



SUBMISSION ON THE PROPOSED NATIONAL POLICY STATEMENT ON INDIGENOUS BIODIVERSITY

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1. Introduction

- 1.1. The Environmental Defence Society (EDS) welcomes the opportunity to comment on the Proposed National Policy Statement on Indigenous Biodiversity (Proposed NPS).
- 1.2. EDS is a public interest environmental law group, formed in 1971. It is Auckland-based and has a membership that consists largely of resource management professionals. The focus of EDS's work is on achieving good environmental outcomes through improving the quality of New Zealand's legal and policy frameworks and statutory decision making processes.

2. General comments

- 2.1. EDS supports the preparation of a NPS on indigenous biodiversity for the following reasons:
 - A NPS on indigenous biodiversity has the potential to achieve consistency in approach among local authorities.
 - A NPS on indigenous biodiversity has the potential to provide clarity in relation to how local authorities should provide for biodiversity in plans

and regional policy statements. This is likely to create greater certainty and reduce the scope for repetitious litigation during plan-making.

- A NPS on indigenous biodiversity could significantly improve the management of adverse effects on biodiversity and ultimately biodiversity outcomes in New Zealand.

3. Policy 1: Defining significant areas and habitats for the purpose of the NPS

Support for Policy 1

- 3.1. EDS supports the inclusion of Policy 1 as it provides clarity to local authorities that they may continue to interpret their section 6(c) obligations more broadly than as required by the NPS. Areas of indigenous vegetation and significant habitats of indigenous fauna may be considered “significant” under section 6(c) for reasons other than their role in maintaining indigenous biodiversity (eg for landscape values). Without the clarity provided by this policy the NPS might incorrectly be interpreted as a definitive statement of a local authority’s obligations under section 6(c).
- 3.2. It is a basic legal tenet that the interpretation of legislation is for the Courts and EDS considers a NPS should not range outside of, or restrict the requirements of Part 2 of the RMA. The Environment Court has stated the same in relation to regional policy statements.¹

4. Policy 2: Criteria for identifying significant indigenous vegetation and the significant habitat of indigenous fauna

Support for criteria

- 4.1. EDS strongly supports providing guidance at a national level for determining “significance” of indigenous vegetation and habitats of indigenous fauna. The assessment of significance is a key part of a local authority’s responsibility to provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna as required under section 6(c) of the RMA and is often central to the determination of whether vegetation or habitats are cleared or protected.
- 4.2. The lack of a definition of significance in the RMA has led to inconsistent approaches between different local authorities. Different interest groups have put forward their own definitions of the term which vary considerably and this has resulted in litigation on this issue.
- 4.3. EDS supports wording this Policy in order to present the matters listed as minimum (or bottom line) criteria. This protects the ability of councils to apply more inclusive criteria for assessing significance to achieve the overall objective of the NPS of promoting the maintenance of indigenous biodiversity.

¹ *St Colomba’s Environmental House Group v Hawkes Bay Regional Council* [1994] NZRMA 560.

- 4.4. In particular, EDS supports the inclusion of Policy 2d, which requires indigenous vegetation or habitat associated with land environments defined by Land Environments of New Zealand (LENZ) at Level IV (2003) that have 20 percent or less remaining in indigenous vegetation cover to be regarded as significant. LENZ uses 15 climate, land form and soil variables likely to influence the distribution of species to classify and map areas that have similar environmental or ecosystem character.
- 4.5. This criterion will enable a representative range of protected areas and reserves to be identified in a systematic way. This systematic approach to significance assessment also provides an objective basis for decision-making.

5. Policy 3: Including criteria in regional policy statements

More logical structure required

- 5.1. EDS considers the Proposed NPS would be more logically ordered and more easily understood if all requirements for the inclusion of criteria in regional policy statements (RPSs), regional plans and district plans for identifying areas of significant indigenous vegetation and significant habitats of indigenous fauna were contained within the same policy.
- 5.2. Currently the requirement that district plans and regional plans include in their plans the criteria for significance is confusingly and illogically placed after the requirement that these plans identify areas of significant indigenous vegetation and significant habitats of indigenous fauna.
- 5.3. EDS considers the Proposed NPS would be more logically structured if Policy 3 included the requirement that both RPSs and plans include *criteria* for significance and Policy 4 included the requirement that plans *identify* significant areas.

