3 November 2023

Environmental Defence Society submission on the Proposed National Policy Statement for Natural Hazard Decision-making

SUBMITTER DETAILS

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Introduction

1. Thank you for the opportunity to make a submission on the proposed National Policy Statement for Natural Hazard Decision-making (**NPSNH**).

2. The Environmental Defence Society (**EDS**) is an independent not-for-profit organisation conducting interdisciplinary policy research and litigation. It was established in 1971 with the purpose of improving environmental outcomes in Aotearoa New Zealand. EDS has a special interest in climate adaptation matters.

3. EDS is supportive of the intent behind the NPSNH. In particular, climate change will exacerbate the risk that natural hazards pose to communities and the natural environment, and there is a need to avoid new development in high-risk areas. Solutions that reduce risks to people and property can also have significant potential to increase the resilience of the natural environment and ecosystems to the impacts of climate induced natural hazards.

4. While EDS considers that there a several positive aspects of the NPSNH, there are also several aspects that we consider need amendment. In summary, these are:

    a. The scope of the NPS should encompass not just new development, but also the review of existing consent conditions;
    b. The NPSNH should contain a general policy 'hook' to encourage land use change that reduces risks from natural hazards, similar to that in other national direction;
    c. There should be no carve out from the NPS for urban intensification instruments;
    d. The term "high risk" is confusing and should be replaced by the term "significant risk" as used in the RMA;
    e. The NPSNH should specify a time-horizon of 100 years for risk assessment, aligning with other national direction;
    f. The concept of tolerance to risk (especially people's willingness to bear risk) should not form part of risk identification, only how authorities respond to that risk;

g. The precautionary approach should be defined, and should apply wherever risks are uncertain, unknown or little understood (not just where a risk could be intolerable);
h. The precautionary approach should be required when responding to risk under Policy 5, not just identifying risk under Policy 3;
i. There should be a clearer direction to local authorities to proactively identify high hazard risk areas;
j. The NPSNH should specifically refer to national level guidance on identifying risk and tolerability of risk;
k. The NPSNH should strengthen the direction in Policy 5 to ensure that decisions "must not" allow new development in high hazard areas, rather than require "avoidance".

5. **Attachment A** is a tracked change version of the NPSNH which incorporates EDS's recommended amendments.

Positive aspects of the proposed NPSNH

6. EDS supports several aspects of the proposed NPSNH, specifically:

a. The NPSNH's application to all "decision-makers" (as defined in the NPSNH) when making "planning decisions". This means that the obligation to minimise risks from natural hazards applies not just when making plans, but also when determining consent applications and notices of requirement for designation.

However, the definition of "planning decision" does not include review of consent conditions. EDS submits that it should so that risks from natural hazards are considered when resource consents are reviewed.

b. Objective 2.1, which refers to minimising risk to the "environment" (including the natural environment), not just people.

c. Policy 4, which deems natural hazard risk to be a matter over which control and discretion is reserved for controlled and restricted discretionary activities respectively.

d. Policy 6, which directs decision-makers to adopt nature-based solutions to reduce natural hazard risks in new developments "where possible". "Where possible" is a better approach than "where practicable" and is supported.

Our interpretation of Policy 6 is that 'hard' natural hazard mitigation can only be adopted when it is effective *and when nature-based solutions are not possible*. We note that the NPSNH Discussion Document states that Policy 6 "will still allow for site-specific and hard-engineering measures, if they are possible *or* more effective".[1] Given the clear intent of Policy 6, this appears to be a misstatement. We consider that the Discussion Document should have read "… if they are the most effective and nature-based solutions are not possible."

e. Clause 1.6, which states that the New Zealand Coastal Policy Statement 2010 (**NZCPS**) prevails over the NPSNH. This is because the NZCPS (see Policy 25) generally[2] provides a stronger approach to natural hazard risk (where decision-makers must (1) **avoid *increasing***

[1] Discussion Document, pg 24
[2] Although Policy 25(d) of the NZCPS is arguably weaker, in that it only "encourages" infrastructure to be located away from areas of hazard risk where practicable.

the risk of social, environmental and economic harm from coastal hazards, and (2) **avoid** redevelopment, or change in land use, that would ***increase*** **the risk of adverse effects** from coastal hazards). The focus of the NZCPS is thus preventing increases in risk, not just 'minimising' risks (Objective 2.1 of NPSNH) and avoiding high risk in certain circumstances (Policy 5 of NPSNH).

Application of the NPSNH

Clause 1.4: New development

1.4 Interpretation

new development means development:
(a) of new buildings, structures, or infrastructure on land that currently does not have buildings, structures, or infrastructure located on it; or
(a) that is the extension or replacement of existing buildings, structures, or infrastructure.

7. EDS submits that the scope of the NPSNH is too limited, applying only to planning decisions that result in or enable "new development". Avoiding high risks of natural hazards may also be important when determining the reconsenting of existing development (even if it does not involve extending or replacing buildings, structures or infrastructure). This will exclude most land uses which generally have indefinite duration,[3] but may include some that are, by virtue of consent conditions, not of indefinite duration. It may also encompass the reconsenting of things like structures in the coastal marine environment (which are, by law, time bound). In some of these cases, the avoidance of high natural hazard risk should be had regard to when reconsenting.[4]

8. EDS therefore recommends that the definition of "new development" in Clause 1.4 be amended as follows (noting that the RMA definition of "land" includes land covered by water):[5]

> new development means ~~development~~:
>
> (a) development of new buildings, structures, or infrastructure on land that currently does not have buildings, structures, or infrastructure located on it; or
> (~~a~~b) development that is the extension or replacement of existing buildings, structures, or infrastructure or
> (c) the reconsenting of activities involving the presence of buildings, structures or infrastructure on land.

