

Threatened species conservation in NSW

Reform proposal



Department of
Environment and Conservation (NSW)

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Executive summary

More than 80 species of native plants or animals that used to exist in NSW are now extinct, and over 800 more species are on the path to extinction. In 1995, the Government introduced threatened species legislation. While there have been significant increases in our knowledge, and many important conservation gains, more powerful tools are now required to better integrate conservation with mainstream decision-making about how we use land and build our economy.

These reforms address six key areas:

- In urban and coastal areas, better biodiversity outcomes are to be achieved through integration with better strategic land-use planning, changes to the development assessment process and accreditation of flora and fauna consultants;
- In rural areas, threatened species conservation is to be embedded within native vegetation protection to deliver a simpler and more supportive system of conservation incentives for landholders;
- Listing of threatened species is maintained as a scientific process, with enhanced credibility and transparency;
- Actions for recovery and threat abatement will be better prioritised;
- Enforcement and compliance provisions will be upgraded; and
- Expert advisory councils will be established to advise the Minister on social and economic implications and on biological diversity.

This reform proposal has been produced by the NSW Department of Environment and Conservation on behalf of the NSW Government. It is provided as an overview of the *Threatened Species Legislation Amendment Bill 2004*.

August 2004

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Acronyms

CAP	Catchment Action Plan	EPI	Environmental Planning Instrument
CMA	Catchment Management Authority	IUCN	International Union for the Conservation of Nature
DEC	Department of Environment and Conservation	LEP	Local Environmental Plan
DG	Director General (of DEC)	NRC	Natural Resources Commission
DIPNR	Department of Infrastructure, Planning and Natural Resources	PVP	Property Vegetation Plan
		SIS	Species Impacts Statement

1 Introduction to the NSW reform proposal

It is easy to overlook the incremental but profound losses that are occurring across some of our most valuable natural assets as a result of our rapid population and economic growth. More than 80 species of native plants or animals that used to exist in NSW are now extinct, and over 800 more species are on the path to extinction. These losses are highly significant in their own right, but they are also indicators of a broader loss of biodiversity across the landscape.

More effective conservation of threatened species is a fundamental part of protecting our natural heritage and resource base. In 1995, the Government introduced legislation seeking to reverse the trend of loss of species and ecological communities. While there have been significant increases in our knowledge, as well as many important conservation gains, it is clear that more powerful tools are now required.

The current legislation's focus on individual species could be sufficient if there were say twenty or even 50 species under threat. However, with more than 800 species now on the lists, a new systemic approach is required. Conservation of threatened species, by protecting and restoring habitat and ecological communities, must now be included in mainstream decision-making about how we use land and build our economy.

These reform proposals are aimed at establishing better frameworks and processes so that landholders, developers, farmers, community groups and government agencies can more effectively contribute to protecting the State's biodiversity. The reforms shift the fundamental focus to protecting and restoring habitat and plant communities at the landscape scale. The proposals see a stronger role for better land-use planning at the strategic level, and are integrated with the Government's reforms to natural resource management.

The new system builds on the historic Wentworth agreement between the Government, conservationists and farmers. This agreement ends broad-scale land clearing in NSW and establishes catchment management authorities with significant resources to help farmers repair the landscape.

Crucially, the new system will also significantly cut red tape and delays for individual developments caused by overly complex processes, exacerbated by broader conflicts about landscape aspirations. The new system is based on a more sophisticated approach to regulatory design. It introduces a step between understanding the science which reveals the threats, and applying a mix of tools in response.

2 Land use planning in urban & coastal areas

Generally, it is too late to deal effectively with threatened species¹ at the level of individual properties or small-scale development. The reforms acknowledge that threatened species conservation is best achieved through genuinely strategic land-use and landscape planning, expressed within new environmental planning instruments.

The new system will provide greater flexibility to maintain and enhance viable areas of habitat and corridors, offset the impacts of development and identify restoration priorities. It will also provide more certainty for applicants, councils and the community, cut red tape and reduce the frequent tensions that arise during the assessment of development applications.

The focus of this key part of the reforms will be the high growth regions along the NSW coast, including the metropolitan area. This is an area of high biodiversity, boasting 60 per cent of the state's vascular plants and 80 per cent of the state's vertebrate fauna. There are also high levels of complexity and interdependence between terrestrial and aquatic ecosystems in this area and large numbers of migratory species.