Time period required for inclusion of criteria in RPSs

- 5.4. While currently the Proposed NPS requires RPSs that are notified after the Proposed NPS takes effect to include the criteria for significance of Policy 2a-d, some second generation RPSs have already been notified at the time of writing this submission and therefore will not be caught by this policy for potentially a decade. A time frame for implementation of this policy is required to ensure it is given effect to in a timely fashion.
- 5.5. EDS considers 12 months is an appropriate time frame for RPSs to include criteria for the identification of areas of significant indigenous vegetation and significant habitats of indigenous fauna that include, as a minimum, the areas and habitats identified in Policy 2a–e. EDS also considers that the full list of Policy 2 criteria should be included in RPSs, including criterion 2e.
- 5.6. The Proposed NPS should also direct that regional councils can give effect to this Policy without going through the process in Schedule 1 (in accordance with section 55(2A) RMA).

Time period required for inclusion of criteria in district and regional plans

- 5.7. The July 2010 MfE commissioned study *District plans and the Protection of Biodiversity: an update* found 20 percent of district plans have no criteria for the purpose of identifying significant natural areas. The study showed a wide range of techniques are used to identify significant natural areas, with different criteria applied and some plans continue to use rudimentary criteria.
- 5.8. These findings suggest there is currently inadequate use of criteria to determine areas of significant indigenous vegetation and significant habitats of indigenous fauna in district plans. There is currently no time period in the Proposed NPS within which local authorities must include in their plans the significance criteria of the relevant RPS. However there is a five year time period for “decision makers” to include in plans the significance criteria of Policy 2a–d of the Proposed NPS.
- 5.9. EDS considers that given the declining state of biodiversity in New Zealand there is some urgency for district plans and relevant regional plans to include criteria for significance. The Proposed NPS should direct that regional councils and territorial authorities give effect to this Policy without going through the process in Schedule 1 (in accordance with section 55(2A) RMA)).

Suggested changes

Policy 3 should be replaced as follows:

1. Regional policy statements or proposed regional policy statements shall include criteria for the identification of areas of significant indigenous vegetation and significant habitats of indigenous fauna that include, as a minimum, the areas and habitats identified in Policy 2a–e.

2. Regional councils are directed under section 55 of the Act to amend a regional policy statement or amend a proposed regional policy statement by notifying within 12 months of the date on which this national policy statement takes effect, without using the process in Schedule 1 of the Act, a change or variation (whichever applies) as necessary to give effect to subsection 1.

3. Relevant regional plans, or relevant proposed regional plans shall include the criteria of the applicable regional policy statement for identifying areas of significant indigenous vegetation and significant habitats of indigenous fauna.

4. Regional councils are directed under section 55 of the Act to amend a relevant regional plan or relevant proposed regional plan by notifying within 40 working days following the regional policy statement being amended in accordance with subsection 2, without using the process in Schedule 1 of the Act, a change or variation (whichever applies) as necessary to give effect to subsection 3.

5. District plans or proposed district plans, shall include the criteria of the applicable regional policy statement for identifying areas of significant indigenous vegetation and significant habitats of indigenous fauna.

6. Territorial authorities are directed under section 55 of the Act to amend a district plan or proposed district plan by notifying within 40 working days following the regional policy statement being amended in accordance with subsection 2, without using the process in Schedule 1 of the Act, a change or variation (whichever applies) as necessary to give effect to subsection 5.

*For the purpose of this policy a relevant regional plan or relevant proposed regional plan is a regional plan that controls activities that could adversely affect areas of significant vegetation and significant habitat of indigenous fauna.

6. Policy 4: Identifying areas and habitats in district plans

More logical structure required

- 6.1. As discussed above in relation to Policy 3, EDS considers the Proposed NPS would be more logically structured if Policy 3 includes the requirement for RPSs, regional plans and district plans to include criteria for significance and Policy 4 includes the requirement that plans identify significant areas.

