL) initiative in 2015, to foster investments in natural capital, and to seize the full growth and innovation potential of the 'restoration economy', as well as more generally promoting the use of innovative financial instruments and market based instruments, in cooperation with the European Investment Bank and through public private partnerships.

### **3.2 Council views**

14. A first set of Council Conclusions of 23 June 2011<sup>14</sup> *'emphasised the need to develop and implement a methodology taking into account existing impact assessment processes to assess the impact of all relevant EU-funded projects, plans and programmes on biodiversity and ecosystems and stressed the importance of further work to operationalise the NNL objective of the Strategy for areas and species not covered by existing EU nature legislation and of ensuring no further loss or degradation of ecosystems and their services'* (our emphasis).
15. The Council Conclusions of 19 December 2011<sup>15</sup> *'agreed that a common approach is needed for the implementation in the EU of the NNL principle and invited the Commission to address this as part of the preparation of its planned initiative on NNL by 2015, taking into account existing experience as well as the specificities of each Member State, on the basis of in-depth discussions with Member States and stakeholders regarding the clear definition, scope, operating principles and management and support instruments in the context of the common implementation framework of the Strategy'*.
16. Both sets of conclusions indicate that a preliminary definition of this NNL concept is that *'conservation/biodiversity losses in one geographically or otherwise defined area are balanced by a gain elsewhere provided that this principle does not entail any impairment of existing biodiversity as protected by EU nature legislation'*.<sup>16</sup>

### **3.3 Views of the European Parliament**

17. The European Parliament also adopted a Resolution on 20 April which *'Urges the Commission to develop an effective regulatory framework based on the 'No Net Loss' Initiative, taking into account the past experience of the Member States while also utilising the standards applied by the Business and Biodiversity Offsets*

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<sup>13</sup> COM(2011) 571 final

<sup>14</sup> 11978/11

<sup>15</sup> 18862/11

<sup>16</sup> Note: the use of the word 'balance' in this preliminary Council definition does not exclude, but does not explicitly require 'net' gain, which is one of the key potential advantages of an offsetting system.

*Programme; notes, in this connection, the importance of applying such an approach to all EU habitats and species not covered by EU legislation.' The Resolution also 'Emphasises the importance ...of developing innovative financial mechanisms – in particular habitat banking in conjunction with offsetting...'<sup>17</sup> (our emphasis).*

#### **4. DISCUSSION OF THE POLICY CONTEXT, IMPLICATIONS FOR THE SCOPE AND OBJECTIVES OF THE NNL INITIATIVE**

##### **4.1 How broad an initiative should it be?**

18. The No Net Loss (NNL) Initiative cannot be seen in isolation from the broader policy context provided by the EU biodiversity strategy to 2020 and other sector and horizontal policies to which the biodiversity strategy relates. The NNL Initiative should, that is, be seen as one action among several actions contributing to one target (target 2), which in turn is one target of six mutually reinforcing targets, which together contribute to the headline objective 'to halt the loss of biodiversity and the degradation of ecosystem services by 2020, and to restore them as far as feasible.' This objective itself is a key element of the EU 2020 Strategy for smart, sustainable and inclusive growth.
19. If one reasons that (net) loss of biodiversity results from a number of immediate causes, including habitat destruction and degradation, pollution, invasive alien species, and overexploitation, then one might argue that a no net loss initiative should by definition address all of these causes. Indeed, it has been suggested that No Net Loss should be considered a principle to be applied to all activities which impact on nature. With such reasoning, a 'no net loss initiative' would encompass all actions required to deliver the entire headline objective 'To halt the loss of biodiversity (and the degradation of ecosystem services) by 2020, and to restore them as far as feasible.'
20. However, in the EU Biodiversity Strategy to 2020, the NNL Initiative is just one action of several actions, subsumed within just one target out of six targets. There are many other actions within the biodiversity strategy, both within target 2 and under the other 5 targets, which also serve to reduce (net) loss of biodiversity and/or to restore biodiversity. This would suggest that the scope of the NNL Initiative *per se* (as opposed to a no net loss principle) would exclude all those other actions. If we reason in this way (and it should be noted here that Working Group members have differing views on whether or not one should), then the following would not fall within the scope of the NNL Initiative:<sup>18</sup>
  - actions under the nature directives and in relation to Natura 2000 sites (Target 1), unless additionality can be demonstrated (e.g. supplementary conservation activities going beyond the status improvements for

