Regulatory Impact Statement: Overview of required information

Regulatory Impact Statement

Improving the protection of indigenous biodiversity on land outside the public conservation estate

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry for the Environment.

It provides an analysis of options for ensuring that significant areas of vegetation and habitats supporting indigenous biodiversity outside the public conservation estate are identified. The policy is intended to contribute to addressing ongoing indigenous biodiversity decline in New Zealand.

Given the timeframe available for assessing this proposal, we have not been able to accurately estimate the potential costs and benefits of the proposed National Policy Statement (NPS) or the alternative options. Nevertheless, our cost estimates, based the estimates for a recently developed NPS, indicate that the NPS will be the most costly option in terms of its implementation costs for councils. While neither the NPS nor NES will impose direct costs on landowners, they may act to place additional limitations on the way in which landowners can develop their land.

The regulatory impact assessment finds that both the NPS and NES options will meet the policy objectives. Therefore, this document does not make a recommendation on a preferred option, but instead sets out the pros and cons of these two options in the concluding section.

The Minister has proposed not to use the Board of Inquiry process for the proposed NPS, once notified, and instead to use an alternative process, as set out in 46A(1)(b). This is the first time an alternative process has been used, and therefore there is no established model to follow. It will be important to ensure that the process is fair and allows the public and stakeholders adequate opportunity to participate meaningfully.

Additionally, the process or framework for monitoring the effectiveness of the NPS is yet to be determined. Because the NPS cannot require councils to undertake monitoring, there is a risk that we will not have the requisite data available to enable the measurement of key biodiversity indicators, by which the effectiveness of the NPS will be evaluated. This risk will need to be addressed by exploring alternative options (to NPS provisions on monitoring) to encourage consistent monitoring and reporting by councils.

Craig Mallett, Acting Director, Natural and Built Environment

12 November 2010

Executive Summary

This proposal seeks to address two specific issues that have been identified as inadequacies in the way biodiversity is currently managed. In New Zealand, management of biodiversity outside the public conservation estate is primarily devolved to local authorities under the Resource Management Act 1991 (RMA). However, the effectiveness of council efforts to protect and maintain indigenous biodiversity over the past decade has been inconsistent and at times inadequate. This is despite the clear signal that indigenous biodiversity is a matter of national importance, set out in section 6(c) of the RMA (in addition to the maintenance of biodiversity being an explicit function of local authorities under sections 30 and 31), as well as various other policy interventions over the past decade. Therefore, this proposal focuses on ways to set a consistent standard in terms of criteria setting and identification of sites of significant biodiversity value.

Status quo and problem definition

Background – biodiversity on land outside the public conservation estate and why it is important

A significant proportion of New Zealand's indigenous species are found nowhere else on earth. Both species of New Zealand bat are endemic, as are all four frogs, all 60 reptiles, more than 90 percent of insects and a similar percentage of marine molluscs, about 80 percent of vascular plants, and a quarter of all bird species. The ecosystems in which these species live are also highly distinctive. The uniqueness of much of New Zealand's indigenous biodiversity means that it cannot be preserved effectively elsewhere in the world.

Although the public conservation estate in New Zealand is proportionally large by international standards, it is not representative of the breadth of ecosystem types and habitats found here. Some important habitats, ecosystems and species – most notably those associated with lowland forest and wetlands – are found primarily in modified environments, many of these being on private land. In other words, a significant proportion of under-represented and at-risk habitats are located on land outside the public conservation estate.[1]

Background - how biodiversity on land outside the public conservation estate is managed in New Zealand

The RMA is the principal legislation governing the use of New Zealand's natural resources on private land, and has a key role in managing New Zealand's biological diversity, as almost all forms of resource use affect indigenous biodiversity. The protection of areas of significant indigenous vegetation and habitats of indigenous fauna is listed as a "Matter of national importance" under Part 2, 6(c) of the RMA. Under sections 30 and 31, both regional councils and territorial authorities have responsibility for the maintenance of biodiversity.[2]