9. Beyond that, we acknowledge that addressing managed relocation requires a quite different (and much more complex) set of tools than can be provided in the NPSNH alone. That is especially so for lawfully established land uses that have not required consent or which have received consent of indefinite duration. Work on this issue needs to proceed at pace.

10. We note that powers (and grounds) to review consent conditions will be stronger under the Natural and Built Environment Act (**NBE Act**). To the extent that the NPSNH is to be melded into the new legislative framework, it will be important for it to also apply to cases where consents

[3] Unless consents are reviewed or cancelled, which will be enabled more under the NBE Act than under the RMA where necessary to comply with environmental limits or for climate change adaptation reasons.
[4] Under s 123 of the RMA, land use consent is indefinite *unless otherwise specified in consent conditions*.
[5] We note a typographical error in the definition of "new development", which has two instances of subclause "a".

are being reviewed / extinguished for climate change adaptation purposes (e.g., managed relocation of buildings and infrastructure) or where land uses are infringing environmental limits. This should form part of a subsequent workstream.

11. Finally, we note that the NZCPS in Policy 25(c) specifically encourages "change in land use, where that would reduce the risk of adverse effects from coastal hazards, including managed retreat by relocation or removal of existing structures or their abandonment in extreme circumstances, and designing for relocatability or recoverability from hazard events". The NPSNH should echo this wording in a new Policy 8, so it applies to areas outside the coastal environment, even if it would not have the "teeth" to provide fully for managed relocation:

> **Policy 8:** In areas potentially affected by natural hazards over at least the next 100 years, encourage redevelopment, or change in land use, including managed retreat by relocation or removal of existing structures or their abandonment in extreme circumstances, and designing for relocatability or recoverability from hazard events, where that would reduce the risk of adverse effects from natural hazards.

Clause 1.5: Intensification planning instruments

1.5 Application to intensification planning instruments

(1) In order to minimise disruption and complexity for local authorities, nothing in this National Policy Statement applies to a specified territorial authority (as defined in section 2 of the Act) when it is preparing an intensification planning instrument under section 80F of the Act.

12. EDS does not agree with the exemption set out in Clause 1.5, which excludes application of the NPSNH when specified territorial authorities (tier 1, 2 and 3 councils) are preparing intensification planning instruments under the National Policy Statement on Urban Development (**NPSUD**).

13. Under Clauses 3.31 and 3.32 of the NPSUD, tier 1 authorities are obliged to implement strong intensification policies[6] unless various "qualifying matters" are established. One qualifying matter (which would justify less intensive development) is where needed to give effect to another national policy statement (**NPS**). Due to the exemption in Clause 1.5 of the NPSNH to intensification planning instruments, the NPSNH cannot be used as a qualifying matter to constrain intensive urban development where natural hazard risks are high.

14. There are other qualifying matters,[7] including section 6 RMA matters (such as "the management of significant risks from natural hazards"),[8] but the specific exclusion of the NPSNH which is designed to flesh out that direction seems odd and inconsistent.

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[6] See NPSUD, Policy 3, which enables: "in city centre zones, building heights and density of urban form to realise as much development capacity as possible, to maximise benefits of intensification" and "in metropolitan centre zones, building heights and density of urban form to reflect demand for housing and business use in those locations, and in all cases building heights of at least 6 storeys" and "building heights of at least 6 storeys within at least a walkable catchment" of rapid transit stops, the edge of city centre and metropolitan zones, and "within and adjacent to neighbourhood centre zones, local centre zones, and town centre zones (or equivalent), building heights and densities of urban form commensurate with the level of commercial activity and community services".

[7] Including "any other matter that makes higher density development as directed by Policy 3 inappropriate in an area, but only if the requirements of clause 3.33(3) are met".

[8] Giving rise to questions as to whether "managing" "significant" risks from natural hazards under s 6 is appreciably different from "avoiding" "high" risks under the NPSNH.

15. There is also potential misalignment and uncertainty about application, given that section 6 of the RMA talks about managing "significant" risks (which *can* be a qualifying matter under the NPSUD and limit intensification), but the NPSNH talks about avoiding "high" risk (which *cannot* be used as a qualifying matter). The difference between significant and high risk is not clear, but in our view the direction in the NPSNH should be treated as providing more detailed guidance on what section 6 qualifying matters *should* be.

16. The Discussion Document states that the exemption is to minimise "disruption and complexity" in the preparation of intensification planning instruments.[9] This is a weak justification, particularly given recent events in Auckland and elsewhere in the past year,[10] which highlight the need to stop building in high natural hazard risk areas.

17. Overall, the effect of Clause 1.5 is to reduce consideration of the risks of natural hazards in the very areas where natural hazard risks may be most important – where more people are being encouraged to live and work (with associated high investment in infrastructure and property).[11]

18. We recommend that Clause 1.5 be deleted, and that guidance be provided to tier 1-3 councils about how intensification under the NPSUD is to be aligned with an obligation to avoid areas of high natural hazards. This is urgent, to ensure that new and intensive development does not get directed into such areas (since it will be much harder and much more expensive to undertake managed relocation after the fact).