2.1 Biodiversity certification of environmental planning instruments

Biodiversity planning is a major component of sound local government planning in the urban fringe and along the coast. A local plan which deals adequately with biodiversity will minimise contentious threatened species issues in the future. Integrating threatened species into wider land use planning processes will ensure land for threatened species conservation is considered at the same time as land for housing, employment, recreation and infrastructure. This could include:

- identifying conservation areas within the plan area and/or other secure conservation areas; and/or
- considering how conservation can be integrated with other land uses and how threats associated with these land uses can be ameliorated.

Under the proposal, the Minister for the Environment may certify effective local environmental plans (or other EPIs²) that seek to promote conservation. Biodiversity certification has the benefit (for the subsequent 10 years) of not requiring a separate threatened species assessment or concurrence at the development application (DA) stage for development applications and activities that are consistent with the plan.

The new system for planning instruments will be most valuable in local government areas where there is high development pressure and where

¹ 'Threatened species' includes threatened species, populations and ecological communities

² EPI Environmental Planning Instrument

enhanced long-term strategic planning is needed, such as major urban centres and along the coast. A cooperative program between the DIPNR³, the DEC⁴ and local councils will be developed for new environmental plans that incorporate biodiversity certification in priority areas. The first groups proposed for this process are the Far North Coast, Greater Sydney Metropolitan area, Lower Hunter, Illawarra/South Coast and the Sydney-Canberra Corridor.

The biodiversity certification process

The broad process for biodiversity certification to be granted to an EPI involves:

1. The State Government and/or the local council identifying the area as suitable for obtaining biodiversity certification. Although certification may be limited to a particular area within an EPI, or to particular species, the Government's priority will be for whole areas and all species.
2. Environmental studies about biodiversity and threatened species in the area to be covered by the certified EPI, and its regional context, are to be prepared. Significant resources from State agencies will be made available to conduct these studies within the Government's priority areas. The work will be performed by a mix of specialist agency or council staff, or accredited consultants. The studies would include:
 - fine scale information on the distribution and condition of the elements of biodiversity such as vegetation maps and vegetation community descriptions and records/predicted distributions of key threatened species;
 - references to regional scale information on the distribution of biodiversity (eg regional vegetation maps, biodiversity hotspots, key habitats and corridors, centres of endemism, source and refuge areas);
 - other relevant scientific information such as threatening processes, responses to disturbance of vegetation communities, responses to changes in water quality for aquatic and water dependent species;
 - Aboriginal cultural heritage as it interacts with threatened species and broader biodiversity; and
 - information on land use such as current land-use patterns, future land-use or land use options and their predicted impact on biodiversity, and identification of potential areas for rehabilitation.
3. Planning options for development and conservation are identified and evaluated. Biodiversity planning tools will support decision making (such as biodiversity forecasting). This will ensure planning decisions are based on science and are transparent and repeatable, giving the public greater

³ DIPNR Department of Infrastructure, Planning and Natural Resources

⁴ DEC Department of Environment and Conservation

confidence in planning decisions. Species, ecosystem and assemblage modelling may also be useful.

4. A draft environmental planning instrument is prepared in accordance with the normal process under the Environmental Planning and Assessment Act including public exhibition (details of public exhibition and feedback would be provided to the Environment Minister to assist in deciding whether to grant biodiversity certification). The exhibition process will flag whether or not biodiversity certification is being sought so that stakeholders can comment on its suitability for that purpose.
5. The draft plan is submitted for consideration and (potentially) approval by the Minister for Planning, Infrastructure and Natural Resource via the normal process.
6. The Environment Minister decides whether or not to grant biodiversity certification to the plan. The Minister considers whether the plan adequately seeks to promote conservation of threatened species, populations and ecological communities, and has regard to:
 - (a) the likely social and economic consequences of implementation of the plan;
 - (b) the most efficient and effective use of available resources for conservation;
 - (c) the principles of ecologically sustainable development;
 - (d) conservation outcomes resulting from formal reservation of land for conservation, or entering into conservation agreements, or other actions to secure the protection of land for conservation purposes;
 - (e) conservation outcomes outside the plan – strategies, plans, agreements and other instruments. This ‘off-site’ provision is essential as many EPIs may not cover sufficient area to adequately protect threatened species within the plan at a reasonable cost.

