

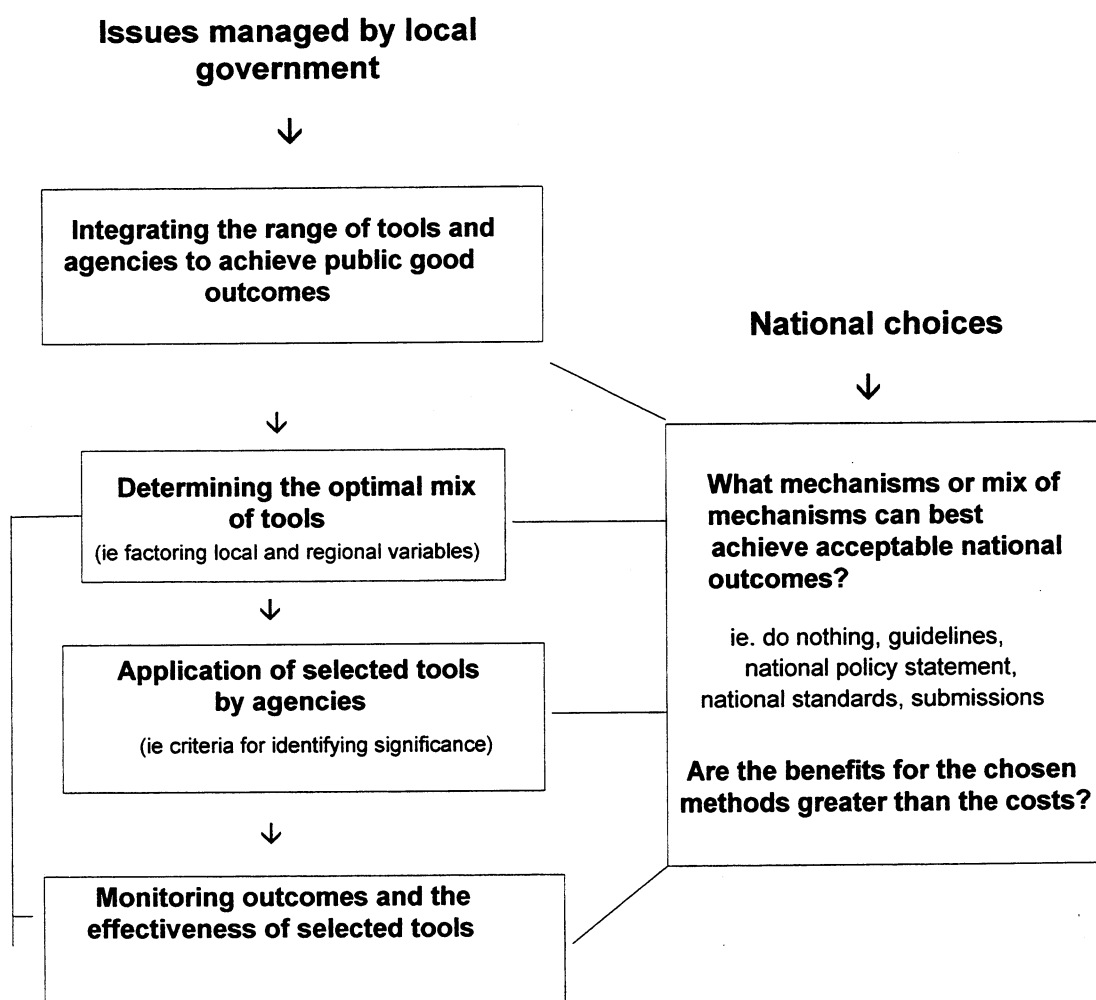
A National Policy Statement on “significance” in s. 6(c) - the best practicable option?

Introduction

This paper provides background information about the potential role of a national policy statement (NPS) to address the effective implementation of section 6(c) of the Resource Management Act (RMA) and broader biodiversity related policy issues. The paper does not present a particular viewpoint on the merits of a national policy statement as a best practical option. Its purpose is to facilitate discussion and debate at the conference workshop.

