

RMLA SUBMISSION

National Policy Statement for Indigenous Biodiversity

TO: Ministry for the Environment

indigenousbiodiversity@mfe.govt.nz

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

Introduction

- 1 This Submission 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
 - 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. Currently the Association has some 1,000 plus members. Within such an organisation there are inevitably a divergent range of interests in views of members.

- 4 While the membership has been consulted in preparing this submission, it is 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 and those may represent quite different approaches to the views expressed here.
- 5 RMLA's main objective in making submissions on Government proposals is to ensure that a coherent and workable body of resource management and environmental law and practice is developed in New Zealand. As a result it is not the RMLA's practice to make submissions in opposition. Instead, submissions should focus on what (if any) changes should be made to the proposal to ensure that it will:
- a. Be consistent with the general framework of existing laws and policies and legally sound;
 - b. Be practicable, effective and efficient;
 - c. Assist in promoting best practice;
 - d. Produce high quality environmental outcomes.

SUBMISSION

Section A: Recognising te ao Māori and the principles of the Treaty of Waitangi

A.1 Providing for the concept of Hutia te Rito

- Q4. *Hutia te Rito recognises that the health and wellbeing of nature is vital to our own health and wellbeing. This will be the underlying concept of the proposed NPSIB. Do you agree? Yes/no? Why/why not?*

The RMLA welcomes the inclusion of a whakatauki to underpin and elaborate on concepts of kaitiakitanga, mauri and whakapapa. As with any new principles and regulatory documents we would expect to see an initial flush of litigation that will test the boundaries of this concept.

- Q5. *Does the proposed NPSIB provide enough information on Hutia te Rito and how it should be implemented? Yes/no. Is there anything else that should be added to reflect te ao Māori in managing Indigenous Biodiversity?*

There may be some risk that the english description of the whakatauki becomes the focus of challenges and distracts from the intended meaning and application of the concept of Hutia te Rito, however it would seem preferable to include some explanation at this stage rather than none.

A.2 Providing for the principles of the Treaty of Waitangi and engaging with tangata whenua

- Q7. *What opportunities and challenges do you see for the way in which councils would be required to work with tangata whenua when managing indigenous biodiversity? What information and resources would support the enhanced role of tangata whenua in indigenous biodiversity management?*

This question is related to the RMLA's practical concerns about how feasible it is for this NPS to actually be implemented as MfE envisages.

The NPS appears to require an almost immediate commencement of a complex and comprehensive process of consultation and expert assessment across all regions of New Zealand. However in many regions territorial authorities, regional councils and tangata whenua are already very busy or overwhelmed by their responsibilities and involvement with RMA processes.

Q9. What specific information, support or resources would help you implement the provisions in this section (section A)?

This question is also related to the RMLA's practical concerns about how feasible it is for this NPS to actually be implemented as MfE envisages.

If MfE wishes to see consistent and prompt implementation of this NPS (which RMLA supports) then it must consider rolling out substantial support and additional resourcing to ensure local authorities, tangata whenua are able to properly contribute to indigenous biodiversity management.

Section B: Identifying important biodiversity and taonga

B.1 Identifying and mapping Significant Natural Areas

Q10. Territorial authorities will need to identify, map and schedule Significant Natural Areas (SNAs) in partnership with tangata whenua, landowners and communities. What logistical issues do you see with mapping SNAs, and what has been limiting this mapping from happening?

Many territorial authorities with the highest proportion of natural areas which may contain the highest proportion of indigenous biodiversity are situated in areas with low population numbers and therefore have a much lower funding base for resourcing this type of work. Planning and other expertise to support this work is also commonly in limited supply in these areas.

On the other hand territorial authorities with more income also commonly encounter the highest demands for urban growth, and therefore these needs may take priority over protections for any remaining indigenous biodiversity.

In all areas where land carries high values and/or is under considerable development pressure, territorial authorities are very likely to face considerable opposition to mapping of SNAs or any other tools that seek to protect indigenous biodiversity.

To help address the resourcing issues, the NPS could prioritise the identification of SNAs to private land, on the basis that administrators of Public land should already be appropriately maintaining and protecting indigenous biodiversity.

Q11. Of the following three options, who do you think should be responsible for identifying, mapping and scheduling of SNAs? Why?

- a. territorial authorities*
- b. regional councils*
- c. a collaborative exercise between territorial authorities and regional councils.*

A further option should be considered whereby a nationally funded group facilitates a collaborative exercise between territorial authorities, regional councils and tangata whenua to identify SNAs. This would ensure not only a consistent approach is taken to identifying SNAs nationally, and also ensure the involvement of people with appropriate expertise to do so, it would also be the most likely method to ensure that the timeframes provided in the NPS could be met.