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<sup>17</sup> P7\_TA-PROV(2012)0146

<sup>18</sup> NL and Euromines disagree with the additionality clauses in the first two bullets.

habitats and species foreseen in Target 1 and, some argue, beyond the legal obligations for reaching favourable conservation status of all protected habitats and species).<sup>19</sup>

- actions for green infrastructure<sup>20</sup>, unless additionality can be demonstrated (including additionality to articles 3 and 10 of the Habitats Directives and article 3 of the Birds Directive) (Action 6, Target 2)
- actions to increase the contribution of agriculture and forestry to maintaining and enhancing biodiversity, notably measures under the CAP (direct payments, rural development) (Target 3)
- actions for sustainable fisheries, including elimination of adverse impacts on biodiversity (Target 4)
- actions to combat alien species (Target 5)
- actions to avert global biodiversity loss (i.e. outside the EU) (Target 6)

21. Actions under the No Net Loss Initiative can nonetheless complement and contribute towards some of the above actions. Many of the actions within the Biodiversity Strategy are inter-connected and mutually reinforcing and this applies also to No Net Loss Initiative actions. For example, offsetting of development impacts on nature could deliver additional biodiversity in Natura 2000 sites (e.g. where it goes above and beyond existing legal requirements), could build green infrastructure (through habitat creation/restoration), could complement, as a 'flanking measure', agri-environment measures under the CAP (by restoring nature on offset sites on farmland), and could combat alien invasive species (e.g. by restoring to native vegetation a site that had become invaded by alien species).

22. It might be argued that actions proposed under Targets 3 (Agriculture & forestry), 4 (fisheries) and 5 (alien species) do not necessarily assure no net loss. If the No Net Loss Initiative were to take a more horizontal approach, that is, if no net loss were to be applied as a principle, it could serve as a yardstick for the performance of all sectors that impact on nature. The Environmental Liability, Habitats and Birds Directives already introduce some provisions that are close to no net loss requirements applicable to all sectors having an impact on specific kinds of biodiversity. Broader application of the no net loss principle could

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<sup>19</sup> One sensitive issue to be clarified and agreed is whether impacts outside Natura 2000 sites could be offset by additional conservation outcomes within Natura 2000 sites. Some working group participants saw no reason why this should not be permitted while others wanted a clear separation between Natura 2000 and the NNL initiative. A related and perhaps even more sensitive issue relates to whether experience and methods from offsetting good practice worldwide might actually inform and enhance (from the point of view of outcomes for nature) compensatory approaches under Article 6(4) of the Habitats Directive.

<sup>20</sup> The Communication on Green Infrastructure – COM(2013)249final – uses a working definition of Green Infrastructure: “a strategically planned network of natural and semi-natural areas with other environmental features designed and managed to deliver a wide range of ecosystem services. It incorporates green spaces (or blue if aquatic ecosystems are concerned) and other physical features in terrestrial (including coastal) and marine areas. On land, GI is present in rural and urban settings.”

extend it to elements of biodiversity not addressed by those directives and specific measures under Targets 3, 4 and 5 could then build on this. Agriculture and fisheries are, for example, major drivers of biodiversity loss in the EU. Indeed, it might be argued that a NNL Initiative which targets development impacts but not the impacts of agriculture and fisheries is not treating all sectors equitably. A strong rationale is therefore required for excluding them from the No Net Loss Initiative. A majority of working group participants argue that there is no such strong rationale and that the impacts of agriculture, forestry (including forest fires), fisheries and alien species, should be included within the Initiative.

