

Submission

To the

Ministry for the Environment

On

“Proposed National Policy Statement on Indigenous Biodiversity

(released on 29 January 2011)”

INTRODUCTION

1. Straterra Inc was formed in 2008 to be a collective voice for the New Zealand resource sector. Its membership represents 84% by value of New Zealand minerals production (excluding oil & gas, and geothermal), as well as exploration, research, service and support. Straterra works closely with the petroleum sector and has links to the geothermal sector.
2. The resource sector makes a significant contribution to the New Zealand economy. Oil, gas, coal, gold, aggregates and other minerals contributed \$2.15 billion to GDP in 2008, compared to the wine industry (\$0.45bn), and tourism (\$6.66bn). Resource exports in 2009 earned \$3.6bn (8.2% of total goods exports) while dairy in that year was \$10.0bn, and overseas tourism, \$9.3bn. In 2009 there were 6800 people employed directly in mining, and 8000, indirectly, flowing from the economic activity of the 6800. The median wage for a mining employee was \$57,320 in 2008, compared to the New Zealand median of \$33,530.
3. Compared to the wealth generated, mining has a relatively small footprint, occupying 0.016% or 4000 ha of New Zealand’s land area. Most of this area is occupied by quarries, most of which produce aggregate for roading and construction.
4. As a general rule, mining as well as geothermal development are approved under the Resource Management Act 1991 subject to consent conditions covering discharge to air and water, noise, dust, effects on indigenous biodiversity, and proposals to manage the foregoing. The proposed National Policy Statement on Indigenous Biodiversity is highly relevant in this context.
5. Currently mining is carried out in tandem with biodiversity management activities including replanting of disturbed areas with native vegetation (e.g. Macraes, East Otago), riparian plantings and endangered native species conservation (e.g. Martha mine, Waihi), removal and replacement of intact habitat and pest control over a much larger area than the footprint of

development (e.g. Cypress extension to the Stockton mine). The last example fulfils much of the requirements of a biodiversity offset, which is a prominent policy tool in the proposed NPS. Many mining companies are committed to having a net positive impact on the environment as a result of their activities.

6. Straterra welcomes the opportunity to submit on the proposed NPS (including the accompanying section 32 report). We do so from the perspective that resource management decisions must strive for an appropriate balance between economic, social and environmental objectives, and be based on good information, and that the New Zealand resource sector may legitimately expect to be treated fairly, find clarity in legislation and regulations, and to find certainty of process and in the rules to be followed, or in the absence of that, certainty in being able to discover them. This is necessary for upholding the rule of law and promoting New Zealand's attractiveness for investment. Our main concern is that the NPS as written will fail to be consistent with the sustainable management purpose of the RMA.

KEY ISSUES

7. The proposed NPS is fine in its intent but is unlikely to achieve its objective relating to the "reasonable use of land" for the following key reasons:
 - a. The criteria in Policy 2 for identifying significant vegetation and species are unlikely to be accurate on the ground;
 - b. Forcing councils to set aside areas as significant in plans within five years of the NPS taking effect could lead to errors (Policy 4). That could cause unnecessary distress to land owners and businesses who may have to resort to court or other action to clarify the status of land at their expense;
 - c. Having biodiversity offsets as the only tool for mitigating the residual effects of development in significant areas is overly restrictive given there is no such scheme and a cost-effective one may never be developed for all circumstances (Policy 5). The opportunity to use alternative tools, e.g. negotiated agreements, compensation is has been missed;
 - d. Appropriate development could be unnecessarily prevented in significant areas, with less biodiversity conservation occurring than would otherwise occur.

