

BIODIVERSITY PROTECTION PROVISIONS

COUNCIL IMPLEMENTATION
OF THE BIODIVERSITY
PROTECTION PROVISIONS
IN THE RESOURCE
MANAGEMENT ACT.

Why is Biological Diversity an Issue for New Zealand Planners

New Zealand has signed and ratified the International Convention on Biological Diversity. This means that New Zealand has agreed to a suite of obligations which include the conservation of biological diversity. The Resource Management Act (RMA) is an important tool that New Zealand can use in meeting its obligations under the convention. Local authorities will, as the agencies largely responsible for implementing the RMA have an important role in promoting the protection of biodiversity on private land and for marine and freshwater ecosystems.

The Convention on Biological Diversity defines *biological diversity* as "the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are a part; this includes diversity within species, between species and of ecosystems."

The biological diversity of ecosystems incorporates the ecological processes that sustain these ecosystems including interactions between organisms and the non-living environment.

New Zealand's 80 million year period of isolation from other landmasses resulted in the evolution of unique and vulnerable biota and ecosystems. For example there is an exceptionally high level of endemism (species not found anywhere else on earth). The New Zealand biota and ecosystems have been substantially damaged by human actions over the last 1000 years. There has been a high level of species extinctions and many freshwater, coastal and lowland ecosystems have been substantially damaged or lost. Park (1995) stated "When the Treaty of Waitangi was signed almost all plains ecosystems were composed entirely of plants and animals native to this country—(Today) almost every tree, every bird, every living thing on the coastal plains outside the lowland forest reserves of South Westland and a few tiny remnants elsewhere—is foreign" (page 331). For these ecosystems effective protection needs to include rehabilitation and restoration.

Damage to New Zealand's indigenous ecosystems is still continuing. For example 500

species of plants and animals are currently threatened and at least 90% of former wetlands have been drained or are degraded (Ministry for the Environment, 1994)

While New Zealand has been a leader in conservation on public lands, many species do not recognise the boundaries between public and private lands and many ecosystems occur primarily outside the public reserve system. In addition some ecosystem processes (especially for marine and freshwater ecosystems) are affected by activities that occur outside any reserves and throughout the catchment.

THE ACT

The Resource Management Act includes a number of provisions that promote the protection of biodiversity. The purpose of the Act in Section 5 is "to promote the sustainable management of natural and physical resources". Sustainable management means managing the use, development and protection of natural and physical resources. Natural resources include biodiversity and so the protection of this is an integral part of sustainable management. The priority elements of biodiversity protection in the Act are reflected in the principles listed in Part II.

Section 5 Purpose

"(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, "sustainable management" means managing the use, development and protection of natural and physical resources...while:

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) Safeguarding the life supporting capacity of air, water, soil, and ecosystems; and

(c) Avoiding, remedying or mitigating any adverse effects of activities on the environment"

Section 6 Matters of national importance

"In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development,



Saltmarsh, Ohiwa Harbour. The overlapping functions and land-water boundaries between territorial authorities and regional councils can hinder the effective protection of estuarine ecosystems.

and protection of natural and physical resources, shall recognize and provide for the following matters of national importance:

(a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:

(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use and development:

(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:—

Judge Kenderdine in *Gill v. Rotorua District Council* (1993)2NZRMA 604(PT) stated that “—implicit in s6(a) is the protection of ecosystems and ecological processes and the extent to which those are modified by any development”. This is so even though explicit protection is given to the intrinsic values of ecosystems under s7(d) (Brookers RMA commentary, A2-14, 1997).

The scope of natural character in section 6 (a) was discussed in *Trio Holdings and Treble Tree v. Marlborough District Council* W103/96. Natural character was considered to be a complex interaction of the vegetation, land form, and aesthetic aspects of adjoining land, as well as beaches, coastal marine waters and benthic environment. In that case it also included a King Shag feeding ground. (Brookers RMA Commentary A2-13, 1997).

Clearly the preservation and active protection of the natural character of waterbodies and their margins includes the protection of key elements of biological diversity, namely natural ecosystems and

ecological processes. This is amplified for the coastal environment in the New Zealand Coastal Policy Statement.

