

2 May 2011

Craig Mallett
Manager, Land and Water Management Team
Biodiversity NPS
Ministry for the Environment
PO Box 10362
WELLINGTON 6143

via e-mails: biodiversity@mfe.govt.nz & craig.mallett@mfe.govt.nz

Dear Craig

National Policy Statement of Indigenous Biodiversity

BusinessNZ is pleased to have the opportunity to provide a submission to the Ministry for the Environment on its proposed National Policy Statement on Indigenous Biodiversity (the 'NPS'), released on 29 January, 2011.¹

Introduction

BusinessNZ supports the introduction of measures that enable the effective protection of nationally significant biodiversity. National consistency and balance in decision making in regard to the maintenance and protection of New Zealand's indigenous biodiversity is welcomed. However, having said that, BusinessNZ has some concerns regarding some key elements of the draft NPS - its consistency with the overall purpose of sustainable management of natural and physical resources under the Resource Management Act, 1991 (the 'Act'), the derogation implied by the draft NPS of private property rights, and the uncertainty regarding the extent of its application that will result in a chilling effect on private investment at a time when the economy is at its most fragile.

These are not new concerns, having been raised by submitters in earlier consultation processes, but they are yet to be addressed to our satisfaction.

BusinessNZ has set out a number of comments to expand on these introductory remarks, below.

¹ Background information on BusinessNZ is attached in Appendix One.

Specific Comments

BusinessNZ's comments (in no particular order of preference) are as follows:

1. the NPS appears to contain some novel features that are not immediately recognisable as being consistent with the purpose of the Act. For example:

- (a) the hierarchy set out in Policy 5. BusinessNZ's understanding of recent case law is that the terms of avoid, remedy and mitigate are of equal importance and have been held by case law to be conjunctive. Which term is given emphasis will depend on the factual situation. However, this is clearly not the intent of Policy 5 which not only lays out a hierarchy of avoidance, remediation and mitigation, but adds a fourth effects-management option to the preceding three, of offsetting. On the face of it, the hierarchy appears to over-ride section 5 of the Act where it states that the purpose of the Act is to promote sustainable management while:

“ ...avoiding, remedying, or mitigating any adverse effects on the environment.”²

The draft NPS therefore appears to expand the understood definition of section 5 of the Act by regulatory fiat. Interpreting section 5 of the Act in such a manner is inappropriate and possibly *ultra vires*;

- (b) the requirement to use offsets: not only is the use of offsets being presented as the fourth effects-management option in a hierarchy, but they are also presented as the *only* alternative mechanism once an effect cannot be avoided, remedied or mitigated. In being so treated, it excludes other types of environmental compensation such as the transfer of land to public ownership, covenants protecting significant areas or the provision of walkways and public access. This elevation would also appear to be inconsistent with the purpose of the Act and inconsistent with the intent of the draft NPS as the term “maintenance” is defined as:

“'no net loss' as achieved by the protection of.....as may be required through biodiversity offsets *or other initiatives*.”³
(emphasis added)

In addition, there would appear to be some very real practical issues associated with the stipulation to use offsets for any residual adverse effects that are more than minor. For example:

- i. Schedule 2 states the offset design will demonstrate that:

“a conservation gains have been predicted without the offset project (“without-offset”) and with the

² Resource Management Act 1991, section 5(2)(c).

³ Draft NPS, Section Three, Interpretation, page 2.

offset, and on this basis, evidence is provided to show that the anticipated conservation outcomes would not have occurred without the offset.”⁴

However, there is no guidance as to how the anticipated gains will be valued. Each local authority is responsible for establishing its own methodologies and if past practice is a guide to the future, this is more likely than not to result in a multiplicity of approaches and inconsistent outcomes;

- ii. the absence of a robust, measureable and transparent biodiversity offsetting mechanism that provides best-practice methodologies and high quality assurance suggests that its use as a statutory mechanism is premature. As noted by the Department of Conservation in the Cabinet committee paper:

“ ... offsetting as an approach to biodiversity management is in its infancy and it may be premature to address offsetting in statutory policy. In the Department’s view it would therefore be preferable to put the National Policy Statement framework in place now, with a review time-tabled to add policies on offsetting after the [previously mentioned research programme] of work has been completed.”⁵

- iii. offsetting is unlikely to be appropriate in all circumstances. Even if measurement problems can be overcome and offsetting was theoretically possible, in some circumstances the nature of the proposed activity may simply not be amenable to the use of offsets, for example, land reclamations, land drainage or stream redirections.

BusinessNZ believes the stipulation to use offsets to be unnecessary to achieve the outcomes sought from the draft NPS and should be removed. This also has implications for those parts of the draft NPS in which the term ‘maintenance’ is used (for example, the objective and policies 1 and 6);

- (c) the ‘no net loss’ approach: the reliance on the use of offsets as a tool appears to be driven by the desire to achieve the outcome of a ‘no net loss’. This is defined as meaning “no overall

⁴ Draft NPS, Schedule 2: Principles to be applied when considering a biodiversity offset, page 1.