The other key legislation dealing with land-based biodiversity is the Conservation Act 1987. However, this relates primarily to public land under Department of Conservation (DoC)

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[1] Analysis using the Land Environments of New Zealand System and Land Cover Database data from 2002 indicates that 468,000 hectares of Priority 1 vegetation/habitat is not legally protected by public ownership or legally binding covenant. This represents about 82% of all such areas in New Zealand. (Priority 1 vegetation/habitat is that which occurs in LENZ environments that have 20% or less of their original land cover remaining.)

[2] Regional council responsibilities for biodiversity, as set out in 30(1)(ga) is "the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity"; while territorial authorities are responsible for the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of "the maintenance of indigenous biological diversity" (section 31 (1) (b) (iii)). Other sections of the RMA which directly relate to biodiversity are sections 5 and 7(d).

jurisdiction; DoC only has an advocacy and support role in respect to land outside the public conservation estate.[3]

New Zealand is a signatory to three international conventions that deal with indigenous biodiversity: the Convention on Biological Diversity, the Bonn Convention on the Conservation of Migratory Species, and the Ramsar Convention on Wetlands of International Importance.

Non-statutory tools have also had an important role in the management of biodiversity on land outside the public conservation estate. These include trusts and funds such as the Queen Elizabeth II Trust, Nga Whenua Rahui and the Nature Heritage Fund, as well as non-regulatory guidance.[4] DoC maintains a website and an advice service about biodiversity funds. In addition, the Ministry for the Environment (MfE) has recently released updated guidance for councils on biodiversity management.

Background – key decisions

In December 2000, the Government announced a package of policy measures to enhance the management of indigenous biodiversity outside of public conservation lands, including:

- increased funding to the Queen Elizabeth II National Trust, Nga Whenua Rahui and the Nature Heritage Fund
- the establishment of a Biodiversity Condition Fund to assist private landholders and community groups to protect areas, habitats and species on private land
- the establishment of a Biodiversity Advice Fund to provide information and advice to land managers to assist them in managing indigenous biodiversity
- funding to support local and regional pilot projects to build capacity in local government
- development of an NPS on biodiversity.

With the exception of the NPS, all elements of this package have been put in place.

In addition, in 2003 amendments were made to the RMA to provide clarity around the biodiversity functions of local authorities.

In 2007, Cabinet decided to introduce the *Statement of National Priorities for Protecting Rare and Threatened Native Biodiversity on Private Land* rather than develop a national policy statement. Cabinet noted the need to evaluate the effectiveness of this non-statutory approach to achieving its biodiversity objectives by the end of 2009. This was subsequently extended to 2011 [Cab Min (06) 47/3].

Evidence of biodiversity decline

Despite interventions designed to help arrest biodiversity decline in New Zealand, data from various sources indicate that it continues to decline. For instance, data from the Land Cover Database (LCDB) indicates that there was a clear decline in indigenous vegetation cover from the period of 1997 to 2002, while the Land Use and Carbon Analysis System (LUCAS) shows that there has been a loss of 100 hectares in wetlands over the period from 1990 and

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[3] Other legislation relevant to biodiversity management (but not limited to private land) is the Wildlife Act 1953, Forests Act 1949 and Forests Amendment Act 1993, the National Parks Act 1980, the Reserves Act 1977, and the Biosecurity Act 1993.

[4] Nearly 110,000 hectares of private land is now protected by covenant under the QEII Trust, for example.

