



SUBMISSION ON THE PROPOSED NATIONAL POLICY STATEMENT ON INDIGENOUS BIODIVERSITY

**TO: Land Water Management Team
Ministry for the Environment
Environment House
23 Kate Sheppard Place
PO Box 10362
Wellington**

Submission on behalf of the Resource Management Law Association of New Zealand Incorporated

Introduction

1. This Submission on the proposed National Policy Statement on Indigenous Biodiversity (**Proposed NPS**) is made by the Resource Management Law Association of New Zealand Inc (**RMLA**).
2. The RMLA is concerned to promote within New Zealand:
 - (a) an understanding of Resource Management Law and its interpretation in a multi-disciplinary framework;
 - (b) excellence in resource management policy and practice; and
 - (c) resource management processes which are legally sound, effective and efficient and which produce high quality environmental outcomes.
3. The RMLA has a mixed membership. Members include lawyers, planners, judges, environmental consultants, environmental engineers, local authority officers and councillors, central government policy analysts, industry representatives and others.

RMLA, C/- 4 Shaw Way, Hillsborough, Auckland 1041
Tel: (9) 626-6068 Email: karol.helmink@xtra.co.nz
www.rmla.org.nz

Currently the Association has over 1,100 members. Within such an organisation there is inevitably a divergent range of interests underlying different views within the membership. It is therefore not possible for the RMLA to form a single universally accepted view on the proposed regulations. It should also be noted that a number of members may be providing their own individual feedback, which may represent quite different approaches to the views expressed here.

4. For these reasons, this submission does not seek to advance any particular policy position in relation to the Proposed NPS, but rather is kept at a reasonably high level and is made with a view to ensure that the provisions of the Proposed NPS:
 - (a) are consistent with the general framework of existing laws and policies of relevance, and the Resource Management Act 1991 (**RMA**);
 - (b) are practicable and workable; and
 - (c) will assist in promoting best practice.

Summary of submission

5. In summary the RMLA submits that:
 - (a) The definitions included in the Proposed NPS by way of cross reference to the definitions in the RMA (ie "matter" and "biodiversity") should be amended so that they are provided for in full in the NPS. A number of other proposed definitions should be amended for reasons of clarity and certainty, and others deleted.
 - (b) For consistency of approach and because indigenous vegetation and indigenous species do not recognise cadastral boundaries, serious consideration should be given to whether the NPS should apply to all land within New Zealand. The Proposed NPS should also expressly state its relationship with the New Zealand Coastal Policy Statement (**NZCPS**), and confirm whether the Proposed NPS or NZCPS has priority in the event of conflict.
 - (c) The timeframes for the implementation of the Proposed NPS should be amended to provide greater consistency and certainty.
 - (d) Policy 5 should be amended so as to delete the hierarchy given to "avoid", "remedy" and "mitigate", and to delete or amend wording in this policy that might otherwise be interpreted as a requirement to offset any residual more than minor adverse effects, irrespective of the broader balancing of interests required by Part 2 of the RMA.
 - (e) A number of changes should be made to Schedule 2 to the NPS to aid the clarity and subsequent application of this schedule.
 - (f) The typographical errors in the Proposed NPS should be corrected.

RMLA, C/- 4 Shaw Way, Hillsborough, Auckland 1041
Tel: (9) 626-6068 Email: karol.helmink@xtra.co.nz
www.rmla.org.nz

6. The members of the RMLA Legislation Sub-Committee would welcome the chance to meet with Ministry staff to discuss our concerns and recommended amendments in more detail, and to assist with the drafting of any replacement provisions.

Clause 3 - Interpretation

7. The Proposed NPS has adopted the following definitions from the RMA: "Biodiversity"; and "Matter". The RMLA submits that these definitions should be stated in full in the Proposed NPS so that readers of the Proposed NPS (particularly lay people), who may not have a copy of the RMA with them, can understand these definitions.

