

# DRAFT NATIONAL POLICY STATEMENT FOR INDIGENOUS BIODIVERSITY

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To: Ministry for the Environment  
indigenusbiodiversity@mfe.govt.nz

## Submission by Bathurst Resources Ltd and BT Mining Ltd

### Background

1. Bathurst Resources Ltd (including BT Mining Limited of which Bathurst is a 65% joint venture owner) (**Bathurst**) is New Zealand's leading coal producing company with operations throughout New Zealand providing coal for local steel making, delivering energy for electricity generation and to domestic dairy and food processing industries and exporting high quality metallurgical coal to international steel makers. We anticipate ending this financial year having mined around 2.4m tonnes of coal.
2. Bathurst is a New Zealand registered ASX listed resource company with the majority of its shareholders being overseas investors. All Bathurst's mining operations are in New Zealand. The Bathurst group employs around 580 people directly and makes a significant contribution to the economic wellbeing of the regions of the West Coast, Canterbury, Southland and the Waikato through this direct employment (\$48m p/a) as well as taxes, coal royalties, energy resources levy and equipment and supply purchases. It is generally accepted that the flow-on economic effect in a community is 3.2 jobs for each mine job.
3. Responsible resource use lies behind all of Bathurst's activities and its approach to sustainable development and management of its social and environmental performance. This means everything the company does is guided by a commitment to shareholders, employees, local communities, and, importantly, the environment. Bathurst's commitment is backed by significant investment of time and money to ensure social and environmental impacts are managed from design and planning through to production and eventually rehabilitation of mining sites.
4. Our ultimate aim is to ensure that Bathurst's operations enable society to meet its present needs without compromising the ability of future generations to meet their needs.
5. Bathurst has a Health, Safety, Environment and Community management framework to guide the company's decisions on responsible resource use and the impact of its activities. The framework is in accordance with international standards to enable continuous improvement of Bathurst policies, standards and procedures to minimise risk to mine workers and the environment.

### *Customers for New Zealand Coal*

6. Bathurst mines and sells coal to the New Zealand dairy industry for processing of its milk. We also sell coal for electricity generation at the Huntly Power Station (to provide electricity supply security particularly for the Auckland market) and to New Zealand Steel at Glenbrook. In addition, we mine and sell coal to steelmakers in Japan, India and China. The high quality of New Zealand's coking coal reduces net global emissions from steel making,
7. Clearly, we are driven by demand from our customers. While there are no economic alternatives to the use of coal it will continue to be used, or the industries that use coal in New Zealand will

relocate to other parts of the world.

### ***Location of Mining***

8. The coal resource is fixed in location and must be extracted where it is located. All our mines operate as open cast mines which means that overburden (material that is not coal) is removed to access the coal seam. The coal is then extracted and the overburden replaced. Mining is by its very nature an activity that moves along the landscape as the coal seam(s) are followed and extracted.
9. As would be expected mines are generally located in rural areas and earthworks to remove overburden and to extract the coal will inevitably intersect with vegetation, ephemeral streams and wetlands and watercourses. In addition while mining is taking place it will be necessary to divert water, including watercourses, and to discharge clean and treated water to adjacent watercourses. Mining is transitory by nature and on the completion of mining the area is rehabilitated and returned to other productive uses.