Section 7 Other matters

“In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to:—

(d) Intrinsic values of ecosystems:—

“Intrinsic values” in relation to ecosystems is defined in section 2 of

the Act as meaning “those aspects of ecosystems and their constituent parts which have value in their own right, including:

(a) Their biological and genetic diversity;

(b) The essential characteristics that determine an ecosystem’s integrity, form, functioning and resilience.”

In addition to the Part II provisions the Act also contains some specific mechanisms that can be used to protect natural features, including: water conservation orders, heritage orders, designations, esplanade reserves and strips. Some provisions that address biodiversity protection can also address other matters/values. For example under section 6(c) indigenous vegetation can be significant for its soil conservation and cultural values as well as its biodiversity values.

REVIEW METHODOLOGY

This article is based on my recently published review: “Implementing the Biodiversity Protection Provisions in the Resource Management Act—a Review of Council Progress to Date”. That review draws on initial research that I undertook using a New Zealand Planning Institute Mobil Study Grant to review the implementation of section 6(c) of the Resource Management Act. The scope of that work was subsequently expanded to an assessment of the implementation of the biodiversity protection provisions in the Act.

Thirty-six district councils, 3 unitary authorities and 7 regional councils were chosen to represent the range of council situations. Most of the selected councils and/or their consultants were visited. Each council’s RMA discussion papers, draft and proposed plans and policy statements were assessed with the review document reporting on the situation as at 25 February 1997. Some additional councils, various central government agencies, interest groups and landowners were also visited to gain a wider perspective on the issues and possible solutions.

Few RMA plans are yet operative and so provisions in a number of draft and proposed plans may change as a result of ongoing plan preparation and public submissions and hearings processes.

TERRITORIAL AUTHORITY APPROACHES

The territorial authorities reviewed showed the following main approaches in how they have addressed or intend to address the biodiversity protection provisions in the RMA.

- Approaches varied from the minimalistic to the comprehensive approaches of Waitakere City, Auckland City (Hauraki Gulf Islands Section) and Far North District.
- Most biological databases were based on the collation of existing information which was often incomplete.
- Nearly two thirds of the councils reviewed used or proposed to use some form of a schedule of ecologically significant sites. The extent of these schedules varied from those including only protected areas to those that contained a relatively extensive range of unprotected sites of ecological value. While most of these schedules were associated with protective rules, some were included in the plan for information purposes only.
- Approximately half of the councils used or proposed to use some form of general rule for controlling the clearance of indigenous vegetation or forest. The area above which the clearance of indigenous vegetation or forest is no longer a permitted activity varied considerably, as did the definitions of indigenous vegetation and indigenous forest.
- A number of councils used both schedules of ecologically significant sites and general rules for controlling indigenous forest/vegetation clearance. Often this was because the schedules were limited in scope and/or there was a particular vegetation type where a council wanted to control clearance.
- Relatively few councils with schedules of ecologically significant sites had consulted or intended to consult comprehensively with landowners prior to plan notification. The expertise and commitment with which landowner consultation was carried out varied. A number of councils chose not to consult with individual landowners prior to plan notification and so had received submissions from many landowners opposing the inclusion of their properties in a schedule.
- Some councils reported that where landowners objected to the inclusion of part of their property in a schedule of ecologically significant sites those

sites were automatically deleted from the schedule regardless of their ecological values. Often there were no alternative mechanisms to address biodiversity protection for these deleted sites. Some councils retained at least some of the sites which were objected to by landowners, excluding those sites which were demonstrated to be of poor quality. In some cases site boundaries were adjusted. Generally landowner opposition was greater where the quality of site mapping and site information was poor.