8. In addition:

- (a) The definition of "Biodiversity Offset" should be substantially amended. The last sentence is an aspiration/intention, and is not a useful component of any definition. The word "prevention", not used in the RMA, should be replaced with the common legislative phrase "avoid, remedy or mitigate" and for consistency of approach within the NPS where reference to residual effects is also made (Policy 5, principle 3 of Schedule 2).
- (b) "Ecosystem" should be amended to clarify the purpose of the second clause - ie to make it clear that the second clause comprises a subset of the first, rather than being a standalone clause.
- (c) The NPS currently has numerous references to "species" and "vegetation". All such references must be qualified by the addition of the words "indigenous", so as to avoid confusion as to whether the NPS is intended to apply to non-indigenous vegetation and species. Otherwise perverse outcomes could result; for example, the definition of "no net loss" and Policy 5 could be argued as requiring no reduction in exotic or even invasive species.
- (d) The definition of "restoration or enhancement" should be deleted. In its current form it would be virtually impossible to apply in any meaningful way. For example: what is "biological character"? What constitutes a "degraded" landform, and what is the baseline from which any degradation is to be judged?
- (e) The definition of "indigenous vegetation" is complicated, confusing and should therefore be amended so that it provides greater clarity on the meaning of indigenous vegetation.
- (f) As drafted, the definition of "maintenance" suggests that both restoration and enhancement of areas and habitats is required to achieve 'no net loss'. The RMLA submits that maintenance is a separate concept from restoration and enhancement, and should not be conflated in the same definition. Doing so merely leads to considerable confusion. The definition should be limited to "the protection of existing areas and habitats".

- (g) The definition of "no net loss" as currently drafted, provides insufficient guidance as to whether all the requirements listed in subparagraphs (a)-(d) must be achieved to ensure "no net loss", or whether achieving just one of the requirements listed is sufficient to ensure that there is "no net loss". The definition also needs to make it clear over what geographical area such a "no net loss" is to be assessed - ie is it site by site, district-wide, region-wide or nationally?

9. The RMLA suggests the following specific amendments (deletions struck out, additions underlined):

- (a) Insert the definitions of "Biodiversity" and "Matter" from the RMA into the NPS.

- (b) Amend the definition of "Biodiversity offset" as follows:

Biodiversity offset means measurable conservation outcomes resulting from actions which are designed to compensate for more than minor ~~residual~~ adverse effects on biodiversity, ~~where those effects arise from an activity after appropriate prevention and mitigation measures have been taken to avoid, remedy or mitigate those effects.~~ The goal of biodiversity offsets is to achieve no net loss and preferably a net gain of biodiversity on the ground with respect to species composition, habitat structure and ecosystem function.

- (c) Amend the definition of "Ecosystem" as follows:

Ecosystem means an ecological community together with its environment, functioning as a unit, including any ~~an~~ interacting system of living parts and non-living parts such as sunlight, air, water, minerals and nutrients.

- (d) Amend the definitions and provisions of the Proposed NPS to insert the word "indigenous" before "vegetation" and "species" wherever they appear, and replace reference to "native" with "indigenous". Amend the definition of "indigenous species" and "indigenous vegetation" to narrow/clarify the scope. As a suggested first sentence for the latter, reword it to state:

Indigenous vegetation means any local indigenous plant community which, through the course of its growth or succession, consists primarily of indigenous species and habitats normally associated with that vegetation type, soil or ecosystem. [The rest of the existing definition should be deleted as it is unnecessary, given the reference to the course of succession at the outset.]

- (e) Delete the definition of "restoration" and "enhancement".

- (f) Amend the definition of maintenance as follows:

Maintenance means ~~'no net loss' as achieved by the protection of existing areas and habitats and/or the restoration and enhancement of areas and habitats as may be required through biodiversity off-sets or other initiatives.~~

- (g) Amend the definition of "no net loss" to clarify the area over which the assessment of no net loss will be undertaken - for example, is it to occur within a site or an ecological district, within a region, or on a national basis? Amendments should also be made to provide clarity on whether the components listed in (a)-(d) of this definition are conjunctive or disjunctive.