### **Executive summary**

10. The Draft National Policy Statement for Indigenous Biodiversity (**DNPS-IB**) presents the following key problems:
  - (i) Definitions are included in the *Fundamental Concepts* section (1.7) e.g. *indigenous biodiversity* and this creates legal confusion;
  - (ii) The introduction of concepts such as Hutia Te Rito (which in any case appears to be misapplied) undermines the principles of statutory interpretation and will lead to confusion and needless litigation;
  - (iii) Indigenous biodiversity appears to be defined to cover all biodiversity in New Zealand;
  - (iv) Almost all biodiversity will meet a classification of significant and of high value in almost all areas outside urban areas and therefore any future development will be effectively prohibited as there will be adverse effects (even if only minor) and 3.9 is absolute in requiring these to be avoided with no application of the effects hierarchy;
  - (v) Councils are under resourced to meet their obligations under the DNPS-IB and it is unfair to expect ratepayers to fund the additional expenditure (particularly considering the extra costs being proposed under the Proposed NPS for Freshwater Management (**PNPS-FM**)).
11. While the DNPS-IB makes provision for the mineral and aggregate extraction within significant natural areas (**SNAs**) classified as medium (3.9(2)(d)ii) to be considered under the effects management hierarchy, the reality is that all SNAs will meet the high value classification, as the bar for significance is set too low. Thus while clearly intending that mineral extraction should not be prevented by the DNPS-IB in reality the extractive industry will not be able to utilise 3.9(2) to present its proposals for assessment against the effects management hierarchy.
12. It is unclear how existing mining operations will be dealt with under 3.12 and whether it will act to prevent expansion of existing consented operations.
13. We discuss each of these issues further below together with other submission points.

## 1.5 Application

14. The potential for duplication (and confusion) between this DNPS-IB and the PNPS-FM should be resolved. Including the restoration and enhancement of wetlands within this DNPS-IB is unnecessary given the PNPS-FM already addresses this issue. At the very least there should be a statement as to the relationship between the two proposed NPS's and which is to take priority in the event of conflicts.
15. We think the timeframes proposed for identification/mapping of SNAs and subsequent plan changes are too optimistic and show a lack of understanding of the reality *on the ground* of what is being required by the DNPS-IB. We have no doubt that local government will be submitting on these issues and can say that we know from our own experience that suitably qualified ecologists are few in number and that councils are under resourced to carry out this work. What is being required is the work of decades.

## 1.7 Fundamental concepts

16. The DNPS-IB has the effect of a regulation once promulgated and therefore must be drafted accordingly. Meanings of terms need to be clear, so that a judge or decision-maker can understand what they mean and then be able to apply that definition consistently throughout the document. Section 1.7 as a whole needs reconsideration in the light of the principles of statutory interpretation and the common law of New Zealand.
17. It is not possible to introduce terminology without expecting it to have a meaning that can be derived in an objective rather than a subjective way and which can be readily subject to judicial examination and review. This becomes of greater issue as most of the concepts set out in section 1.7 are cross-referenced in section 1.8 where they are certainly given the weight of legal definitions (this applies to *Hutia Te Rito*, *indigenous biodiversity*, and *maintenance of indigenous biodiversity* but curiously not to *adverse effects on indigenous biodiversity*).
18. Section 1.7 opens by saying that it is a one of a number of terms that *cannot adequately be described by a short definition*. Yet it is stated to give effect to the DNPS-IB it is important to understand *these concepts fully*. The question has to be asked as to why the terms cannot be defined in a short tight definition. It may well be because they are not in fact definitions rather statements of ideas and values which lie behind why the DNPS-IB is being promoted. They should not however form part of a legal instrument – this is poor drafting.
19. This issue is important because of the way the concepts are applied later in the DNPS-IB and the requirements that the concepts be given effect to. How this is to be done if the concept is vague and subjective presents significant legal issues.
20. Taking for example the concept of *Hutia Te Rito*. The DNPS-IB requires that:
  - (a) Part 2.1 – Objective 3: *to recognise and provide for Hutia Te Rito in the management of indigenous biodiversity;*
  - (b) Part 2.2 – Policy 1: *ensuring that Hutia Te Rito is recognised and provided for;*

- (c) Part 3.2 Hutia Te Rito: *recognise and provide for Hutia Te Rito in implementing this National Policy Statement;*
- (d) Part 3.3 Tangata whenua as kaitiaki – *to develop objectives, policies and methods that recognise and provide for Hutia Te Rito;*
- (e) Appendix 5 2. – *recognise and provide for Hutia Te Rito.*

21. To fulfil these legal requirements local authorities will need to know what Hutia Te Rito actually is. A quick bit of research on the internet has brought up the following with respect to the whakatauki which *is the basis of the concept of Hutia Te Rito* as used in the DNPS-IB:

Our most senior Māori lawyer, Justice Joe Williams gave a fantastic kōrero on this particular whakataukī at our Hunga Rōia Māori (the National Māori Lawyers Association) Hui ā Tau (annual conference) at AUT last November. He pointed out the common misuse of the proverb, and reminded us of its true meaning and value - having regard to the context within which the words were uttered, by Te Aupouri wāhine rangatira (female chief) Meri Ngaroto in the early 19th century.

