

Biodiversity offsets seminar 16 March 2011:

NPS on Indigenous Biodiversity: Issues and options

Introduction

The Minister for the Environment, Hon Dr Nick Smith, and the Minister of Conservation, Hon Kate Wilkinson, have invited public input into a proposed National Policy Statement on Indigenous Biodiversity (NPS). Submissions close on 2 May 2011.

<http://www.mfe.govt.nz/publications/biodiversity/indigenous-biodiversity/index.html>

The NPS would provide clearer direction to local authorities on their RMA responsibilities for managing biodiversity. It outlines policies and decision-making frameworks for identifying and managing biodiversity on private land.

Criteria for protection of rare or threatened habitats or habitats containing rare or threatened species are based on the Government's Statement of National Priorities for Protecting Rare and Threatened Biodiversity on Private Land. District and relevant regional plans will have to have areas of significant biodiversity identified within five years of the NPS taking effect.

Local authorities would be required to manage the effects of activities through district and regional plans, and resource consent decisions (or be satisfied that effects are managed by other methods) to ensure there is no net loss of significant indigenous biodiversity.

The NPS would set out the Government's expectations of and guidance for local councils in protecting native biodiversity on private land, under the RMA. The Ministers' press release of 29 January 2011 said: "A balance needs to be found in protecting our unique plant and bird life while respecting the reasonable rights of property owners to use and develop their land."

In particular, the NPS offers businesses an avenue for offsetting the effects on biodiversity of development, namely, a "biodiversity offset". At face value, this looks positive: it would allow a developer to offset effects at one site by enhancing or creating biodiversity at a separate site, as an acceptable form of environmental compensation.

Case law in this field is developing rapidly, a cause for concern for government agencies. In their belief, this has occurred in an ad hoc way, and is of uneven quality and often not informed by latest international best-practice. Hence the Government's interest in providing coherence on biodiversity offsets via an NPS.

Overall, the issue is controversial. There have been several failed attempts to develop an NPS on biodiversity over the last decade because of strongly-held and different views on how best to manage native biodiversity on private land. All that past governments have been able to achieve is non-statutory guidance for councils, for their use if they wish.

Summary of concerns raised during the biodiversity offsets seminar: 16 March 2011

1. Process

Issue

Cabinet decided on a fast-track approach to developing the NPS. Unlike previous NPS processes, there will be no formal hearings.

This is at odds with the Government's decision to finalise the NPS only after it has considered its response to the Waitangi Tribunal's report on Wai 262 (the flora and fauna claim in which Maori seek ownership, management and control of indigenous biodiversity).

While the Wai 262 report is due by June 2011 this claim has been in train for the last 15 years and there have been many deadline extensions. The findings – when they are made - are likely to be contentious; therefore, the Government will wish to consider carefully its response, particularly so in an election year.

Risk

A fast-track process, with limited opportunity for public input, may not necessarily lead to a quality NPS. The first attempt at an NPS on biodiversity was in 1999 and there have been at least two further attempts since then. This illustrates the difficulty of regulating biodiversity.

The Cabinet paper records DOC's view that it may not be ideal to progress the NPS at this time.

Options

In light of the issues around Wai 262, there is little point in hurrying to enact an NPS. There are a few approaches that could be taken:

- Withdraw the proposed NPS, as unnecessary for managing biodiversity; or
- Set up a full board of inquiry, that would undertake formal hearings, as per the normal process; alternatively
- Propose the Minister consider a truncated process that would still provide for hearings, e.g. technical advisory group, independent hearing by a High Court judge.

2. Policies 1-4: identifying areas with "significant" vegetation, or habitats containing "significant" species, section 6 (c) of the RMA, and inserting these into plans

Issues

There is no definition of "significance" (which was deliberate on the part of MfE). Rather, Policy 2 provides examples of significance, taken from the non-statutory Statement of National Priorities of 2007 for protecting rare and threatened native biodiversity on private land.

Risks

This is a blunt-instrument approach to determining what is significant. For example, broadscale information on naturally-uncommon ecosystems, the areas of NZ with less than 20% of original

habitat cover remaining, and areas inhabited by at-risk species, is unlikely to be accurate at specific sites. Nor is there provision for balancing regional versus national interests.

Yet the above could provide the basis for setting aside areas to be protected for their significance, or even set aside as no-go areas for development on the basis they are “vulnerable” or “irreplaceable” (cf. Policy 5). The ability of the public to participate in a quality way in this planning process would be hampered by inadequate information.