- Sometimes council consultation was not able to address the deep suspicion of landowners in relation to a schedule of ecologically significant sites. This particularly applied where there were other processes that complicated matters, for example the South Island High Country Pastoral Lease Tenure Review.
- Approximately one quarter of councils reviewed listed criteria they had used for identifying significant indigenous vegetation and wildlife habitats in their district plan. These criteria varied considerably.
- Approximately half of the councils reviewed used or intended to use some form of coastal and/or aquatic riparian overlay or setbacks where certain activities were more strongly regulated than for the adjoining land.
- While some councils had policies relating to rehabilitation only a few councils implemented or proposed to implement ecological rehabilitation projects. At this stage Waitakere City had the most comprehensive approach.
- Some district plans provided for council to require protection of areas of ecological value upon subdivision and development. Some other councils used the protection/bush lot subdivision incentive whereby landowners received an entitlement to extra lot(s) in return for protecting areas of ecological value.
- Most councils reviewed had not developed a package of incentives to promote biodiversity protection. Approximately one third of councils offered or intended to offer rate relief for protected areas. Some councils intended to offer some form of financial assistance for conservation activities such as fencing.
- A few councils offered or proposed to offer incentives that take the form of additional development privileges in return for the landowner carrying out some conservation activities. This is additional to the protection/bush lot subdivision incentive.
- A few councils intended to purchase (either individually or with other agencies) areas of

ecological value to add to their landholdings already held for biodiversity protection purposes.

UNITARY AUTHORITY APPROACHES

The three unitary authorities reviewed had each prepared a Resource Management Plan that combined their territorial authority functions with many of their regional council functions. Marlborough had at 25 February 1997 produced a proposed plan for only part of its district (Marlborough Sounds).

The unitary authority approaches to their territorial authority functions were similar to those taken by the territorial authorities themselves. Each of the three councils reviewed, had incorporated a limited schedule of ecologically significant sites into their Resource Management Plan.

None of the unitary authorities had yet addressed freshwater management. Coastal marine area management and controls on vegetation clearance on steep slopes for soil conservation reasons were two regional council functions that had been addressed.

REGIONAL COUNCIL APPROACHES

The seven regional councils reviewed showed the following main approaches in how they addressed the biodiversity protection provisions in the RMA.

- The treatment of biodiversity protection in Regional Policy Statements (RPS) ranged from the general to the specific and detailed approach of Auckland. Auckland was the only region reviewed that identified sites that are regionally significant for their wildlife and botanical values. Several RPS's specifically addressed rehabilitation.
- Some Regional Policy Statements recognised and promoted territorial authority and regional council roles in promoting biodiversity protection through regulation, and non-statutory mechanisms while others only encouraged landowners and other agencies to take appropriate courses of action.
- Most Regional Policy Statements contained criteria for identifying significant indigenous vegetation and wildlife habitats.
- The reviewed councils showed considerable variation in relation to

which regional plans they intended to prepare and which topics would be in each plan. Councils which chose to prepare many plans ran the risk of omissions and inconsistencies.

- The overall approach of coastal plans was relatively consistent. These plans varied considerably in the extent of the identified areas of significant ecological value which were usually accompanied by stronger controls on potentially damaging activities. Several reviewed plans, identified ecologically significant sites above mean high water springs.
- Several councils had prepared regional freshwater plans. These plans addressed freshwater ecosystem protection relatively comprehensively although they did not specifically address riparian or catchment matters. One of the plans may eventually include some provisions relating to catchment land use activities. Riparian rules, where they exist, tended to be in soil or land management plans as did general soil conservation rules.
- As yet only one geothermal field of ecological significance (Rotorua) is covered by a RMA plan that regulates fluid and energy extraction.
- Most of the regional councils reviewed were actively involved in non-statutory methods that addressed at least some aspects of biodiversity protection. Education and advice were important in Taranaki and Waikato Regions with the latter being strongly involved in the Landcare movement. Some councils offered assistance for fencing and planning riparian margins. Several councils contributed financially to the collecting of information on terrestrial ecosystems. Auckland and Wellington Regions manage extensive areas of high ecological value.

Coastal Pohutukawa Forest.
Pohutukawa forest is now a rare forest type on the mainland.



CURRENT BEST PRACTICE EXAMPLES

Some councils have developed effective and innovative ways to promote biodiversity protection in their district or region. The review document (Froude, 1997) identifies many good examples of regulatory and non-regulatory techniques that can be used in appropriate situations to promote biodiversity protection for territorial authorities, unitary authorities and regional councils.