19. Alternatively, it could be made clear in Clause 1.5 that the NPSNH overrides the NPSUD in the event of conflict, and that development in an area of high natural hazard risk is deemed to be a qualifying matter under the NPSUD. EDS seeks the following amendments:

> *Preferred option:*
> ~~**1.5 Application to intensification planning instruments**~~
>
> ~~(1) In order to minimise disruption and complexity for local authorities, nothing in this National Policy Statement applies to a specified territorial authority (as defined in section 2 of the Act) when it is preparing an intensification planning instrument under section 80F of the Act.~~
>
> *Potential alternative:*
> (1) New development in an area of high natural hazard risk is deemed to be a qualifying matter under the National Policy Statement on Urban Development, and the provisions of the National Policy Statement for Natural Hazard Decision-making prevail over the provisions of the National Policy Statement on Urban Development if there is a conflict between them.

Issues with identification of risk: Policies 1, 2 and 3

20. Policies 1-3 of the NPSNH are set out below. Essentially, they deal with the *identification* of natural hazard risk.

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[9] Discussion Document, pg 26

[10] It is also unclear, if a different qualifying matter (eg freshwater quality) enables urban intensification to be a controlled or restricted discretionary activity in a plan, whether natural hazards can then be a mandatory matter over which control/discretion is reserved under Policy 4 of the NPSNH.

[11] The Discussion Document on the proposed NPSNH states that "decision-makers sometimes attribute less weight to natural hazard risk than to other matters, such as the need for new infrastructure and housing". The exemption in Clause 1.5 will likely perpetuate this issue.

Policy 1: When making planning decisions, decision-makers are to determine the level of natural hazard risk as high, moderate, or low.

Policy 2: When determining natural hazard risk, decision-makers are to consider:

(a) first, the likelihood of a natural hazard event occurring (either individually or in combination) and the consequences of the natural hazard event occurring, including potential loss of life, serious injury, adverse effects on the environment, and potential serious damage to property and infrastructure; and

(b) second, tolerance to a natural hazard event, including the willingness and capability of those who are subject to the risk (such as a community, Māori, or the Crown) to bear the risk of that natural hazard (including its cost) and any indirect risks associated with it.

Policy 3: Decision-makers must adopt a precautionary approach when determining natural hazard risk if:

(a) the natural hazard risk is uncertain, unknown, or little understood; and

(b) the natural hazard risk could be intolerable.

21. Policy 1 requires decision-makers to determine the level of natural hazard risk as high, medium or low (for example, by identifying hazard zones on maps in a district plan or regional policy statement). EDS submits this approach of classifying risks is too vague and not directive enough.

22. The Discussion Document states that the notion of "significant" risk under section 6 of the RMA is unclear, but this is not made any clearer by its replacement with the term "high" risk (even when defined as a risk that is "intolerable"). "Significant" is a term that has an established history of interpretation under the RMA. To replace it with new and vaguely defined terms like "high" is bound to create uncertainty and litigation, and provide little meaningful guidance to councils.

23. The use of "high" risk also raises issues with alignment with other statutory directions. For example, section 106 of the RMA provides that "a consent authority may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers that … there is a significant risk from natural hazards". It is not clear how the terms "high", "moderate" and "low" relate to the RMA's concept of "significant".

    EDS submits that the term "high" risk should be replaced with "significant" risk to create greater alignment with the RMA.

24. Furthermore, there is no direction as to the planning horizons involved in assessing high, moderate or low risk under Policy 2 of the NPSNH (only "likelihood" in generic terms). There should be some indication in the NPSNH of the timeframe over which risk should be assessed (for example, long-term). This should be aligned with the NZCPS (at least a 100-year timeframe) and specifically refer to climate change.

    Policy 2 should include a specific planning horizon for identifying risk, preferably mirroring the "at least 100 year" horizon in the NZCPS.

25. "Risk" is not defined in the NPSNH (in contrast to the open-ended, narrative definition contained in the NZCPS),[12] but its definition is effectively provided for in Policy 2. EDS is concerned that Policy 2(b) introduces subjective concepts of "tolerance" into determinations of natural hazard risk. This contrasts with the NZCPS, which defines risk (e.g., whether it exists or not) with reference to likelihood and consequence, not people's willingness to bear it.

26. The risk management process includes two distinct steps:

    a. Risk identification - involving an assessment of the likelihood and consequences of a natural hazard; and

    b. Risk assessment - involving a decision about how to respond to that risk, and whether taking action is worth it or not.

27. In EDS's view, planning instruments need to clearly articulate what the degree of risk *is* (the first step above). This process should not be influenced by whether local authorities/consent authorities think that the risk is *tolerable* (the second step above). To introduce the notion of tolerability invites the identification of risk to be politicised or downplayed due to community or sectoral pressures (which has had a chilling effect on council natural hazard identification processes in the past).

28. Every person looking at a council plan should be able to determine where a risk is *actually* high (based on evidence of likelihood and consequence),[13] irrespective of whether someone has made a judgement about whether that risk is tolerable or not (i.e., a risk worth bearing). Tolerability of risk is important, of course, but that comes into play when determining how the risk is assessed under Policy 5 (what should happen in response).

29. The distinction can be seen in the framework for landslide risk management that was applied at Matatā (see Figure 1 below), which sees a clear distinction made between risk analysis (identification) and assessment (what is done in response).

[12] See Glossary: "Risk is often expressed as a combination of the consequences of an event (including changes in circumstances) and the associated likelihood of occurrence (AS/NZS ISO 31000:2009 Risk management – Principles and guidelines, November 2009)".
[13] Or "significant", to use our recommended language. This might legitimately include mitigation measures, to the extent that they actually reduce the likelihood or consequences of an occurrence, but should not include the tolerability of any risk that remains.