2008, and a loss of 50,700 hectares of "natural forest" over the same period.[5] Analysis of LUCAS and LCDB has indicated a large increase in the rate of indigenous forest loss between the periods of 1990 to 2000 and 2001 and 2007, the loss occurring predominantly on private land. This is significant in that the rate has increased despite policy interventions related to sustainable forestry and biodiversity management on private land.[6]

Species data also shows continued declines. For instance, total threatened bird species and sub-species increased to 153 from 145 over the period from 2002 to 2005, while total threatened reptile species and sub-species increased from 59 to 67 over the same period.[7] More recent research shows a continued decline in threatened or at-risk species, with the threat status of 13 species of birds and 2 species of reptiles worsening between 2005 and 2008, and the threat status of 139 species of plants worsening between 2004 and 2009.[8] In the case of both the bird and lizard species, one of the main causes for deterioration in conservation status is thought to be changes in land use, particularly conversion of sheep farming to dairy farming.[9] Many lizard species are found only outside the public conservation estate: analysis of LCDB data has calculated that, of the threatened species for which there is distribution data, 70 per cent are found outside public conservation land.[10] Even in the case of our more "iconic" species, such as the five species of kiwi, land outside the public conservation estate can make up a significant proportion of their habitat – 28 per cent in the case of the kiwi.[11] Numerous threatened plant species are also found only on private land: analysis of LCDB data has calculated that, of the threatened species for which there is distribution data, 62 per cent are found outside public conservation land.[12]

The problems this proposal seeks to address

The long-term policy objective is to address the decline in indigenous biodiversity in New Zealand. However, this cannot be achieved through one action alone; it will require a "tool-kit" of measures, implemented over time. This was recognised in the package of measures

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[5] *Environmental Snapshot – Land Use*, Ministry for the Environment (January 2010). This latter statistic must be treated with some caution, however, as it includes regenerating scrubland and self-sown exotic species such as wilding pines and willows.

Note that while councils also collect biodiversity data, owing to the data and methods monitoring and collecting data not being regionally comparable, it is not possible to aggregate this to provide a national picture, let alone trends. A report commissioned by MfE in 2005, "A Survey of Regional Council Biodatabase", undertaken by Landcare Research and Seradigm Limited, examined this issue, focusing on databases of regional councils and unitary authorities. The report identifies that good data management practices exist within many regional councils but the challenge is to move to a situation where data can be compared at a national level. It notes that because the councils' databases have been set up in different ways, independent of one another, it may be difficult to combine data across different organisations.

[6] The logging of indigenous forest has been strongly regulated since the enactment of the Forests Amendment Act in 1993, and the Biodiversity Strategy was introduced in 2000, with supporting interventions occurring in the subsequent years.

[7] See *New Zealand Threat Classification System Lists*, Department of Conservation (2002 and 2005).

[8] See "Conservation status of New Zealand birds", *Notornis* 55: 117-135, Miskelly .C.M. et al (2008) and "Conservation status of New Zealand reptiles", *New Zealand Journal of Zoology*, Hitchmough, R.A. et al (2009).

[9] This applies to the decline in pied oystercatcher, pied stilt, banded dotterel, black-billed gull and the pipit. See "Conservation status of New Zealand birds", *Notornis* 55: 117-135, Miskelly .C.M. et al (2008) and "Conservation status of New Zealand reptiles", *New Zealand Journal of Zoology*, Hitchmough, R.A. et al (2009).

[10] This data provided by Josh Fyfe, Ministry for the Environment.

[11] This data provided by Brent King, Ministry for the Environment.

[12] This data provided by Josh Fyfe, Ministry for the Environment. Specific threatened plant species found only on private land are: Bartlett's Rata (only 29 surviving nationally – all on iwi land); kakabeak (less than 120 plants left in the wild, down from 2,300 in 1989 – many of the key populations are on private land); *Libertia cranwelliae* (a type of iris, only known population occurs on private iwi land on the East Cape). (This data provided by Peter J. de Lange, Department of Conservation.)

developed and implemented in the early to mid-2000s. The present proposal focuses on a further measure, which deals with the specific issues that have been identified as hindering the effective management of indigenous biodiversity in regional and district council planning and practice; that is, the consistent identification of significant indigenous vegetation and habitats outside public conservation lands.

