

ITEM NO: 7**SUBJECT: BIODIVERSITY BANKING AND OFFSETS SCHEME
(BIOBANKING)****FILE NO:** F02952

Recommendations:

1. *That the submission to the Department of Environment and Climate Change (DECC) on the BioBanking Scheme be noted.*
2. *That the Council make representations to DECC, seeking assurance that the Blue Mountains environmental protection outcomes in general and the protection of locally significant native vegetation and local biodiversity values in particular, will not be undermined by the BioBanking scheme.*
3. *That the Council endorse the request to DECC that the issues raised in the submission at Annexure A be given consideration and that a response be provided by DECC to enable the Council to understand the mechanism by which any introduction of the BioBanking scheme would be managed so as not to undermine the local environmental protection policies of the Blue Mountains.*

Report by Acting Group Manager, Community and Corporate:**Introduction**

The NSW State Government plans to introduce a Biodiversity Banking and Offsets Scheme (BioBanking) expected to be operative from March 2008. The draft BioBanking proposal was on exhibition until 1 February 2008.

Given the concurrent exhibition of this matter with the NSW Government proposed planning reforms, the impact of the Christmas period and the relatively limited time frame given the complexity of the matter, a submission was made seeking clarity with respect to the technical interpretation and likely impact on the policies of the Council as contained in the LEPs in particular. A copy of that submission is at Attached. The submission notes that implications for potential amendment to policy are matters for the Council. It is the purpose of this report to bring the BioBanking proposal to the attention of the Council and to provide an opportunity to consider and comment upon the proposal.

Biodiversity Banking and Offsets Scheme (BioBanking) in Outline

The Biodiversity Banking and Offsets Scheme (BioBanking) is promoted as helping address the continuing loss of biodiversity in NSW that currently occurs despite the existing NSW *Threatened Species Conservation Act 1995*. It aims to achieve this by means of a framework to assess and determine a neutral or beneficial effect from a development by offsetting the impact through improved management and biodiversity outcomes on another site. BioBanking is in effect a free and open market-based scheme which places a real value on biodiversity which should encourage development to move away from areas with high biodiversity value.

For the foreseeable future the scheme will run parallel to the existing threatened species regulatory framework in place through the NSW *Threatened Species Conservation Act 1995* and *Environmental Planning and Assessment Act 1979*, allowing a developer a choice of framework in which to seek development consent.

Under the scheme, a participating developer impacting upon biodiversity values, including the composition, structure and function of ecosystems, and threatened species, their habitat, and/or endangered ecological communities is required to offset the impact. The offsets are measured in terms of credits, using the BioBanking Assessment Methodology. The level of credits required are determined using a complex equation factoring in a range of biological parameters and will be different for each site. The scheme requires participating developers to meet an “improve or maintain” test, which means they need to create an improvement in biodiversity value at another site/s equal to or better than the loss incurred at the development site, with the intention that the scheme will not result in a net loss of biodiversity value in NSW.

BioBank credits are created by the landowner, who establishes a BioBank site and commits, via a legally binding agreement, to enhancing and protecting biodiversity values. The credits represent an improvement in the condition of biodiversity values such as an improvement in the habitat or an increase in the habitat or population of a threatened species. Credits will be issued for ecosystems and species. Ecosystem credits can only be used to offset biodiversity impacts in the same ecological community, or in another community of the same formation that has an equal or greater percentage of land cleared and the same predicted threatened species. Species credits can only be used to offset biodiversity impacts on the same threatened species.

The scheme therefore generates a market that allows the creation, sale and purchase of credits. The value of a credit will in effect be monetary and open to free market influence. Landowners can sell the credits to provide income and fund the future management of the site. Developers can buy the credits to offset impacts from their development and to meet the “improve or maintain” test. DECC will manage the scheme, which will involve a regulatory component including enforcement and the capacity for penalties for non-compliance.

The scheme is promoted as achieving biodiversity gains and reducing “red-tape”, which has been challenged by opponents of the scheme. The scheme does provide the opportunity for landholders and/or organisations seeking to secure conservation outcomes, including local councils, to make available credits and secure income to ensure conservation of biodiversity in perpetuity.

The Scheme is not without its critics, and the Nature Conservation Council and Environmental Defenders Office have been vocal in their opposition, having cited the potential for a continuing loss of biodiversity resulting from the scheme, allowing the development of high conservation lands that would currently be refused, the immediate loss of biodiversity traded away for an offset that will take time to realise, and the loss of highly threatened ecosystems and species from urban areas that are subject to high development pressure and their offset with lands in much less threatened rural areas.