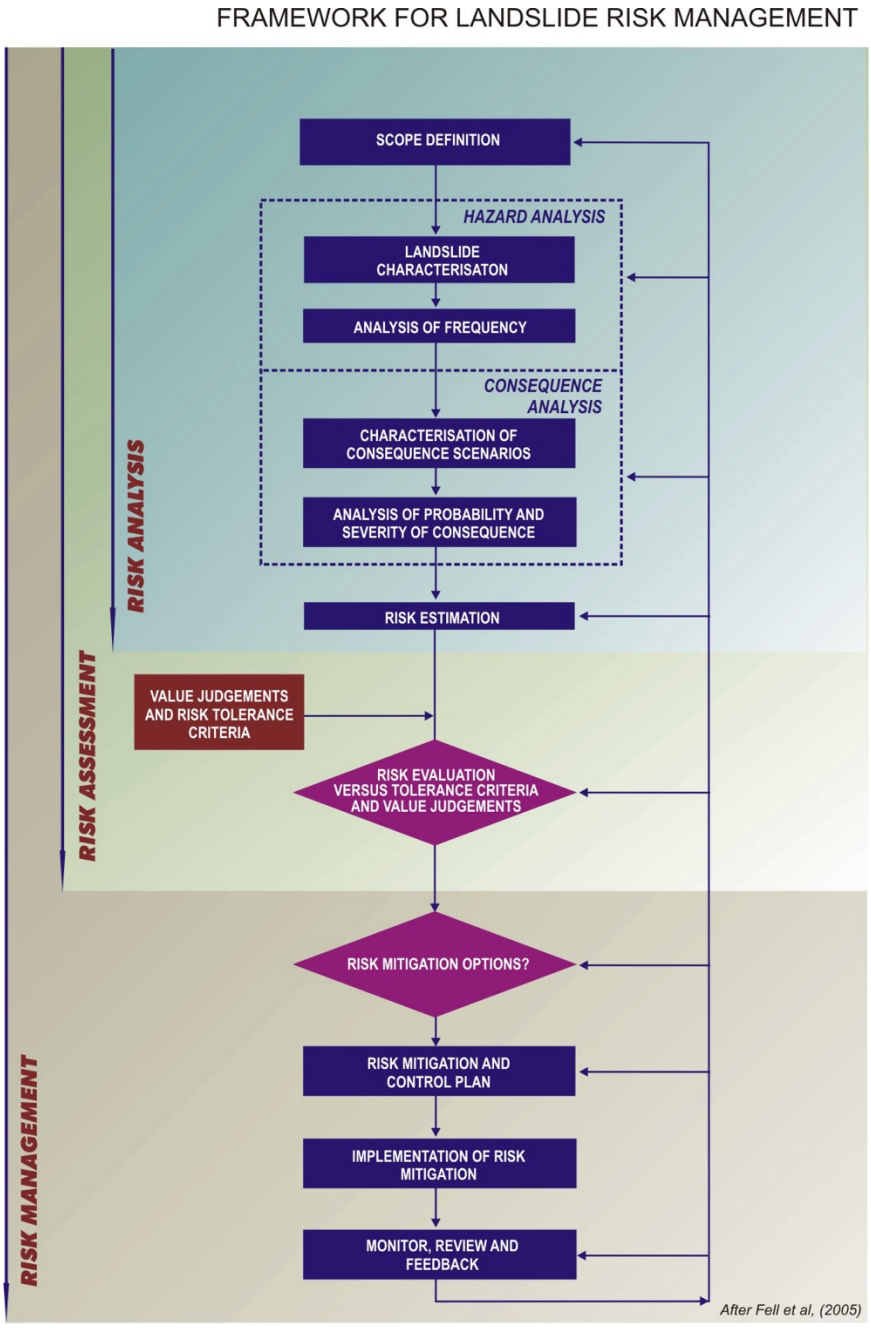

Figure 1. Framework for landslide risk management[14]

30. Similarly, we do not think that the "willingness" of those subject to the risk to bear a risk (one aspect of tolerability) should be a factor in determining whether a high risk *exists* under Policy 2. In addition to the reasoning outlined above, it will also be extremely hard to identify who is "subject to" a risk (a future tenant of a property?) and therefore whether the relevant people are 'willing' to bear it or not. This makes it a difficult metric for determining the extent of a risk. In addition, willingness to bear risk can differ significantly between different members of a community and can shift over time.

31. Moreover, the willingness of public authorities (for example the Crown) to bear short-term risk and associated costs of development in a high risk area does not mean the risk itself is mitigated.

[14] Quantitative Landslide and Debris Flow Hazard Assessment: Matatā Escarpment (Report prepared for Whakatāne District Council by Tonkin & Taylor Ltd, November 2013) at 6.

For example, a risk to infrastructure may seem low, until a road is not rebuilt following a major flooding event. Again, willingness to bear risk is relevant to whether the risk is worth taking, not identification of the risk itself.

32. How a risk is classified under Policy 2 has significant legal consequences when it comes to how it is managed under Policy 5. In particular, "new hazard sensitive developments" must be avoided in areas of "high" risk (for example residential houses, hospitals and so forth). This 'avoidance' requirement does not apply if an area is "medium" or "low" risk.

33. Thus the clear intent behind Policy 5 – to prevent such things happening – risks being undermined by consideration of whether an unidentified section of the community is 'willing' to assume the risk. It may turn a "high" risk into a "moderate" risk, in which case there is no longer a legal obligation to 'avoid' sensitive developments like hospitals, houses and schools.

