28 October 2010

Ministry for the Environment
PO Box 10362
WELLINGTON 6143
By email: Joshua.mclennan-deans@mfe.govt.nz

Attention: Joshua McLennan-Deans

Environmental Defence Society response to letter seeking views under s46(a) of the Resource Management Act 1991 on proposed National Policy Statement on Biodiversity

1. Introduction

The Environmental Defence Society (EDS) welcomes the opportunity to comment on the proposed National Policy Statement on Biodiversity (NPS).

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. Summary of EDS submissions

A summary of our submissions is included in the list below. These points are expanded on in the sections following.

1. An NPS on biodiversity is needed to provide high level guidance to local authorities on how to provide for biodiversity in district and regional plans and regional policy statements.

2. The protection of indigenous biodiversity should be a key objective of the NPS.

3. Biodiversity in terrestrial, freshwater and marine environments must be protected.

4. Biodiversity of populations, sub species, species, habitats and ecosystems must be protected.

5. The NPS must specify criteria to identify "areas of significant indigenous vegetation and significant habitats of indigenous fauna".

6. The NPS must be clear on how "protection" is to be achieved.

7. The NPS must direct local authorities on the planning approaches and measures to be implemented in order to "recognise and provide" for section 6(c) of the Resource Management Act 1991 (RMA).

8. The NPS should address biodiversity on productive land and in urban environments.

9. There must be consistency between the NPS and other legislation, national policy statements and national environmental standards.

10. The NPS should require monitoring to occur to allow for an assessment of changes in the condition of biodiversity.

3. Relevant provisions of the Resource Management Act 1991

The RMA contains a number of provisions relating to biodiversity. Section 5 incorporates biodiversity into the Act's purpose in its reference to the life-supporting capacity of ecosystems.

> **5 Purpose**
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
> (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) **safeguarding the life-supporting capacity of air, water, soil, and ecosystems**; and
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.
>
> (emphasis added)

Section 6 of the RMA identifies a number of matters of national importance that must be considered when implementing the Act. Section 6(c) is concerned with protecting biodiversity:

> **6. Matters of national importance**
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
> ...
> (c) **the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna**:
>
> (emphasis added)

The functions of regional councils and territorial authorities are set out in sections 30 and 31 of the RMA respectively. These sections mandate regional councils and territorial authorities with maintaining indigenous biodiversity, and regional councils with maintaining and enhancing ecosystems in water bodies and coastal water:

> **30 Functions of regional councils under this Act**
>
> (1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:
>
> (c) the control of the use of land for the purpose of—
> ...
> (iiia) **the maintenance and enhancement of ecosystems in water bodies and coastal water**:
> ...
> (ga) **the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity**
>
> **31 Functions of territorial authorities under this Act**
>
> (1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:
> ...

(b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—

(iii) **the maintenance of indigenous biological diversity**

(emphasis added)

4. EDS supports an NPS on biodiversity

National policy statements are important tools to provide a higher level of guidance and quality control in the plan making process. It is mandatory that regional policy statements, regional plans and district plans give effect to national policy statements (sections 62(3), 67(3) and 75(3)). EDS considers a national policy statement on biodiversity is needed to state policies and objectives to direct local authorities how to provide for biodiversity in district and regional plans and regional policy statements. An NPS on biodiversity would lead to plans being more consistent with higher level objectives for biodiversity and ultimately could significantly improve biodiversity outcomes in New Zealand. An NPS would achieve consistency of approach between regions. More clarity would reduce the scope for repetitious litigation during plan-making.

5. The NPS on biodiversity needs a clear objective and scope

The NPS needs clearly stated objectives. EDS considers that the law requires that the protection of indigenous biodiversity should be a key objective. This would provide the NPS with a strong and unequivocal direction. This terminology reflects that in s6(c) which provides for "protection" and restricts biodiversity under the NPS to "indigenous" biodiversity.

Further the NPS must clearly state what aspects of biodiversity are to be protected. EDS makes two recommendations in this regard (and elaborates on these recommendations below):

- Biodiversity in terrestrial, freshwater and marine environments must be protected.
- Biodiversity of populations, subspecies, species, habitats and ecosystems must be protected.

Biodiversity in terrestrial, freshwater and marine environments must be protected

EDS considers biodiversity in terrestrial, freshwater and marine environments must be protected. To achieve this the geographic scope of the NPS should extend to all land areas, freshwater areas and marine areas out to the outer limit of the coastal marine area (as defined in the RMA).