Ngaroto was making a plea for the lives of a group of manuhiri to her marae at Ohaki - upon hearing of the plans of her relatives to massacre these visitors. Using metaphor in a manner that is typical of Māori language, she uses her own mana and authority to beg for a reconsideration of the decision, imploring:

*“Hutia te rito o te harakeke  
Kei whea to kōmako e kō?  
Ki mai ki ahau  
He aha te mea nui o te Ao?  
Maku e kī atu,  
he tāngata, he tāngata, he tāngata...”*

*If the heart of the harakeke was removed,  
where would the bellbird sing?  
If I was asked what was the most important thing in the world  
I would be compelled to reply,  
it is people, it is people, it is people*

Ngaroto is alluding to the common metaphor of the pa harakeke, the flax bush, as a representation of a healthy and functional family - where the plant is well-rooted, and the central shoots (the rito), representing the children, are protected from the elements and adverse forces by the older surrounding shoots - the matua, or parents. Justice Williams reminded us, that what she is claiming therefore is the most important thing, through a Māori lens, is not people in the sense of those individuals you see before you, alive and breathing now, but those to whom they are connected - their tūpuna, or ancestors, but also their as yet unseen/unborn descendants.

In other words, Ngaroto is referring to WHAKAPAPA as the most important thing - the people to whom we are connected - and the idea that we are people through other people, and all that they represent in terms of knowledge and experience. In begging for their lives, she is therefore asking her relatives to consider everyone connected to those they plan to eliminate - ie if you wipe these guys out, you are wiping out all of these others not physically here today.

<https://www.newsroom.co.nz/2018/07/05/141709/its-not-people-its-kaupapa>

and:

*Unuhia te rito o te harakeke, kei hea te kōmako, e kō? Whakatairangitia, rere ki uta, rere ki tai; ui mai koe ki a au, he aha te mea nui o tēnei ao? Māku e kī atu: he tangata, he tangata, he tangata!*

[Remove the centre shoot of the flax and where will the bellbird be, where? It will mill around, fly inland, fly seawards; and then you will ask me, what is the greatest thing in the world? I will respond by saying: it is people, it is people, it is people!]

It is everywhere. It is emblazoned on the walls in Work and Income centres, it is the mantra of a lot of social services and how they operate—it is their mantra. I just want to take a very brief moment to explain the origin of that particular saying. An ancestor from Te Aupōuri in the far north—Mr Kelvin Davis' territory—a lady by the name of Meri Ngāroto is responsible for those words "Unuhia te rito o te harakeke" ["Remove the centre shoot of the flax"], and it goes on to "he tangata, he tangata, he tangata!" ["it is people, it is people, it is people!"]. And if the members across the House who use it, and will nowadays, were to understand its origins I think they would second-guess whether or not they would use it. It was actually a remark made to her father, who was about to offer her to a rival tribe as a peace offering, knowing full well that she was unable to have children. So she expressed to him "Hūtia te rito o te harakeke"—and the rest is history.

[https://www.parliament.nz/en/pb/hansard-debates/rhr/document/HansS\\_20161129\\_078300000/henare-peeni](https://www.parliament.nz/en/pb/hansard-debates/rhr/document/HansS_20161129_078300000/henare-peeni)