If this approach is taken then the local authorities would have strong supporting evidence and a robust preparation process with which to then to tailor the identified SNA's, and go out and notify the SNAs as a part of a plan change process.

Q12. Do you consider the ecological significance criteria in Appendix 1 of the proposed NPSIB appropriate for identifying SNAs? Yes/no? Why/why not?

The RMLA supports the identification of consistent ecological site significance criteria for application across New Zealand particularly if it will improve predictability of outcomes between districts and regions.

The proposed significance criteria includes many subjective elements that can be interpreted and applied differently. This increases the risk of inconsistent implementation and uncertainty.

Q13. Do you agree with the principles and approaches territorial authorities must consider when identifying and mapping SNAs? (see Part 3.8(2) of the proposed NPSIB) Yes/no? Why/why not?

Generally yes. However, as noted, a more efficient approach would prioritise identification on private rather than public land.

This question is relevant to the general comments made throughout this submission regarding resourcing and very constrained availability of the necessary expertise (most especially ecologists) in territorial authorities across New Zealand.

The implementation section of the NPS is quite dense, apparently in an effort to encourage consistent application of the NPS, however in reality these directions will not be consistently applied unless there is sufficient resources, support and funding to make this happen.

Q14. The NPSIB proposes SNAs are scheduled in a district plan. Which of the following council plans should include SNA schedules? Why?

- a. regional policy statement*
- b. regional plan*
- c. district plan*
- d. a combination*

SNAs may be a consideration for a number of activities which are regulated in both regional and District plans. For this reason it may be helpful to ensure that a schedule

of SNAs is included in the RPS (as opposed to a regional plan or district plan) so that is given effect consistently in regional and district plans.

It is relevant to note that having such a schedule both in a regional and district or city plan may sometimes cause issues of consistency between the two documents. It would also be inefficient to have different or duplicate provisions in both a regional plan and a district plan. Regardless it would seem preferable to ensure more widespread access to this information where possible.

Q15. We have proposed a timeframe of five years for the identification and mapping of SNAs and six years for scheduling SNAs in a district plan. Is this reasonable? Yes/no? What do you think is a reasonable timeframe and why?

The RMLA supports the identification of proposed SNAs within five years. However, we reiterate concerns regarding resourcing issues, existing workloads of Councils, substantial pressures on iwi and iwi authorities, and limited availability of the necessary experts.

Given the extent of change that the identification of a SNA may have on a landowner it would also appear aspirational to provide just one further year for an SNA, once the SNA is identified and mapped as part of a proposed plan change, to be included in a schedule to a plan.

Plan processes can take upwards of 5 years to be completed through notification, submissions, section 42A reports, Council hearings, decision writing and publication, Environment Court appeal, mediation, hearings and potentially further challenge and the higher courts.

An alternative proposed earlier may be for the identification and mapping of SNAs to be progressed by a national group in collaboration with regional authorities, territorial authorities and tangata whenua. It may be possible through this method to identify and map SNAs across New Zealand within 5 years. It would then be appropriate to allow at least 5 years for that information to be incorporated properly into district plans.

B.2 Recognising and protecting taonga species and ecosystems

Q16. Do you agree with the proposed approach to identifying and managing taonga species and ecosystems? (see Part 3.14 of the proposed NPSIB) Yes/no? Why/why not?

Yes. The RMLA considers it is relevant and appropriate to recognise and protect taonga species to the extent this is supported by tangata whenua respectively.

B.3 Surveying for and managing 'highly mobile fauna'

Q17. Part 3.15 of the proposed NPSIB requires regional councils and territorial authorities to work together to identify and manage highly mobile fauna outside of SNAs. Do you agree with this approach? Yes/no? Why/why not?

The RMLA agrees in principle with the proposed approach, but remains concerned about the practicality of these requirements. Finding a practical, user friendly and consistent approach may require significant resourcing and will take time.

Q18. *What specific information, support or resources would help you implement the provisions in this section (section B)?*

In line with previous comments in this submission, each territorial and regional authority, along with the iwi groups and iwi authorities should be supported in their determination of the best method to manage highly mobile fauna. Without adequate resourcing, support and time to properly implement any measures they are likely to be strongly opposed at the time they are being inserted in plans and potentially also difficult to apply or enforce.