Submission in Summary

The primary issues raised by the submission are the need to ensure that:

1. the detailed circumstances of biodiversity protection as implemented in high conservation value areas such as the Blue Mountains are fully considered and accommodated by the BioBanking Scheme;
2. the intent and principal objectives of the Blue Mountains LEP 2005, LEP 1991 and Better Living DCP, and the World Heritage Listing are realised and not compromised by the BioBanking Scheme;
3. the conservation of native and locally significant vegetation remains a primary determining factor of a given site's development constraints;
4. the BioBanking Assessment Methodology adequately considers and protects Development Excluded Land (DEL) including locally significant vegetation communities, steep slopes greater than 20%, watercourses and buffers to significant vegetation communities and watercourses;
5. there is ongoing consistency between State and Local approvals;
6. the independence of local government environmental assessment and approvals is maintained; and
7. special conservation significance of areas such as Blue Mountains be recognised and appropriately incorporated into the implementation of this scheme.

Potential Implications of the Scheme for BMCC

The natural and cultural values of the Blue Mountains are such that significant weight has been attached to the protection of local biodiversity, by the community, the Council and by various government agencies. Approximately twenty percent of the ecological communities underpinning this local biodiversity have been identified as significant by both State and Commonwealth legislation and by the listing of the Greater Blue Mountains as an area of World Heritage significance for its biodiversity values.

The Council has therefore made a substantial commitment to local biodiversity conservation via detailed vegetation mapping and analysis and implementation of protection regimes within LEP 1991 and LEP 2005.

There is the potential for both positive and negative implications to arise from the implementation of the BioBanking scheme in the Blue Mountains.

The principal concern is that the BioBanking scheme is a state-wide regulatory instrument that does not demonstrate that it has been formulated with due regard to the detailed circumstances of biodiversity protection as implemented in high conservation value areas such as the Blue Mountains. There is concern that the BioBanking Scheme could potentially undermine the outcomes sought to be achieved by the implementation of the Blue Mountains LEP 2005 and LEP 1991. DECC has provided verbal assurance that the immediate operation of the scheme will not undermine, negate or conflict with the objectives and provisions of Blue Mountains' LEPs.

DECC also advise that the impact of the BioBanking scheme is likely to be relatively limited at least initially because of the significant up front costs for a development site or BioBanking site to participate, which will mean that only larger scale development proposals are likely to want access to the scheme. If this is the case, even if there are problems with the methodology, it is likely that the scheme could operate for some time before significant issues arose for biodiversity conservation in the Blue Mountains.

On the positive side, it may be that the BioBanking Scheme could be implemented in a way so as to strengthen the strategic outcomes for biodiversity conservation in the Blue Mountains. The City has extensive, privately owned tracts of bushland whose zoning objectives are focused upon environmental protection. In the majority of cases this land has limited development potential due to zoning constraints. However, zoning constraints alone do not ensure biodiversity conservation outcomes as this requires active management of threatening processes, including weeds, erosion and inappropriate fire regimes.

The implementation of an appropriate management program is often beyond the skills and resources of a private landholder, and a lack of active management may lead to a decline in biodiversity values. The BioBanking scheme represents an opportunity for private landholders to access funds to undertake active management of private land that will in the long term improve biodiversity values when compared to the current situation.

The Council owns and/or manages an extensive natural area reserve system and commits significant resource towards management to protect biodiversity values. Preliminary discussions between the Council and DECC indicate that we will be eligible to participate in the BioBanking scheme as a provider of BioBanking sites. Through the sale of credits, the Council will be able to generate additional funds to improve management and biodiversity outcomes.

Within the City the opportunity for participation in the scheme from a development perspective is expected to be low. However, the City's large tracts of bushland, much of which is high conservation value, suggest there is high potential for providing BioBanking sites. The trading of credits across LGA boundaries is permissible and through the sale of credits the City may increase biodiversity values at the expense of other LGAs. These LGAs are likely subjects of high development pressure and the incremental loss of biodiversity would likely occur under the current system anyway.

A further improvement in biodiversity values in the City would be a positive as we have a strong commitment to environmental sustainability and this situation may well represent a positive biodiversity outcome when considered at a broader regional and state-wide level.

Sustainability assessment

As this report concerns a submission on a new State Government scheme there is no sustainability effects. The fully sustainability implications of the State Government scheme cannot be assessed until the further information requested in the submission is received.

Financial implications

The preparation of the submission has no financial implications. The proposed BioBanking scheme may have positive financial implications for the Council and City as a whole, however this might be at the expense of environmental outcomes in other areas of the State. It will be difficult to measure the implications of this scheme until it is in operation.

Legal and risk management issues

There are no legal or risk management issues associated with the submission presented by the Council staff on BioBanking.

The Way Forward

It has been assumed in the preparation of the submission to DECC and in the preparation of this report to the Council, that the Council will be seeking to ensure that its environmental protection outcomes will not be undermined by the BioBanking scheme. A recommendation has been proposed, reinforcing the Council seeks that assurance.

