

THE CONSERVATION ESTATE AND CLIMATE CHANGE: A LOST OPPORTUNITY?

Mark Christensen, Partner, Anderson Lloyd Lawyers

Introduction

Climate change poses one of the most significant threats to biodiversity. This threat is widely acknowledged. In 2001, Landcare Research prepared a report for the Ministry for the Environment identifying that "climate change is likely to impact on the indigenous biota and their ecosystems over the next 100 years"¹. Possible impacts include the potential spread of pests further south and effects on ecosystems already under stress if extreme weather events become more frequent.

In April 2007 an Intergovernmental Panel on Climate Change report noted that the resilience of many ecosystems is likely to be exceeded this century by an unprecedented combination of climate change and associated disturbances such as drought, flooding, wildfire, pests and ocean acidification. As a result, significant biodiversity loss is projected to occur in New Zealand. The Ministry for the Environment's second State of the Environment Report (2007) states that "climate change is expected to place additional pressure on many species particularly those already at risk".²

In addition to issues of biodiversity loss, the conservation estate is very important in respect of climate change for a second reason. About one-third of the country is administered by the Department of Conservation, as national parks, reserves and various categories of land held under the Conservation Act. In some conservancies the percentage of land administered by DOC is much higher. The achievement of the government target of meeting 90% of New Zealand's energy needs from renewable energy sources by 2025 will necessarily require some new generation plant partly or wholly located on conservation land. Already this has become apparent through the recent grant of a concession to Bay of Plenty Energy Limited to partly locate a hydro scheme within the Upper Kaituna Scenic Reserve, near Rotorua, and the proposed Mokihinui hydro project on the West Coast.

¹ McGlone, 2001.

² Page 318

Despite potential biodiversity loss and the need to use conservation land for renewable energy, no strategies or policies expressly require the Department of Conservation to either consider the impacts of climate change on the conservation estate or provide mechanisms that enable DoC decision makers to balance the need to respond to climate change with the need to manage local areas for conservation purposes. In particular:

- a) The Department's statutory policies and processes do not currently provide guidance for either conservancies or applicants for concessions on how the impacts of climate change (at a national and global perspective) on biodiversity is to be weighed or balanced against local or regional conservation values;
- b) The Department, when considering effects in the context of applications for concessions, appears to interpret the Conservation Act in a way that issues of national importance (such as climate change and the renewable energy target of 90% under the New Zealand Energy Strategy); cannot be considered and
- c) The Conservation Act and various policies under it, are silent on guidance to DOC on how it should balance actions to mitigate wider impacts on conservation from climate change (such as renewable energy projects and biodiversity offsets and environmental compensation for other projects) versus protection of biodiversity.

The Need for Recognition of Renewable Energy Projects and other Opportunities in the Conservation Estate.

DOC is one of six government departments that has volunteered to be "carbon neutral" by 2012. It is pursuing options such as introducing fuel-efficient vehicles and offsetting remaining gross emissions by planting new forests, enhancing regeneration of existing indigenous forests and stepping up pest control. That of course is laudable so far as it goes. However, it is inconsistent for DOC to not also have regard to the extent to which activities which it might or might not authorise on public conservation lands increase or offset carbon emissions, or are otherwise consistent with climate change policies, including the ability of the conservation estate to adapt to climate change.

A number of countries are incorporating a response to climate change into national strategies relating to biodiversity, for example Australia, Scotland, England and South Africa. New Zealand is lagging behind in policy development.

It is not responsible or appropriate for the Department through its statutory processes to regard climate change and the supply of renewable energy as "someone else's problem". The 2025 renewables target is a government target. As a Department of State, DoC has a responsibility to understand the extent to which meeting that target will have implications for each of the DOC conservancies, and needs to provide for consideration of developments on conservation land in a way which meets the requirements of the Conservation Act and government policy. In the same way, it may be that proposals for other activities on conservation land or for land swaps of conservation land might result in net conservation gains which result in the reduction of the risks of, or the ability to adapt to, climate change.

It is time that the Conservation Act was administered in a manner which is consistent with the Resource Management Act which does enable consideration of climate change issues.

Scope of the Conservation Act to deal with climate change.