DISCUSSION

8. The proposal for the NPS is generally supported. As a concept, it is consistent with and reinforces the intent of the RMA, in particular, Part 2 of that Act. It is intended as statutory guidance for councils when exercising their function of maintaining indigenous biodiversity and that is appropriate. The NPS' Objective reinforces the sustainable management purpose of the RMA in providing for "reasonable use of land".
9. That said, Straterra has major concerns over the proposed NPS, as written, and makes recommendations for improvement, which are aimed at ensuring there is appropriate balance, as our economic, social and environmental objectives are considered.
10. The key concern is around significance - the proposed approach to identifying, protecting, and managing effects on, areas containing significant indigenous vegetation and/or habitats containing significant indigenous species (section 6 (c) of the RMA).
11. The key issues are: Policy 2 provides a set of "criteria" for identifying significance; Policy 3 provides for the criteria to be used in writing regional policy statements; Policy 4 requires areas of significance to be identified and protected in regional and district plans, within five years of the NPS taking effect; and Policy 5 provides for "biodiversity offsets" as the sole tool for managing the effects of development in significant areas.
12. Straterra's view is that this approach carries significant risks to legitimate and appropriate business development, and could stymie investment in exploring for and developing resources. The objective of maintaining biodiversity may be met at the expense of not achieving "reasonable use of land", inadvertently or otherwise. The following scenario could occur.
13. A hypothetical council uses the Policy 2 criteria to identify and protect in its district or regional plan, under Policy 4, areas deemed to be significant. The council does a suboptimal job because of several barriers:
 - The criteria provide for no more than a broad-brush desktop analysis, which is unlikely to be accurate on the ground;
 - The criteria are poorly worded (accepting this can be easily fixed);
 - The cost of ground-truthing determinations of significance - and non-significance - may be prohibitive, as it would require detailed surveying at district or regional scale;
 - Only five years have been set aside for this work to be done.

Areas could be designated in plans as significant (or even “vulnerable” or “irreplaceable”), when, in fact, they are not significant or vulnerable or irreplaceable. Public consultation during plan development may shed little light on the matter because the public will typically be no better informed than the council. (Ironically, for many areas, the only occasion when sufficient information may be available in a particular area is when an assessment is done for a potential new mine or other development – refer to paragraphs 23 and 24.) The burden of establishing the real situation in terms of designations in plans may fall on land owners and businesses, potentially through the courts. The terms, vulnerable and irreplaceable, create further uncertainty because they are undefined, raising the prospect of further court action to have their meanings determined.

14. A mining company then wishes to apply to develop a resource at the site in question. It may be wrongly prevented from doing so because the site has been erroneously determined to be vulnerable or irreplaceable. Alternatively, the company faces increased and unnecessary costs of applying for consents because of the site’s erroneous status, or to resolve its status, and these could include the costs of litigation.
15. After then taking “appropriate actions” – also undefined - to avoid, remedy and mitigate effects on site, there is only one tool available for mitigating residual effects, which is the biodiversity offset. Unfortunately, there is no biodiversity offset scheme in New Zealand, and there may never be one – the jury is out on this issue. The development would be prevented on that basis, with no discussion of how effects could be managed. Even if and when a scheme were developed, it is likely that such an approach will not be suitable, or appropriate, in all cases.
16. If the above scenario is played out, development would occur in New Zealand in a less than efficient way, which would be an unnecessary and undesirable outcome of the NPS. As well, opportunities for new biodiversity conservation, funded by businesses, may be missed.
17. Further clarification of the issues, and proposed solutions, is provided in the following sections.

Policies 2, 3 and 4

18. The criteria in Policy 2 (a) – (e) are high level, and poorly worded. An area could be identified as significant when it is, in fact, a paddock with a single native tree in it. Schedule 1 could be read to mean that every shingle beach in New Zealand is a significant shingle beach. A tailings dam at a mine that attracts endangered birds to nest on newly disturbed material could be designated as significant. We understand officials are already aware of these issues. We understand that the

Landcare Research web site specifies sites where naturally uncommon ecosystems occur, to underpin Schedule 1.

19. The term “criteria” ignores the context in which Policy 2 (a) – (e) was originally intended to be implemented. That was drawn from the Statement of National Priorities for Protecting Rare and Threatened Native Biodiversity on Private Land 2007, in which the material is listed - appropriately, Straterra believes - as “priorities” for councils to consider when focusing their efforts. A background note is attached as Appendix 1.
20. Even if the wording is ironed out, and even if councils are required to ground-truth at sites every determination made, in light of the broad-brush nature of the criteria, many issues remain.
21. Giving councils only five years to implement Policy 4 could lead them, through no fault of their own, to doing a less than adequate job of designating areas in plans as significant. There may be high costs in some cases to ground-truthing the desktop analysis, to avoid two potential errors: wrongly identifying areas as significant when they are not; and failing to identify areas which should be regarded as significant. Councils are unlikely to have the money for the detailed survey work at district or regional scale, within the five-year time frame. For the same reason of cost, the Department of Conservation has not fully surveyed the ecological values on the land it administers.
22. Quality assurance of ground-truthing could be an issue. Presumably it would be independently peer reviewed, an additional cost. The ability of the public to challenge or improve on council proposals may be limited because the public will not always have better access to information, peer reviewed or otherwise, than councils. Councils would have a tacit incentive to shift the burden of quality assurance to those most affected by planning decisions, namely, land owners and businesses. The matter of whether a site is significant or not may end up being resolved through the courts.
23. The section 32 report is light on these risks and misses the point. The issue is not about the precise application of criteria; it is about whether the criteria and the methodology are any good or appropriate or useful. Nor was any analysis provided of the *quality* of efforts made to date by councils to implement their obligations towards biodiversity under the RMA. Further comments on the section 32 report are provided in Appendix 2.
24. Straterra believes it would make more sense for councils to investigate the issue of significance only when considering specific proposals, e.g. under permitted activity rules or RMA consent applications. It is at this stage, and only at this stage, that adequate information would be