#### **4.2 How should the NNL Initiative relate to habitats and species protected under EU law?**

23. In the Biodiversity Strategy, in the text relating to Target 2, the focus is on the restoration of degraded ecosystems in the 'wider countryside' (i.e. outside of Natura 2000), in particular to combat fragmentation. In the Staff Working Paper, wording relating to the NNL Initiative focuses on the issue of providing systematically for compensation for damages to biodiversity in this 'wider countryside' outside Natura 2000. It should be noted that the Commission already provides some guidance on compensation in relation to protected species occurring in this 'wider countryside' outside of the Natura 2000 network.<sup>21</sup> Care is needed therefore to ensure that any measures to compensate for damages to biodiversity in the wider countryside are consistent with the existing guidance and do not duplicate or undermine this. Indeed, the Council Conclusions specify that the NNL Initiative relates to 'areas and species not covered by existing EU nature legislation'.
24. This is not to say that the NNL Initiative might not deliver benefit to areas and species already protected under EU legislation. For example, the Initiative might deliver such benefits through better implementation of existing guidelines on avoidance and compensation of damage to protected species outside of Natura 2000 sites. Further, the Staff Working Paper makes clear that it could aid 'functional connectivity' both between and within Natura 2000 sites. Equally, offsetting might deliver net gain for certain species already protected under EU law, for example by providing additional habitat for species already at favourable conservation status. Clearly, the requirement for compensatory measures for damages to the integrity of Natura 2000 sites (in view of their conservation objectives) is already provided for under the Nature Directives and the Environmental Liability Directive (and indeed other relevant legislation such as the Mining Waste Directive), so it is important that any NNL Initiative complements those provisions, and indeed does not in any way undermine them. This is stressed by the Council's 'working definition' of NNL, which is that

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<sup>21</sup> See , [http://ec.europa.eu/environment/nature/conservation/species/guidance/pdf/guidance\\_en.pdf](http://ec.europa.eu/environment/nature/conservation/species/guidance/pdf/guidance_en.pdf) section III.2.3.b) Derogations and conservation status

- 'conservation/biodiversity losses in one geographically or otherwise defined area are balanced by a gain elsewhere provided that this principle does not entail any impairment of existing biodiversity as protected by EU nature legislation' (our emphasis). This proviso might also be extended to biodiversity protected by national legislation.
25. While the Article 6(4) compensatory mechanism under the Habitats Directive should not be compromised in any way, it may nevertheless be worthwhile, in terms of conservation outcomes, to consider applying no net loss also within Natura 2000 sites, for example in relation to avoiding, mitigating and compensating for impacts on species or habitats that are not of Community interest (i.e. that are not species or habitats for which the site has been designated).
  26. The Habitats Directive and related guidance lays down requirements in relation to avoiding, minimising and compensating for impacts within Natura 2000 sites. Guidance on Article 6 already refers to the possible use of habitat banking.<sup>22</sup> Some working group participants argued that offsetting could therefore be used for impacts within Natura 2000, though others oppose this and argue that there should be a strict separation between the provisions of the nature directives and the No Net Loss Initiative, and that Annex I habitats (outside the Natura 2000 network) should not be addressed by the NNL Initiative.
  27. Compensating within Natura 2000 sites or using compensation to strengthen network connectivity and coherence, where this compensation arises from impacts on nature outside Natura 2000 sites, would seem to offer the potential for substantial new innovative financing for Natura 2000. Such financing is in principle allowable; legislation does not say how Member States should finance Natura 2000. It could however be argued that there is a risk that improvements in Natura 2000 would be paid for by deteriorations outside Natura, exacerbating biodiversity loss outside Natura 2000 and damaging coherence and connectivity of the network. And it could be argued that the NNL Initiative should not include actions to manage and restore habitats in Natura 2000 sites Member States should be doing that anyway. Obligations under these Directives have not always been sufficiently implemented, but some argue that a NNL Initiative should not be seen as a means to finance existing legal obligations, or at least that NNL

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<sup>22</sup> The guidance document on Article 6 states that although the “option of habitat banking as compensatory measure under Article 6(4) is of very limited value due to the tight criteria mentioned in relation to the need for compensation to ensure the protection of the coherence of the network” it is recognized that “there could be a potential use of the concept of habitat banking in a constraint regime linked to Article 6(1). For instance, where a development is foreseen it might be appropriate to consider and implement within the management plan designed for the site or integrated into other development plans, the necessary compensatory measures that would be required in the context of such development and consequently before any decision is made by the competent authorities”. Although it is not expressly mentioned, the Guidance thus implicitly recognises the potential role of a NNL mechanism in the framework of N2000.