Clause 4 - Application

10. While the RMLA accepts that it is largely a matter of policy, given the desirability of consistency, and the fact that biological and ecological process pay no regard to cadastral boundaries, it would seem desirable for all land within New Zealand to be subject to the Proposed NPS. Obviously some areas of conservation estate may have a greater degree of protection, but this should not preclude the Proposed NPS applying as a minimum to all land.
11. The RMLA submits that serious consideration should be given to whether the Proposed NPS should apply to all land within New Zealand, and should not exclude the conservation estate.
12. As noted earlier, the Proposed NPS should also:
- (a) explicitly state that not only does it cover terrestrial resources down to the edge of the CMA, but that it overrides the NZCPS references to biodiversity, and, if there is conflict, whether the Proposed NPS (as the newer policy) prevails; or
 - (b) state that where the Coastal Environment has been mapped, the NZCPS has primacy over provisions in the Proposed NPS.

Clause 7 - Policy 1

13. Proposed Policy 1 of the NPS states: "*for the purpose of this national policy statement, an area of significant indigenous vegetation or a significant habitat of indigenous fauna is an area or habitat whose protection is important for the maintenance of indigenous biological diversity.*"
14. Proposed Policy 1 is effectively providing that indigenous vegetation or habitat of indigenous fauna is significant, because it is important. The RMLA submits that this definition is circular and consequently unhelpful and should therefore be deleted. Rather, such areas should be identified by Districts and Regions as already provided for by Policy 2, and as such Policy 1 is unnecessary.
15. Policy 1 should be deleted.

Clause 7 - Policy 3 - timeframes

16. Proposed Policy 3 requires that any Regional Policy Statement (**RPS**) notified after the NPS takes effect include the significance criteria identified in proposed Policy 2(a-d). There is no timeframe or deadline specified. It could therefore conceivably take 10 years (until an RPS is reviewed in accordance with section 79) for the

criteria to be included in an RPS. The RMLA submits that this is too long and uncertain a period for implementation.

17. However Policy 4 requires that district plans and regional plans must include the significance criteria in proposed Policy 2 (a-d) within 5 years of the NPS taking effect if they are broader in scope than the relevant criteria in the RPS. This inconsistency in timing (relative to Policy 3), and potentially as to the substantive requirements for regional policy statements versus district and regional plans, as to when the criteria for significance needs to be incorporated is unhelpful and must be resolved.

Clause 7 - Policy 5

18. Policy 5 is likely to be the most contentious aspect of the Proposed NPS and, for the reasons mentioned earlier, the RMLA does not wish to comment on the degree of direction/control proposed to be imposed by Policy 5. The RMLA does wish to make the following comments:

- (a) Policy 5 imposes a clear hierarchy within the phrase "avoid, remedy or mitigate". The Courts have for many years been very clear in their desire to avoid any sort of hierarchy and to leave the weighting of each of these elements to the judgement of the decision makers as applied in the circumstances of a given case.
- (b) There is nothing in the current wording of Part 2 of the RMA that would support reading into this phrase so directly and expressly the hierarchy set out in the Proposed NPS.
- (c) If the Government wishes to impose such a hierarchy, then Part 2 should be changed to do this expressly. It is inappropriate for subordinate legislation (ie the Proposed NPS) to be inconsistent with the principal Act (the RMA). Accordingly, Policy 5 should be substantially rewritten to avoid the reference to this hierarchy.