PLAN ADMINISTRATION

The true test of how effectively councils are addressing the biodiversity protection provisions in the RMA is what happens on the ground. As yet this is difficult to determine because:

- Few councils monitor biodiversity changes.
- Few councils have finalised their RMA plans.
- Few councils (especially territorial authorities) have long term monitoring of resource consent provisions relating to biodiversity protection.

SOME OUTSTANDING ISSUES

The review document contains a comprehensive list of outstanding issues grouped under the following headings: damage and loss of New Zealand's indigenous biodiversity; experience and knowledge; funding; other priorities; legislation and council systems.

- As there is little case law and no national policy or guidelines on biodiversity protection under the RMA, councils have had little to guide them during plan preparation and when making decisions on submissions.
- Many council representatives reported that they did not have the training and experience to adequately address the biodiversity protection provisions in the RMA.
- Effective methods of consulting with landowners are often not appreciated, understood and/or applied by councils. This can result in biodiversity protection provisions being removed from proposed plans and/or a reluctance to include any provisions in the first place.
- Much of New Zealand's unprotected biodiversity is in territorial authorities with a low rating base. These councils are the least well resourced to address the biodiversity protection requirements of the RMA.
- Councils can find it difficult to determine how the costs of biodiversity protection should be distributed between the landowner and the

community, in different council circumstances, and in the absence of nationally consistent criteria.

- Relatively few councils have developed incentive packages to promote biodiversity protection. Some councils reported a reluctance by councillors to spend money on biodiversity protection, particularly any form of financial assistance to landowners.
- Funding for non regulatory methods of biodiversity protection can be highly vulnerable to budget cuts especially when the methods are not formally recorded in statutory plans.
- Councils have a variety of functions many of which relate to the provision of infrastructure under several statutes. A number of councils reported that biodiversity protection was seen as a minor function especially when councillors sensed there was little ratepayer demand or support.
- Some councils have been reluctant to take responsibility for promoting biodiversity protection in their regions/districts.
- A number of councils reported a reluctance by councillors to impose costs on landowners by restricting their land development options because of biodiversity protection reasons.
- The respective roles of central and local government for biodiversity protection can be ambiguous. A number of poorly resourced councils consider that central government should play a greater role (as opposed to local authorities) because biodiversity protection is in the national interest.
- The overlapping functions and land—water boundaries between territorial authorities and regional councils can hinder the effective protection and rehabilitation of riparian and aquatic ecosystems (especially estuaries). Relatively few territorial authorities and regional councils work closely together to achieve the best combined mix of policies and methods for areas of overlapping responsibility, especially riparian, wetland, geothermal, coastal and aquatic habitat protection and enhancement.

THE FUTURE

The review of council progress was designed to be part of a package that included an identification of options to address outstanding issues, and an evaluation of various methods for addressing biodiversity protection. It is unclear whether, and if so how and when, this subsequent work will be completed. In the interim there are some steps that councils can take to improve biodiversity protection outcomes in their district and regions. These include:

- Having a council commitment to address biodiversity protection issues in its region/district in an effective and fair manner.
- Recognizing that there is no one approach that is suitable in all cases. An effective package of provisions to promote biodiversity protection will reflect the characteristics of a particular region or district.
- Having a willingness to develop an appropriate suite of techniques including both regulatory and non regulatory approaches to address biodiversity protection
- Consulting effectively with affected landowners at the preformal stages of plan preparation. This can include working with individual landowners to help them: recognise the natural values on their property and surrounding areas; understand how their activities can affect these values; and appreciate the likely effects of the proposed plan provisions. This consultation also allows the plan provisions to be revised and refined so that they promote effective biodiversity protection without imposing unnecessary or unfair burdens on landowners.
- Using incentives to encourage landowners to protect and appropriately manage ecological values on their properties and undertake riparian and catchment land uses in a way that protects and enhances aquatic ecosystem biodiversity values.
- Having partnership relationships between region and district councils so that they work together to develop combined packages of mechanisms to protect and enhance the biodiversity values of freshwater and marine ecosystems.

REFERENCES

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