

Aligning Biodiversity Assessments

Implications for biodiversity assessments following the Australian Government endorsement of the NSW Biodiversity Offsets Scheme

Streamlining NSW and Australian government biodiversity assessments

The NSW Government and Australian Government finalised amendments to the NSW Assessment Bilateral Agreement (the Agreement) in 2020 after changes to NSW legislation. The Australian Government has also formally endorsed the NSW Biodiversity Offsets Scheme (the NSW BOS) through the *Environment Protection and Biodiversity Conservation Act Condition-setting Policy*.

The Australian Government is the decision-maker for *Environment Protection and Biodiversity Conservation Act 1999* approval

The Australian Government is the decision-maker for all actions that significantly impact on matters of national environmental significance (MNES) under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). A NSW Government decision-maker cannot determine or condition impacts to matters not prescribed under NSW legislation.

A person proposing to take an action that may impact on MNES is required to submit a referral to the Australian Government Department of Climate Change, Energy, the Environment and Water to determine whether the proposed action will significantly impact the matter(s). If so, the action will be determined a controlled action and will require approval by the Australian Government.

The Commonwealth's *Matters of National Environmental Significance: Significant impact guidelines 1.1* provides guidance on determining whether an action is likely to have a significant impact on a matter protected under the EPBC Act. These guidelines outline a 'self-assessment' process, including detailed criteria, to assist proponents in deciding whether a referral is required.

A state, territory or Australian government Minister for the Environment (the Minister) or government agency that is aware of a proposed action can make a referral if that Minister or agency has administrative responsibilities relating to the action. The

Minister may request a person to make a referral. If a referral is made by a Minister or government agency, the Minister will inform the person proposing to take the action and invite them to provide further information.

If a controlled action decision has been made, the Australian Government will advise on the assessment approach and determination pathway. If the action is a major project in New South Wales (where the NSW Government is the consent authority) and the project is eligible, the Agreement will apply. For other types of actions, or if the project is not covered by the Agreement, it will need to be assessed separately by the Australian Government for the MNES impacts and the relevant NSW determining authority.

Agreement with the Australian Government

The Agreement streamlines the assessment process for major projects that require both NSW and Australian government environmental approvals. The Agreement was made under the Australian Government's EPBC Act relating to environmental approvals. The Agreement accredits the use of planning processes for State Significant Development (SSD) and State Significant Infrastructure (SSI) under the NSW *Environmental Planning and Assessment Act 1979* (EP&A Act).

Under the Agreement, the NSW Government manages the assessment process on behalf of the Australian Government, which includes setting the assessment requirements (e.g. Secretary's Environmental Assessment Requirements) and undertaking the assessment of MNES in consultation with the Australian Government. The intent is to streamline environmental assessments and reduce regulatory burden as much as possible. The Australian Government considers the assessment report, prepared by the NSW Department of Planning and Environment, and remains the decision-maker for EPBC Act approval.

On 24 March 2020, the NSW and Australian governments signed Amending Agreement No. 1 (the amending Agreement), which makes minor amendments to the 2015 Agreement in response to changes to NSW biodiversity and planning laws and to improve the operation of the Agreement.

All eligible major projects are assessed under the updated provisions of the Agreement. Projects that have been determined to be controlled actions prior to the amending Agreement being signed will continue under their existing arrangements. Further information on the Agreement is available on the 'NSW Government agreements' webpage of the NSW Department of Planning and Environment.

NSW Biodiversity Offsets Scheme is endorsed

The Agreement covers major projects (where the NSW Government is the consent authority, e.g. SSD and SSI). To achieve streamlining benefits for all NSW proponents that use the NSW BOS and need approval under the EPBC Act, for impacts to threatened species or ecological communities, the Australian Government has endorsed the NSW BOS via the EPBC Act Condition-setting Policy. Any NSW proponent who needs an EPBC Act approval may be able to use the NSW BOS to assess and meet their biodiversity offset requirements.