NPS must establish a time period for identification

- 6.2. EDS considers that given the declining state of biodiversity in New Zealand there is some urgency for plans to identify significant indigenous vegetation and significant habitats of indigenous fauna.
- 6.3. The Proposed NPS does not specify a time period within which plans must identify significant indigenous vegetation and significant habitats of indigenous fauna.
- 6.4. EDS and has redrafted Policy 4 to specify a 24 month time period from the date the NPS takes effect for a local authority to identify significant indigenous vegetation and significant habitats of indigenous fauna.

NPS must ensure identification occurs

- 6.5. EDS considers Policy 4 must be re-worded to ensure there is no room for local authorities to use the “where practical” qualifier to avoid the obligation to undertake any process of identification. It is important that some method identification is still carried out in districts and regions where mapping is not practical (for example in districts with large numbers of small areas and habitats). In these circumstances identification should occur by other means, through, for example, listing particular vegetation types.

Suggested changes

Policy 4 should be amended as follows:

1. District plans or proposed district plans must identify areas of significant indigenous vegetation and significant habitats of indigenous fauna in accordance with the criteria of that district plan.

2. Relevant regional plans or relevant proposed regional plans must identify areas of significant indigenous vegetation and significant habitats of

indigenous fauna in accordance with the criteria of that relevant regional plan or relevant proposed regional plan.

3. For the purpose of subsections 1 and 2 of this policy, identification shall occur through the use of maps and/or schedules. In circumstances where it is not practical to use maps or schedules, areas of significant indigenous vegetation and significant habitats of indigenous fauna may be identified by listing vegetation type or habitat type.

4. Local authorities are directed under section 55 of the Act to amend plans or proposed plans by notifying, within 24 months of the date on which this national policy statement takes effect, a change or variation (whichever applies) as necessary to give effect to this Policy.

*For the purpose of this Policy a relevant regional plan or relevant proposed regional plan is a regional plan that controls activities that could adversely affect areas of significant vegetation and significant habitat of indigenous fauna.

7. Policy 5: Managing effects to achieve no net loss

General comments on environmental compensation and offsetting

- 7.1. Environmental compensation has been defined by the Court as “any action (work, services or restrictive covenants) to avoid, remedy or mitigate adverse effects of activities on the relevant area, landscape or environment as compensation for the unavoided and unmitigated adverse effects of the activity for which consent is being sought”.² The Court has also held “the offer may be fungible, that is of the same kind as the values or resources being lost, or different; it may be to remedy or mitigate adverse effects on-site or off-site”.³
- 7.2. In New Zealand, while environmental compensation or offsetting is not provided for, explicitly, under the RMA, decisions of the Environment Court and local authorities clearly recognise that if the adverse effects of development cannot be avoided, then they are to be remedied or mitigated, and in certain cases this has involved an application of environmental compensation.
- 7.3. In *Arrigato Investments Limited v Rodney District Council*⁴ the Environment Court recorded that a “major feature” of the subdivision application under consideration was a proposal to covenant almost 60 per cent of the site, including parts already planted out with almost 300,000 indigenous seedlings. Much of this area had been “degraded” by earlier farming practises and an attempt was being made to remedy this. While nowhere in this decision does the Court mention environmental compensation, it does talk about “incentives” and about balancing enhancement against perceived adverse effects. On the issues relating to the matters of national importance in ss6(a) and (b) the Court concluded there were no outstanding landscape values requiring protection. But even if it was wrong about that this matter, such values had to be “balanced” with other matters such as the protection in perpetuity of the enhanced degraded landscape (ie the environmental compensation offered).

² *J F Investments Ltd v Queenstown Lakes District Council* C48/2006 at paragraph 8.

³ *J F Investments Ltd v Queenstown Lakes District Council* C48/2006 at paragraph 8.

⁴ [2000] NZRMA 241 (EC).