The Department's current Strategic Direction emphasises that the Department will seek to entrench conservation as an essential part of the sustainable social and economic future of New Zealand and that society's values will be weighed in department decision-making. In light of this overarching Strategic Direction, the potential contribution of public conservation lands to government sustainability strategies to manage the impacts of climate change cannot be ignored.

DOC's Statement of Intent (SOI) identifies climate change as a challenge to New Zealand's natural heritage – but fails to indicate how this is to be managed³. The SOI also recognises that society has increasingly wider interests that will need to be more actively addressed – but does not put this into the context of delivering the Department's core programmes⁴. Nor is there reference to climate change in the "Outcomes and Outputs" section of the SOI – where guidance on biodiversity outcomes and appropriate business opportunities (such as concessions and access arrangements for mining activities) in relation to climate change could be expected.

³ Statement of Intent 2007 – 2010 page 19

⁴ Ibid page 28

The SOI also places some emphasis on the contribution of conservation land to offsetting the effects of greenhouse gases and regulating climate⁵.

However, the SOI does not provide any guidance on how the conservation estate should be managed in response to the threats posed by climate change.

The Conservation General Policy is silent on responding to the threat of climate change. It is at the conservancy level in the context of conservation management strategies that one would expect to see policies on this matter. The CMSs guide the Department in considering applications for concessions and access arrangements. They are also relevant to consideration of any land exchange proposals. The CMSs also guide the Department in its advocacy role under the Resource Management Act.

Given the devolved nature of the Department's decision making, and without national statutory guidance – consideration of the impacts of climate change needs to be done on a conservancy by conservancy basis through each conservancy's conservation management strategy. It is my contention that CMSs should contain more general management objectives that have regard to the extent to which activities on the conservation estate positively impact on climate change and on the ability of the conservation estate to adapt to climate change. Such a management objective or policy in CMSs should not be considered a trump card for any concession application such as one for a renewable energy development – but rather, an objective or policy would be one matter, amongst a number of other conservation related matters to be considered. Such objective would be relevant to all proposed activities – including mining activities – and enable consideration of all effects, positive and negative, as well as potential offsets and opportunities for conservation gains.

Including management objectives relating to climate change in CMSs would be consistent with the conservation purposes of the Conservation Act, the current policies of the Conservation General Policy and the statutory purpose of a CMS.

One example of a CMS that does mention climate change is the draft West Coast CMS. However, it only acknowledges in general terms:

"As the manager of a significant area of New Zealand's land mass, the Department has a responsibility to manage for the impacts of

⁵ see for example page 22

*climate change. This will involve adaptive management for the protection of natural, historical and cultural values.*⁶

The West Coast CMS is typical, however, in that it provides no further detailed guidance on how the West Coast Conservancy will be managed for the impacts of climate change.

This lack of strategic guidance is not only inconsistent with achieving the purpose of the Conservation Act, it also fails to implement (or even acknowledge) government directives in respect of achieving renewable energy targets and carbon neutrality in the administration of the conservation estate, and the objective of reversing continuing biodiversity loss as it relates to climate change.

The difficulty faced by DOC as a decision maker under the Conservation Act is balancing action that reduces our national greenhouse gas emissions or otherwise responds to the threats of climate change with possible impacts on specific geographic areas in the conservation estate. To address this issue there is an urgent need for a transparent process that enables DOC decision makers to have the ability to weigh and balance these relative impacts against each other.

The Perceived Difficulties of Considering Positive Effects

Conservation management strategies should also acknowledge the potential for positive effects that may be associated with commercial facilities, (whether that might be a renewable energy generation plant or an opencast coalmine located on the conservation estate) and seek to maximise these positive effects.

In considering any application for a concession, the Minister is required to have regard to the effects of the activity, structure, or facility (section 17U(1)(b) of the Act). "Effect" is broadly defined to have the same meaning as it has in the Resource Management Act and hence includes any (conservation related) positive effect (section 2 of the CA and section 3 of the RMA). This requirement to have regard to positive effects is not restricted to recreational activities, structures or facilities. It applies to any application for concession or access arrangement.

⁶ section 2.1.3.4 of the draft West Coast CMS

The Minister is also required to have regard to any measures that can reasonably and practicably be undertaken to avoid, remedy or mitigate any adverse effects of the proposed activity (section 17U(1)(c) of the Act). These measures may also include positive effects and are not restricted to measures associated with recreational facilities.