This approach is consistent with the Resource Management Act, which is designed to enable integrated planning and management of all areas of land, freshwater and the coastal marine area.

This approach also recognises the interconnectedness between freshwater, terrestrial and marine environments. For example:

- Freshwater bodies are directly affected by the use and management of land in the associated water catchment. Catchments where the land cover is predominantly pasture, urban or exotic forest have significantly less native fish than catchments with native forest cover. Best practice freshwater management therefore encompasses an

integrated catchment management approach which recognises that changes to land or water in one part of the catchment are likely to result in impacts in other parts.

- Around 60 per cent of native New Zealand freshwater fish have a marine stage in their life cycles. For example adult inanga (*Galaxias maculatus*), migrate downstream to the coast, spawning when spring tides flood the grasses that line estuary shores. The adults then die. The eggs remain in the grasses, and hatch when inundated one month later by the next spring tide. The young then swim out to sea. They remain in the sea over the winter and return as adults to a river the following spring. Management approaches must be able to protect the habitat of these species at all life stages.

- A number of threatened migratory birds also move between marine, terrestrial and freshwater ecosystems. For example, Wrybills (*Anarhynchus frontalis*) are classified as nationally vulnerable. They breed on braided rivers in Canterbury and inland Otago and then fly to Northland and harbours in the Auckland region during the summer.

EDS considers a weakness of the 2003 *Working Papers: National Policy Statement Indigenous Biodiversity* was the exclusion of the coastal marine area from the ambit of the NPS. New Zealand has a high diversity of marine habitats, some of which are particularly important to the ecological health and productivity of the marine area. As much as 80 per cent of New Zealand's total biodiversity lives in the sea.

The New Zealand Coastal Policy Statement (NZCPS) cannot be relied on as the sole source of protection of biodiversity in the marine environment. The current NZCPS (2004) only has one high level policy (1.1.2) which directly addresses the application of section 6(c) in the coastal marine area and this is not sufficient to ensure adequate biodiversity protection in the marine area.

The 2004 NZCPS review reported that the implementation of NZCPS policies were lacking. Rosier (2005) comments that while NZCPS policies have generally been effectively implemented through regional policy statements and regional coastal plans, the NZCPS has only been partially effective in influencing district plans. The NZCPS was found to only generally be referred to in applications and officer reports about resource consents. In addition, the poorest area of implementation was in monitoring environmental outcomes and assessing the degree to which plans and policy statements have influenced environmental results.[1] There is no guarantee that the implementation of the new NZCPS will be strengthened significantly.

In EDS's view, an NPS on biodiversity that failed to include the coastal marine area would be unlawful.

Biodiversity of populations, subspecies, species, habitats and ecosystems must be protected

The NPS must provide for the protection of populations, subspecies, species, habitats and ecosystems. This comprehensive approach is consistent with the New Zealand's Biodiversity Strategy which states, as its third goal to:

> Halt the decline in New Zealand's indigenous biodiversity. Maintain and restore a full range of remaining natural **habitats** and **ecosystems** to a healthy functioning state, enhance critically scarce **habitats**, and sustain the more modified **ecosystems** in production and urban environments; and do what else is necessary to maintain and restore viable **populations** of all indigenous **species** and **subspecies** across their natural range and maintain their genetic diversity.
>
> (emphasis added)

This approach is also consistent with the United Nations Convention on Biological Diversity which requires each contracting party to promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings and to develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations.[2]