The NSW and Australian governments agree that endorsement of the NSW BOS to avoid, minimise and offset biodiversity impacts on both NSW and Commonwealth listed threatened species or ecological communities provides for the best biodiversity and streamlining outcomes. The Australian Government supports the use of the Biodiversity Assessment Method (BAM) as the underpinning methodology for calculating biodiversity credit requirements.

Addressing inconsistencies in NSW and Australian government listings and settings

The NSW and Australian governments are working to resolve key alignment issues. At the moment, the listings of threatened species and ecological communities between the 2 jurisdictions are not perfectly aligned because they were developed separately, with different methods of classification and assessment. Ongoing work for both governments is to maximise the alignment of the 2 systems and develop case-by-case solutions when this is not possible.

Entities listed under *Environment Protection and Biodiversity Conservation Act 1999* but not *Biodiversity Conservation Act 2016*

Where an action will impact on an Australian Government listed entity that is not listed under NSW law, the Australian Government will set the assessment requirements and consent conditions for that entity (e.g. Hoary Sunray). The BAM can still be used to assess impacts from a proposal on an EPBC Act only listed entity and these should be clearly documented in the Biodiversity Development Assessment Report (BDAR). However, biodiversity credits cannot be created or traded under the NSW BOS for these entities because they are not listed under the Schedules of the NSW *Biodiversity Conservation Act 2016* (BC Act). Biodiversity credits can only be created for NSW listed entities.

Any biodiversity credit output displayed in a BAM-Calculator (BAM-C) credit report for entities listed under the EPBC Act but not listed under the BC Act is invalid. The BAM-C credit reports have messaging that reflects this situation, referring the proponent to the Australian Government. Note that the requirements relating to serious and irreversible impacts (clause 6.7 of the Biodiversity Conservation Regulation 2017 (BC Regulation)) will not apply to EPBC Act only listed entities.

Consent conditions for a NSW planning approval cannot legally require the retirement of biodiversity credits for an entity that is not listed under the BC Act. For example, there may be situations, where a BAM-C credit report submitted to a consent authority includes an EPBC Act listed entity that is **not** listed under the BC Act (e.g. Hoary Sunray), and the conditions of consent require proponents to demonstrate the retirement of *all* generated and/or listed credits in a BDAR. The proponent is not legally required to retire credits for the EPBC Act listed entity, because it is not listed under the Schedules of the BC Act.

Consent authorities should clarify that the requirement to demonstrate the retirement of credits does not apply to any EPBC Act listed entities that are not listed under the BC Act. In situations where entities only listed under the EPBC Act are listed in a BAM-C credit report, proponents should provide a copy of this factsheet to the consent authority to ensure a clause is put into the conditions of consent that 'invalid credits' listed on the BAM-C credit report are not required to be retired. Alternatively, consent authorities can include a clause which lists the specific credits that need to be retired under the BC Act.

Variations in listing status

The BAM can be used to assess the impact to entities where their listing status differs between the 2 Acts. The listing status is considered when calculating credit requirements through the risk weighting in the BAM. The NSW Department of Planning and Environment considers both the NSW and Commonwealth listing status and currency of the determination when setting the risk weighting.

As with any other decision, the Australian Government may have additional assessment requirements or set additional conditions of consent to reflect its own listing status of entities. In practice, the Australian Government will seek to ensure consistency with NSW assessment and conditions.

Variations in listing definitions

Listing a threatened ecological community (TEC) under the EPBC Act ensures that a legal framework is in place for the conservation and sustainable use of TECs across all states and territories. However, differing approaches between jurisdictions mean there may be some differences between EPBC Act listed TECs and NSW listed TECs. Key issues are addressed below.

Vegetation that conforms to different NSW and Australian government listed threatened ecological communities

Plant community types (PCTs) are the main community level typology used in the BAM and underpin NSW biodiversity policy and programs more generally. In very limited situations, at a given location, a PCT may be identified as conforming to one TEC under the BC Act and a different TEC under the EPBC Act. Therefore, a single vegetation patch could in practice be identified as different state and federally listed entities.

Generally, the BAM credit calculations will be applied to the BC Act TEC, with the BDAR outlining the assessment and impact in relation to both listed entities. It is not the intention of the Australian Government to require additional or duplicative offsets. Proponents will not generate 2 separate credit obligations for the same area. Again, the Australian Government may set additional assessment requirements or conditions of consent.