However, the traditional interpretation by the Department does not treat effects in the way they are defined in the Resource Management Act. Rather, the interpretation of the Conservation Act, reinforced by CMSs, has generally been that only recreational facilities can have positive effects on conservation values. Moreover, many planners and advisers within the Department have interpreted the Conservation Act as being solely concerned with protection and preservation so that any activities that might have an impact on conservation values (irrespective of whether they have public benefits or otherwise offset or compensate for effects on conservation values), are interpreted to be inconsistent with the Conservation Act.

This has led to the perception (at least) that the entire conservation estate is sacrosanct, irrespective of the actual conservation values. While it might be argued that this traditional approach is inconsistent with the statutory provisions referred to above, the statutory scheme of the Conservation Act sets DOC up as judge, jury and executioner. It is particularly difficult for the Department to know how it should be dealing with these issues under the Conservation Act given its statutory mandate to advocate for conservation under the Resource Management Act. I conclude that CMSs should properly recognise that consideration of positive effects should not be limited to recreational facilities, and should extend to other types of facilities, including from time to time commercial facilities, and to do so is consistent with the of the Act.

The Kaituna Hydro Decision

The difficulties arising from the way DOC interprets the Conservation Act is demonstrated by the recent Kaituna hydro project decision. In June 2005 Bay of Plenty Electricity Limited applied to the Department for a concession to locate the abutment of a weir within, and to flood part of the, Upper Kaituna Scenic Reserve, near Rotorua.

The proposal involves:

- The construction of the left abutment of a proposed 12 metre high concrete weir on part of the Reserve;
- The inundation of approximately 1 hectare of the reserve. This will flood a vegetated strip of the reserve that is river margin, approximately 1.2 kilometres in length;
- The dewatering of a 2.5 kilometre section of the Kaituna River below the weir. This section of the river bounds the Reserve;
- The ongoing maintenance and operation of the proposed weir and the proposed inundation.

The proposed scheme is anticipated to generate 13.5 MW for the national grid which provides the equivalent power for approximately 10,000 homes.

The Upper Kaituna Scenic Reserve is bounded by the Kaituna River. It consists of moderately steep slopes with low cliffs along the riverbank and supports a range of mature, unmodified, forest types dominated by rewarewa, kamahi and tawa. It is ranked as being of high botanical conservation value. The Reserve is considered to be of high scenic and natural value. It also contains a significant population of the threatened king fern that is near the southern geographical limit of this species in the Central North Island. Access to the reserve by the public is limited due to private land surrounding it and steep terrain. It is, however, frequently enjoyed by kayakers and rafters using the Kaituna River.

In its report to the Director-General and after hearing submissions from the applicant and a number of submitters, the Department recommended that he decline the concession application. This recommendation was largely based on the Department's assessment that the adverse effects of the proposed concession activity on the scenic values, natural character and vegetation of the reserve were so significant that the threshold test of section 17U(3) was not passed because it was not possible to provide for the 'protection' of the conservation values of the reserve.

The Department was of the view that:

- Any proposed mitigation measures must relate to adverse effects arising from the proposal. The Department considered that a proposed walkway enhancing public access and recreation was not relevant, as it did not mitigate the adverse effects of the proposed concession activity;
- A proposed pest control programme in another part of the reserve was a relevant mitigation measure, as it indirectly mitigated vegetation loss associated with the proposed concession activity;
- The social and economic benefits arising from electricity generation were irrelevant to assessing the concession application;
- When considering whether a proposed concession activity was consistent with the purposes for which the land was held and thereby passed the threshold test of section 17U(3), a qualitative assessment of the nature and degree of adverse effects was required;
- In order to be consistent with the purposes for which the land was held, effects must be "truly minor". This is a matter of judgement for the decision-maker to assess having regard to the values of the reserve, the nature and degree of any potential adverse effects and the mitigation measures proposed; and
- Applying this test, the Department determined that the proposed concession activity would be likely to have significant adverse effects on the scenic values, natural character and vegetation of the reserve. Of particular relevance to the Department was that the general purposes of the Reserves Act included a requirement to preserve the natural character of the margins of rivers and protect them from unnecessary development.