The paper is structured to address three policy areas that have presented key issues requiring national guidance. These key issues are briefly discussed in the context of whether a NPS is the best practical option to provide national guidance. The paper concludes with some ideas about the potential scope of a NPS. The flow diagram below (Figure 1) summarises the format of the discussion.

Figure 1. Structure of Discussion Paper



Overview of Key Policy Areas

There are three key policy areas that have provoked consideration of a NPS. These are the proposed New Zealand Biodiversity Strategy and its implementation, council implementation of section 6(c) of the RMA, and issues concerning sustainable forest harvesting and the Forest Amendment Act. Although these three key policy areas have involved different issues, they potentially generate a need for guidance on common areas at a national level. This section provides a broad overview of the policy areas and why some form of national guidance has been considered a desirable option.

Draft New Zealand Biodiversity Strategy

The New Zealand biodiversity strategy, which is currently in draft form, is a government-led initiative to provide an integrated response to New Zealand's declining biodiversity. The draft strategy proposes to cover a range of themes, which includes land, freshwater, coastal and marine, conservation, biosecurity information, knowledge and capability, New Zealanders and biodiversity. Each theme will have a set of recommended actions for implementing the strategy goals.

One of the key focus areas for the strategy is sustaining biodiversity in privately managed areas and in freshwater environments by implementing improved incentives and better planning tools. As part of the actions to achieve this, the draft strategy proposes that a national policy statement be prepared under the RMA. The proposal to prepare a national policy statement is intended to shift the focus from protecting isolated natural habitat remnants within production landscapes, to first identifying in a nationally consistent way the ecosystems and habitats most important for sustaining New Zealand's indigenous biodiversity and then establishing appropriate management regimes for those areas that will sustain their values in the long term. In doing so, a NPS would assist in implementing New Zealand's international obligations under the Biodiversity Convention.

Implementing the Section 6(c) provisions of the RM Act

The definition and delineation of section 6(c) has been an issue of widespread concern throughout New Zealand. Landowners from many areas have complained about implicit restrictions on property rights caused by RMA policies and rules. Dissatisfaction has also been expressed about the quality of the field information used, and the poor or inconsistent regulatory requirements which have resulted. Some councils, in turn, have sought national guidance on how to interpret and implement these RMA provisions.

A Significant Natural Areas workshop held in September 1997 highlighted some key areas of concern for those implementing the section 6(c) provision. These included:

- the absence of a clear and workable definition of "significance";
- the issue of private property rights and achieving equitable outcomes for both landowners and the community;
- awareness of the necessary processes to achieve community agreement;

- adopting the right mix of protection tools;
- understanding the values each area holds and the threats to those values;
- lack of specialist expertise within councils.

Another issue of concern is that the focus of managing significant natural areas has been on protecting these areas from human activities and not addressing the ecological threats posed by invasive plant species and animal pests.

Sustainable forest harvesting

In 1990, the Government adopted the Indigenous Forest Policy which introduced the concept of sustainable indigenous production forestry. The resultant Forests Amendment Act 1993 regulates the harvesting of timber from indigenous forests, to ensure the sustainable management of the resource.

The provisions of the Forest Amendment Act do not necessarily mesh easily with the provisions of the RMA. Because the former legislation is exercised at a national level (without a public process) and the latter at the district and regional council level, tension and some confusion exist about the respective roles and responsibilities of the different levels of government. This arises from the potential to duplicate consideration of the same activities but against different test in the two statutes by different decision-makers.

The Forest Act processes prescribe how and on what scale harvesting is possible to achieve a sustainable outcome. Uncertainty exists about the interplay between the two statutes when an area has been identified as a significant natural area. In defining an area as significant, councils can apply different levels of control through consent processes designed to protect the natural values identified. National guidance may be a mechanism that provides advice or criteria on how to select the most appropriate level of control, and to assist councils to apply the best mix of policy tools.

The best practicable option?

Stemming from these three policy areas are key issues requiring guidance from a national level, potentially in the form of a NPS. However, in order to determine the best practicable option to provide this necessary guidance, each issue needs to be evaluated against other national policy mechanisms. These include:

- do nothing and allow the issues to be addressed at a local and regional level
- provision of national guidelines
- advice through consultation and submissions on regional policy statements, and regional and district plans.
- national environmental standards

For any issue where national guidance is suggested to be warranted, consideration should be given to the full range of mechanisms available to central government and the appropriate mix of mechanisms. Consideration should also be given to whether national

guidance is actually required, or whether the guidance should be developed at the local and regional level.