available on all of the issues - economic, social and environmental. The various stakeholders would be able to participate in RMA processes to best advantage, as would the decision-makers.

25. This approach would still provide for areas to be determined to be significant, or even vulnerable or irreplaceable (depending on definitions of these terms being produced). But these determinations would have been made in the most economically efficient way.

Policy 5

26. Biodiversity offsets are offered as the only tool for managing the effects of development in significant areas. However, no scheme exists as yet in New Zealand, and no workable scheme may ever be developed. Even if a scheme is developed, it may be unaffordable to implement in many cases. There is a risk of reduced economic efficiency from resource development, and of less biodiversity conservation than might otherwise have been achieved – a lose-lose outcome.
27. The area of biodiversity offsets is a rapidly developing field, as the section 32 report acknowledges (refer to Appendix 2 for more discussion). The Department of Conservation is leading a research & development programme in this field, with the support of the Ministry for the Environment, and several other agencies. One of the pilot projects is the Winstone Aggregates Hunua Quarry where five biodiversity offset methodologies are under trial.
28. It is, therefore, premature for Schedule 2 – and the definition of “no net loss” - to be worded in an overly restrictive way and potentially obsolete way. The emerging best-practice being developed by contractors to DOC provides for alternative approaches to biodiversity offsets, namely, negotiated agreements and financial compensation, in appropriate circumstances, when addressing residual effects. As well, this work is likely to supersede the concept of a biodiversity offset as presented in the NPS. For more information refer to: http://www.straterra.co.nz/uploads/files/presentation_-_graham_ussner.pdf
29. The NPS should, therefore, provide a framework for biodiversity offsets without specifying too narrowly what a biodiversity offset is or is not. Straterra suggests that DOC be approached to rewrite Schedule 2, to reflect the latest developments in the field, and to provide for further development.
30. That assignment could also iron out uncertainty over the use of several undefined terms in Schedule 2, such as “like for like or better”, “vulnerable”, “irreplaceable, and “in perpetuity”. There are other oddities to be resolved.

31. Under Policy 5 (b), the applicant is required to be “ensuring remediation” of adverse effects, yet, under (c), has the option of “ensuring mitigation” if adverse effects cannot be remedied. This contradictory formulation extends to (d). Schedule 2, principle 3, is worded in a very different way, introducing the undefined concept of “appropriate actions”, absent from Policy 5. We believe that term should be replaced with “reasonable actions” to enable discussion on practical measures for avoidance, remediation and mitigation on site.
32. This leads to the issue of avoidance of effects, under Policy 5 and Schedule 2, which is of particular relevance to the mining industry. A quarry can always be avoided, with the trade-off being a sharp increase in the price of aggregate from transport costs. The cost of gravel can more than double after being trucked 30km.
33. A sensible approach to avoidance would take into proper account both the economic and the environmental issues. As was discussed during informal engagement with officials, the Coastal Policy Statement 2010 provides wording under its Policy 6 (2) (c): “recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places”. A similar approach could be taken in this NPS.

Other matters

Application

34. The exclusion of public conservation land from the application of the NPS seems anomalous. There are some 56 mines and quarries on public conservation land, all of which are subject to RMA processes, as well as to the Crown Minerals Act 1991, and, indirectly, conservation legislation. There are around 85 operations, if the common marine and coastal area is included.
35. Consider also: that mines or quarries may abut or extend across more than one class of land; that much of public conservation land has been inadequately surveyed; and that biodiversity offsets or alternative off-site mitigation mechanisms could be applied over both public and private land. There is no compelling reason to exclude the application of the NPS from public conservation land; this is a national policy statement.
36. There is an overlap of jurisdiction between the Coastal Policy Statement and the NPS, which could lead to confusion, namely, the area of coastal land above the mean high water spring. Perhaps, the NPS should override the CPS for clarity.