34. Risk identification and risk assessment are also conflated in Policy 3. When identifying risk level, Policy 3 requires a precautionary approach to be taken only if the risk "could be intolerable". As in Policy 2, this is an inappropriate approach to risk identification. It leaves excessive discretion to local authorities to determine that, factually, a risk is not "high" simply because it is "tolerable" (which might be because other factors are seen to be more important – for example, significant risk might be tolerated if the social or economic benefits of a development were large in the short-term).

35. It also involves circular logic. If a decision-maker thinks a risk is tolerable, then a precautionary approach does not have to be taken when identifying the risk. But how can one assess whether a risk *is* tolerable, unless one first identifies the nature of the risk (its likelihood and consequence)? And in doing so, how does one know whether to apply a precautionary approach? Only by determining if the risk could be tolerable. And so the circle of logic continues. Precaution therefore needs to be required in determining risk irrespective of whether someone deems it tolerable or not. It should be required whenever there is uncertainty/inadequacy in information.

36. In summary, Policy 2, which is about identifying high, moderate and low risks, should not include an assessment of whether that risk is "tolerable" or whether unidentified persons are "willing" to bear it. That belongs in the risk assessment phase (dealt with under Policy 5). Similarly, tolerability of risk should have no place in triggering a precautionary approach under Policy 3, which should apply whenever there is uncertainty in information. EDS seeks the following amendments:

> Policy 2: When determining natural hazard risk, decision-makers are to consider:
>
> (a) first, the likelihood of a natural hazard event occurring (either individually or in combination) over at least the next 100 years: and
>
> (b) the consequences of the natural hazard event occurring, including potential loss of life, serious injury, adverse effects on the environment, and potential serious damage to property and infrastructure~~; and~~
>
> ~~(b) second, tolerance to a natural hazard event, including the willingness and capability of those who are subject to the risk (such as a community, Māori, or the Crown) to bear the risk of that natural hazard (including its cost) and any indirect risks associated with it.~~

Policy 3: Decision-makers must adopt a precautionary approach when determining natural hazard risk if ~~: (a)~~ the natural hazard risk is uncertain, unknown, or little understood~~; and (b) the natural hazard risk could be intolerable.~~

37. We also note that the "precautionary approach" referred to in Policy 3 is not defined, leaving uncertainty as to exactly (or even generally) what is required. We recommend inserting a definition that broadly reflects that in the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, where there is an obligation to favour caution and environmental protection. In the context of natural hazards it may warrant erring on the side of a higher risk status.

A "precautionary approach" should be defined in the interpretation clause of the NPSNH, building on that contained in the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 and directing decision-makers to err on the side of classifying areas as higher risk in the event of uncertainty.

38. In addition to the above, the NPSNH should also:

    a. Refer to relevant non-statutory standards / guidance (or enable such standards / guidance to be considered, which can be updated as technical knowledge advances) when determining the level of natural hazard risk. For example, Policy 24 of the NZCPS directs decision-makers to take into account national guidance and the best available information. This has provided a hook for regularly updated guidance to be developed and taken into account.[15] This will be particularly important if specific standards (in a National Environmental Standard (**NES**)) are not to be promulgated anytime soon.

    b. Include a much stronger connection with national climate change risk assessments prepared under the forthcoming Climate Change Response Act, to which (at minimum) particular regard should be had by regional councils and territorial authorities (as well as consent authorities and requiring authorities more broadly).

    c. Specifically require local authorities to identify and map high (significant) natural hazard areas in plans, which it currently does not do.[16] This may occur as part of a more comprehensive approach to national direction on natural hazards (given resourcing constraints), but it should occur at pace. In that regard, the NZCPS has a more directive approach that could usefully be replicated or echoed in Policy 1 of the NPSNH (or a new policy), in that local authorities must "identify areas … that are potentially affected by [hazards], giving priority to the identification of areas at high risk of being affected".

The NPSNH should direct decision-makers to take into account national guidance on the identification of natural hazard risk, and specifically require particular regard to be had to national climate change risk assessments prepared under the Climate Change Response Act. There should be a more directive requirement to identify and map areas of significant (ie high) natural hazard risk.

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[15] See Bell R et al, 2017, *Coastal hazards and climate change: Guidance for local government*, Ministry for the Environment, Wellington which replaced the 2008 guidance document and which was itself updated last year with Ministry for the Environment, 2022, *Interim guidance on the use of new sea-level rise projections*, Ministry for the Environment, Wellington

[16] Arguably it is implicit, in that Policy 5 requires avoidance of new development in high hazard areas (which must presumably be identified), but there is no specific direction to identify or map such areas (as there is for most places of national importance under the NBEA).

Policy 5: Responding to risk

39. Policy 5 of the NPSNH is set out below. It is about how decision-makers respond to risks identified under Policies 1 to 3.

Policy 5: Planning decisions must ensure that:

(a) in areas of high natural hazard risk, new development is avoided unless the level of risk is reduced to at least a tolerable level or:

(i) the new development is not a new hazard-sensitive development; and
(ii) there is a functional or operational need for the new development to be located in the area of high natural hazard risk, and
(iii) there are no practicable alternative locations for the new development; and
(iv) risk is reduced to as low as reasonably practicable; and

(b) in areas of moderate natural hazard risk, mitigation measures are taken to reduce natural hazard risk to new development as low as reasonably practicable; and

(c) in areas of low natural hazard risk, new development is enabled.