actions in Natura 2000 sites should demonstrate clear additionality.<sup>23</sup> On the other hand, it would not make sense to arrive at a situation in which a NNL Initiative is delivering substantial funding for improvements to biodiversity only outside Natura 2000, while Natura 2000 sites are underfunded and deteriorating due to insufficient implementation of the Directives. Indeed, one element of the NNL Initiative might be to stress the importance of adequate funding and implementation of Natura 2000 to achieve the favourable conservation status of protected sites and species. However, many working group members stressed that the NNL Initiative should not be considered a principal means by which to finance Natura 2000.

28. Finally, the nature directives address habitats and species of Community Interest. In advancing the concept of a no net loss initiative that addresses other species and habitats in ‘the wider countryside’, there may be a need to clarify how this fits with the principle of subsidiarity. To what extent is there a rationale for intervention at Community level?

#### **4.3 Focus on avoidance of impacts, and on compensating for residual impacts**

29. The Staff Working Paper identifies ‘*a need for, on the one hand, a clear hierarchical framework whereby degradation is avoided as far as possible, and on the other hand, where degradation cannot be avoided, a requirement for compensation.*’ The paper presents 3 options: the first focussing on the decision-making framework for avoidance of impacts; the second on guidance and exchange of best practice on biodiversity offsetting; and the third on a possible mandatory legal framework which might include mandatory requirements for avoidance and/or offsetting. Thus, the Commission’s intention appears to be that the NNL Initiative should be focussed on two issues: (i) avoidance of impacts and, where impacts cannot be avoided, minimisation and restoration on-site (where this is ecologically viable), then (ii) offsetting of (residual) impacts.<sup>24</sup> This interpretation is further reinforced by the wording of the action (7b) on the NNL Initiative in the annex to the Biodiversity Strategy which specifically mentions compensation and offsetting schemes as a possible means to achieve NNL. It is also reinforced by both the Council Conclusions (which relate NNL to impact assessment, and thus, by inference, the mitigation hierarchy as enshrined in existing instruments) and by the European Parliament’s Resolution (which emphasises the need to develop habitat banking in conjunction with offsetting, and also highlights the relevance of the BBOP standards [which are in fact standards for offsetting under the mitigation hierarchy]).

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<sup>23</sup> Additionality in relation to commitments would in this case probably have to be evaluated by the competent authority on a case-by-case basis, e.g. in relation to the commitments in the management plan of the site concerned.

<sup>24</sup> Adherence to the mitigation hierarchy is an important principle, but judgement is also required to assess how to deliver the best outcome for nature – experience in other countries outside the EU has shown that compensation through offsetting (outside the development site) may in some cases be more ecologically viable than attempting to restore on-site.

30. Avoidance of impacts is to some extent addressed by the existing *acquis*, though there are concerns about implementation, for instance as described in recent reviews. The NNL Initiative should therefore stress the importance of the mitigation hierarchy and avoidance of impacts as the first step in the hierarchy – indeed, some working group members felt this should be the main emphasis of the Initiative. This could, for example, include more effective consideration of biodiversity within SEA, EIA and Member States’ spatial planning and sufficient emphasis on the implementation of avoidance and mitigation measures identified through SEA and EIA.<sup>25,26</sup> Other working group members argue that the NNL Initiative could also, and perhaps most substantially, benefit biodiversity and ecosystem services by addressing residual impacts through offsetting. However, safeguards should be put in place to ensure that the principle of no net loss, and provisions for compensation, including through offsetting, do not facilitate damage to biodiversity, for example by creating a ‘license to trash’.
31. There may be a hierarchy of ways of undertaking the offsetting/compensation part of the mitigation hierarchy, including: 1) like-for-like (for residual impacts on biodiversity of high value – for example, priority habitats and species); 2) trading up to ‘better’ (for residual impacts on biodiversity of more modest conservation value; 3) within bioregion and typically close to the impacts; 4) farther afield (the geographical limits would need to be defined) but still meeting ‘like-for-like or better’ requirements where spatial constraints mean no viable offset sites ‘as close as possible’, 5) as a fall-back position, in exceptional cases only (to be defined), in lieu fees. In addition, other policy instruments, such as a development tax proportionate to impacts on ‘low value’ biodiversity, might be explored, though a taxation approach is unlikely to find favour in the current economic context.<sup>27</sup>
32. Some working group participants suggested provision could be made for compensation/offsetting to take place across Member State borders, particularly for habitats and species for which conservation measures are required in more than one Member State or, for example, for migratory species.<sup>28</sup> However, other working group members disagreed with this suggestion.