Integrated Management

There is a requirement for greater integration between the various agencies and individuals who have roles in maintaining areas of significance. For example, an important management consideration for protecting significant natural areas is the identification and management of threats to biodiversity. However, no single agency has the responsibility for the management of all the threats. The threat of pests (ie. possums) is the responsibility of the regional council, the threat of grazing stock is the responsibility of the landowner, and the threat of habitat loss is the responsibility of territorial authorities and also regional councils, where the effects adversely impact on water and soil quality. An integrated management approach could ensure that closer links are made between pest management strategies at a national and regional level, and other management programmes needed to halt the decline of these natural areas and habitats.

An integrated management approach would also ensure that pests and the adverse effects of activities outside isolated protected areas are managed, so they don't impact on the identified areas. In addition to this, there will be opportunities where collaboration between agencies over the management of adjacent areas eg corridors that connect the protected estate to other areas would assist protecting the values sought in a low cost way

What is the best method or mix of methods for achieving an integrated approach to biodiversity management?

Determining the optimal mix of tools

The choice of management tools by local authorities for protecting significant natural areas has caused widespread concern in many districts in New Zealand. Of particular concern to landowners has been the introduction of over-prescriptive plans that rely heavily on regulation for protecting significant areas rather than exploring the full mix of policy tools. Regulatory clarity is therefore sought about the level of control which is appropriate to govern activities on identified significant natural areas, sufficient to mitigate the threats to those areas..

A range of policy tools is available for protecting significant natural areas. Some of these include:

- Information, education and motivation programmes
- Voluntary agreements with landowners and other groups (ie QE II Covenants).
- Financial Incentives (eg development rights, rates relief)
- Working out and codifying the rights and duties of different parties
- Rules and Standards
- National funds (ie. Forest Heritage Fund)
- Funding for fencing, pest control etc.

The policy approaches taken by local authorities to date have been varied. Some councils have relied solely on regulation to protect areas, while others have focused entirely on non-regulatory methods. Some councils have adopted a mix of methods, which include a range of incentives and non-regulatory methods backed by “trigger” rules.

The key issue is to find the optimal mix of instruments to meet both national goals and local circumstances. Local circumstances, for example, will vary depending on the threats to particular sites, political and community support for promoting financial incentives, the funding available for protecting significant natural areas, and the extent of significant natural areas requiring protection. Another issue that also requires clarity is the extent to which land use controls can be imposed on landowners.

What is the best method or mix of methods for achieving this optimal mix?

Application of methods, including criteria for identifying “significance”

National guidance has been sought on the application of policy tools for identifying and protecting significant areas. Of particular concern has been the varied application of ecological criteria for identifying “significance” in accordance with Section 6(c) of the RMA.

National criteria on defining significance are currently being developed by the Ministry for the Environment, and will be published as part of broader guidance on section 6(c).

Achieving the public policy goals sought by using the least cost combination of methods will only be possible where it has broad support of all the affected stakeholders. Experience around the country has shown that where stakeholders consider that there has been inadequate involvement in moving from establishment of broad goals to specific proposals (including methods), the proposals are opposed irrespective of their merit. Guidance could be provided on appropriate processes to avoid this.

What is the best method or mix of methods for achieving consistent application of selected policy tools?

Monitoring and information gathering

Monitoring and reporting on the condition of significant natural areas is an important function of local authorities. The collection of this information is critical in determining the effectiveness of selected management tools. However, some local authorities lack the funding and necessary skills for developing a robust monitoring system.

National guidance on this issue could also provide linkages to the National Indicators programme, currently being developed by the Ministry for the Environment. There may also be synergies with other government agencies, both central and local (ie. Pest Management Strategies).

What is the best method for providing the necessary guidance on monitoring sites?