40. As discussed above, tolerability of risk (including willingness to bear it) should not form part of the factual question of whether a risk is high, moderate or low. While it may be a legitimate factor when it comes to how authorities *respond* to such risks under Policy 5, allowing new development to occur in high risk natural hazard areas based on subjective judgements by local authorities about tolerability, or people's actual or perceived willingness to bear that risk, is still concerning.[17] It will be difficult to determine who exactly is bearing a risk (and therefore gets to decide), and this may create questionable social outcomes.

41. For example, a decision that the risk of new development (eg a new house) in a high-risk area[18] is "tolerable" would not necessarily be visible to (for example) future purchasers / occupiers of that property. Even if such choices were made clear (eg conditions in a land use consent clearly stated which risks and costs were to be borne by the consent holder, potentially in conjunction with a bond for any impacts on others), people may in some cases have little choice but to take risks they are uncomfortable with (for example if purchasing a property in a higher risk area is all they can afford). In other words, the "willingness" to bear risk could translate to a concentration of the poorer sections of society in high-risk environments.[19] Such outcomes should not be allowed.

42. In other cases, this kind of social issue may be less significant. For example, the risk of fatalities per annum has been used as a measure of tolerability of risk in the case of the Skyline Gondola in Queenstown. However, risk averse people can simply choose not to engage in such activities. They have greater choice in the matter.

[17] In other words, the question under Policy 5 is whether development is to be avoided/prohibited in identified high risk areas (or, on the flipside, whether a consenting pathway is appropriate where people are willing to assume high risk/associated liability).
[18] Not just risks to health and safety of occupiers, but also risks that the council may phase out supporting infrastructure (eg water pipes, transport connections, or seawalls), and risks of maintaining hazard mitigation requirements on the property itself.
[19] We note that Policy 5 currently talks about allowing development in high-risk areas where risk is reduced to a "tolerable" level. This would seem unlikely to allow large scale, low-income housing development in high-risk areas, but it is unclear whether future residents' (or council's) willingness to bear that risk would be a determinative factor.

43. To address this issue (to the extent it is possible to), EDS submits that Policy 5(a) of the NPSNH (which already refers to tolerability)[20] should require that regard be had to guidelines that carefully outline how to assess the tolerability of different forms of risk. This approach would leave open the possibility of refining the specific meaning of tolerability – and therefore what precise forms of new development need to be "avoided" – over time. Such guidance should guard against scenarios in which vulnerable sections of society are effectively compelled to take on high levels of risk without the means to address them.

Require decision-makers in Policy 5(a) to have regard to guidelines on what tolerability means in different scenarios.

44. Further, in EDS's submission, national direction needs to more clearly state that new development is not to be allowed in high natural hazard areas.[21] A direction to "avoid" is insufficient.[22] It is acknowledged that detailed mapping is still some way off, meaning that this cannot realistically be achieved by using prohibited activity status (via an NES) at the present time (although that should proceed as a matter of urgency).[23] Instead, the wording of Policy 5 should be amended as follows:

(f) in areas of significant~~high~~ natural hazard risk, new development must not occur ~~is avoided~~ …

45. Policy 5 should also be required (under the NPSNH's implementation provisions) to be directly inserted into all relevant plans under section 55 of the RMA.

46. The precautionary approach also needs to be reconsidered when it comes to Policy 5. As currently worded, precaution is only required when determining whether a risk is high, moderate or low under Policy 3. Reference to a precautionary approach is absent from Policy 5. In other words, if a risk *is* identified as high under Policy 3, there is then no corresponding obligation in Policies 5 or 6 to take a precautionary approach in determining whether development can proceed (or subject to which conditions).

47. While the direction to "avoid" new development is arguably itself precautionary, new development can still proceed if it meets Policy 5(a)(i) to (iv) and is "tolerable". When assessing whether a risk is "tolerable", a precautionary approach is important (especially where the reason a high risk has been identified in the first place is because of uncertainty in information).

48. It should also be made clear that the test currently in Policy 5(b) still applies to Policy 5(a), so that mitigation measures reduce natural hazard risk to new development to as low as reasonably practicable. This makes sure that even a "tolerable" risk in high hazard areas must still be mitigated to as low as reasonably practicable.

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[20] Although curiously (and unlike Policy 2), this does not explicitly state that tolerability includes the willingness of a community to bear the risk.

[21] Or, irrespective of the "area" (eg lines on a map), where natural hazard risk is high for a particular activity. The NPSNH is concerned not just with avoiding development in high risk areas, but also with avoiding particular activities (the construction of buildings, structures and infrastructure) where the risk is high irrespective if an area is labelled as "high risk".

[22] While an avoidance policy (as in Policy 5) is strong (as established by the Supreme Court in the *King Salmon* case), it does not completely shut off a consenting pathway. A consent authority is able to have regard to many matters under section 104 of the RMA, including conflicting policies under different instruments. A consenting pathway allowing for new urban development in high hazard areas is especially risky, in that the NPSUD uses the strong language of "bottom lines" for urban development that could vie with an avoidance policy in the NPSNH for pre-eminence.

[23] If there are no clear and specific standards to which a prohibited activity can be linked, an NES may be unworkable. Regulations need to be precise enough for regulated parties to know if they are complying or not.