The Department of Environment and Conservation and DIPNR will assist by providing support and direction on biodiversity certification, including:

- Guidelines for councils and other planning authorities on how to prepare an EPI for certification;
- Comprehensive technical support on biodiversity planning including guidelines, and decision-making and planning tools;
- Accreditation of environmental consultants (to improve the quality of biodiversity surveys used for biodiversity certification);
- Planning Reform Funding Program grants may be provided for councils within priority areas to prepare plans for certification

Handling new listings

Uncertainty arising from potential new threatened species in areas covered by a certified plan is to be minimised. Rigorous upfront investigation will help identify any known and potential threatened species (eg species of local conservation significance), as well as identifying high biodiversity value areas for protection.

New listings of threatened species that occur after certification will not automatically 'reopen' certification decisions. That is, development applications that are consistent with the certified plan will not need to conduct site specific assessments for the new listing. However, the Minister will have the discretion to request a council to review a certified plan to take into account newly listed threatened species or significant new information about existing listings. Reviews would only be requested if the species is not already conserved within the plan area or if the species is not found in other parts of the State and urgent and ongoing conservation action is needed. Interim protection orders may be used to protect the species while a plan is being reviewed and revised.

2.2 Changes to development assessment

The current legislation introduced a development assessment (DA) regime administered by local councils and government agencies which has been criticised by developers, councils and the conservation movement. Criticisms have included:

- Claims that processes were not properly followed and hence that threatened species were not adequately protected (eg flora and fauna surveys not adequate, and assessments of 'significance' incorrect);
- Delays and costs for development as a result of new listings by the Scientific Committee during the assessment process;
- Threatened species laws exploited to stop development when it was opposed for other reasons;
- The need for many applicants to spend excessive sums on consultants in order to prepare assessment documentation on threatened species.

Changes are proposed to resolve these issues.

Simpler process for most DAs

In areas for which the Minister has conferred biodiversity certification on an environmental planning instrument, DAs that are consistent with the certified EPI will no longer require threatened species assessment (as outlined above).

DAs with little or no effect on threatened species will also no longer require threatened species assessment. The regulations will specify types of development and activity that do not constitute development likely to significantly affect threatened species, populations or communities or their habitats.

DAs which are clearly likely to have a significant effect on threatened species will have a simplified single stage assessment process. The regulations will specify classes of development or activity that will move directly to a species impact statement (SIS). No additional test of significance will be required.

A revised 'test of significance' (uncommenced from the 2002 amendments) will apply for development not covered by the above provisions. The changes in the revised test are designed to:

- better address ecological communities (in addition to species and populations);
- remove some factors which were difficult to answer and were not crucial in determining whether or not there would be significant effect; and
- clarify the wording of the factors in the light of operational experience.

If approval of developments and activities requires concurrence, this may take into account voluntary reservation of land, protecting land for conservation in some other way, or taking action to assist with the restoration of threatened species habitat. This allows a more flexible approach to be taken in the conservation of threatened species, including using offsets.

The role of consultants

Consultants provide an important source of threatened species expertise to developers, local and State government. Given the importance of decisions made on advice from these consultants, the DEC is preparing a system for accreditation for these consultants. This will ensure that consultants provide unbiased and objective information for the purposes of biodiversity certification, tests of significance and species impact statements. Initial accreditation is to be based on knowledge and experience, with ongoing accreditation based on performance. A point-score system (similar to drivers' licences) is proposed to be used to manage poor performance.

3 Natural resource management and farming in rural areas

Conservation of threatened species, populations and ecological communities is integrally linked with the management of the landscape – soils, rivers and vegetation. Integrating catchment action and property planning allows greater flexibility to:

- maintain and enhance viable areas of habitat and corridors;
- offset impacts, where feasible, in order to achieve net gain or avoid loss; and
- identify and implement recovery and restoration priorities.

The new system for threatened species conservation will help deliver more certainty and support for landholders. This has become possible as a result of the Government's new laws that will end broadscale clearing of native vegetation and provide significant new funding to assist landholders to repair the landscape.

3.1 Routine agricultural management activities

A threatened species licence will no longer be required for routine agricultural management activities, including:

- (a) clearing that constitutes a routine agricultural management activity (defined in the same way as under the *Native Vegetation Act 2003* (NV Act));
- (b) a routine agricultural management activity (other than clearing, which is covered in (a)), but only to the extent that the activity is reasonably necessary for the purposes of the agricultural activities carried out on the land concerned;
- (c) an activity that is permitted under any of the following provisions of the NV Act:
 - (i) Clearing of non-protected regrowth (s 19 NV Act);
 - (ii) Continuation of existing farming activities (s 23 NV act);
 - (iii) Sustainable grazing (s 24 NV Act);
- (d) any other activity prescribed by the regulations for the purposes of this section.