Section C: Managing adverse effects on biodiversity from activities

C.1 Managing adverse effects on biodiversity within Significant Natural Areas

Q20. *Do you agree with the use of the effects management hierarchy as proposed to address adverse effects on indigenous biodiversity instead of the outcomes-based approach recommended by the Biodiversity Collaborative Group? Yes/no? Why/why not?*

The RMLA considers that careful thought should be given to the use of the term “avoid” in Policy 3.9 in light of the King Salmon jurisprudence. It may not always be appropriate to avoid development proposals simply on the basis they will result in indigenous biodiversity loss.

The RMLA also has some concerns about how the effects management hierarchy will be implemented in practice, and submits that there needs to be further consideration of the wording of these provisions and/or amendments and/or further guidance on how this is to be interpreted.

On the current drafting, it is unclear how strictly the effects management hierarchy should be interpreted by local authorities when they are drafting planning provisions or assessing applications.

For example, given that “avoid where possible” is the first step that needs to be satisfied in the hierarchy, this could be interpreted as meaning that any subdivision, use or development cannot proceed (regardless of the particular circumstances) if this results in adverse effects on indigenous biodiversity.¹ If that is the case, then it leaves open the question of when or in fact if, the rest of the effects management hierarchy realistically comes into play.

C.4 Providing for existing activities, including pastoral farming

Q26. *Do you agree with managing existing activities and land uses, including pastoral farming, proposed in Part 3.12 of the proposed NPSIB? Yes/no? Why/why not?*

Existing land uses are already provided for in the RMA. If the NPSIB is intended to provide for something more than or different to s10 existing use rights, this is not made sufficiently clear and Part 3.12 appears to duplicate s 10. The duplication of this framework, including the addition of a regional policy that sits over the existing framework via the NPS requirement adds undue complexity.

¹ See both provisions 3.9 (Managing effects on SNAs) and 3.13 (general rules applying outside SNAs)).

It is submitted that the more direct method of incorporating this management approach would be an NES or a national planning standard.

C.5 Managing adverse effects on biodiversity outside SNA's

Q27. Does the proposed NPSIB provide the appropriate level of protection for indigenous biodiversity outside SNAs with enough flexibility to allow other community outcomes to be met? Yes/no? Why/why not?

The RMLA accepts that until the SNA mapping has been completed then other measures for protection of biodiversity may be appropriate e.g. through identification of SNA's during a resource consent process.

However after SNA's have been mapped and adopted in planning documents, there is a risk of undermining the First Schedule process and creating uncertainty by providing for the de facto identification of SNA's through a resource consent process. Given that the original intention of identifying SNA's appears to be founded in strong policy considerations and with reference to the clear parameters provided in the NPS, these objectives may be undermined by recognising the potential for identification of an SNA or other area of significant biodiversity to be 'missed' such that it should then be created through a resource consent process. In these instances there are already a range of other mechanisms being used to provide protections, including through conditions of consent.

In this regard it is noted that it is not unusual for there to be some disagreement between different ecologists engaged by different parties in a resource consent process as to the "significance" of some natural areas of a site.

RMLA members have diverse views on this issue:

On the one hand it would seem inappropriate for the classification of an SNA to play out in an ad hoc way in various resource consent applications, and it may also increase uncertainty and the reliability of plans;

On the other hand there are concerns that it will not be feasible for all SNA's to be sufficiently identified, or consistently classified, through the Schedule 1 process and therefore the ability to recognise and address significant habitat through a resource consent process should be ensured.

Q28. Do you think it is appropriate to consider both biodiversity offsets and biodiversity compensation (instead of considering them sequentially) for managing adverse effects on indigenous biodiversity outside of SNAs? Yes/no? Why/why not?

It is appropriate to provide other tools for managing effects on SNAs. Again it would be preferable for these tools to be consistently applied to better provide certainty for landowners.

C.10 Biodiversity offsetting and biodiversity compensation

Q34. Do you agree with the framework for biodiversity offsets set out in Appendix 3? Yes/no? Why/why not?

The RMLA does not have a position on the merits of each of the principles for biodiversity offsets but welcomes the inclusion of Appendix 3 because it provides a mechanism by which parties are able to address impacts on biodiversity in a practical manner, while also seeking to continue to utilise their resources in a productive way.

Q36. *What level of residual adverse effect do you think biodiversity offsets and biodiversity compensation should apply to?*

- a. *More than minor residual adverse effects*
- b. *All residual adverse effects*
- c. *Other. Please explain.*

An expected approach would be more than minor, however every application should be assessed on its own merits given the unique circumstances of each application.