22. So it would appear that it is the connection of people to people that is the underlying thrust of the whakatauki. This illustrates the problems with constructing concepts in this way where they will have legal effect but which are open to wide interpretation. There is also the issue of translation of Maori words and concepts. As shown by the above quotes there can be varying interpretations of the whakatauki – whose version is to take precedence? This issue also flows into the introduction of several Maori phrases (such as *te hauora o te koiora*) which have English words following them in parentheses but with no guidance as to whether the English words are the exact translation or whether they are merely descriptive and the Maori words may in fact be more extensive and therefore embody more. How will a decision maker correctly apply these terms?
23. These issues are not academic as it is intended that the DNPS-IB will require *objectives, policies and methods to operationalise Hutia Te Rito*. It is a fundamental principle of law that if obligations are placed on a person they should be able to know what those obligations are without recourse to subjective interpretations. Unfortunately the concept of Hutia Te Rito as written in the DNPS-IB will not achieve this.
24. *Indigenous biodiversity* is defined to be *biodiversity that is naturally occurring anywhere in New Zealand. It includes all New Zealand's ecosystems ...*(emphasis added) This definition means that all biodiversity is encompassed by the definition of *indigenous biodiversity* as the following sentence makes it clear that what would usually be understood as indigenous biodiversity is only a subset of a wider category (this is applying the standard legal principle of interpretation that the word *includes* introduces examples and is not an exhaustive list in itself). The definition needs to be redrafted to limit the DNPS-IB to what is usually understood as indigenous biodiversity (or its title needs to be changed and the implications of covering all biodiversity properly understood). Otherwise every introduced weed will receive the same level of protection as any indigenous vegetation.
25. The concept of *maintenance of indigenous biodiversity* as set out in 1.7(3) needs to be amended to allow for a qualitative as well as a quantitative assessment and as a minimum we suggest amending (a) to read:  
  
(a) *Overall quality of populations of indigenous species*

26. In 1.7(4) adverse effects include *degradation of mauri*. What legally speaking is *mauri*? How is this to be measured? Is it to be dependent on a subjective assertion which cannot be objectively challenged? This subclause should be deleted as objective demonstrable effects are covered by the other subclauses.

### **3.5 Resilience to climate change**

27. This section requires local authorities to have, or to have access to, the scientific expertise to be able to accurately assess climate change effects on their regions and districts. It also opens up the prospect of litigation around what the climate change effects will likely be on particular proposals. Given that knowledge in this area is extremely limited with only broad brush assessments currently available this clause should be deleted.

### **3.8 Identifying significant natural areas**

28. Many local authorities have already been through extensive (and expensive) processes to identify SNAs in their districts and regions with subsequent legal challenges with final resolution through the Environment Court. The DNPS-IB will now require them to repeat much of this work. This undermines the certainty that has previously been achieved.

29. We have, for example, been involved in the mediation arising out of the appeals on the West Coast Regional Policy Statement for well over a year now. One of the particular issues was around activities within SNAs and indigenous biodiversity. After many months of detailed and prolonged mediation with input from respected ecologists all parties have reached agreement on the objectives, policies and methods of the WCRC RPS. We are currently awaiting the Environment Court's acceptance of the outcome of mediation.

30. The DNPS-IB throws the results of mediation into the air and we have effectively wasted our time (and money) and will be starting all over again.

31. More generally, the timeframe for identifying SNAs is too short and there is an acknowledged lack of suitably qualified ecologists in New Zealand to carry out the necessary work. If the councils tie up all the resources then landowners, applicants etc will have no resource to call on to challenge proposed plans etc.

32. Given the criteria set out in Appendices 1 and 2 it is likely that all SNAs will have significant vegetation or fauna and be of high value. This is so because a site only needs to have one attribute to qualify as an SNA and once qualified all biodiversity within that area becomes subject to the rules around SNAs. Similarly, once a site is an SNA it only needs one attribute to place it into the high value category. Other submitters will be expanding on this issue, but the conclusion is that there is little land outside urban areas that will not fall into an SNA and likely into an SNA of high value regardless of its true intrinsic value.

33. This in turn means that almost all development outside urban areas will be dealt with under 3.9(1)(a) where the listed effects have to be avoided. There is no nuancing to the description of the effects that have to be avoided, for example the loss of one snail or one snail egg would trigger (a)(iv). There is no opportunity to propose to offset that one loss with a breeding programme for

example. The only way to be sure that there would be no intended or accidental reduction in population would be not to go ahead with the proposed development.