19. The RMLA has chosen not to comment directly on the use of "offsetting" and the provision of "no net loss". However, we should record a degree of concern no doubt held by some members that the Proposed NPS should not be used or applied to override the broader judgment required by section 5. In other words, the RMA is quite clear that a particular project or planning document may promote the purpose of the Act (ie sustainable management) even where it is contrary to aspects of sections 6, 7 and 8. To ensure that the primacy of Part 2 is maintained by those applying the NPS at the coalface, the provisions of the Proposed NPS should expressly recognise that a proposal that does not meet the requirements of the Proposed NPS might nonetheless be approved following the exercise of the overall judgment required by Part 2.

20. The issues raised in this part of the submission have implications for, and may require consequential changes to, other parts of the NPS (eg, Principle 3, Schedule 2).

21. As mentioned earlier, members of the Legislation Sub-Committee would welcome the chance to discuss its concerns about Policy 5 in more detail, and to offer its

RMLA, C/- 4 Shaw Way, Hillsborough, Auckland 1041
Tel: (9) 626-6068 Email: karol.helmink@xtra.co.nz
www.rmla.org.nz

suggestions as to how some of its members' concerns might be addressed in amendments to Policy 5 and any consequential changes.

Schedule 2: Offset methodology and principles

22. Schedule 2 of the Proposed NPS records the principles to be applied when considering a biodiversity offset.
23. The use of the term 'in-situ' in Principle 1 suggests that biodiversity offsets should be designed and implemented to achieve measurable conservation outcomes on the site subject to the proposal, therefore precluding the ability to undertake biodiversity offsetting on another site. The RMLA submits that the term in-situ be deleted from Principle 1 because it is inconsistent with the requirement in Principle 5 that offsets be designed to complement biodiversity goals at "landscape and national level".
24. The RMLA submits that Principle 2 should be amended. In its current form, the principle is ambiguous and poorly worded. While its intent may be able to be deciphered by those working in the RMA or related fields, it will not be understood by many laypeople and it will be source of debate between applicants, submitters and local authorities.
25. Principle 4 needs to be amended for clarity. The RMLA suggests that it reads as follows:

Limits as to what can be offset: There are situations where residual effects cannot be fully compensated and where offsetting is not appropriate. This may be the case where the indigenous vegetation or indigenous habitat: ... [Continue with (i) to (iv) as listed, and then delete the last paragraph below (iv)].
26. Principle 5 states that "a biodiversity offset should be designed and implemented in a landscape context...". The meaning of this Principle is ambiguous. It is unclear how this Principle will assist with the consideration of biodiversity offsets. This Principle should be deleted.
27. The RMLA submits that Principle 7 be amended so that it provides greater clarity on whether "communication of its results to the public ..." means communication to the relevant local authority or some other body.

Typographical errors

28. The following typographical errors need to be corrected (additions are shown in underline, deletions in strikethrough):
 - (a) Preamble - page 1, should be amended so that it states that "...such distinct ecosystems that New Zealand has, have been described as..."
 - (b) Preamble - page 2, should be amended so that it states that "...in the way we manage ~~for~~ biodiversity under the Act."
 - (c) Interpretation - page 3, should be amended so that it states that "...where those effects arise from..."

RMLA, C/- 4 Shaw Way, Hillsborough, Auckland 1041
Tel: (9) 626-6068 Email: karol.helmink@xtra.co.nz
www.rmla.org.nz

- (d) Policy 8 - page 8, should be amended so that it states that "...local authorities shall ~~will~~ consult with, and provide reasonably opportunity for, the input of:...

Signature:



Bal Matheson on behalf of the Resource Management Law Association

Date: 2 May 2011

Address for Service: RMLA, C/- 4 Shaw Way, Hillsborough, Auckland 1041

Telephone: (09) 626 6068 or 027 272 3960

Email: karol.helmink@xtra.co.nz

Contact Person: Karol Helmink

RMLA, C/- 4 Shaw Way, Hillsborough, Auckland 1041
Tel: (9) 626-6068 Email: karol.helmink@xtra.co.nz
www.rmla.org.nz