37. During engagement with officials, there was discussion on whether or not the NPS dealt adequately with freshwater ecosystems (with the exception of wetlands). We believe it does and that no change is necessary.

Structure of the NPS

38. The Preamble contains content that should be shifted into the main text as its own section, for ease of reference and interpretation. This is the explanation that the NPS is subject to Part 2 of the RMA, and to be used as a “relevant consideration” when achieving the sustainable management purpose of the RMA.

39. The eight Policies are presumably mechanisms for achieving the Objective. For clarity, it would be useful to preface the Policies with a sentence explaining that this is the purpose of the Policies.

40. Officials have suggested it would be desirable for this NPS to have a similar look and feel to other NPSs. We do not agree. The overriding consideration is that this NPS should be fit for purpose.

Process

41. On the above, it appears the preparation of the proposed NPS and the section 32 report was rushed, arguing in favour of extending the process with a further round of public consultation, this time with formal hearings. There may be time to do this without penalty because the Government has said it would not finalise the NPS before formulating its response to Wai 262, the flora and fauna Treaty claim. That said, we are not unsupportive of the current process, and commend officials on the attention given to date to engagement with the resource sector.

RECOMMENDATIONS

42. Straterra provides the following recommendations to the Government, which it believes are essential for the NPS to achieve that part of its objective relating to “the reasonable use of land”:
- a) Note Straterra’s support, in principle, of a **national policy statement** for indigenous biodiversity; and further
 - b) Note Straterra’s support for the NPS’ **Objective**, particularly as it relates to the “reasonable use of land”;
 - c) Insert the word “*natural*” into the definition of **habitat** (Section 3. Interpretation) after “means the” and before “area or environment”, to avoid mines - which may create new habitat for endangered species - being identified as significant;
 - d) Insert into **Policy 2** the words “*guidance for the identification of*” after the words “regard the following as” and before the words “significant indigenous vegetation” in the 4th line of the first paragraph. This provides a logical connection with Rec. (g), and provides for the judicious application of Policy 2 (a) – (e);
 - e) Insert a paragraph at the beginning of **Schedule 1** to say: “*To avoid doubt, naturally uncommon ecosystems are those, and only those, where there is indigenous vegetation associated with each habitat listed in Schedule 1, and those sites are specified in the relevant data base on the Landcare Research web site.*”;
 - f) Insert the words “*indigenous vegetation associated with*” before the words “land environments” in **Policy 2 (d)**, to avoid isolated native trees in a field and the like being identified inappropriately as significant indigenous vegetation;
 - g) Insert a paragraph after **Policy 2 (a) - (e)** to say: “*In applying the guidance listed in Policy 2 (a) - (e), on-the-ground verification must be carried out at every site where a determination of significance or otherwise is to be made.*”;
 - h) Insert a requirement for independent peer review of work done under Rec. (g) by a national advisory panel or similar, noting that **Policy 2 (a) – (e)** by their nature are unlikely to be sufficiently accurate for use on their own;
 - i) Replace the word “criteria” in **Policy 3** with “*guidance*”. This provides for consistency of approach with Recs. (d) - (h);

- j) Provide for councils to set aside areas in plans (**Policy 4**) as significant (or vulnerable or irreplaceable), only in the context of considering specific proposals over part or all of those areas, and to provide consistency of approach with Recs. (d) – (i);
- k) Remove the requirement in **Policy 4** for councils to identify areas as significant within five years of the NPS taking effect, for consistency of approach with Rec. (j);
- l) Rewrite **Policy 5 (a) – (d)** for consistency with Schedule 2, principle 3;
- m) Define “vulnerability” and “irreplaceability” for the purposes of **Policy 5** (and Policy 2);
- n) Replace the title of **Schedule 2** with the following text: *“Principles to be applied when considering the management of effects of development on biodiversity”*. This is to provide for off-site mitigation tools other than biodiversity offsets;
- o) Rewrite **Schedule 2** to provide for: off-site mitigation tools other than biodiversity offsets, e.g. negotiated agreements and financial compensation; and to incorporate the latest results and thinking arising from the Department of Conservation’s research into and development of biodiversity offsets, and to provide for further development of that work;
- p) Amend **Schedule 2, principle 3**, by inserting the following text: *“In determining an appropriate level of avoidance, it is recognised there are activities that have a functional need to be located at particular sites, for example, quarries.”* This is to avoid development proposals in significant areas being declined, without any consideration of proposals for managing residual effects;
- q) Replace in **Schedule 2, principle 3**, the term “appropriate actions” with “reasonable actions” to enable a discussion on practical measures for avoidance, remediation and mitigation at sites;
- r) Delete the definition of “no net loss” (Section 3. Interpretation) to take into account the progress being made by the Department of Conservation in developing and implementing biodiversity offsets and other off-site mitigation tools in New Zealand, and for consistency with Rec. (o);
- s) Replace the first paragraph within the section, “4. Application”, with the following text: *“This national policy statement applies to all land in New Zealand above the mean high water spring.”* This is because RMA consents are also required on **public conservation land**, and because development applications on private land or proposals for biodiversity offsets may abut or extend into public conservation land;