#### **4.4 Focus on species and ecosystem losses, or also on losses of other ecosystem services?**

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<sup>25</sup> Copa-Cogeca and ELO do not support statements in this paper requiring spatial planning for NNL.

<sup>26</sup> To allow for an effective consideration of biodiversity within EIA, a framework for objective assessment is required (CEFIC).

<sup>27</sup> ELO, COPA COGECA, CEFIC, Eurelectric and Euromines suggest that this point on a tax should have been moved to the paper on Instruments.

<sup>28</sup> The EC study on supply and demand for habitat banking states: “Trans-boundary offsets may sometimes be beneficial on both ecological and economic grounds, but raise potential challenges with regard to political acceptability and regulatory enforcement. They may offer particular opportunities to further the conservation of migratory species”

33. The title of the Working Group is the Working Group on No Net Loss of Ecosystems and their Services' (our emphasis). Target 2 of the Strategy refers to both ecosystems and ecosystem services, while Action 7(b) also refers to both ecosystems and their services. The implication of this, in the context of compensation and offsetting, is that the compensation/offset should ideally deliver both ecosystems and a range of ecosystem services, including carbon capture, and storage, water quality/quantity, flood alleviation, etc. However, enhancing one ecosystem service may result in depletion of another, so there are trade-offs to be considered. Where offsetting is used, addressing multiple ecosystem services implies approaches such as stacking (selling individual ecosystem services separately) and bundling (selling several ecosystem services as a package). This does however complicate matters, and requires fuller examination of the pros and cons of such approaches. It is debatable whether one can achieve no net loss of all ecosystem services. Often enhancing one service results in depletion of another, so there are trade-offs to be considered.
34. A number of working group members highlighted that the NNL Initiative should address species, ecosystems, and ecosystem services. Some highlighted the risk that net loss of certain species might continue if the focus was on ecosystems and ecosystem services, for example where no direct link can be demonstrated between a species and any ecosystem service.

#### **4.5 What impacts should be addressed?**

35. A key question arising from the above is 'What kinds of impacts should the NNL Initiative address?' Some kinds of impacts are more readily tackled at project level (because they involve a direct transformation of habitat and associated loss of biodiversity that can be attributed to a particular developer), while others (e.g. changing agricultural cropping practices) might be more easily addressed at the level of policy or planning (though not all working group members supported tackling no net loss through spatial planning throughout the EU).<sup>29</sup> One starting point might be to include all those activities that are conventionally addressed through impact assessments. This would include housing developments, transport and energy infrastructure, extractive industries and other industrial developments. It would also include all other projects and plans falling under the EIA and SEA objectives, including those agricultural, forestry and fisheries activities listed in Annex II of the EIA Directive, and might also be extended to impacts falling within the scope of the IPPC Directive.<sup>30</sup> Over time, the scope might be extended to encompass also less direct impacts, such as diffuse pollution, though some working group participants argued that this would be impractical.

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<sup>29</sup> Copa-Cogeca and ELO do not support statements in this paper requiring spatial planning for NNL.

<sup>30</sup> Copa-Cogeca argue that as the EIA Directive is under discussion (in the Council and EP) and may change, they cannot agree to this wording. They also argue that listing in Annex II is far wider than the Directive applying to those activities and that the sentence should therefore be deleted.