Potential Scope of a National Policy Statement

The final section of this paper provides some ideas on the potential scope of a NPS. A NPS could take either a narrow or broad approach. It could identify broad policy objectives from which a response is sought, or it could identify the optimum mix of methods to implement policy. Consideration needs to be given to whether a NPS would address broader biodiversity issues or focuses primarily on section 6(c) of the RMA. If section 6(c) was a preferred option, would an NPS seek to incorporate technical issues (ie ecological criteria to define significance) or would it focus on process issues (ie application of ecological criteria to define significance)? Consideration also needs to be given as to whether a NPS would cover terrestrial, aquatic and coastal marine areas.

Conclusion

This paper has provided a brief overview of the issues that have led to the consideration of a NPS. Emphasis has been placed on outlining the key policy areas and associated issues, while focusing thought on the full range of policy mechanisms. The purpose of the workshop is to provide open debate about the potential role of a NPS in addressing the identified policy issues, and the appropriate mix of policy tools. Thought and debate is also required on the potential scope of a NPS.

Appendix 1

Overview of National Policy Statements

A National Policy Statement (NPS) is a statement of government policy on a matter of national significance that is relevant to achieving the purpose of the Resource Management Act. A NPS is a mechanism for Government to provide direction on matters it thinks are particularly important to local authorities exercising their functions, powers and duties under the Resource Management Act (RMA).

The RMA provides for a NPS to be developed through a statutory process outlined in sections 45 to 55. The NPS is implemented as part of normal district and regional planning. Sections 62(2), 67(2), 75(2) of the RMA provide that regional policy statements and regional and district plans shall not be inconsistent with any NPS. Section 65(3)(g) requires that regional councils shall consider the desirability of preparing a regional plan to implement the NPS. Section 104(1)(c) requires that when considering an application for a resource consent and any submission received, the consent authority shall have regard to any relevant NPS.

A NPS must be relevant to achieving the purpose of the RM Act and the objectives must be achieved by local authorities in exercising their functions under the RM Act.

Matters the Minister may have regard to when deciding whether to prepare NPS

Section 45 (2) of the RM Act lists matters the Minister may have regard to in determining whether it is desirable to prepare a NPS. These include:

- The actual or potential effects of the use, development, or protection of natural and physical resources;
- New Zealand's interests and obligations in maintaining or enhancing aspects of the national or global environment;
- Anything which affects or potentially affects any structure, feature, place, or area of national significance;
- Anything which affects or potentially affects more than one region;
- Anything concerning the actual or potential effects of the introduction or use of new technology or a process which may affect the environment;
- Anything which, because of its scale or the nature or degree of change to a community or to natural and physical resources, may have an impact on, or is of significance to New Zealand;
- Anything which, because of its uniqueness, or the irreversibility or potential magnitude or risk of its actual or potential effects, is of significance to the environment of New Zealand.
- Anything which is significant in terms of section 8 (Treaty of Waitangi);
- The need to identify practices (including measures referred to in section 24(h), relating to economic instruments) to implement the purpose of this Act;
- Any other matter related to the purpose of a NPS

National Interest

Section 45 (1) states the purpose of NPS is to state policies on matters of national significance that are relevant to achieving the purpose of the Act. The national interest does not mean that the issue has to be geographically spread across the country. There may be an issue which because of its value to the nation has national significance but which only features in one region of the country. The decision could be largely influenced by the degree of public interest in the matter.

Process for preparing NPS

There is no formal route for a person to suggest that a NPS be prepared. It is the Minister for the Environment who initiates the NPS process. However, the NPS procedure does allow for other government departments to suggest that a NPS be prepared, provided that there is joint agreement between the initiating department and the Minister for the Environment. Approval of Cabinet is required before the intention to prepare a proposed NPS is publicly notified by the Minister for the Environment. Cabinet approval is also required for the purpose of notification of the NPS under section 46(b) of the RMA.

Once a proposed NPS has been notified, the process for its consideration is fairly straightforward and is set out in sections 46-55 of the RM Act. The Minister appoints a board of inquiry which publicly notifies the NPS inquiry and seeks submissions. A hearing is held and, on completion of its inquiry, the board prepares a written report on the proposed NPS and the matters raised by the inquiry. The board then makes a recommendation to the Minister. The Governor-General in Council may, on recommendation of the Minister, approve the NPS. It is then issued by notice in the Gazette and presented before the House.