- t) Insert a paragraph in the section, “4. Application”, to say: *“To avoid doubt, within the area to which the Coastal Policy Statement 2010 applies above the mean high water spring, this national policy statement overrides the CPS.”* This will provide clarity when considering biodiversity issues in RMA consent processes in **coastal areas**;
- u) Remove the 2nd and 3rd to last paragraphs from the **Preamble** and insert a new heading, “4. Purpose”, with the following text: *“The purpose of this national policy statement is as set out in section 45 (1) of the Act. The national policy statement is not meant to be a substitute for, or prevail over, the Act’s statutory purpose or the statutory tests already in existence. The national policy statement is subject to Part 2 of the Act. For decision-makers under the Act, it is intended to be a relevant consideration to be weighed along with other considerations in achieving the sustainable management purpose of the Act.”* This is to place text where it logically belongs, which is in the main body of the NPS and not the Preamble;
- v) Under the heading, “**7. Policies**”, insert the following text: *“The policies described below are the mechanisms by which the objective of this national policy statement is to be met.”* This provides a connection between the objective and policies of the NPS;
- w) In light of: the complexity of the issues; the flaws and omissions in the proposed NPS and the section 32 report; and there being no immediate impetus to finalise the NPS, reconsider the **process** for developing the NPS, either by: (1) setting up a full board of inquiry to undertake formal hearings as per the normal process, or (2) considering a truncated process that would still provide for hearings, e.g. technical advisory group or an independent hearing by a High Court judge.

Thank you for the opportunity to provide a submission.

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APPENDIX 1: BACKGROUND NOTE

42. Feedback was invited on 29 January 2011 on the Government's proposed National Policy Statement for Indigenous Biodiversity. Consultation closes on 2 May. An extension to this deadline was sought on 2 May and obtained that day for the week to 6 May.
43. NPSs are statutory instruments under the Resource Management Act 1991, and their proposal and development are provided for in Part 5 of the Act. The only example of a working NPS is the Coastal Policy Statement 2010. NPSs on freshwater and on renewable energy are in development.
44. An NPS is intended to help the achievement of the purpose of the RMA which is "sustainable management" (s.5 (1)). This entails providing for social, economic and cultural wellbeing *while* (our emphasis) sustaining natural capital, safeguarding ecosystem services, and avoiding, remedying and mitigating adverse effects of activities (s.5 (2)).
45. Since 1991 there has been ongoing loss of native biodiversity on private land, for a range of reasons, among them, inadequate council attention to the issue. Amendments to the RMA in 2003 provided a requirement to councils for "maintaining indigenous biological diversity" (s.30 (1) (ga)) and for the "maintenance of indigenous biological diversity" (s.31 (1) (b) (iii)). This followed the release of the Government's Biodiversity Strategy in 2000, which called for "halting the decline" in New Zealand's native biodiversity.
46. Experience then showed that many councils lacked direction on how to exercise their newly-defined functions under the RMA. This led to further government attempts – the first having been made in 1999 - to develop an NPS on biodiversity, to provide that direction. The reasons for failure need not be dwelled on; suffice to say biodiversity is a complex area for regulation. The best that could then be done was to promulgate a non-statutory Statement of National Priorities for Protecting Rare and Threatened Native Biodiversity on Private Land in 2007.
47. This Statement list four national priorities for protection: habitats where less than 20% of original extent remains; wetlands and dune lands; originally rare ecosystems, e.g. in geothermal areas; and habitats of "acutely and chronically-threatened" species such as wrybill and geckos.
48. The Statement of National Priorities was subsequently underpinned by work done by the Ministry for the Environment and the Department of Conservation to provide lists of relevant places, habitats or ecosystems and species for councils to use when writing or reviewing plans.