The ability to extend, limit and vary these activities by regulation is also proposed. This ability is needed because some routine agricultural management activities that can impact threatened species are not addressed in native vegetation provisions.

3.2 Property vegetation plans

A property vegetation plan (PVP), developed under the NV Act will provide farmers with:

- regulatory certainty regarding farming activities;
- incentive payment arrangements for landscape repair; and/or
- clearing approval, where an environmental outcomes test has been met.

Under the proposed reforms, the Environment Minister may, in regard to conservation of threatened species, certify the native vegetation reform package, consisting of the:

- (a) the *Native Vegetation Act 2003* and the regulations under that Act;
- (b) State-wide standards and targets for natural resource management issues recommended under the *Natural Resources Commission Act 2003* and adopted by the Government;
- (c) catchment action plans under the *Catchment Management Authorities Act 2003*;
- (d) protocols and guidelines adopted or made under the regulations under the *Native Vegetation Act 2003*, the *Catchment Management Authorities Act 2003* and the *Natural Resources Commission Act 2003*.

This biodiversity certification further streamlines the regulatory system for farmers who hold PVP⁵s. They do not need to prepare a test of significance for threatened species and are protected from prosecution or the need for licensing for any activity set out in the PVP. Instead, it is proposed that PVPs contain a clear map of high conservation areas and a description of conservation actions. This allows threatened species conservation to be integrated into everyday management of farmland. In addition, incentives may be provided to help farmers conserve threatened species or habitat.

If a landholder undertakes an activity that harms a threatened species that is not included in the PVP and not otherwise excepted, the landholder is still subject to the offence provisions for the Threatened Species Conservation Act.

The DEC will be assisting by providing:

- Guides that enable CMA⁶s to assist farmers to identify possible threatened species and threatened species habitats and the impacts or benefits of their proposed activities; and
- Decision support tools to allow CMAs to work with farmers to quantify the impacts on biodiversity and threatened species, and the benefits of offsets and incentives.

⁵ PVP Property Vegetation Plan

⁶ CMA Catchment Management Authority

3.3 Catchment action plans and incentives

The objective is to have each CMA integrate the conservation of threatened species within its core activities of catchment action planning and incentives. To guide policy, priorities, incentives and decision-making at the catchment level, DEC will work with CMAs to identify and/or help them adopt:

- A map of vegetation communities, including
 - ⇒ a list of the threatened species for which the vegetation community is considered an important habitat (or of which it is a constituent);
 - ⇒ a list of the actions to be taken to protect the vegetation communities (including both strategic matters, such as core areas and large-scale corridors, as well as small-scale measures, such as protecting hollow-bearing trees);
 - ⇒ strategies for protecting and restoring each vegetation community type in the CMA area. Strategies should reflect the relative scarcity or abundance of each type and hence its priority for incentives and consideration when approving PVPs;
 - ⇒ the regional biodiversity conservation priority of each vegetation community for the allocation of incentive payments and consideration when approving PVPs;
- A list of species which cannot be readily conserved by protecting a vegetation community type, and the means and incentives to support their conservation to be adopted in PVPs;
- A statement of how threatened species conservation (either through vegetation communities or otherwise) will be incorporated into a decision to finalise a PVP; and
- An adaptive management strategy to incorporate new threatened species listings and significant new information about existing threatened species into subsequent PVPs and incentives.

The Minister may withdraw biodiversity certification for specific CMA areas if the CMA fails to act consistently with the certified native vegetation reform package, or if the CMA otherwise fails to protect threatened species through its core activities. This decision may be based on an audit by the NRC⁷ (under the NRC Act or at the request of the Minister) or an investigation by the Department of Environment and Conservation. Withdrawal would not affect PVPs already issued.

⁷ NRC Natural Resources Commission

4 The Scientific Committee and listing of threatened species

The Government is committed to retaining a scientifically robust and credible listing process, where the decisions are made by an independent scientific body. Whether a species is threatened or not is a matter of scientific fact, not opinion.

The bill clearly separates two key stages in threatened species conservation. The first stage is to identify the species or ecological community that is under threat (which is the role of science and the Scientific Committee). The second stage is to deploy a considered mix of tools to motivate the community (in all its parts and activities) to achieve recovery.