There are three key issues that this policy proposal seeks to address:

1) Inconsistent or inadequate identification of areas of significant indigenous vegetation and habitat by local authorities. This hinders the effective protection of sites of significant biodiversity value on land outside conservation estate.

2) Linked to 2) is the lack of nationally consistent criteria to enable the identification of sites.

3) All available evidence points to a continued decline in indigenous biodiversity in New Zealand.

Inconsistent/inadequate identification of sites with significant biodiversity value

A prerequisite to protecting, maintaining or enhancing sites with significant biodiversity value is their identification. There is a broad variance in the degree to which councils identify sites: some have comprehensive lists of sites of significant biodiversity value, which are mapped or scheduled. However many councils have not fully identified sites.

In September 2010, MfE conducted an informal survey of regional councils, asking about identification of sites of significant natural areas. This survey was designed to augment the April 2010 survey of plan provisions (discussed below), and gather more information about the identification of sites, an aspect which was not comprehensively canvassed in the April survey. In answer to the question: "Have most of the significant areas that your council has jurisdiction over been identified in your regional/district plan?" the response of the majority of councils for which responses were provided was negative, although most councils indicated that they do some identification.[13]

Lack of consistent criteria

Inconsistency, and in particular, lack of systematic criteria or methods for identifying indigenous biodiversity, has significant implications in respect to biodiversity management. It means that councils are not able to obtain baseline or trend data, which is pre-requisite to making good decisions about biodiversity management. This is particularly critical in the case of biodiversity on private land because of the lesser protections on land outside the public conservation estate and the higher pressures for land-use change and intensification.

In 2010, a review of council plan provisions relating to the protection of indigenous biodiversity was undertaken.[14] This review found that while 80 per cent of councils identified significant natural areas, 20 per cent did not have any form of criteria. Of the 80 per cent that do have criteria, there is a wide range of variance in what methodologies are used, which means that sites identified are not necessarily comparable.

A further indication of inadequacy of some plan provisions is the degree of litigation around biodiversity provisions, and specifically, criteria. In the last decade, four substantial cases have revolved around plan criteria for identifying sites with significant biodiversity value.[15] All

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[13] Email survey by Ministry for the Environment, September 2010. Data provided by Joshua McClennan-Deans.

[14] *District Plans and the Protection of Biodiversity: An Update*, Ministry for the Environment (September 2010).

[15] These are: Friends of Shearer Swamp Inc v West Coast Regional Council (2010), Director-General of Conservation v Whangarei District Council (2006), Royal Forest and Bird Protection Society Inc v Central Otago District Council (2004) and Minister of Conservation v Western Bay of Plenty District Council (2001).

of these cases involved DoC as one of several parties. This sort of litigation absorbs many months of time and work and is very costly – for all parties concerned. If minimum national criteria for identifying sites of indigenous biodiversity were established and implemented, litigation around the nature of criteria – and the associated cost and effort - may be avoided or reduced. However, there is also the risk that introducing new national criteria may lead to their relitigation of criteria established through case law and council good practice.

Objectives

The following policy objectives flow from the three issues outlined above: i.e., inconsistent or inadequate identification of areas of significant biodiversity value; lack of baseline criteria to provide a minimum level of maintenance and protection; and evidence of an ongoing decline of biodiversity in New Zealand. The policy options explored in the analysis to follow will be assessed against these objectives:

1. Ensure that significant indigenous vegetation and habitats outside public conservation lands are identified.

2. Provide baseline criteria for achieving the identification of significant indigenous vegetation and habitats outside public conservation lands.

3. Contribute to addressing the ongoing decline of indigenous biodiversity outside public conservation lands.

Regulatory impact analysis

The following is a description of a range of options for addressing the problems outlined above, followed by an assessment against the three objectives (refer to table on pages 8 - 9).