36. A key issue relates to the establishment of thresholds to determine when provisions for compensation are required, in relation to the scale and significance of impact, taking into account also cumulative impacts. (This is also a key issue facing existing EU nature legislation).
37. However, some of the most widespread and damaging impacts on biodiversity and ecosystem services have been caused by agriculture, forestry and fisheries, or by alien species, through activities falling outside the scope of the EIA and SEA Directives. Actions proposed under Targets 3 (Agriculture & forestry), 4 (fisheries) and 5 (alien species) to address these impacts may not necessarily assure no net loss. Extending the NNL Initiative to address all impacts of agriculture, forestry, fisheries and alien species might be over-ambitious (not least given that in 2015, the current reforms of both the CAP and CFP would only just have started to take effect) and might compromise the opportunity presented by the Initiative to make significant progress in relation to addressing the impacts of more tractable activities. However, exclusion of agriculture, forestry and fisheries, as key drivers of biodiversity loss, from the scope of the NNL Initiative risks missing the target. Several Working Group participants also argued that it is important that there is a level playing field across sectors, rather than targeting specific sectors. One option might be to require reporting, for example on the CAP, to address the extent to which CAP measures have contributed to no net loss, in such a way that comparisons can be made between the contributions of various sectors to losses and gains of biodiversity and ecosystem services.
38. It may however be appropriate to consider applying the mitigation hierarchy to a number of agricultural and/or forestry activities that may involve negative impacts on biodiversity and ecosystem services, with a view to achieving no net loss with respect to them. Within the EU, these might include (a) the conversion of natural habitat for agricultural or forestry purposes, and (b) changing agricultural or forestry management practices and activities on existing agricultural or forested land (e.g. intensification including increasing the use of pesticides, fertilizer, veterinary products, water). They might also include similar conversion or changes in management activities outside the EU, by or with the support of EU entities (for instance by EU registered companies, or with finance from European headquartered banks) or to supply EU supply chains (see section 4.7. below). Some or all of the above activities may necessitate licenses or permits. This could be one pragmatic factor to take into consideration when determining whether such activities should form part of the EU NNL Initiative.
39. Conversely, some conversions or changes in land management practices may result in gains for biodiversity and ecosystem services that can contribute towards achieving no net loss. This may include: (a) conversion from agriculture to land management for the restoration and conservation of biodiversity and ecosystem services, and (b) a change in management practices on agricultural or forested land (e.g. reduced use of pesticides, fertilizers, veterinary products,

water). Indeed, the such conversions or changes favourable to biodiversity and ecosystem services often form a significant part of the delivery of no net loss policies. Agri-environment payments already contribute to such conversions and changes in management practices within the EU, although they risk varying in time based on funds available and up-take of the measure.

40. The inclusion of agriculture and forestry within the NNL Initiative would need to assess how this would deliver additional gains for biodiversity and ecosystems and how any compensation/offset system applied to agriculture and/or forestry might work alongside such agri-environment measures.<sup>31</sup>

#### 4.6 Application (or not) to the coastal and marine environment

41. Although some working group participants suggest the NNL Initiative should be restricted to the terrestrial and freshwater environment, others considered it should also extend to coastal and marine environments. The Strategy and Staff Working Paper are silent on this issue. Coastal habitats, like many freshwater or high altitude habitats, are very dynamic and subject to rapid and large-scale shifts in their physical characteristics (e.g. through coastal erosion, flooding, rock-fall) with important consequences for biodiversity. This creates specific challenges to assessing impacts and designing appropriate offsets. The marine environment presents some additional challenges in applying the mitigation hierarchy and compensating for residual impacts although there is growing experience in this in Europe and worldwide, not least from impact assessments done for marine Natura 2000 sites.<sup>32</sup> It remains debatable whether knowledge is sufficient to apply compensation in the marine environment in a comprehensive and systematic way but there is nonetheless considerable potential for offsetting some types of impacts (e.g. of coastal defences, ports and navigation, energy infrastructure) in the marine environment, while ensuring *additional* gains with regard to existing legal obligations under the MSFD and the nature directives. Whilst re-creation *per se* of sea-bed habitats is very difficult, restoration or