Section D.1 Restoration and enhancement of biodiversity

Q39. *Do you see any challenges in wetland protection and management being driven through the Government's Action for healthy waterways package while wetland restoration occurs through the NPSIB? Please explain.*

There are likely to be challenges in efficiently managing the overlapping rules/responsibilities btw local and regional authorities under regional and district plans. There will need to be transparent "ring fencing" of roles and responsibilities.

D.2 Restoring indigenous vegetation cover in depleted areas

Q40. *Part 3.17 of the proposed NPSIB requires regional councils to establish a 10 per cent target for urban indigenous vegetation cover and separate indigenous vegetation targets for non-urban areas. Do you agree with this approach? Yes/no? Why/why not?*

Targets such as these may provide impetus for action. If MfE wishes to see outcomes in the short term it will likely be necessary for this type of approach to be used.

D.3 Regional biodiversity strategies

Q41. *Do you think regional biodiversity strategies should be required under the proposed NPSIB, or promoted under the New Zealand Biodiversity Strategy? Please explain.*

Again resourcing is a key question here. The method that best ensures robust science is made available to regional councils that is then able to be applied effectively by experienced planners to underpin the development of clear policy direction should be preferred.

Q43. *Do you think the proposed regional biodiversity strategy has a role in promoting other outcomes (eg, predator control or preventing the spread of pests and pathogens)? Please explain.*

Yes, on the understanding that many biodiversity protection, enhancement, and restoration initiatives are undertaken on a voluntary non-statutory basis and can

be interrelated / interdependent. Each region should be able to determine the relevance of any of these issues independently.

Q44. Do you agree with the timeframes for initiating and completing the development of a regional biodiversity strategy? (see Part 3.18 of the proposed NPSIB) Yes/no? Why/why not?

Not without significant resourcing. Existing pressures on councils, iwi and limited availability of experts will make it difficult for all of these new regulations to be prepared as contemplated by the NPS-IB.

MfE could consider staggered implementation of each of the overlapping national policies and standards, or rolling out national assistance for providing the necessary science and analysis to underpin new RMA documents.

Q45. What specific information, support or resources would help you implement the provisions in this section (section D)?

Provision of expert assessments (or resourcing to secure expert assessments) of all of the key issues, applied to a scale that provides sufficient support for clear policy and rules.

Provision of implementation guidelines, including examples of Good Management Practice.

Section E Monitoring and implementation

Q47. Part 4.1 requires the Ministry for the Environment to undertake an effectiveness review of the proposed NPSIB. Do you agree with the requirements of this effectiveness review? Yes/no? Why/why not?

If MfE wishes to see the NPS implemented in a timely manner and in the way contemplated then yes an effectiveness review will be necessary.

E.2 Assessing environmental effects on indigenous biodiversity

Q48. Do you agree with the proposed additional information requirements within Assessments of Environment Effects (AEEs) for activities that impact indigenous biodiversity? (see Part 3.19 of the proposed NPSIB). Yes/no? Why/why not?

This will be an effective method for obtaining site specific information. However the standard of this requirement is likely to be applied very differently across New Zealand, especially as there are no set of agreed “best practice” methodologies (that the RMLA is aware of).

Some of the matters are potentially too onerous. For example, the costs associated with undertaking “best practice” assessments (which implies engagement of expert ecologists) is unwarranted in many cases where sites contain some indigenous vegetation. A “scale and significance” test may be appropriate (akin to that in s.32 of the Act).

E.3 Timeframes and implementation approaches

Q49. Which option for implementation of the proposed NPSIB do you prefer? Please explain.

- a. Implementation as soon as reasonably practicable – SNAs identified and mapped in five years, scheduled and notified in plans in six years.*
- b. Progressive implementation programme – SNAs identified and mapped within seven years, scheduled and notified in plans in eight years.*

Progressive implementation may be a more realistic timeframe. However this is subject to the comments earlier in this submission regarding the reality of incorporating SNA's in a district or city plan within 1 year.

Q50. Do you agree with the implementation timeframes in the proposed NPSIB, including the proposed requirement to refresh SNA schedules in plans every two years? Yes/no? Why/why not?

No. This is unrealistic for the reasons outlined elsewhere. A refresh every 2 years is aspirational for the same reasons.

E.4 SNAs on public land

Q51. Which of the three options to identify and map SNAs on public conservation land do you prefer? Please explain.

- a. Territorial authorities identify and map all SNAs including public conservation land*
- b. Public conservation land deemed as SNAs*
- c. No SNAs identified on public conservation land*

Another practical approach might be for public conservation land to be deemed SNA's until more specific information is provided otherwise.