⁵ Minister for the Environment paper to the Cabinet Economic Growth and Infrastructure Committee entitled ‘Proposed National Policy Statement on Indigenous Biodiversity: Proposal to Release for Public Consultation, page 11, paragraph 70.

reduction in...” (in other words, neither a loss nor a gain) and is intended to be the result of hierarchy set out in policy 5. However, two issues emerge with respect to the use of this concept:

- i. key elements of the draft NPS appears to extend the idea of no net loss or reduction to that of a gain. For example, the definition of “biodiversity offset” states that:

“The goal of biodiversity offsets is to achieve no net loss *and preferably a net gain* of biodiversity”

Paragraph one states:

“...which can reasonably be expected to result in no net loss *and preferably a net gain* of biodiversity.”

and paragraph two states:

“A biodiversity offset should achieve conservation outcomes *above and beyond results* that would have occurred.....”

(emphases added)

There is no mention of a net gain in biodiversity in the definition of “no net loss”; and

- ii. its use risks extending the ambit of the Act. The first limb of section 5(2) is:

“...managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety.”

From this it is clear to see that the Act is not intended to be a no-effects statute, nor one at which the environment is to be protected at any cost. Instead, the Act’s central tenet is the sustainable management of natural and physical resources. But the draft NPS makes no mention of sustainable management and in doing so, appears to extend the interpretation of the purpose of the Act from managing effects to ‘doing no harm’ – a substantial leap, and one not likely to have been intended by Parliament. In doing so, the draft NPS requirement of ‘no net loss’ will reduce the likelihood of appropriate development with positive social, economic and cultural benefits that would, but for the draft NPS, otherwise achieve sustainable development.

2. the creation of investment uncertainty. BusinessNZ notes that the Preamble to the draft NPS states that one of the difficulties in local authorities in delivering its previously enhanced role in biodiversity protection was that:

“areas and habitats of indigenous species occur on private land and there can be tensions between the aspirations of private landowners for land use and development and the need to protect those areas habitats”⁶

The fact that the proposed NPS will give local authorities clarity as to their role and as a result, businesses more certainty about this particular aspect of environmental policy so that they can plan and invest accordingly, is given some prominence. Unfortunately, BusinessNZ considers it naive to believe that the NPS as drafted will diminish these tensions. If anything, it is likely to exacerbate them.

The draft NPS gives rise to an unquantified and open-ended financial liability for private land-owners. Specifically, the:

- (a) vague wording of the draft NPS (for example, what does “important” mean in the context of policy 1);
- (b) uncertainty created by the as-yet identified areas of naturally uncommon ecosystem types as listed in Schedule 1 (for example, where will these areas be precisely and what future economic activities will they affect); and
- (c) potential duration of the outcomes sought (for example, the expectation of long-term outcomes *preferably in perpetuity* over which timeframe is would be extremely difficult to maintain an unbroken chain of responsibility)

is not conducive to stable, and predictable long-term policy environment. Businesses rarely act without a clear understanding of costs, risks and benefits. If market uncertainties grow too large, it is difficult for businesses to justify major investment. Businesses who are reliant on the use of land and their associated natural resources (for example, electricity generators, miners, and infrastructure developers) will, as a result of the draft NPS now face a more, not less uncertain future regarding the application of the NPS and its reach. The likely effect of such uncertainty is to increase the risk-adjusted rate of return required on future investments, with a chilling effect on project development at a time when the economy is at its most fragile.

Business understands that even under the best of circumstances, perfect certainty is not a realistic outcome. Predictability is a much more reasonable expectation. For an increased likelihood that the draft

⁶ Draft NPS, Preamble.

NPS attains sustainable management outcomes, business needs clarity not unpredictability of operational settings.

A well considered NPS can both inform and make environmental commitments more credible to long-term investors in energy, infrastructure and industry, by providing more detailed information on how the outcome will be achieved. A well informed NPS can also provide a more fruitful avenue for business to inform and gauge central and local government's expectations, resulting in greater clarity on investment requirements and policy implications for growth, competitiveness and jobs. However, the reverse is equally applicable;

3. the cost-benefit analysis is grossly inadequate. Good public policy demands justification of the new environmental regulation in terms of its net benefit to New Zealand-inc. At a minimum, in order to be assured of the underlying quality of the proposed regulation, BusinessNZ expected a comprehensive regulatory-impact statement that included a robust cost-benefit analysis. This is not evident. Indeed, the Regulatory Impact Statement notes that:

“we have not been able to accurately estimate the potential costs and benefits of the proposed National Policy Statement (NPS) or the alternative options”⁷