The submission at Annexure A requests that the detailed issues described therein be given consideration and that a response be provided to enable the Council to understand how the introduction of the BioBanking scheme would be managed so as not to undermine the local environmental protection policies of the Blue Mountains. A recommendation has also been proposed to that affect.

Alternatively, unless this assurance can be given with a high degree of certainty, then it may be appropriate for the Council to request the exclusion of the Blue Mountains from the scheme until these matters are addressed.

* * * * *

Attachment

19 February 2008

Environmental & Customer Services

Reference File: F02952

Reference Document: 08/013691

Deputy Director General
Department of Environment and Climate Change NSW
PO Box A290
Sydney South NSW 1232
biobanking@environment.nsw.gov.au

Dear Dr Richard Sheldrake,

Subject Submission on Biodiversity Banking and Offsets (Biobanking) Scheme

I refer to our recent phone conference concerning the Biodiversity Banking and Offsets Scheme, between Louisa Mamouney of the Department of Environment and Climate Change (DECC) and Blue Mountains City Council staff.

During this phone conference a number of issues were raised and resolved but a number of concerns remain. Those concerns are the subject of this submission.

The Biobanking scheme is relatively complex and far ranging. Any policy issues arising from the proposed introduction of the Biobanking scheme would be a matter for the elected the Council. The opportunities to report to and gain the view of, the elected Council have been limited because of the timing of the consultation period over the Christmas period and exhibition at the same time as the NSW Planning Reforms. It is proposed that this submission will be reported to the Council in the near future. That will provide an opportunity for the Council to make policy based comment.

This submission flags potential issues of technical concern with respect to the implementation of the current biodiversity protection policies of the Council as reflected in the local environmental planning instruments.

The principal concern, is that the Biobanking scheme does not demonstrate that it has been formulated with due regard to the detailed circumstances of biodiversity protection as implemented in high conservation value areas such as the Blue Mountains.

The natural and cultural values of the Blue Mountains are such that significant weight has been attached to the protection of local biodiversity, by the community, the Council and by various government agencies. Approximately twenty percent of the ecological communities underpinning this local biodiversity have been identified as significant by both State and Commonwealth legislation and by the listing of the Greater Blue Mountains as an area of World Heritage significance for its biodiversity values.

For these reasons, the Blue Mountains Council has over the last 10 – 15 years, undertaken detailed analysis and mapping of locally significant vegetation communities and has implemented policies to secure the protection of that local biodiversity.

Both the Blue Mountains Local Environmental Plan 2005 and Local Environmental Plan 1991 aim to provide a framework for the development of land in a manner that is consistent with and promotes the principles and practices of ecologically sustainable development. The principal objectives of LEP 2005 include but are not limited to maintaining the unique identity and values of the City as the “City within a World Heritage National Park” and conserving and enhancing for future generations, the

ecological integrity, environmental heritage and environmental significance of the Blue Mountains. LEP 1991 contains similar objectives.

The need to maintain and enhance the integrity and health of local biodiversity and the underpinning ecological systems by the proper management of development was one of the key elements evaluated by the Committee that assessed and approved the nomination of the Blue Mountains for World Heritage listing.

Protection of the local natural heritage values is achieved in large part by the appropriate zoning of land and the assessment of development applications in accordance with special provisions which include consideration of mapped and unmapped environmental features such as significant vegetation communities (as listed in Schedule 5 of LEP 2005 and Schedule 3 of LEP 1991), steep slopes and watercourses. There are corresponding designated protected areas to provide protection of and buffers to sensitive features, and the requirement for a detailed environmental impact assessment by Clause 44 for LEP 2005 and Clause 10.5 of LEP 1991.

Subdivisions for example must not have an adverse impact on “Development Excluded Land” (the definition of which includes Environmental Protection zoned land, slope constraint areas, ecological buffer areas to protect and buffer significant vegetation communities and watercourses and the habitat for rare or threatened species, populations or communities).

In the case of both instruments, a subdivision requires 750m² of land that is not Development Excluded Land. The primacy attributed to this clause under LEP 2005 prevents variation to this clause (i.e. SEPP 1 does not apply).

There is concern that the Biobanking Scheme could potentially undermine the outcomes sought to be achieved by the implementation of the Blue Mountains LEP 2005 and LEP 1991.

There is also potential for conflict between State Government processes and Local Government process, which would appear to be inconsistent with the general aims of the reform. It is therefore considered to be important that local government assessment requirements are considered by the DECC methodology and reflected in any approval issued by the Biobanking Statement.

Annexure A details the key issues and describes the key operative provisions of the LEP with the potential to be undermined by the Biobanking scheme. It is requested that the detailed concerns be given consideration and that the Council be given the opportunity to consider the detailed mechanisms by which any introduction of the Biobanking scheme would be managed so as not to undermine the local environmental protection policies.