Status quo
The status quo consists of RMA provisions which set out direction on the national importance of indigenous biodiversity (s. 6c) and the roles of councils in relation to biodiversity management (ss.30 and 31); a mix of non-statutory guidance, support, advice and funding for biodiversity management; and voluntary tools such as covenants, in addition to existing council provisions and rules relating to biodiversity.

The indigenous biodiversity guidance for councils on the Quality Planning website has recently been updated with more comprehensive guidance. This guidance has been developed in close collaboration with councils, ecologists, environmental planners and practitioners.

Option 1: Targeted assistance for councils to support the development of criteria and identification of significant indigenous vegetation and habitats
Central government could target councils which are struggling to meet their biodiversity responsibilities under the RMA with assistance to help them lift their performance in biodiversity maintenance and protection.[16] This could involve appointing officials to work with specific councils to assist them with planning, monitoring and engagement with land owners.

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[16] This can manifest itself in a number of ways, including weak biodiversity plan provisions, or poor enforcement or monitoring. Councils may struggle to fulfil their responsibilities under the RMA for a number of reasons, including under-resourcing (some small district councils have only one planner, for example), lack of political will.

Option 2: Increase biodiversity funds to encourage the identification (and protection) of significant indigenous vegetation and habitats

The Biodiversity Condition and Advice funds (DoC administered) provide assistance to communities and land owners to protect biodiversity in their area. The funds provide an incentive for more individuals and organisations to more proactively identify and protect biodiversity on private land. Current funding for these biodiversity funds are around $3.6 million. DoC currently receives twice as many applications as it can currently fund. The funds could be increased by between $1 – 2 million to enable more applicants to take advantage of the assistance and advice provided through these funds.

Option 3: Amend the RMA to provide more direction on planning requirements relating to biodiversity

The RMA could be amended to provide more specific direction on planning requirements for biodiversity, such as requiring that local authorities apply baseline criteria and identify sites using a nationally consistent method.

Option 4: National Environmental Standard to require consistent criteria and identification of significant indigenous vegetation and habitats

A National Environmental Standard (NES) issued under sections 43 and 44 of the RMA could set criteria, methods and rules for the identification, protection and monitoring of significant indigenous vegetation and habitats. An NES would require regional, city or district council to enforce the same standard. This option would require councils to apply a consistent set of criteria, and methods by which to identify significant indigenous vegetation and habitats.

Option 5: National Policy Statement

An NPS provides national direction, which local authorities formulate plan provisions and make decisions. Because NPSs focus on policy objectives and decision-making frameworks, rather than the content of the policy, provision or rules themselves, they allow local authorities some scope and flexibility in determining how they are going to achieve the policy objectives or work within the decision-making framework.

The current NPS proposal will require councils which do not have criteria to apply a set of baseline criteria. These will be applied both through the decision-making process on matters under the RMA, and also by being reflected in their planning documents within a specific time-frame.

Policy Options	**objectives**			**Fiscal cost $***	**Benefits, costs, risks and opportunities**
	1	2	3		
Status quo	x	x	x	No additional cost to councils. No additional cost to central govt	The status quo will not address the lack of baseline criteria, nor will it address the patchy identification of areas of significant biodiversity value. The newly released improved guidance may assist in improving council practice in respect to biodiversity management generally, but this is unlikely to have any significant effect in respect to the current policy objectives.
Option 1: Targeted assistance to councils	x	x	✓	Some cost to councils. Central govt cost: **1 mil** over 3 years (based on 4 FTE for 3 years).	This option may help support councils with criteria-setting or identification of sites, but will not mandate it. Therefore an improvement in respect to these objectives is not ensured, especially where there is a lack of political will to manage biodiversity proactively.
Option 2: Increase biodiversity funds	x	x	✓	No cost to councils. Additional **$1 - 2 mil** for central govt.	This measure is likely to improve motivation of landowners to identify and protect biodiversity on their land, but will not address the lack of criteria or patchy identification of sites. This measure will only target areas on private land, not public land outside the conservation estate.
Option 3: Amend RMA	–	–	–	**2 - 3 mil** for councils, depending on level of prescriptiveness and scope (criteria, identification, monitoring).	Provides clear, unambiguous statutory obligation. However, would be at odds with existing RMA framework, which generally sets out processes and principles rather than prescribing matters of technical detail. Would need to be given effect to through plans, leading to relatively high costs to councils. This level of detailed direction, including on standards and methods, would be more appropriately