The bill provides improvements to strengthen the operation of the Scientific Committee, and the manner in which it is seen to operate:

- The Minister for the Environment will have the ability to refer a draft determination back to the Scientific Committee for further consideration, if further scientific assessment is warranted. This provides an opportunity for the public to be sure that any extra information held is specifically considered by the Committee.
- The Scientific Committee will be required to publish the reasons for its decisions against criteria and guidelines developed by the Commonwealth Department of Environment and Heritage and the Commonwealth Threatened Species Scientific Committee (these are guided by the IUCN⁸ criteria). This will provide a standardised framework for decision-making and public reporting.
- The Committee will be able to prioritise its consideration of nominations to ensure its resources can be focussed on the areas of highest need. This prioritisation can be informed by recommendations of the Natural Resources Commission or the Minister for the Environment regarding State-wide issues of concern in biodiversity conservation. The Committee will have an additional function of providing advice to the newly established Natural Resources Commission on matters of a scientific nature that relate to threatened species.
- The Scientific Committee will keep the lists under review and determine whether changes to the lists are necessary. This will assist to maintain public confidence in the validity of the threatened species lists. The Scientific Committee may also be directed by the Natural Resources Commission or Minister to undertake investigations to identify potential threatened species, populations and ecological communities. This is in addition to the nomination process that may be initiated by any person for inclusion on, omission from or amendment to lists.

⁸ IUCN International Union for the Conservation of Nature

- The bill introduces two new categories of listing – critically endangered ecological community and critically endangered species. These categories assist to identify species and ecological communities which are at an extremely high risk of extinction in the immediate future.
- Other changes relate to minor amendments to schedules and timeframes in which the Committee is required to make decisions, and the appeal of those decisions.

5 Better prioritisation of recovery and threat abatement

While there will be an ongoing key role for species-specific plans to bring high profile species back from the brink of extinction, most recovery outcomes depend on integrating the necessary protective actions with the mainstream processes that decide the fate of habitat.

Actions for recovery and threat abatement will be better prioritised through a Priorities Action Statement. This will be reviewed and updated every three years, after seeking input from the NRC, the Scientific Committee, the Social and Economic Advisory Council, the Biological Diversity Advisory Council, State and federal government agencies and the public.

The Statement will set out strategies to be adopted to promote recovery of each threatened species and to manage key threatening processes. These strategies may include:

- action to secure or repair habitat via integration with the land-use planning system or the reformed NRM system (as outlined above), additions to the reserve network or conservation agreements;
- reliance on wider government programs, such as reform of natural resource allocations (eg water, timber, minerals) or national measures or plans for threatened species conservation;
- single or multi-species recovery plans.

The Statement includes proposed relative priorities for action over the period and realistic performance indicators to ensure accountability. Consultation on the draft Statement allows stakeholders to comment on the adequacy of the proposed total recovery effort.

Given the new opportunity to apply a wider range of more powerful tools to achieve threatened species outcomes, the Statement development and action processes will achieve significantly more threatened species recovery and conservation than is currently possible.

6 Upgraded compliance and enforcement

It is proposed to upgrade the threatened species enforcement provisions to make them consistent with enforcement and evidentiary provisions found in other environment protection legislation. This will allow the newly integrated Department of Environment and Conservation to move toward a single set of enforcement powers that are consistent across the department. It will ensure potential offences are investigated in an efficient manner.

Changes to the offence provisions are intended to overcome the extreme difficulty experienced in successfully prosecuting under the existing provisions. The Government intends that those who flout the new laws should not gain unfair economic advantage through damaging our unique and threatened plants and animals.

7 Advisory councils

A statutory Social and Economic Advisory Council will be established to advise the Minister, the DEC and the NRC on all aspects of the implementation of the Act that follow the listing process. The Council will have expertise in natural resource management, economics, social impact assessment and industry. The Minister for the Environment will appoint members to the Council.

The Biological Diversity Advisory Council will be re-established to provide expertise to the Minister, the DEC and the NRC on biological diversity, biological science and environmental science. The Council will retain its role in the development of the State's Biodiversity Strategy, and other advisory roles as requested by the Minister.

Increased collaboration between scientists and decision-makers is proposed by enabling the NRC to obtain advice from, and provide advice to, the Scientific Committee, the Social and Economic Advisory Council and the Biological Diversity Advisory Council.