For your reference the LEPs can be viewed at the following web link:

<http://www.bmcc.nsw.gov.au/citydevelopment/localenvironmentalplans>

Should you have any queries regarding this correspondence please do not hesitate to contact the undersigned on 47805707.

Yours faithfully,



LEE MORGAN
Manager Planning Health and Enforcement
Environmental & Customer Services

Annexure A – Blue Mountains Local Government Area Issues for consideration with regard to the Biobanking Scheme.

1. The primary area of concern is that the scheme currently appears not to allow the recognition of all “Development Excluded Land” (DEL) by the Biobanking Assessment Methodology. This is to ensure for example, that a scheduled vegetation unit, such as “Schedule 5 significant vegetation community 5A – Blue Mountains Heath and Scrub”, which is not listed as an Endangered Ecological Community by the Threatened Species Conservation Act, 1995, but is locally significant and protected by LEP 2005, will remain protected with adequate buffers, and will not be identified for clearing with offsets elsewhere by any Biobanking Statement that may be presented to Council with a development application. Other items of DEL afforded protection under Blue Mountains LEPs include steep slopes >20%, watercourses and buffers to locally significant vegetation and watercourses.
2. The Biobanking Scheme appears to represent a policy shift away from conserving existing bushland and utilising existing cleared areas as far as practicable (a position that is also adopted in the Blue Mountains LEPs), as being the starting point for determining primary constraints on development.
3. Why should any further clearing be considered for any Endangered Ecological Community (EEC)? Application of an “over-cleared” status for EEC’s seems flawed. Under the BM LEPs additional clearing impacts on EECs such as Blue Mountains Swamps and Shale Sandstone Transition Forest are generally not permitted,. This is particularly the case where new subdivision is concerned (as opposed to circumstances where a dwelling on an existing lot is concerned). The LEPs also seek restoration of a native vegetation buffers around these communities wherever practicable.
4. It is not clear how the Biobanking Assessment Methodology will adequately consider all regionally sensitive vegetation units (Scheduled Sensitive Vegetation Units as listed by Blue Mountains LEP 2005 & Blue Mountains LEP 1991) such as those that are not listed as EECs and may not provide Threatened Species habitat, but that are still important in order to conserve the biodiversity values unique to the Blue Mountains. It is considered that all Blue Mountains scheduled vegetation units should be cross referenced against EEC’s protected by the Threatened Species Conservation Act, 1995, and consideration be given as to how the methodology could protect all such Blue Mountains scheduled vegetation units from clearing to be approved by any Biobanking Statement.
5. It is not clear how the Biobanking Assessment Methodology will ensure native vegetation buffers to protect EEC’s and to protect other sensitive vegetation units or watercourses identified by the Blue Mountains LEPs, will be protected and rehabilitated. A minimum buffer of 60m measured from the boundary of scheduled vegetation units is adopted by Blue Mountains Council LEP mapping and development within those buffers must demonstrate consistency with the environmental protection objectives of the instrument.
6. There is concern that it will be difficult to locate EEC for offset protection works that are the equivalent of the EEC approved for clearing. (Blue Mountains City Council (BMCC) has had experience of this issue first hand when the Blue Mountains was a candidate for the funding of a restoration area). This is likely to be a relatively common problem, given that by definition, EEC units are relatively scarce.
7. There is concern that inconsistencies may arise between Local and State approvals, where the BM LEP may define areas of scheduled vegetation/and other Development Excluded Land (DEL) that precludes development (and clearing), and the State bio-banking methodology may not consider these areas of DEL as red flag areas. Local government legislation may impose a stricter test than State legislation. It is likely that under such circumstances the LEP would be undermined and tests revised to be more consistent with State assessment criteria.
8. It is unclear how a Council can maintain an effective independent environmental assessment of the DA, if it is required to include the bio-banking statement as a condition. If the LEP does

not allow the clearing permitted by the bio-banking statement, is the Council limited in the discretion that it can exercise with respect to the determination of the application? The role of the 7 part test requirements in that circumstance is also unclear.

9. Will it be possible to develop half of an EEC on a development site such as a Shale Sandstone Transition Forest remnant and offset it with protection of the other half on the same development site?
10. The Biobanking Statement should be as detailed as possible with all relevant information to enable third parties including Councils to adequately understand the environmental factors considered by the methodology, stating assumptions, parameters and reasons and the basis for which credits have been issued.
11. It may be possible for areas of special conservation status to be reflected in the Biobanking methodology so that when the BioBanking Assessment Methodology is applied, that the level of clearing approved by the State government via the bio-banking statement does not conflict with the level of clearing likely to result from Council's assessment against the LEP.
12. There may be potential to undertake a strategic assessment of complex natural landscapes such as BM LGA to determine how credits for offset sites could be targeted to areas that provide corridor linkages that enhance biodiversity values in high conservation landscapes such as the Blue Mountains.