Despite the Department's recommendation, the Director-General ultimately granted the concession application (in 2008). The Director-General reached a different finding on the factual material, concluding, on the basis of expert evidence provided by the applicant (but the same evidence that had been heard and considered by the Department's representative during the hearing process), that the effects of the proposed concession activity would be no more than minor. This enabled the

Director-General to conclude that the threshold test of section 17U(3) could be passed as the concession activity could proceed in a way that was consistent with the purposes for which the land was held. Key issues arising from the Director-General's final decision are:

- The Director-General differed from the Department's final recommendation on the scope of mitigation measures that he was prepared to consider. Significantly, he took into account the public access and recreation benefits of the proposed walkway on the basis that these benefits were relevant to the broader (albeit secondary) purposes of the reserve.
- The Director-General placed less emphasis than the Department on section 3 and the general purpose of the Reserves Act, including in particular, the requirement to promote the preservation of the natural character of the margins of rivers and to protect them from unnecessary subdivision and development. The Director-General considered that this general purpose should not be used to override the specific purposes for which the scenic reserve was held, as set out under section 19 of the Reserves Act.
- The Director-General placed some emphasis on the control apparently retained by the Minister under both sections 3 and section 19 of the Reserves Act to override the requirements imposed on the Department in respect of the administration of reserves (as indicated by the inclusion of the wording "subject to the control of the Minister" in section 3 and "except where the Minister otherwise determines" in section 19(2)(a)).

While the final decision confirms that absolute protection is not required in order to achieve consistency with the conservation related purposes for which the affected land is held, considerable uncertainty remains. Is the 'no more than minor effects' test the most appropriate one and is it legally valid? In considering effects, can positive conservation outcomes now be taken into account, and in what circumstances? How are conservation values and possible offsets or compensation to be assessed and measured? Can a proposal that has more than a minor effect on conservation values nevertheless be approved if the proposal also results in significant benefits in conservation/biodiversity terms which outweigh the losses? Do the positive benefits have to directly offset the impacts – a 'like for like' offset, or can these be tradeoffs with other values which might result in conservation gains? To

what extent should the nature of the activity involved be taken into account – that is, would the same outcome be likely if the project were a road or a mine?

Need for a Review of the Conservation Act

Whether the Department's advisors now take an interpretation for the Act consistent with the Director General's decision, and whether other applications take over 2 years to be processed remains to be seen.

These questions lead to a consideration of whether the Conservation Act in its present form is the appropriate legislation framework to deal with these issues.

My conclusion is that the Conservation Act requires amendment. Much like the RMA has required amendment (and still requires more in my view) the Conservation Act needs to be reviewed. It was enacted in 1986 and has not been significantly altered in its fundamental framework. Just as importantly, it lacks transparency and accountability. There is no ability for the Environment Court to consider statutory documents such as CMSs (although the Court can review pest management strategies) nor does the Court have any overseeing role on concessions or land swaps. In many cases those who draft plans and strategies are the very people who sit in judgement on them. Much of the difficulty arrives because of DOC's mandate (under the RMA) to advocate for conservation. This is carried over into the way the Conservation Act is administered.

Having said that, however, it is important to recognise that the Conservation Act is not the Resource Management Act with the latter's objective of sustainable management. The objective of the Conservation Act as its name suggests, is conservation. Its primary focus should remain conservation, but that does not necessarily equate to preservation of everything within the conservation estate. I doubt whether the Conservation Act should, in itself, provide for the sort of balancing of social and economic benefits with environmental effects allowed by the Resource Management Act. Rather, the Conservation Act could be a good deal more sophisticated in allowing the Department to consider and approve activities which are innovative in dealing with effects on conservation values, by offsets and environmental compensation. The focus should remain on effects, but effects in their wider sense which includes positive effects.

How then to deal with proposals to meet the government's renewable energy generation targets by 2025, given the time it takes to get through the concession

process, and if the Conservation Act is not changed to allow social and economic benefits to be considered on concession applications?

One option is to provide a separate statutory framework for renewable energy generation on conservation land.

I therefore propose a new statutory regime which would require legislative amendment to the Conservation Act allowing for what could be called 'Nationally Significant Recoverable Energy Projects' (NSREPs). The purpose of a NSREP declaration would be to facilitate the orderly and timely expansion of New Zealand's renewable generation capacity so as to meet the NZES target of 90% renewable generation by 2025, but would not be limited to such projects being on conservation land.