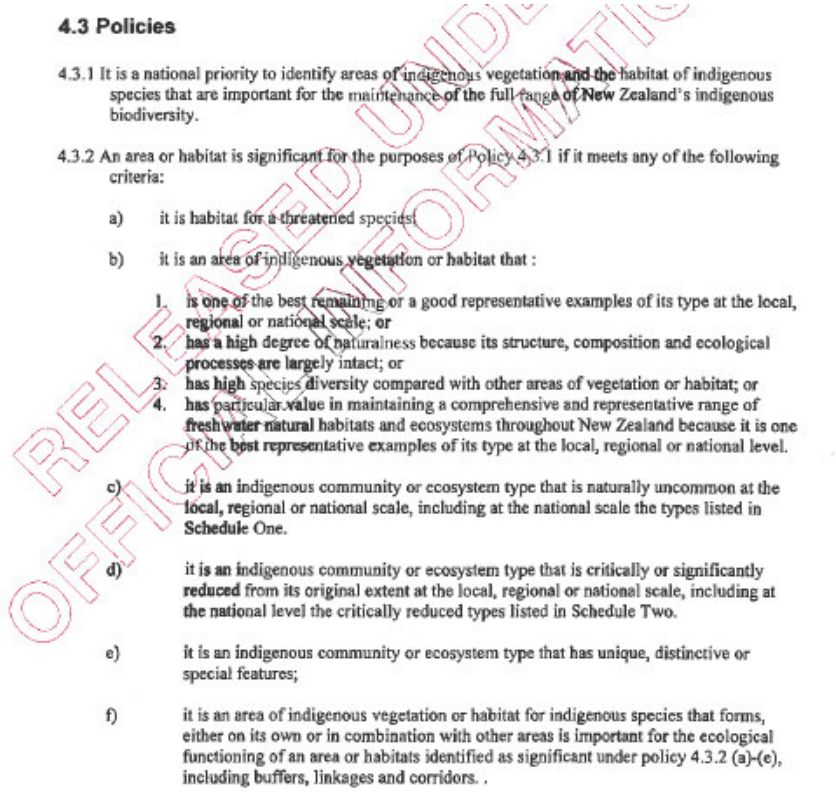
6. The NPS must specify criteria to identify "areas of significant indigenous vegetation and significant habitats of indigenous fauna"

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. However there is currently no high level guidance at a national level or definition in the RMA of "significant" for the purpose of section 6(c).

This has led to fear by private landowners of the consequences of significance assessments and inconsistency of approaches between different local authorities.

EDS considers the NPS must specify criteria to identify areas of significant indigenous vegetation and significant habitats of indigenous fauna. Case law, previous policy work and scientific literature are a useful starting point from which criteria for assessments of "significance" could be developed.

The 2003 *Working Papers: National Policy Statement Indigenous Biodiversity* makes identification of significant indigenous vegetation and significant habitat of indigenous fauna an objective, and sets criteria to determine significance as follows:



4.3 Policies

4.3.1 It is a national priority to identify areas of indigenous vegetation and the habitat of indigenous species that are important for the maintenance of the full range of New Zealand's indigenous biodiversity.

4.3.2 An area or habitat is significant for the purposes of Policy 4.3.1 if it meets any of the following criteria:

a) it is habitat for a threatened species;

b) it is an area of indigenous vegetation or habitat that :

1. is one of the best remaining or a good representative examples of its type at the local, regional or national scale; or
2. has a high degree of naturalness because its structure, composition and ecological processes are largely intact; or
3. has high species diversity compared with other areas of vegetation or habitat; or
4. has particular value in maintaining a comprehensive and representative range of freshwater natural habitats and ecosystems throughout New Zealand because it is one of the best representative examples of its type at the local, regional or national level.

c) it is an indigenous community or ecosystem type that is naturally uncommon at the local, regional or national scale, including at the national scale the types listed in Schedule One.

d) it is an indigenous community or ecosystem type that is critically or significantly reduced from its original extent at the local, regional or national scale, including at the national level the critically reduced types listed in Schedule Two.

e) it is an indigenous community or ecosystem type that has unique, distinctive or special features;

f) it is an area of indigenous vegetation or habitat for indigenous species that forms, either on its own or in combination with other areas is important for the ecological functioning of an area or habitats identified as significant under policy 4.3.2 (a)-(e), including buffers, linkages and corridors. .

Norton and Roper-Lindsay (2004)[3] present an ecologist's view of significance assessment within the context of section 6(c). The authors propose four criteria for assessing significance of indigenous biodiversity as set out in the following table:

Criteria	**Explanation**
rarity and distinctiveness	A site is considered positive for the rarity/distinctiveness criterion if it is known to support a species that is listed as Acutely Threatened in the current version of the New Zealand Threat Classification System (Molloy et al., 2002), or supports a species that: • is at a national distributional limit; • only occurs in that area (e.g. an endemic species); • although common elsewhere, is particularly uncommon in the study area.
representativeness	An area is considered positive for the representativeness criterion if it: • supports an ecosystem that is now at less than c.10% of its former extent in the ecological district; or • supports a high quality example of an ecosystem that is now at less than c.20% of its former extent in the ecological district. The exact percentages in these cases should be determined for each ecological district at the time of assessment.
ecological context	An area is positive for the ecological context criterion if it: • enhances connectivity between patches; or • buffers or similarly enhances the ecological values of a specific site of value; or • provides seasonal or "core" habitat for specific indigenous species.
sustainability	A site is considered positive for the sustainability criterion if: • key ecological processes remain viable or still influence the site; and • the key ecosystems within the site are known to be or are likely to be resilient to existing or potential threats under some realistic level of management activity; and • existing or potential land and water uses in the area around the site could be feasibly modified to protect ecological values.