Condition thresholds for Australian government listed threatened ecological communities

Some EPBC Act TEC listings since 2005 specify 'condition classes' and/or 'condition thresholds' that determine which occurrences of a TEC are of highest conservation significance under the EPBC Act. Condition thresholds aim to prioritise habitat considered higher in function or quality and focus national legal protection on patches or occurrences of a TEC that are functional, relatively natural and in relatively good condition. There may be instances where the vegetation, or patches, are considered too degraded and do not meet the condition threshold of the EPBC Act listing and, therefore, will not require assessment or approval under the EPBC Act. These areas may still require assessment and approval under the NSW BOS.

Similarly, there may be situations where vegetation meets the condition threshold for an EPBC Act listing but is below the assessment or offset thresholds set in the BAM. These matters should be referred to the Australian Government for consideration.

Where a biodiversity stewardship site has generated credits for a TEC listed under the EPBC Act and BC Act, but the current condition of the vegetation is below that of the thresholds defined in the Australian Government listing, in general, these credits may

be used to meet an offset obligation. The Australian Government accepts that the predicted improvements in vegetation as part of a biodiversity stewardship agreement will result in the TEC meeting the condition thresholds defined in the listing.

Assessing threatened species

The Australian Government expectation for threatened species assessment generally accords with that of the NSW BOS. The NSW BOS allocates species to ecosystem credit species or species credit species, and this influences assessment requirements.

Ecosystem credit species are assumed to be present on a site if all relevant site context and condition filters are met (i.e. the species does not require survey to establish presence), while species credit species can either be assumed present (impact assessment only) or require targeted survey (or an expert report) to confirm presence. Further species-specific information is available in the BioNet Threatened Biodiversity Data Collection.

While the Australian Government retains the ability to set additional assessment requirements for EPBC Act listed threatened species, this will be unlikely where an accredited assessor follows the requirements of the BAM. Similarly, the Australian Government will generally accept the resulting offset obligation. For example, where an EPBC Act listed threatened species is an ecosystem credit species (e.g. spotted-tailed quoll), and the result of the NSW assessment is an offset obligation for an ecological community (e.g. PCT/offset trading group) rather than the individual species for that EPBC Act listed species, this will typically be acceptable for Australian Government purposes.

Consideration of migratory species that are also threatened species

The BAM can be used to assess and offset impacts on migratory species where they are also listed as threatened species and the impacts being assessed relate to the habitat of that species in New South Wales. It is not designed to assess specific migratory species considerations that are aligned to the Australian Government's international obligations.

The Australian Government will consider assessment requirements for impacts to migratory species, consistent with published advice such as the *Industry guidelines for avoiding, assessing and mitigating impacts on EPBC Act listed migratory shorebird species*. Accredited assessors may be able to use survey data gathered for the BAM assessment to support the assessment of migratory species impacts.

NSW and Australian government policy settings

On 22 November 2019, New South Wales passed an amendment to the BC Regulation. The amendment aligns the NSW BOS offset rules to Australian Government requirements.

The NSW BOS allows for variation rules to be used after reasonable steps have been taken to source like-for-like credits. This clause of the BC Regulation (clause 6.6A) was amended so that variation rules can no longer be applied to offsets required for Australian Government listed entities if the impact is a controlled action. Variation rules remain available to proponents with biodiversity offset requirements for impacts that are not a controlled action.

To meet offsets required for Australian Government listed entities for controlled actions under the NSW BOS, proponents retain the ability to:

- retire biodiversity credits based on the like-for-like provisions in the BC Regulation
- fund biodiversity conservation actions that are listed in the *Ancillary rules: Biodiversity conservation actions* and directly benefit the threatened entity impacted
- commit to deliver mine site ecological rehabilitation that creates the same ecological community or threatened species habitat
- pay into the Biodiversity Conservation Fund, noting it is the proponent's responsibility to notify the Biodiversity Conservation Trust that their payment is for a controlled action.