34. We are not aware of any mine being able to be established without going through a consenting process. Thus mining has always been subject to scrutiny particularly around likely impacts on biodiversity. Being assessed against the effects hierarchy in the Resource Management Act 1991 (RMA) has allowed better outcomes for the environment, with many proposals significantly improving biodiversity outcomes compared to the counterfactual of no development taking place, as well as providing for the economic and social wellbeing of people and communities.
35. There is no good reason why any proposed developments within an SNA of high value should not be assessed against the proposed effects management hierarchy. Where the biodiversity values are very high and irreplaceable, as is the case now, no consents will be granted and the development will not proceed and in all cases the proposed mitigation package will be able to be assessed against the detailed facts of an individual application.
36. Accordingly 3.9(1) should be deleted and 3.9(2) should be amended to permit applications to be managed using the effects management hierarchy for all SNAs whether high or medium.
37. In passing we note that RMA already has a definition of *mining* and that should be used instead of *mineral and aggregate extraction* which has no legal definition. In addition prospecting and exploration (which are also defined in RMA) should be included as they are an integral part of any mining operation.
38. As indicated above 3.12 should be redrafted to be clear that existing mining operations will not be prevented from expanding within a previously consented area. It is currently unclear whether while a mining operation may have a district land use consent to mine within an area nevertheless if it seeks to vary that consent or to apply for related regional consents for stream diversions (for example) as expansion takes place it may fall foul of 3.12.

### **3.15 Highly mobile fauna**

39. The other objectives and policies in the DNPS-IB already address issues around highly mobile fauna and this section is an unnecessary duplication and should be deleted.

### **3.19 Assessment of environmental effects**

40. To the extent that this section is intended to impose additional requirements on applicants over and above what is already required by RMA then it is inappropriate, unnecessary and will be disproportionately expensive for the majority of applicants who wish to carry out low level activities within an SNA that may in fact not impact any biodiversity of any importance .
41. The level of detail (and technical expertise) that will be required to meet the requirements of (2) is excessive. This clause should be deleted in its entirety, RMA already provides sufficient obligations with respect to information that must be provided in an assessment of environmental effects.

**Appendix 3: Principles for biodiversity offsetting**

**Appendix 4: Principles for biodiversity compensation**

42. The proposed effects management hierarchy, in the definitions section, and in Appendices 3 and 4, is supported subject to the comments below.
43. Principle 2 of Appendix 3 and Principle 2 of Appendix 4 make the obvious point that there will be some circumstances where offsetting or compensation will not be appropriate. However this point is better made at the beginning of the appendices rather than being inserted as one of the principles. Accordingly we suggest these principles be deleted and instead the following wording be added to the opening of each of the Appendices:

*Appendix 3*

*The following sets out a framework of principles for the use of biodiversity offsets. Not all biodiversity values may be able to be offset. The following principles set out when offsetting may be appropriate. Principles ....*

*Appendix 4*

*The following sets out a framework of principles for the use of biodiversity compensation. Not all biodiversity values may be able to be compensated. The following principles set out when compensation may be appropriate. Principles ....*

44. **Principle 5, Appendix 3**, requires a “like for like” swap between biodiversity affected and biodiversity enhanced or created, while **Principle 9** provides for “trading up” of biodiversity, subject to conditions. The two principles appear to be in direct conflict and this needs to be resolved.
45. **Principle 9** on trading up should provide for most biodiversity to be eligible for trade-ups in the context of an offset proposal. As worded, the applicable threat classifications are very broad, and in practice will exclude almost all biodiversity from being traded up. The exclusion from trading up should be limited to the highest threat categories, nationally critical and nationally endangered. In such situations, if offsetting is possible, it should be like for like (**Principle 5**). The point is that in respect of high-value biodiversity, the opportunity to trade up will be limited in any event because it would have to be of even higher value, a very high bar to reach.

**Bathurst Resources Limited/BT Mining Limited**



Richard Tacon  
**CHIEF EXECUTIVE OFFICER**

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