49. Nonetheless, it was always envisaged the NPS proposal would be revisited. This was National Party policy before the 2008 election, and the Government is now acting on that intention. A new element is the inclusion in the current proposed NPS of the concept of biodiversity offsets.
50. International work on biodiversity offsets proceeded in earnest since 2004 when the IUCN and Insight Investment published a paper on this approach to managing effects of development on biodiversity. This work led to the Business for Biodiversity Offsets Program (BBOP), led by Forest Trends, a Washington DC-based NGO comprised of forestry, mining and other interests.
51. Among pilot projects being run under the auspices of BBOP is a project led by Solid Energy New Zealand, in partnership with DOC.
52. In 2009 DOC started a three-year research programme on biodiversity offsets, with government funding approved under the Cross-Departmental Research Programme (CDRP). In bidding successfully for the \$1.68 million, DOC obtained the support of MfE, as well as Land Information New Zealand, the then Ministry of Agriculture and Forestry, and the Ministry of Economic Development, with the Treasury having an arms-length interest. At the time of writing the BOP had a further 18 months to run, and includes a number of research contracts and engagement with industry. Straterra is among stakeholders engaging with DOC.
53. The proposed NPS is intended to guide councils in drafting plans that recognise and protect biodiversity values and in making decisions under the RMA about activities that may affect native biodiversity. Councils would “maintain indigenous biodiversity” by “promoting a nationally-consistent approach to biodiversity protection by clarifying the hierarchy that should apply to managing adverse effects and the policy of biodiversity offsets.”
54. The above objective of maintaining indigenous biodiversity is to be achieved via eight Policies, which are in summary:

Policy 1 – Protection of s.6 (c) habitat is important for maintaining biodiversity

Policy 2 – Definition of s.6 (c) habitat, based on Statement of National Priorities

Policy 3 - Apply Policy 2 to regional policy statements

Policy 4 – District and regional plans to identify areas of s.6 (c) habitat

Policy 5 – Manage effects on s.6 (c) habitat, only with biodiversity offsets

Policy 6 - Elsewhere, maintain biodiversity including with offsets

Policy 7 – Provide a role for tangata whenua as kaitiaki

Policy 8 – Consultation

55. Appended to the proposed NPS are: Schedule 1 which lists naturally uncommon ecosystems; and Schedule 2 which lists principles to be used when considering biodiversity offsets.

APPENDIX 2: SECTION 32 REPORT

56. Accompanying the proposed NPS is a s.32 report entitled: "Proposed National Policy Statement on Indigenous Biodiversity: Evaluation under section 32 of the Resource Management Act 1991". This is a requirement of the RMA, and relevant excerpts of s.32 are reproduced below (our italics):

Section 32: Consideration of alternatives, benefits, and costs

- (1) In achieving the purpose of this Act, before a national policy statement ... is notified under [section 48](#), or a regulation is made, *an evaluation must be carried out by—*
 - (a) the Minister, for a ... national policy statement ...
- (2) A further evaluation must also be made by—
 - (b) the relevant Minister before issuing a national policy statement ...
- (3) An evaluation *must examine—*
 - (a) the extent to which each objective is *the most appropriate way* to achieve the purpose of this Act; and
 - (b) whether, having regard to their *efficiency and effectiveness*, the policies, rules, or other methods are the most appropriate for achieving the objectives.
- (4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account—
 - (a) the *benefits and costs* of policies, rules, or other methods; and
 - (b) the *risk of acting or not acting if there is uncertain or insufficient information* about the subject matter of the policies, rules, or other methods.

57. The following comments are made in respect of Policies 2, 4 and 5, which are the key policies of interest and concern to the NZ resource sector, and should be read in conjunction with the main text of this submission. We make these comments to draw attention to what we believe to be deficiencies in the s.32 report.