In the September 2010 decision in *Friends of Shearer Swamp Inc v West Coast Regional Council* the Environment Court determined the criteria that should be included in the West Coast Regional Council's Proposed Regional Land and Riverbed Management Plan to determine whether a wetland contained an area of significant vegetation and significant habitats of indigenous fauna.[4]

The Court determined a wetland would contain an area of significant vegetation and significant habitats of indigenous fauna if one or more of four criteria are satisfied; ecological context, representative wetlands, rarity and distinctiveness.

- Ecological context relates to the wetland's functions (ie as a habitat for critical life history stages for indigenous fauna and in protecting adjacent and downstream ecological and hydrological processes).

- Representative wetlands are those that contain indigenous wetland vegetation types or indigenous fauna assemblages that were typical for, and has the attributes of, the relevant class of wetland as it would have existed prior to 1840.

- The wetland would satisfy the rarity criterion if nationally threatened species are present or other criteria are met.

- The wetland would satisfy the distinctiveness criterion if it has special ecological features of importance at the international, national, freshwater biogeographic unit or ecological district scale.

EDS considers that while these examples provide useful starting points, this aspect of the NPS must also draw on the most up-to-date scientific data and best practice. In addition, the approach to significance assessment may need to be different for freshwater, terrestrial and marine environments, given that these environments are made up of different species and habitats and face different biodiversity challenges.

7. The NPS must be clear on how "protection" is to be achieved

As stated above EDS considers that the protection of indigenous biodiversity must be a key objective of the NPS.

However EDS considers the NPS must tailor approaches to protecting biodiversity to freshwater, terrestrial and marine environments, given the specific nature of the threats faced by the populations, species, habitats and ecosystems in these environments. It is not enough to use a broad brush approach in setting policies and objectives and expect biodiversity in these diverse environments to be adequately protected.

For example achieving protection of biodiversity on land will require proactive and ongoing land management through weed and pest control. In contrast achieving protection of biodiversity in a freshwater body requires an integrated catchment management approach. Achieving biodiversity protection in the marine area requires both an integrated catchment approach and control on activities locating within important marine habitats.

8. The NPS must direct local authorities on the planning approaches and measures to be implemented in order to "recognise and provide" for section 6(c).

The Environment Court has made it clear that there is an obligation on local authorities to recognise and provide for section 6(c) in plans.[5] However there has been little national direction on what planning approaches and measures might be used by local authorities for biodiversity protection.

The approach developed by local authorities to address section 6(c) has generally been to prepare schedules and maps of significant areas which are used by local authorities to restrict the type of activity that may be undertaken and to develop rules specific to the identified areas or alternatively to develop criteria for identification of significant areas.

The scheduling process has been plagued with litigation as parties frequently resort to the Environment Court, as has been the case in disputes between private landowners, conservation organisations and local authorities over the mapping of "significant natural areas" (SNAs).

The NPS must provide national direction on the planning approaches and measures that should be taken by local authorities. EDS considers that for some areas, such as habitats of

highly threatened species, it would be appropriate for the NPS to prescribe a rules-based approach. There is also value in reflecting on the lessons learnt in the experience of the NZCPS. In this respect, the 2004 review of the NZCPS suggested additional prescription was needed in some circumstances, for example, in relation to policies relating to natural character of the coastal environment.[6]

For other less vulnerable areas there may be more scope for using less prescriptive methods such as voluntary instruments (see below) to retain some flexibility of planning at the local level.

9. Voluntary Instruments

Other approaches developed by local authorities to address section 6(c) have involved the use of voluntary instruments, such as subsidies for the costs of fencing and covenanting areas containing important habitats. Territorial authorities have also commonly included conservation lot provisions in their subdivision rules. These enable landowners to subdivide an additional lot to that otherwise provided in the plan, if they permanently protect areas of indigenous vegetation or areas with high conservation or landscape values. There is little information on the effectiveness of these voluntary measures in protecting biodiversity and based on its own experience on the Coromandel Peninsula and Rodney District, EDS remains sceptical of their utility.