- 7.4. In *J F Investments Ltd v Queenstown Lakes District Council*⁵ the applicant proposed to compensate the Queenstown community for the adverse effects on the rural landscape of another house, by cutting down pine trees on another person's land. Resource consent was granted on the basis that while the quality of the edge of the ONL would be reduced slightly by the building of a house and the attendant signs of domesticity, there would be an improvement in the rest of the same outstanding natural landscape.
- 7.5. In *J F Investments Ltd v Queenstown Lakes District Council*⁶ the Court found that it was not uncommon for the Environment Court to allow some adverse effects, even on matters of national importance, if there are sufficiently useful and appropriate offsetting or remedial works.
- 7.6. In *Royal Forest and Bird Protection Society Inc v Gisborne District Council*⁷ the Court granted consent for indigenous logging on the basis of a pest management programme which the Court described as a "biodiversity offset". It considered there was the need for sufficient "safeguards" in the conditions in relation to the pest management programme. The Court held that under section 108 of the RMA it is possible to impose general conditions as well as conditions requiring services or works, including for the protection, restoration, or enhancement of any natural or physical resource and that conditions requiring pest management measures to be undertaken by the consent holder up to a certain value would come within that.⁸
- 7.7. Many regional and district planning instruments also provide for environmental compensation through their financial contribution provisions.
- 7.8. However commentators have expressed concern over the current policy ambivalence on the part of central government in relation to environmental compensation and offsetting.⁹ This has led to differences in local government application of environmental compensation. The Environment Court has also varied in its application of the concept. Commentators argue we appear to be learning as we go, rather than learning from the best and worst of international practice.¹⁰
- 7.9. EDS considers that a far more robust regime needs to be developed in New Zealand if environmental compensation or offsetting is to be

⁵ C48/2006.

⁶ C48/2006 at paragraph 17.

⁷ W026/2009.

⁸ W026/2009 at paragraph 75.

⁹ See eg Ali Memon and Peter Skelton 2004 *The Practice of Environmental Compensation under the Resource Management Act 1991: A Comparison With International Experience* Lincoln University.

¹⁰ Ali Memon and Peter Skelton 2004 *The Practice of Environmental Compensation under the Resource Management Act 1991: A Comparison With International Experience* Lincoln University.

used to protect biodiversity. Central government should not only provide more explicit policy direction but should also promote good practice guidelines. The provision of policy direction is particularly timely in order to improve the quality of policies in second generation regional policy statements.

- 7.10. It is against the above background that EDS has considered the biodiversity offset regime in Policy 5 and Schedule 2.

Enforcement and monitoring of offsetting works

- 7.11. One of the key risks associated with offsetting is that an offset does not actually achieve its ecological outcomes. This is particularly the case in circumstances where an offset takes some time such as the creation or restoration of a habitat, ecosystem or wetland. The consent holder may on-sell the developed land or simply fail to implement the offset measures to the standard agreed. There must be mechanisms to enforce the implementation of offsetting works and consent holders and their successors must be bound for the long term, including following the expiry of the resource consent.
- 7.12. In this regard EDS strongly supports the inclusion of principle 6 in Schedule 2 which requires management, legal and financial arrangements to be in place. EDS also supports the incorporation of monitoring and evaluation into the design and implementation of an offset.

Recognition that some sites are off-limits to development

- 7.13. EDS considers, some very valuable areas of significant indigenous vegetation and significant habitats of indigenous fauna should be entirely 'off-limits' to development and should be protected in the public interest. Offsetting is inappropriate for these sites and the only option for such sites is to avoid adverse effects. EDS has amended Policy 5 to reflect this.

Offset methods

- 7.14. EDS considers there is a need for a biodiversity offset regime to have a clear method for determining what is able to be offset and how to value it. In this regard EDS supports the requirement in Schedule 2, principle 1, that the anticipated losses of biodiversity at the site of the activity and the anticipated gains at the offset site have been calculated to determine "no net loss" and preferably "net gain" and documented. EDS also supports the requirement that the offset design demonstrates appropriate measures/metrics that address the quality and quantity of biodiversity be identified and used in the loss-gain calculations.

Adequate expertise is required by local authorities.

- 7.15. EDS is concerned to ensure local authorities and their staff have the expertise to develop offsetting measures, monitor their effectiveness, and enforce application of these measures. Such resources and skills may be currently limited within New Zealand's local government. This is something that the Ministry should assess and address if necessary.