49. Finally, some "new" development in high hazard areas may actually be a good thing for reducing natural hazard risks and, therefore, be consistent with the policy intent of the NPSNH. For example, open green spaces such as sports fields in urban areas can act as flood mitigation measures (as well as having environmental benefits). These often require associated structures to facilitate their purpose (for example clubrooms, public toilets, exercise equipment). As presently drafted, the NPSNH would seek to avoid new developments of this sort, since there would be a high risk to that infrastructure.[24]

50. To address the issues with Policy 5 identified above, EDS seeks the following amendments:

> **Policy 5**: Planning decisions must ensure that~~:~~
>
> (1) in areas of ~~high~~ significant natural hazard risk, new development must not occur ~~is avoided~~ unless:
>
> (a) the level of risk is reduced to at least a tolerable level, taking into account relevant national guidance and mitigation measures are taken to reduce natural hazard risk to as low as reasonably practicable: or
>
> (b) the purpose of the new development is to minimise the risk of natural hazards: or
>
> (c) the following apply:
>
> (i) the new development is not a new hazard-sensitive development; and
> (ii) there is a functional or operational need for the new development to be located in the area of significant~~high~~ natural hazard risk, and
> (iii) there are no practicable alternative locations for the new development; and
> (iv) risk is reduced to as low as reasonably practicable; and
>
> (2) in areas of moderate natural hazard risk, mitigation measures are taken to reduce natural hazard risk to new development as low as reasonably practicable; and
>
> (3) in areas of low natural hazard risk, new development is enabled; and.
>
> (4) a precautionary approach is taken where information is uncertain, unknown or little understood.

Miscellaneous

51. Finally, officials should investigate the potential for the Building Act to allow/require actual construction of buildings in high hazard areas to be restricted/prevented. This interface with the RMA will be important.

Conclusion

52. Overall, EDS supports the policy intent of the NPSNH, but submits that it needs to be amended in the ways discussed above and as reflected in the tracked changes in **Attachment A**.

[24] It may not fall foul of Policy 5(a) if it was presumed to be a "tolerable" risk, but it is very uncertain as to how that term is to be interpreted. Infrastructure specifically designed to mitigate natural hazard risk also falls under Policy 6 (even though it is, itself, a form of "new development" technically subject to Policy 5), and a sensible approach would be to exclude it from the application of Policy 5. However, that would not exclude infrastructure like changing rooms, playgrounds and so forth, even though overall such planning choices may be positive in minimising hazard risk.

53. We also note and support the development of a more comprehensive package of national direction on natural hazards, and a new Climate Adaptation Act to address the much broader issues associated with existing development.

Attachment A

Part 1: Preliminary provisions

1.1 Title

(1) This is the National Policy Statement for Natural Hazard Decision-making 2023.

1.2 Commencement

(1) This National Policy Statement comes into force on [to come].

1.3 Application

(1) This National Policy Statement applies only to planning decisions that result in or enable new development.

1.4 Interpretation

(1) In this National Policy Statement:

Act means the Resource Management Act 1991

commencement date means the date on which this National Policy Statement comes into force, as identified in clause 1.2

decision-maker means any person exercising functions or powers under the Act

~~high~~ significant **natural hazard risk** means a risk from natural hazards that is intolerable

low natural hazard risk means a risk from natural hazards that is generally acceptable

moderate natural hazard risk means a risk from natural hazards that is more than a low risk, but is not intolerable

natural hazard has the meaning in the Act and includes, without limitation, natural hazards arising from the effects of climate change

new development means ~~development~~:

(a) development of new buildings, structures, or infrastructure on land that currently does not have buildings, structures, or infrastructure located on it; or

(b) development that is the extension or replacement of existing buildings, structures, or infrastructure; or~~.~~

~~(a)~~ (c) the reconsenting of activities involving the presence of buildings, structures or infrastructure on land.

new hazard-sensitive development means a new development relating to any of the following:

(a) residential dwellings, including papakāinga and retirement villages:

(b) marae:

(c) educational facilities:

(d) emergency services:

(e) hospitals and other health care facilities:

(f) community facilities.

planning decision means a decision on any of the following:

(a) a resource consent:

(b) a regional policy statement or proposed regional policy statement:

(c) a regional plan or proposed regional plan:

(d) a district plan or proposed district plan:

(e) a designation:

(f) a change to a plan requested under Part 2 of Schedule 1 of the Act.

specified Māori land means land that is any of the following:

(a) Māori customary land and Māori freehold land (as defined in Te Ture Whenua Māori Act 1993):

(b) land set apart as a Māori reservation under Part 17 of Te Ture Whenua Māori Act 1993 or its predecessor, the Māori Affairs Act 1953:

(c) land held by or on behalf of an iwi or a hapū if the land was transferred from the Crown, a Crown body, or a local authority with the intention of returning the land to the holders of mana whenua over the land:

(d) land vested in the Māori Trustee that is constituted as a Māori reserve by or under the Māori Reserved Land Act 1955, and remains subject to that Act:

(e) land that forms part of a natural feature that has been declared under an Act to be a legal entity or person (including Te Urewera land within the meaning of section 7 of the Te Urewera Act 2014):

(f) the maunga listed in section 10 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014:

(g) Treaty settlement land, being land held by a post-settlement governance entity (as defined in the Urban Development Act 2020) where the land was transferred or vested and held (including land held in the name of a person such as a tipuna of the claimant group, rather than the entity itself):

(i) as part of redress for the settlement of Treaty of Waitangi claims; or

(ii) by the exercise of rights under a Treaty settlement Act or Treaty settlement deed.

~~1.5 Application to intensification planning instruments~~

~~(1) In order to minimise disruption and complexity for local authorities, nothing in this National Policy Statement applies to a specified territorial authority (as defined in section 2 of the Act) when it is preparing an intensification planning instrument under section 80F of the Act.~~

~~1.6~~1.5 Relationship with New Zealand Coastal Policy Statement 2010

(1) The provisions of the New Zealand Coastal Policy Statement prevail over the provisions of this National Policy Statement if there is a conflict between them.