More specifically, what limited effort has been expended upon the assessment of costs and benefits focuses on the costs to central and local government, with no regard to the potential economic costs being imposed on private land-owners (or the benefits for that matter). It is unclear, therefore, how the Minister was able to attest that the regulatory proposals recommended in the Cabinet committee paper:

“ ... will deliver the highest net benefits for the practical options available”⁸

4. there is inequitable treatment between the private and public estates for which there appears to be no good public policy reason. It is interesting to note the comment in the Regulatory Impact Statement that:

“Both MAF and MFish questioned why the draft NPS excluded public conservation estate, and MAF suggested that there may be perceived equity issues around this.”⁹

While this is undoubtedly true (there *is* unequal treatment), BusinessNZ can see no economic (as opposed to equity) rationale for this disparate

⁷ Regulatory Impact Statement: Overview of Required Information, page 1.

⁸ Minister for the Environment paper to the Cabinet Economic Growth and Infrastructure Committee, *ibid*, page 12, paragraph 76.

⁹ Regulatory Impact Statement, *ibid*, page 8

treatment either. Respective size of land-holdings is irrelevant. Disparate treatment would only be economically justified if either:

(a) the public land gave rise to some indigenous biodiversity positive externality for which the imposition of a cost on private land owners was appropriate (this is unlikely);

or

(b) the Crown is already bearing the cost of the management of the indigenous biodiversity in a manner consistent with the costs that are expected to be imposed on private land owners as a result of the draft NPS (this too seems unlikely, as if this was the case, officials would have been able to make an estimate of the costs for inclusion in their cost-benefit analysis).

Unfortunately, in the absence of more information, the perception one is left with is that of the Government simply wanting to limit any additional costs from being imposed on the Crown as a result of the application of the draft NPS during fiscally difficult times, while doing exactly that with respect to the private sector;

5. the net effect of the draft NPS is the probable derogation of private property rights for which no compensation is proposed. The implications of the draft NPS on private property owners could be significant as future returns are diminished, particularly for those who cannot afford to offset impacts on biodiversity, where this is stringently applied by a local authority. Economic activity would be dampened as a result.

The Government has recently agreed to proceed with a Regulatory Standards Bill. The purpose of this Bill is to establish a set of principles of responsible regulation, or good law-making. BusinessNZ considers this draft NPS would likely fall foul of the requirements of this Bill, in particular, of the third principle set out in Part 2 of the Bill (Principles of responsible regulation and their effect):

7 Principles

- (1) The principles of responsible regulation are that, except as provided in **subsection (2)**, legislation should—

Rule of law

(a)

Liberties

(b)

Taking of property

- (c) not take or impair, or authorise the taking or impairment of, property without the consent of the owner unless—

- (i) the taking or impairment is necessary in the public interest; and
- (ii) full compensation for the taking or impairment is provided to the owner; and
- (iii) that compensation is provided, to the extent practicable, by or on behalf of the persons who obtain the benefit of the taking or impairment:

The economic significance of the draft NPS is such that it warrants being required to meet such a stringent standard of quality and associated requirements, as intended in the Bill; and

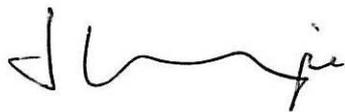
6. BusinessNZ is particularly concerned about how to prevent 'scope creep'. In other words, the management of the risk of local authorities being overly conservative in their efforts to protect indigenous biodiversity. For this reason, BusinessNZ strongly supports the development of a programme for monitoring the implementation and effect of the NPS and for its implementation at the same time as the NPS takes effect. BusinessNZ also supports the suggestion that an accompanying National Environmental Standard also be developed alongside the NPS.

Summary

The draft NPS is likely to have a significant impact on many businesses whose operations involve the use of land and associated natural resources. While the protection of New Zealand's unique biodiversity is appropriate, it should not be done in a cavalier manner in which private property rights are trammelled with a concomitant chilling effect on future investment opportunities.

If costly and unnecessary litigation is to be avoided, substantial improvements to the draft NPS need to be made. BusinessNZ is happy to assist in this regard and we look forward to working co-operatively with the Ministry for the Environment in achieving this outcome.

Yours sincerely



John A Carnegie
Manager, Energy, Environment and Infrastructure
BusinessNZ

APPENDIX ONE: ABOUT BUSINESSNZ

Encompassing four regional business organisations (Employers' & Manufacturers' Association (Northern), Employers' Chamber of Commerce Central, Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association), BusinessNZ is New Zealand's largest business advocacy body. Together with its 70 strong Major Companies Group, and the 70-member Affiliated Industries Group (AIG), which comprises most of New Zealand's national industry associations, BusinessNZ is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, Business NZ contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.

BusinessNZ's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services). It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.