					delivered through an NES.
Option 4: NES	✓	✓	✓	Up to **1 mil** for councils.	An NES prevails over all relevant council plans. An NES could provide a baseline set of criteria through the decision-making and planning process. An NES can set standards and methods for identification, but cannot mandate that the identification is carried out. An NES risks being too prescriptive, and not allowing councils sufficient flexibility to develop locally tailored approaches. It may also act to undermine councils plans and criteria established under case law, where existing criteria or standards are more stringent than those in the NES. Once issued, an NES can take effect immediately, rather than having to be applied through plan changes. An advantage of an NES is that it can be used to set standards and methods for monitoring.
Option 5: NPS	✓	✓	✓	Up to **4 mil** for councils.	Sets baseline criteria to be applied through the decision-making and planning process, and requires sites to be identified. Also provides direction on wider matters that should be considered to support the maintenance of biodiversity. There is the risk that an NPS that sets baseline criteria at too low a level will not lead to a significant improvement in biodiversity management (and may lead to an erosion of effectiveness of high-performing councils, if it the discrepancy in standards leads to litigation), but will still involve significant compliance costs for councils to implement.

Key:

✓ substantially meets objective

x does not meet objective

– partially meets objective

* This column does not include costs to central government of developing and delivery of the NES or NPS options; these are considered as "sunken costs". Council implementation costs for the NES based on the proposed NES for plantation forestry; compliance costs for NPS based on estimated costs for the proposed Renewable Electricity Generation NPS (but halved to reflect longer implementation periods – "next review" for RPSs and 5 years for regional/district plans as opposed to 2 years for regional councils and 3 years for district councils).

Consultation

The Department of Conservation, Ministry of Agriculture and Forestry (MAF), Ministry of Fisheries (MFish), Local Government New Zealand (LGNZ) and Te Puni Kokiri (TPK) have seen draft versions of the proposed NPS.

DoC have raised a number of concerns. The first key concern is that an NPS alone will not achieve greater certainty, consistency or firm minimum standards in council plans; to achieve this, DoC recommends that an NES be developed alongside the NPS. (DoC has expressed particular concerns about vegetation clearance rules.) A second concern is that the proposed NPS could be interpreted as providing guidance as to what is significant under section 6(c) of the RMA, thereby having the potential to undermine that section and the body of case law developed under that section. A third concern is with the ability the NPS provides to use offsetting to counteract the loss of biodiversity. In particular, DoC is concerned that some biodiversity values (e.g., rare and threatened ecosystems) are irreplaceable, and therefore unsuited to offsetting. In response to this concern, qualifications around the application of offsetting have been inserted in the draft NPS, however, DoC has reiterated their concerns in respect to offsetting in their review of the latest draft. A fourth concern is the absence of monitoring and reporting provisions in the draft NPS. It is suggested that if they cannot be included for legal reasons, this strengthens the rationale for a supporting NES.

Both MAF and MFish questioned why the draft NPS excluded public conservation estate, and MAF suggested that there may be perceived equity issues around this. MFish suggested that the implications for private property owners could be significant, particularly for those who cannot afford to offset impacts on biodiversity, where this is stringently applied by a council. MAF also suggested that some habitats and ecosystems may be too significant to be

subject to offsetting, and there should be caveats around any offsetting provisions. These concerns have been addressed as outlined above. MAF also raised concerns that while pests and weeds are a major threat to indigenous biodiversity, the NPS is silent on invasive species. MAF also suggested that an NES may be more appropriate than an NPS, owing to its potential to address the lack of coordinated monitoring and reporting.