E.5 Integrated management of indigenous biodiversity

Q53. Part 3.4 requires local authorities to manage indigenous biodiversity and the effects on it of subdivision, use and development, in an integrated way. Do you agree with this provision? Yes/no? Why/why not?

Yes, to promote an integrated approach to the sustainable management of our national and physical resources.

E.6 Managing indigenous biodiversity within the coastal environment

Q54. If the proposed NPSIB is implemented, then two pieces of national direction – the NZCPS and NPSIB – would apply in the landward-coastal environment. Part 1.6 of the proposed NPSIB states if there is a conflict between these instruments the NZCPS prevails. Do you think the proposals in the NPSIB are clear enough for regional councils and territorial authorities to adequately identify and protect SNAs in the landward- coastal environment? Yes/no? Why/why not?

It is submitted that the inclusion of a priority provision is helpful to plan-making and decision-makers. A priority provision should reduce risks of inconsistent interpretation and challenge.

E.7 Guidance and support for implementing the proposed NPSIB

Q58. What support in general would you require to implement the proposed NPSIB? Please detail.

a. Guidance material

The proliferation of overlapping national policies and national standards is a significant concern and further consideration is required on this issue. There is very little guidance anywhere as to how to apply conflicting documents or where priorities might lie between them.

For example a rural property may contain areas of highly productive land and an SNA, however it is unclear in the relevant NPS documents how any conflicting priorities should be managed.

Another example is the NPS for urban development, again this could come into conflict with this NPS-IB but local authorities have limited guidance on which issue should take priority.

b. Technical expertise

c. Scientific expertise

d. Financial support

e. All of above.

f. Other (please provide details).

The RMLA supports all of the above. Aside from guidance on priorities between policies, we have flagged real concerns around the practicality of parts of this NPS. It directs actions to be taken to implement this policy which seem too onerous, and in the RMLA's view are unlikely to be met without substantial resourcing and support from Central Government. It is submitted that any such requirements and timeframes need to be measured against the realistic capabilities of Local Government, iwi and affected stakeholders.

Section F: Statutory frameworks

Q59. Do you think a planning standard is needed to support the consistent implementation of some proposals in the proposed NPSIB? Yes/no? If yes, what specific provisions do you consider are effectively delivered through a planning standard tool?

In this submission the RMLA has submitted an option for the nationally funded identification and development of SNAs, and for these to then be adapted and incorporated through a local process.

It is submitted that the second step for a local process is essential to recognize local priorities and issues. In addition much of the local ecological context will be

relevant to the final determination of SNAs and their key attributes for protection.

In principle the RMLA would support increased national direction through a National Environmental Standard(s).

Q60. Do you think there are potential areas of tension or confusion between the proposed NPSIB and other national direction? Yes/no? Why/why not?

The RMLA does consider there could possibly be tension or confusion between the proposed NPSIB and other national direction.

One example where this could arise is the between the NPSIB and the National Policy Statement for Urban Development Capacity. It may be difficult for local authorities to apply development density targets under the NPS-UDC (if any area has been identified as a high growth area) whereby those density targets apply to areas that are later identified as SNAs, or the subdivision, use or development of those areas may affect neighbouring SNAs.

Another example is the provision of nationally significant infrastructure, which is provided for under the NPSET and NPSREG respectively. It is unclear whether one national policy direction would prevail over the other, although the “avoid” provisions in the Draft NPS-IB may have the effect of fettering the intent of these “enabling” NPSs. There is no defined way to balance or resolve conflicting national direction.

Q61. Do you think it is useful for RMA plans to address activities that exacerbate the spread of pests and diseases threatening biodiversity, in conjunction with appropriate national or regional pest plan rules under the Biosecurity Act 1993? Yes/no? Why/why not?

The RMLA does not agree that the RMA should be utilised to address this issue, particularly given that other pieces of legislation are more directly relevant. There is too much capacity for overlap not just with existing legislation and regulation, but also a substantial risk that inconsistent approaches will be taken by the various entities charged with administering and managing these regulatory measures.

6. If there is any further opportunity to do so, the RMLA wishes to be heard in support of this submission.



Signature of Mary Hill on behalf of the Resource Management Law Association

Date: 13 March 2020

Address for Service: RMLA, PO Box 89187, Torbay, Auckland 0742

Telephone: 027 272 3960

Email: karol.helmink@rmla.org.nz

Contact Person: Karol Helmink