Part 2: Objective and Policies

2.1 Objective

Objective: The risks from natural hazards to people, communities, the environment, property, and infrastructure, and on the ability of communities to quickly recover after natural hazard events, are minimised.

2.2 Policies

Policy 1: When making planning decisions, decision-makers are to determine the level of natural hazard risk as **significant**~~high~~, moderate, or low.

Policy 2: When determining natural hazard risk, decision-makers are to consider the following, taking into account any national level guidance (including risk assessments prepared under the Climate Change Response Act 2002):

(a) first, the likelihood of a natural hazard event occurring (either individually or in combination) over at least the next 100 years: and

~~(a)~~(b) secondly, the consequences of the natural hazard event occurring, including potential loss of life, serious injury, adverse effects on the environment, and potential serious damage to property and infrastructure.~~; and~~

~~(b) second, tolerance to a natural hazard event, including the willingness and capability of those who are subject to the risk (such as a community, Māori, or the Crown) to bear the risk of that natural hazard (including its cost) and any indirect risks associated with it.~~

Policy 3: Decision-makers must adopt a precautionary approach (erring on the side of caution and a higher risk classification) when determining natural hazard risk if~~:~~

the natural hazard risk is uncertain, unknown, or little understood.~~; and~~

~~(c) the natural hazard risk could be intolerable.~~

Policy 4: Natural hazard risk must be a:

(a) matter of control for any new development that is a controlled activity; and

(b) matter of discretion for any new development that is a restricted discretionary activity.

Policy 5: Planning decisions must ensure that~~:~~

(1) in areas of **significant**~~high~~ natural hazard risk, new development ~~is avoided~~must not occur unless:

(a) the level of risk is reduced to at least a tolerable level ~~or~~, taking into account relevant national guidance, and mitigation measures are taken to reduce natural hazard risk to as low as reasonably practicable: or

(b) the purpose of the new development is to minimise the risk of natural hazards: or

(c) the following apply:

(i) the new development is not a new hazard-sensitive development; and

(ii) there is a functional or operational need for the new development to be located in the area of **significant**~~high~~ natural hazard risk, and

(iii) there are no practicable alternative locations for the new development; and

(iv) risk is reduced to as low as reasonably practicable; and

(2) in areas of moderate natural hazard risk, mitigation measures are taken to reduce natural hazard risk to new development as low as reasonably practicable; and

(3) in areas of low natural hazard risk, new development is enabled; and~~.~~

(4) a precautionary approach is taken where information is uncertain, unknown or little understood.

Policy 6: The most effective natural hazard mitigation measures are adopted to reduce natural hazard risk over the life of any proposed new development, provided the natural hazard mitigation measures do not exacerbate natural hazard risks in other areas, and where possible:

(a) nature-based solutions are preferred over hard-engineering solutions; and

(b) comprehensive area-wide measures are preferred over site-specific solutions.

Policy 7: Māori and, in particular, tangata whenua values, interests, and aspirations are recognised and provided for, including through early engagement, when making decisions on new development on specified Māori land where there is a **significant**~~high~~ or moderate natural hazard risk.

Policy 8: In areas potentially affected by natural hazards over at least the next 100 years, the following is encouraged: redevelopment, or change in land use, including managed retreat by relocation or removal of existing structures or their abandonment in extreme circumstances, and designing for relocatability or recoverability from hazard events, where that would reduce the risk of adverse effects from natural hazards.

Part 3: Implementation

3.1 Outline of Part

(1) This Part sets out a non-exhaustive list of things that local authorities must do to give effect to the objective and policies of this National Policy Statement, but nothing in this Part limits the general obligation under the Act to give effect to that objective and those policies.

3.2 Tangata whenua involvement

(1) Natural hazard risk is a matter that must be discussed with tangata whenua in accordance with existing requirements under the RMA.

3.3 Best information

(1) In giving effect to this National Policy Statement, decision-makers must use the best information available at the time, which means, if practicable, using complete and scientifically robust data.

(1) In the absence of complete and scientifically robust data, the best information may include information obtained from modelling, as well as partial data, local knowledge, and information obtained from other sources, but in this case decision-makers must:

- (a) prefer sources of information that provide the greatest level of certainty; and
- (b) take all practicable steps to reduce uncertainty (such as through monitoring or the validation of models used).

(2) A local authority:

- (a) must not delay making decisions solely because of uncertainty about the quality or quantity of the information available; and
- (b) if the information is uncertain, must interpret it in the way that will best give effect to this National Policy Statement.

Part 4: Timing

4.1 Timing

(1) From the date on which this National Policy Statement comes into force, decision-makers must have regard to it when making decisions on:

(a) resource consent applications;

(b) designations; and

(c) a change to a plan requested under Part 2 of Schedule 1 of the Act.

(2) As soon as reasonably practicable, every local authority must give effect to this National Policy Statement by updating their policy statements and plans.

4.2 Existing policy statements and plans

(1) To the extent that policy statements and plans already (at the commencement date) give effect to this National Policy Statement, local authorities are not obliged to make changes to wording or terminology merely for consistency with it.

(2) In case of dispute, the onus is on the local authority to show that, despite the different wording or terminology used, their policy statement or plan does implement this National Policy Statement.

(3) However, if a local authority chooses to amend an operative policy statement or plan by merely changing wording or terminology for consistency with this National Policy Statement, the amendment is to be treated as the correction of a minor error (and therefore, under clause 20A of Schedule 1 of the Act, the amendment can be made without using a process in that Schedule).