TPK queried how the draft NPS will interface with the New Zealand Coastal Policy Statement. TPK also highlighted the need to ensure that Maori have a full opportunity to participate in the consultation process.

Representatives from both LGNZ and the affiliated Regional Council Biodiversity Forum are supportive of an NPS being developed, particularly one which supports council good practice to date.

Forest and Bird, Federated Farmers, Environmental Defence Society, Forest Owners Association and iwi advisors have also been consulted on the general direction of the NPS. Federated Farmers have asked that the proposed NPS ensures that landowners are recognised and consulted as affected parties when indigenous vegetation and habitats are identified and protected.

MfE also received 44 letters from stakeholders in response to the letter sent under section 46(a) of the RMA, which requires the Minister to "seek and consider comments from the relevant iwi authorities and the persons and organisation that the Minister considers appropriate". The respondents comprised the following: territorial authorities (14), regional councils (6), iwi agencies (6), research organisations (4), non-government organisations (5), industry organisations (3), utility companies/electricity generators (3) and other (3). As part of this section 46 letter feedback, iwi organisations raised concerns about the need to consider Treaty claims (including the WAI 262 claim relating to flora and fauna), the need to recognise iwi cultural values, and the desirability of considering cultural, social and economic as well as biodiversity benefits in developing the NPS.

While wide-scale consultation has not been undertaken in respect to this specific NPS proposal, the government has conducted substantial consultation on biodiversity in the past 10 years. Some of this has been on the broader biodiversity issue, including consultation on the Biodiversity Strategy, but some has been specific to earlier draft versions of NPSs. There will be an opportunity for public consultation on the proposed NPS following its release for public submissions (planned for December 2010).

If progressed, the Minister has indicated that he wishes it to follow an alternative (non Board of Inquiry) process as set out in 46A(1)(b), which has not been followed before. Given the level of scrutiny it will be subjected to, and the potential for it to be judicially reviewed, the consultation process will need to ensure that stakeholders and the public can participate in the process in an equitable and meaningful manner.

The proposed approach to consultation on the NPS is outlined as follows. (Because this follows the process established for an NES, this would be appropriate for both an NPS and NES.)

1. The proposed NPS, along with supporting documents and a consultation questionnaire/submissions template, will be released for public consultation on the Ministry website in late December 2010. The questionnaire will include questions designed to elicit responses which will help address the gaps in our analysis (e.g., evidence of biodiversity decline on land outside the conservation estate, approaches to monitoring etc). Stakeholders, including local government, non-government organisations, industry groups and iwi organisations, will be notified of the release of the proposed NPS for consultation by email or mail. The submissions period will run from late December 2010 to 31 March 2011.

2. In addition, up to 14 regional forums and hui will be held over the consultation period. Formal feedback on the NPS will occur through a submission process, which will run from late December 2010 to 31st March 2011. Stakeholders will be notified directly about the forums by email/mail and via the website, while public notices advertising the meetings will be published in local newspapers, and where appropriate, specialist publications such as agricultural/rural magazines.

3. Submissions will be analysed in April 2011, and collated into a summary report (due 29th April 2011). This report will inform decisions regarding policy and the refinement of the NPS.

4. The NPS will be revised during May, along with the section 32 report and RIS. If significant changes are made, an extra round of targeted consultation may be undertaken at this time. The revised NPS will be submitted to Cabinet for approval to gazette in June 2011.

Unlike the board of inquiry process (set out in sections 47 to 52 of the RMA), this process will not involve a Board of Inquiry or a hearing. The justification for following the process set out in 46A(1)(b) was outlined in a briefing to the Minister on 2 November 2010. The Minister agreed to using the alternative process, based on this justification.

Conclusions

In the analysis of the options against the policy objectives, the option of the NES and NPS both met the three objectives. The following table sets out the pros and cons of each of these two options (not limited to an assessment against the three policy objectives). This is intended to inform a decision about the preferred option.