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<sup>31</sup> Copa-Cogeca and ELO do not agree with paragraphs 37 – 40 nor with paragraph 48 of the summary. When looking into impacts, all economic activities should be looked at on a non discriminatory basis. Moreover, agriculture, forestry and fishery are addressed without recognising their role in contributing to ecosystem services, including food/fibre production. With regard to paragraph 48 we miss a clear recognition that via the targets 3 and 4 of the Biodiversity Strategy those sectors are already specifically addressed. It has to be acknowledged that agriculture already responds through the CAP to environmental requirements with biodiversity policy being integrated (in particular via cross compliance and in future via mandatory greening).

<sup>32</sup> There is still a large potential to improve avoidance and mitigation of impacts on marine biodiversity, for example through better marine spatial planning and better implementation of current legal obligations. Consistency and overlaps of a NNL Initiative with the legal obligations under the Marine Strategy Framework Directive (MSFD) to achieve good environmental status of all EU seas need to be verified. Also due to important delays in Member States' designation of marine Natura 2000 sites, precaution needs to be applied in order not affect or weaken the legal protection that will apply to these areas once they are designated and properly managed. The relative lack of knowledge about marine ecosystems suggests a more precautionary approach should be taken here than in the terrestrial environment.

'functional re-creation' measures and averted risk offsets<sup>33</sup> both offer opportunities in the marine environment. Similarly, although offsetting at the coast requires the resolution of different issues - not least reversibility questions associated with coastal erosion or with saline inundation<sup>34</sup> - experience in coastal habitat restoration, creation and enhancement also continues to evolve. Further there may be opportunities to compensate for some marine activities by offsetting in the coastal environment.

#### **4.7 Geographical scope – only within the EU, or worldwide?**

42. Target 2 of the Biodiversity Strategy is clearly targeting EU ecosystems while actions to avert global biodiversity loss fall under Target 6 and we can therefore infer that the NNL Initiative should be limited territorially to the EU. However, some Working Group members note that the Birds and Habitats Directives do not apply in some Member States' outermost regions and overseas countries and territories, yet some of the EU's most important biodiversity is found there, so that the NNL Initiative should pay attention to these areas. In addition, several members of the Working Group point out that the majority of the impact of EU actors on biodiversity takes place outside the EU (through government procurement and companies' supply chains). For this reason, one could argue robustly that the EU (including Member States, and companies based in or having major operations in the EU) should compensate for or offset its net impacts on biodiversity and ecosystem services also where these impacts occur beyond EU borders, for example as a result of supply chain impacts.<sup>35</sup> Nevertheless, some Working Group participants felt the NNL Initiative should be restricted to the EU territory. If so, the Commission's impact assessment of the NNL Initiative should nonetheless also consider any perverse impacts on biodiversity outside the EU that might arise from implementation of the Initiative within the EU.

#### **4.8 Stage of application of NNL in the development process**

43. Finally, it is not clear from the wording in the Biodiversity Strategy and in the Council and Parliament responses at what stage of the development process NNL should be applied. Clearly, consideration should be given to no net loss at the early stages of development. Strategic Environmental Assessment, for example, can include a first analysis of impacts on biodiversity and ecosystem

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<sup>33</sup> An averted risk is the removal of a threat to biodiversity for which there is reasonable and credible evidence. An averted risk offset is a biodiversity offset intervention which prevents future risks of harm to biodiversity from occurring. (BBOP Glossary 2012).

<sup>34</sup> ICE, 2013. *The Role of Coastal Engineers in Delivering No Net Loss through Biodiversity Offsetting*. A Discussion Paper from the ICE Maritime Expert Panel. May 2013.  
<http://www.ice.org.uk/topics/maritime/Best-practice-documents-maritime/Biodiversity-Offsetting>

<sup>35</sup> Ideas which could be discussed are certification schemes, border taxes, mandatory reporting as part of the companies' environmental report with possibility for control by the EU, and integrating a criterion on NNL in the OECD Guidelines for multinational enterprises (which would then need to be applied on a mandatory basis) – these are possibly better addressed in the paper on management and support measures.

services and possible offsetting requirements resulting from different possible project locations, can help ensure that areas of highest nature value are not selected for development in the first place. SEA can also deal with cumulative impacts which have been and continue to be problematic in the EU. However, through application of the mitigation hierarchy, when the focus turns to offsetting the residual impacts of individual development projects, the obvious stage at which to address these is at the stage of awarding permission for the development. Typically, this would mean calculating or assessing the significant<sup>36</sup> residual impacts as part of the environmental impact assessment prior to permitting.