The Ministry for the Environment is presently considering amendments that will simplify the NPS process and make it more of an attractive policy implementation tool.

Statutory Criteria and what an NPS requires of Local Government

NPS are intended to be directive rather than simply open to interpretation. Local authorities have to take positive action to implement a NPS. Section 55(1)(b) requires that the local authority take all such action necessary to implement a NPS, including initiating a change to a policy statement or plan or taking such other action as may be specified in the NPS. Such changes must go through the process set out in the First Schedule of the RM Act. This suggests that it is well within the scope of a NPS to contain specific actions to be undertaken by the local authority in order to achieve the policy objective.

NPS do not in themselves bind individuals and they are not directly enforceable by the Environment Court. Their only means of enforcement is through their policies being reflected in the provisions of regional policy statements, regional and district plans, and in the consideration of resource consents. Sections 62, 67, 75, 82, and 104 spell out the primacy of the NPS in the hierarchy of policies and plans. Under section 82 of the RM Act, the Environment Court can resolve disputes about inconsistency between NPS and local authorities' plans and policy statements.

A NPS is perhaps most useful where it can take existing Government policy and translate it into effective direction for local authorities to exercise appropriate functions and powers under the RM Act. In some cases local authorities are aware of a Government's policy position but are unable to assess what is expected of them in terms of their own response as a regional or district council.

Contents of NPS

The contents of NPS are not spelt out in the Act, but there are some guides by way of the contents of the New Zealand Coastal Policy Statement and the content of Regional Policy Statements.

NPS should outline the nationally significant issue. It would be expected that a NPS would identify the broad objective(s) within which the policy response is sought, and the specific objectives which individual policies are intended to achieve. For example, the NZCPS provides broad goals in the form of national priorities, such as the preservation of the natural character of the coast and specific objectives and policies such as to restore and rehabilitate the natural character of the coastal environment where appropriate.

Another component of the NPS could be the identification of methods for implementing policy or the response expected from local government through its policy statements and plans. This ties the policy to the local authorities duties and functions and secures it to achieving the purpose of the Act. *This view is supported by the case of ARC vs North Shore City Council [1995] 3NZLR 10.* In this case the RPS provisions were challenged on the basis that they were perceived to constitute rules. The Planning Tribunal (now known as Environment Court), held that the provision were in fact, methods which allowed policy objectives to be achieved and were therefore valid. This, together with the requirements of section 55, suggests that the NPS can contain firm directions to councils (albeit narrative in style) about action to be taken to achieve national policy objectives.

A NPS is, however, still a statement of policy. The Act does not envisage that a policy framework would deal with the specifics of allocation or in itself provide an allocative regime. The role of the NPS is to articulate the national priorities by providing a clear statement of objectives and environmental outcomes sought. The Government is free to leave local authorities to determine how they can achieve the objectives in the most efficient way, as required by section 32. In the end the regional or district plan will contain the rules which will give effect to the policy.

Section 32

The Act requires that a NPS must meet the tests of section 32. The Minister therefore must be confident that a NPS is necessary and appropriate to achieve the purpose of the Act. This requires the consideration of other means (including other Acts), and that the relative merits of the NPS compared to other policy options have been assessed and documented.

The section 32 test applied early on in the process expresses Parliament's wish to ensure that Government is clear that NPS is likely to be a viable and necessary course of action before it goes to the expense of appointing a board of inquiry and public consultation. Given the costs of the inquiry and submission process by which the policy

is set and the likelihood that many councils will have to initiate changes to their plans, such a test is a useful safeguard.

Conclusion

NPS provide the opportunity for the Government to directly influence statutory functions of local government under the RM Act. Its prime purpose is a means of implementing government policy in particular ways through the provisions of and via the powers and responsibilities of local government through the RMA. It is, however, just one of a number of options for influencing councils. Other means include general consultation and advice, submissions, non-statutory guidelines, National Environmental Standards, and call in.

NPS are sometimes seen as an attractive option by the public and local government. For the public, it can be seen as a formal policy-making route within which their role is guaranteed by an independent inquiry process. For local government it offers a mechanism for guidance on what can seem a perplexing and often conflicting range of resource management priorities.