While the proposed NPS does not require councils to create no-go areas upfront, nor does it prevent councils from so doing. Indeed, councils may feel empowered to create no-go zones, using the blunt-instrument approach outlined. That said, this may be an unlikely outcome.

In any event, designation of no-go areas, if done in a rough-and-ready way, could lead to years of litigation. This is because for specific sites there could always be argument over whether or not that site is significant (or vulnerable or irreplaceable), armed with detailed site-specific information; and, even if the site is significant (or vulnerable or irreplaceable), over whether or not effects are manageable to an acceptable degree.

Option

It would be preferable for determinations to be made on what is significant and what is not, at specific sites, rather than indiscriminately applying inaccurate information or blunt-instrument criteria over large areas.

This case-by-case approach to significance would promote informed discussion on specific development proposals, where the information would be of high quality. Indeed, this is the only sensible way of having a debate on significance. This is because it is only for specific proposals that a company would invest in obtaining information on all values present to an acceptable level of accuracy, as well as on any effects and how they would be managed. In this way, stakeholders would be able to participate to best advantage, as would decision-makers.

After following such a process, it is possible that some sites would be revealed to be vulnerable or irreplaceable, where the effects would be too great, or not possible to manage to an acceptable degree, and where development could not go ahead. But such a decision would have been made in a fully-informed and adequately-considered way.

3. Policy 5: managing effects in section 6 (c) areas

Issue

Effects are to be managed for “no net loss”, and the only available mechanism is the biodiversity offset, as spelled out in Schedule 2.

Risks

New Zealand may fail to develop a workable biodiversity offsets scheme or a biodiversity offset may not be workable for a specific proposal, and no other option would be available in the NPS.

The definition of “no net loss” is narrow, ambiguous and premature while research & development into biodiversity offsets is in train (DOC’s Biodiversity Offsets Programme), and could close off other options for managing effects.

The closing off of other options could potentially result in otherwise acceptable proposals being classified in advance, essentially, as prohibited activities. This would be undesirable from the perspective of business, and in terms of achieving the aims of section 5 of the RMA (sustainable management).

Too much detail in the definition of no net loss could lead to too much reliance on experts when making decisions. This would hamper the ability for the public to participate adequately in decision-making processes, and could hamper decision-makers in the exercise of their responsibilities.

Options

It would be preferable to establish a principle of achieving “no net loss”, as an objective when managing effects, without specifying too narrowly what no net loss is. This would allow the work being led by DOC to continue on developing good definitions of no net loss.

For example, no net loss could include accepting one type of loss in exchange for another type of gain, e.g. a trade-off between area of habitat and its condition. Such an outcome would be quite different from that envisaged in the proposed NPS.

The NPS should provide for alternative tools for managing effects, such as “negotiated agreements”. This option is available under the biodiversity offset scheme being developed by DOC.

An alternative is compensation in the form of money, which would be used for biodiversity conservation.

As an ultimate safeguard, there would still be discretionary decision-making by a judge, informed by quality public input. (Any biodiversity offset scheme is unlikely to be a black box in which an ecologist can turn the handle, and the answer is yes or no.)

As well, there would still be monitoring and reporting against the principles outlined in Schedule 2. This is an argument in favour of adaptive management, to allow modification to mechanisms for managing effects, whether under a negotiated agreement or paid as compensation or under a biodiversity offset.

4. Application of the NPS

It is anomalous that the proposed NPS does not apply to public conservation land. It should. (Our soundings are that this is a widely-held concern and that MfE is open to hearing submissions on this.)

5. Potential conflict between the proposed NPS and the Coastal Policy Statement 2010

Issue

There is an overlap in area of application of the proposed NPS and the Coastal Policy Statement 2010, namely the coastal environment above the mean high water spring.

Risks

This could frustrate the application of biodiversity offsets (or other approaches to managing effects of development on biodiversity) in the onshore part of the coastal environment.

It is not clear which Policy Statement overrides which.

Options

The connection between the CPS and the proposed NPS should be spelled out. Perhaps, the proposed NPS should override the CPS.

6. Connection between the objective and policies

There is no clear connection between the eight policies and the objective of the NPS. Intuitively, the policies are tools, approaches or mechanisms for achieving the objective. If so, this should be spelled out. Alternatively or in addition, the NPS could draw on Part II of the RMA for a purpose statement, i.e. sustainable management.