Adherence to mitigation hierarchy

- 7.16. Environmental compensation or offsetting should only be applied to residual impacts after all reasonable avoidance and mitigation measures have been exhausted. EDS supports Schedule 2, principle 3 to the extent it requires the offset design to demonstrate how the activity addresses direct and indirect effects on specific components of biodiversity by avoidance measures, minimisation measures and on-site rehabilitation measures and to demonstrate that the biodiversity offset only addresses the residual effects of the activity, namely those effects left after all the appropriate avoidance, minimisation and rehabilitation actions have been taken.

Support for “no net loss” principle and protocols for offsetting

- 7.17. EDS supports the principle of ensuring “no net loss” in Policy 5. On its face, it is a strong direction and will require that biodiversity offsets are robust enough in their design to achieve set outcomes, and ultimately more likely to achieve the overall objective of the NPS of promoting the maintenance of indigenous biological diversity.

- 7.18. However EDS considers the definition of “no net loss” is deficient. EDS considers that this definition should be extended to also mean no overall reduction in ecosystem types. Currently the range, ecological health and functioning of ecosystems is provided for but this does not go as far as protecting specific types of ecosystems. While relocating a species may be possible in an offset, it is far more difficult to replace the loss of an ecosystem type through offsetting.

- 7.19. The Proposed NPS should be amended as follows:

No net loss means no overall reduction in:

- the diversity of (or within) species
- species' population sizes (taking into account natural fluctuation), and long-term viability
- area occupied and natural range inhabited by species
- range and ecological health and functioning of assemblages of species, community types and ecosystems.
- the range of ecosystem types

Offset design and landscape context

- 7.20. EDS supports the inclusion of Schedule 2, principle 5 to the extent that it provides that a biodiversity offset should be designed and implemented in a landscape context and that the offset design should demonstrate that it contributes to and complements biodiversity priorities and goals at a landscape and national level.

- 7.21. However, more specific guidance is needed about what this means. One example is the offset design might provide connectivity between two vegetation fragments and therefore would complement biodiversity goals at a wider landscape level.

More specificity needed in how district plans and regional plans shall control activities

- 7.22. EDS considers it is unclear as to what is required of local authorities to implement Policy 5. There is no guidance as to how local authorities must manage the effects of activities through plans. It also

allows local authorities to completely avoid containing any provisions to control activities on significant indigenous vegetation and significant habitats of indigenous fauna if they are satisfied that the effects are managed by methods outside of district or regional plans. EDS considers it is highly improbable that all the significant indigenous vegetation and significant habitats of indigenous fauna of a region or district could be managed adequately by methods outside of district or regional plans. Tools of this nature do not exist.

- 7.23. EDS has redrafted Policy 5 to provide more specific guidance on how local authorities must manage the effects of activities through plans. EDS considers effects should be managed through introducing objectives, policies and rules.

Suggested changes

Policy 5 should be replaced as follows:

~~In addition to the inclusion in plans of any other provisions that the plan has or is required to have relating to section 6(c) of the Act, local authorities must manage the effects of activities through district and relevant regional plans (or be satisfied that the effects are managed by methods outside of district or regional plans) to ensure 'no net loss' of biodiversity of areas of significant indigenous vegetation and significant habitats of indigenous fauna. District plans and regional plans shall include objectives, policies and rules to control activities to ensure that within areas of significant indigenous vegetation and significant habitats of indigenous fauna there is no net loss in biodiversity by:~~

- a. avoiding adverse effects
- b. where adverse effects cannot be avoided, ensuring remediation
- c. where adverse effects cannot be remedied, ensuring mitigation
- d. where adverse effects cannot be adequately mitigated, ensuring any residual adverse effects that are more than minor, are offset in accordance with the principles set out in Schedule 2.