The Environment Court has also stated that use of voluntary mechanisms by themselves did not afford adequate assurance of protection in respect to sites of "high value (botanical)" or "moderate high (wildlife)", given that the district plan's schedule of ecological sites could be expanded to accommodate those items. Nor was the scheduling process the complete answer, but part of a raft of mechanisms adopted to assist fulfilment of the Act's purpose in terms of s 6(c).[7]

A review of the first five years of the biodiversity strategy concluded that voluntary mechanisms alone are not enough and there is a place for prescriptive rules along with economic incentives and the purchase of areas containing the most threatened ecosystems. The review also identified that opportunities to protect land during the tenure review process had not been fully identified.[8]

The important point here is that a package of measures needs to be adopted to protect biodiversity and there is value in both regulation and encouraging complementary voluntary measures. In the formation of the NPS, the Ministry must consider the full range of measures available to local authorities and recommend approaches for specific situations.

10. The NPS should address biodiversity on productive land and in urban environments

Seventy percent of New Zealand's landscapes are privately owned and managed. EDS would like to see the NPS address ways to integrate biodiversity into how New Zealanders live, both in urban environments and on productive land.

This is called for in the third goal of New Zealand's Biodiversity Strategy which is to "maintain and restore a full range of remaining natural habitats…and sustain the more modified ecosystems in production and urban environments…".

The Parliamentary Commissioner for the Environment (2002)[9] stated that attention must be given to working lands in order to achieve our biodiversity goals. EDS agrees and suggests the NPS give attention to biodiversity on productive land and in urban environments.

11. There must be consistency between the NPS and other legislation, national policy statements and national environmental standards

There are a range of Proposed National Environmental Standards at various stages of development on issues including ecological flows and water levels, future sea-level rise, on-site wastewater systems, plantation forestry as well as a proposed National Policy Statement for Renewable Electricity Generation and for Freshwater Management. The NPS must be strong in protecting and restoring biodiversity. It must not be undermined by other inconsistent regulatory instruments.

For example the discussion document on the Proposed National Environmental Standard for Plantation Forestry allows local authorities to be more stringent in establishing setbacks of forestry activities from "nationally significant water bodies". However, there is currently no classification of nationally significant water bodies so the scope of this protection is unclear. Even more concerning is the current inability of local authorities to impose set back for significant water bodies that may not be considered significant on a national scale. EDS submitted that local authorities must have the ability to impose greater setbacks for all significant water bodies. The criteria for national significance are clearly inconsistent with section 6(c) of the RMA which requires protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna (without a criteria of national significance).

There are numerous other aspects of the proposed forestry NES that have implications for biodiversity. For example harvesting is a permitted activity (on terrain with low or moderate susceptibility to erosion) but there is no permitted activity condition requiring minimum standards of water quality to be maintained during harvesting.

EDS urges the Ministry for the Environment to consider how the NPS will operate alongside these other instruments to ensure it is effective in achieving biodiversity outcomes.

12. Monitoring

EDS considers the NPS should require monitoring so that changes in biodiversity can be measured. The NPS could state the key aspects of the environment that must be monitored and outline methods of best practice. There should also be a requirement of regular public reporting of the outcomes of biodiversity monitoring.

Yours sincerely

Kelsey Serjeant
Environmental Defence Society

Contact details
Environmental Defence Society
P O Box 95 152
Swanson
Auckland 0653

Phone: 09 480 2565
Email: kelsey@eds.org.nz

Website: www.eds.org.nz

1 Rosier J, 2005, 'Towards Better National Policy Statements: NZCPS Review' *Planning Quarterly* March 2005, page 26.

2 United Nations Convention on Biological Diversity, article 8.

3 Norton D & Roper-Lindsay J, 2004, 'Assessing significance for biodiversity conservation on private land in New Zealand' *New Zealand Journal of Ecology* (2004) 28(2): 295-305.

4 *Friends of Shearer Swamp Inc v West Coast Regional Council* [2010] NZEnvC 245.

5 See eg *Minister of Conservation v Western Bay of Plenty District Council* A71/2001.

6 Rosier J, 2004, 'An Independent Review of the New Zealand Coastal Policy Statement. Report to the Minister of Conservation', May 2004, Massey University, Palmerston North, New Zealand page 67.

7 *Minister of Conservation v Western Bay of Plenty District Council* A071/01, paras 36, 49.

8 Green W & Clarkson B, 2005, 'Synthesis Report: Turning the Tide? A review of the first five years of the New Zealand Biodiversity Strategy' page 17.

9 Parliamentary Commissioner for the Environment, 2002, 'Weaving resilience into our working lands: Recommendations for the future roles of native plants'.