Policies 2 and 4

58. The s.32 report misses the point when it says: "the effectiveness of the policy will also be determined by the ability of decision-makers to apply the criteria in a certain and precise manner." At issue is the *quality* of the criteria, not considered in the s.32 report.
59. The direction to councils to identify areas of significance, and set them aside for protection is glossed over in the s.32 report, which says: "Policy 4 does contain some flexibility by stating that identification is required where 'practical'". This is incorrect. Under Policy 4, plans "shall" identify areas of significance without exception, but may display information in maps and/or schedules if it is "practical" to do that.
60. The s.32 report's analysis of Policy 4 is flawed generally. The figure of 64% of councils already using maps and schedules says nothing about the quality of that material. It is therefore an irrelevant figure to use when seeking to justify the notion that councils will not face greatly

increased costs. Nor is the contention that 46 councils already use criteria similar to those of Policy 2 relevant when determining the efficiency of Policy 4. As argued, we believe the criteria in Policy 2 are inadequate on their own. More importantly, we have no clear idea of how good the criteria used by the 46 councils are, or how effectively they have been implemented.

Policy 5

61. The s.32 report argues that currently the decision-maker can either accept residual effects or decline the application, neither of which is “necessarily in the best interests of New Zealand”. Straterra agrees the two alternatives do not always lead to efficient outcomes. There are two other possibilities, not discussed in the s.32 report.
62. RMA case law provides for “environmental compensation”, including the notion of biodiversity offsets, as a way of addressing residual effects. The RMA process has provided for “side agreements”, or negotiated agreements, with affected parties such as DOC, and these have been commonplace.
63. The s.32 report argues – defectively, as explained - that formally offering the option of a biodiversity offset is a more effective policy than the status quo, and likely to promote greater economic efficiency. We do not agree, and we elaborate below.
64. Turning to the specifics of biodiversity offsets, the proposed NPS identifies what a biodiversity offset would entail, in Policy 5 and in Schedule 2:
 - a. “No net loss” of biodiversity would be a minimum requirement, after “appropriate” actions have been taken to avoid, remedy and mitigate adverse effects at the site of development;
 - b. “Vulnerable” and “irreplaceable” habitats could not be offset;
 - c. There are requirements for appropriate “measures/metrics” to assess an offset of “like for like or better” biodiversity;
 - d. “Temporal loss” between immediate effects on biodiversity at one site and the creation or enhancement over time of biodiversity elsewhere would need to be considered when “calculating loss/gain”, as would “uncertainty and risk”;
 - e. It would have to be shown that in their design offsets would avoid “displacing activities harmful to biodiversity to other locations”(leakage), and that they would need to show that “anticipated conservation outcomes would not have occurred without the offset”(additionality); and
 - f. Outcomes should last as long as the project’s impacts and preferably “in perpetuity”.

65. The terms we have highlighted with quotation marks are either undefined, or difficult to interpret, or there is no explanation of how their intent would be achieved in practice. While research is underway, led by the Department of Conservation, there is currently no workable biodiversity offset scheme in place in New Zealand. To date it is unknown whether these requirements could be met, in a workable or rational way.
66. This creates the risk that the extra costs imposed by the NPS would outweigh the benefits, i.e. that a company's inability to meet the costs of an unrealistic biodiversity offset requirement could cause its RMA consent application to fail, when there may have been alternative approaches to off-site mitigation that could have been explored, e.g. negotiated agreements and financial compensation.
67. The matter is considered at some length in the s.32 report. Biodiversity offsets are described as a "notion" and as a "concept". It is conceded that "its application is still developing, and it remains a field of continuing discussion amongst ecological professionals". It is also conceded that the effectiveness of Policy 5 would be enhanced if there was "greater certainty over when offsetting is, and is not, appropriate and what measures are appropriate offsets (and in what quantity/ratio relative to offsets)" and that "there is insufficient experience with biodiversity offsets for the policy to be able to offer that level of detail".
68. The above issues are brushed off in the s.32 report with the conclusion that "subsequent practice and experience will enable greater guidance to be given in the future either through amendment to the NPS or by way of non-statutory guidance".
69. In our view, the writers of the s.32 report are overly optimistic in their proposal for ensuring that biodiversity offsets are made to work in a rational way. Amendment of the NPS is not a realistic option on current form. It has taken more than a decade to get to this point with the proposed NPS. It took more than five years to review the Coastal Policy Statement. Non-statutory guidance is always a desirable option, if specifically provided for in the NPS.
70. The s.32 report contains no reference to the DOC-led Biodiversity Offsets Programme, which is surprising, considering this is evolving state-of-the-art research & development. We recommend the NPS incorporate the latest developments occurring under the BOP and for advice to be sought from the Department of Conservation to do that.