#### **4.8 Voluntary and mandatory approaches**

44. As we have seen, the Commission's Staff Working paper refers to both voluntary and mandatory biodiversity offsetting policies. Most informed opinion holds that a mandatory approach is required to go to scale. However, this need not exclude complementary voluntary measures which encourage private sector initiatives including through other market-based mechanisms. Indeed, it would be perverse if a mandatory scheme were to prevent continuation of good practice established through voluntary measures. The NNL Initiative could explore the potential for such complementary voluntary measures.

#### **5. SUMMARY<sup>37</sup>**

45. The NNL Initiative might focus on terrestrial, freshwater and coastal habitats, and might also extend as far as is considered feasible, to the coastal and marine environment.
46. The NNL Initiative might address, where not already fully addressed by EU legislation, the need, at planning and project stages, to avoid and, where avoidance is not feasible on the basis of informed evaluation with careful scrutiny, to reduce and compensate (including, where appropriate, through offsetting) for significant residual impacts on biodiversity and ecosystem services arising from all plans, projects and activities (of housing, transport and energy infrastructure, industrial development, extractive industries, major land use

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<sup>36</sup> The definition of 'significant' is critical as this sets the threshold at which the NNLI is applied. First and foremost, it must be clarified that significance is understood as referring to the biodiversity, ecosystems and ecosystem services for which NNL is to be achieved; it does not refer to the socio-economics of the project being assessed. Consideration of this point also raises the issue of where one sets the baseline. For example, for a development on arable land, compensation by provision of other arable land hardly contributes to restoration of biodiversity and ecosystem services and ignores the fact that biodiversity and ecosystem services have already been significantly degraded on the arable land under development and that development definitively closes down the potential to restore biodiversity and ecosystem services on the land in question. As the majority of development in the EU is on land that has already been ecologically degraded, there is great scope for net gain if the baseline is set not at current ecological value, but at potential ecological value (though not all WG members agreed that this would be acceptable).

<sup>37</sup> The UK disagreed with including this summary stating that 'it falsely implies that the Working Group reached a consensus on these questions, which they did not.'

- changes, etc. – not necessarily limited to those plans and projects within the scope of the EIA and SEA Directives).
47. The NNL Initiative might focus on addressing impacts in such a way as to complement (and not impair) existing legal provisions for compensation of damaging impacts on sites, habitats and species already protected under EU (and national) law; consideration might be given to the extent to which compensation for residual impacts in the 'wider countryside and seascape' might also, while respecting the principles of functionality (like-for-like) and 'additionality', enhance the conservation status of protected habitats and species and the ecological cohesion of the Natura 2000 network (above-and-beyond the legal obligation to do so).
  48. The NNL Initiative might seek also to address causes of net loss of biodiversity arising from agriculture, forestry and fisheries, in order to tackle these other key drivers of biodiversity loss and assure a level playing field across sectors, and in such a way as to complement actions under targets 3 and 4 of the Biodiversity Strategy.
  49. The NNL Initiative might give due consideration to the relative advantages and disadvantages of voluntary as opposed to mandatory approaches to the mitigation hierarchy including compensation and offsetting, with due attention to the relative competences of the EU and Member States (e.g. with respect to territorial and developmental planning).
  50. The NNL Initiative might focus on impacts within the EU territory, but might also consider how measures proposed within the EU affect biodiversity and ecosystem services outside the EU, and might also be extended, where feasible, to address EU impacts (including those from developments funded by EU institutions and EU-based banks and those of EU-based companies and companies with major operations in the EU) on biodiversity and ecosystems outside the EU.