National Policy Statement	
advantages	*disadvantages*
- provides for flexibility in local planning and decision making	- highest implementation costs for councils
- sends clear message about national significance of indigenous biodiversity	- has the potential to undermine good council practice and case law[17]
- can provide direction on a broad range of matters[18]	- cannot set standards and methods for monitoring
	- the current draft NPS will take up to ten years to take full effect
National Environmental Standard	
advantages	*disadvantages*
- can take immediate effect	- does not provide for flexible locally-tailored approaches
- lower cost than NPS	- has the potential to undermine good council practice and case law
- can set standards and methods for monitoring and reporting	

[17] By setting out criteria that are less comprehensive and policies that are less stringent than those of some councils or those developed through case law, the NPS risks undermining criteria or standards established through these planning or legal processes. While the draft preamble sets out that the intention of the NPS is to support the "existing good work of local authorities", and that it is not intended to prevail over existing statutory tests, the preamble carries no legal weight. There is a risk that the criteria set out in the NPS will be perceived as the minimum requirement and that councils will be put under pressure to reduce the stringency of existing plan provisions or criteria.

[18] A NPS can provide non-prescriptive direction on matters that councils should give consideration to through their planning and practice related to biodiversity.

Implementation (NES or NPS)

If the NPS is progressed, regional and district councils are to give effect to it immediately that it becomes operative, by applying the minimum criteria for identifying indigenous vegetation and the habitats of indigenous fauna when making decisions about resource consents, designations and other matters under the RMA. The minimum criteria set out in the NPS are also to be incorporated into regional policy statements (RPS) when they are next reviewed. District and any relevant regional plans must incorporate the minimum criteria set out in the NPS within 5 years of it taking effect.

An NES can take effect immediately (i.e., it does not have to be incorporated into plans or policy statements to take effect).

In the case of both the NES and NPS, guidance will be developed and made available to councils.

Monitoring, evaluation and review

In the case of the NPS, it is proposed monitoring needs to be undertaken in six years from the date that the NPS becomes operative, allowing for the proposed five year time frame for criteria to be reflected in district and regional plans (noting that it may take up to ten years for them to be reflected in RPSs). In the case of the NES, which can take effect immediately, this monitoring can be undertaken as early as one year after it becoming operative.

At minimum, monitoring (in the case of both the NPS and NES) should cover the criteria that councils have incorporated into their plans, and the nature and extent of the sites that they have been identified. The sites identified can be compared against databases developed by MfE and DoC to provide a sense of their comprehensiveness.[19]

In order to provide better information for ongoing biodiversity management, a comprehensive and measureable set of indicators will need to be developed to measure actual results of biodiversity management on the ground. This will need to be integrated within the overall Ministry programme for monitoring, compliance and review covering RMA and other policy areas, which is currently under development. More critically perhaps, it will need to be ensured that councils collect comparable data using consistent methodologies, so that the data can be aggregated at a national level to provide baseline and trend information.

Regional councils are currently working on a programme, to be rolled out over the next five years, which will provide for a consistent, coordinated approach to biodiversity monitoring and data collection. This provides an opportunity for central government to feed in, and support the development of this programme. In the case of the NPS, because it contains no requirements for monitoring, direction on monitoring will need to be delivered to councils through alternative means, such as through a national standard or environmental reporting legislation. Providing direction through non-statutory guidance is also an option, but this would have obvious implications for enforceability. An NES can set standards and methods for monitoring, therefore there no requirement for additional direction through other means.

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[19] For example, identified sites can be compared against the LCDB with the LENZ level 4 and 20% or less indigenous cover data overlaid, while wetland sites can be compared again wetlands identified in the Freshwater Ecosystems of New Zealand Geodatabase. Other databases are currently being developed for sand dunes and naturally uncommon ecosystems.