The Biodiversity Conservation Trust is required to meet the Australian Government offset requirement component in a like-for-like manner. This can be through retiring like-for-like credits; funding conservation actions that are listed in the *Ancillary rules: Biodiversity conservation actions* and benefit the threatened entity impacted; or by funding other conservation measures approved by the NSW Minister for Environment that directly benefit the entity impacted.

Reduction in biodiversity credits

A NSW consent authority has the ability to exercise discretion to reduce (or increase) the number of biodiversity credits that would otherwise be required to be retired if the consent authority determines that the reduction (or increase) is justified after considering the environmental, social and economic impacts of the proposed development. The consent authority must give reasons for a decision to reduce or increase the number of biodiversity credits (s.7.13(4) and s.7.15(4) of the BC Act).

A consent authority is not permitted to grant development consent to development for which the Minister is not the consent authority (e.g. Part 4 EP&A Act local development) if the development is likely to significantly affect threatened species, unless the consent authority has obtained the concurrence of the Environment Agency Head, or the development application is accompanied by a BDAR and the conditions of consent will require the retirement of at least the number and class of biodiversity credits specified in the report. The general principle of the Australian Government is to require the full offset credit obligation of the Australian Government component of the controlled action to be retired.

To meet relevant EPBC Act requirements and the Commonwealth Environmental Offsets Policy, generally the full offset obligation must be imposed with no scope for discretionary powers to be used for offsets relating to Australian Government listed entities for controlled actions. When considering giving concurrence to requests for credit reductions for controlled actions, NSW consent authorities (including local councils under Part 4 EP&A Act) will likely also notify the Australian Government.

The Australian Government can consider credit reductions; however, it is unlikely such a reduction would be granted, and any decision on a credit reduction would be made separately by the Australian Government. If the NSW approval requires biodiversity offsets for NSW only listed entities, a NSW consent authority will still be able to use its discretionary powers (including the power to increase or reduce a credit obligation) for these entities.

Common Assessment Method

In June 2015, the Environment Ministers in each Australian jurisdiction agreed to progress an intergovernmental Memorandum of Understanding on a Common Assessment Method (CAM) for the listing of threatened species and ecological communities. The memorandum provides the framework for the implementation of a CAM. It was signed by the NSW Government in October 2016.

The CAM will ultimately address inconsistencies in listing of threatened entities listed under both the NSW and Australian government legislation. It primarily aims to reduce duplication and inconsistency between listings of threatened species by developing a nationally consistent approach and establishing uniform and integrated processes for the future listing of threatened species. The Australian and NSW governments are committed to finalising the CAM to align Australian Government and NSW threatened species and ecological community listings.

More information

- Department of Planning and Environment, Environment and Heritage 2022, [Ancillary rules: Biodiversity conservation actions](#)
- Australian Government Department of Climate Change, Energy, the Environment and Water 2012, [Environment Protection and Biodiversity Conservation Act 1999: Environmental Offsets Policy](#)
- Australian Government Department of Climate Change, Energy, the Environment and Water 2020, [Environment Protection and Biodiversity Conservation Act 1999: Condition-setting Policy \(1.5 MB\)](#)
- Australian Government Department of Climate Change, Energy, the Environment and Water 2017, [Industry guidelines for avoiding, assessing and mitigating impacts on EPBC Act listed migratory shorebird species](#)
- Australian Government Department of Climate Change, Energy, the Environment and Water 2013. [Matters of National Environmental Significance: Significant impact guidelines 1.1](#)
- [NSW Biodiversity Conservation Regulation 2017 – clause 6.6A amendment](#)
- Department of Planning and Environment, Environment and Heritage 2022, [NSW BioNet](#)
- Department of Planning and Environment, Planning 2022, [NSW Government agreements – the bilateral agreement](#)
- Australian Government Department of Climate Change, Energy, the Environment and Water 2015, [NSW Bilateral Agreement Information](#)
- Department of Planning and Environment, Environment and Heritage 2022, [Offset rules – the variation rules](#)
- Department of Planning and Environment, Environment and Heritage 2022, [What are biodiversity credits?](#)

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