For the avoidance of doubt, in accordance with the principles of Schedule 2, there are limits to what can be offset because some vegetation or habitat and associated ecosystems, is vulnerable or irreplaceable. In such circumstances the local authority will need to ensure adverse effects that are more than minor are avoided. ~~off-setting will not be possible and local authorities will need to take full account of residual adverse effects in decision-making processes.~~

8. Policy 6: Supporting maintenance and enhancement of biodiversity

- 8.1. EDS supports the inclusion of Policy 6 as it recognises the importance of maintaining biodiversity beyond specific high-value sites. Landscapes where indigenous habitats are fragmented and have been most extensively cleared in the past and remain under the greatest development pressure today are still important for the maintenance of indigenous biodiversity, despite these sites not necessarily being pristine or unmodified.¹¹

¹¹ Walker S, Brower AL, Clarkson BD, Lee WG, Myers SC, Shaw WB, Stephens RTT 2008. Halting indigenous biodiversity decline: ambiguity, equity, and outcomes in RMA assessment of significance. *New Zealand Journal of Ecology* 32: 225–237.

- 8.2. Policy 6 is also important as in the context of the RMA, biodiversity related obligations on local authorities extend beyond section 6(c). The RMA's purpose refers to safeguarding the life-supporting capacity of ecosystems and the functions of regional councils and territorial authorities specifically relate to indigenous biological diversity (sections 30 and 31 respectively).
- 8.3. However EDS considers that biodiversity in freshwater ecosystems has not been adequately provided for in this Policy. There is a reference to "degradation of non-living components (eg, water and soil)" as a potential adverse effect on biodiversity in section (b) but this does not sufficiently address the importance of physical attributes of freshwater systems, such as temperature, sediment, pollution, water quantity and water quality in determining freshwater biodiversity.

Suggested changes

Policy 6 should be amended as follows:

To promote the maintenance of biodiversity outside of identified areas of significant indigenous vegetation and significant habitats of indigenous fauna, and to support the resilience and viability of populations and species assemblages within identified areas and habitats, decision-makers should:

- a. recognise the contribution that all remaining areas of indigenous vegetation make to the maintenance of indigenous biodiversity and encourage the retention of as many elements as possible
- b. recognise the full range of potential adverse effects on indigenous biodiversity including, but not limited to, population fragmentation, degradation of non-living components of habitat (eg, water and soil), interruption to breeding cycles and migratory pathways, and increased exposure to invasive introduced plant and animal species that pose a threat to indigenous biodiversity.
- c. encourage the retention of existing vegetation, whether indigenous or not (but not including recognised pest plants), that provides:
 - i. habitat for indigenous species
 - ii. seasonal food sources for indigenous species
 - iii. ecological linkage between areas and habitats identified in accordance with Policy 4
 - iv. a buffer to indigenous vegetation for areas and habitats identified in accordance with Policy 4
- d. when the retention of existing vegetation and habitat will not achieve sustainable management, encourage measures that mitigate and offset adverse effects on indigenous species during, and subsequent to, removal or modification of that vegetation or habitat through harvest or clearance or other activity that may threaten the survival of affected species populations
- e. encourage the planting of naturally occurring, locally sourced indigenous species and the creation of habitats for indigenous species as well as plant and animal pest control

f. encourage the establishment of additional indigenous riparian vegetation as a means of increasing connectivity and enhancing freshwater habitat for indigenous species

g. ensure human-made structures do not adversely impact on indigenous species by interfering with their natural migratory movements

ga. ensure physical attributes of freshwater systems, such as temperature, sediment, pollution, water quantity and water quality do not adversely effect indigenous freshwater species.

h. consider both regulatory incentives (such as bonus development rights in exchange for protection and enhancement of vegetation and habitats) and non regulatory incentives, (such as technical advice and practical help) to support and encourage landowners to make appropriate land management decisions.

9. Additional comments

9.1. The New Zealand Coastal Policy Statement 2010 contains objectives and policies that are relevant to indigenous biodiversity. EDS considers the Proposed NPS should provide clarity over which provisions prevail in the event of a conflict between the two NPSs. EDS considers the Proposed NPS should contain a separate policy stating that the most restrictive policy should apply in the event of a conflict between provisions.

10. Conclusion

10.1. EDS would welcome any further opportunity to discuss the Proposed NPS with the Ministry or answer any question the Ministry may have on this submission.

Yours sincerely

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