Similar to the procedure under the Resource Management Act, for approval to be a requiring authority, an applicant could make application to the Minister of Energy (who could approve by way of a Notice in Gazette declaring it to be a nationally significant renewable energy project).

Regulations could set out the criteria to qualify for NSREP which could include:

- Project based on renewables (hydro, wind, geothermal).
- Minimum size (annual GWh/MW).
- Statement of support from the Electricity Commission that the project is of strategic significance in terms of the New Zealand Energy Strategy.

A proposed NSREP would be considered by a Board of Inquiry appointed by Minister for the Environment (i.e. Ministerial Call-In).

Consideration by the Board of Inquiry would need to have regard to provisions of a National Policy Statement on renewables.

Once declared as an NSREP, the project would not require a concession under Part III B of the Conservation Act, but the Board of Inquiry must have regard to the purpose for which land is held under the Conservation Act, and the provisions of any conservation management strategy or plan relating to the land.

The NSREP provisions could be limited, for example by providing that the exception to Part III B does not apply to national parks or wilderness areas.

Once resource consents are granted, the land directly affected by the NSREP should be transferred out of DOC to LINZ or MED subject to a lease/easement in favour of the operator or generator.

Carbon Sinks Project

In the last few years, several companies had discussed with the Department opportunities to establish "forest carbon sinks" on areas of public conservation land in order to access the carbon credits generated or to otherwise offset carbon dioxide discharges generated by those companies. However, rather than deal with these approaches individually, DOC decided to tender for such projects. In June 2007 Cabinet agreed that DOC could establish up to six pilot forest sink projects using private sector money on conservation land. Three of the projects are to establish "Kyoto-compliant" post-1989⁷ forest sinks (on 20 individual sites). The other three projects will focus on managing pre-1990 non-Kyoto compliant forest to create carbon sinks.

The successful tenderers are to provide the money required to create the forest carbon sink. DOC will undertake the operational actions needed to create the sink and recover the costs. In return, the successful tenderer will receive whatever carbon credits associated with the creation of the sink which might be available.

The process comprises a "request for proposals" which closes on 31 March 2008. Notification to tenderers is scheduled to be by 9 May 2008.

The tenders will be evaluated on the basis of the following criteria:

- For the post-1989 forest carbon sink projects only, the adequacy of the tenderer's proposed site restoration plan for each site in the project;
- For all projects, the adequacy of tenderer's actions and plans for reducing greenhouse gas emissions;

⁷ DOC does not guarantee the land is Kyoto compliant. Each Proposer must satisfy themselves the land is Kyoto compliant and able to be entered into the emissions trading scheme (ETS).

- For all projects, there is what is known as the "price bid" whereby the tenderers commit to "additional conservation projects".

The price bid is simply an amount of cash for any one or more of a "wish list" of "additional conservation projects" set out by DOC. Additional conservation projects are projects where the tenderer agrees to fund identified activities on conservation land. DOC sees them, in effect, as sponsorship arrangements. Examples include putting up cash in a threatened species recovery programme or paying for a new track system. Additional conservation projects are separate to the creation of forest carbon sinks and do not themselves generate carbon credits.

There will be no change in tenure status of the sites for the forest carbon sink projects – they will all remain conservation land. Public access will not be affected except for occasional operational requirements (eg pest control programmes).

For the post-1989 forest carbon sink projects, the project is for 45 years. For the pre-1990 forest carbon sink projects the term expires on 31 December 2012.

Permanent exotic species will not be permitted. However exotics may be used initially as nursery crops to provide cover for the regeneration of native vegetation.

The Department is to be commended on its willingness to consider such projects. However, a number of uncertainties and concerns arise:

- There is real uncertainty about what the government is actually providing in terms of "carbon credits".
- The "investor" has no control over how DOC manages the project.
- Why are the management mechanisms so prescribed when there may be alternative methods available?
- The inability to include exotics is a major disincentive because it renders the projects financially unattractive compared with other opportunities for forest carbon sinks.
- DOC's retention of some of the carbon credits.

- The relevance and role of DOC's "wish list" is unclear and further reduce the commercial viability of the scheme.

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