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Submission on Exposure Draft on the National Policy Statement for Indigenous Biodiversity

To the Ministry for the Environment

From the Electricity Networks Association

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1. Introduction

ENA represents the 27 electricity distribution businesses (EDBs) in New Zealand (see Appendix A) which provide local and regional electricity networks. EDBs operate lines, poles and wires which connect to the national grid and distribute electricity to consumers through their local networks to every region in New Zealand. The electricity system, and electricity distribution networks in particular, provide essential lifeline services to people and community in New Zealand. The safe, secure and efficient distribution of electricity is a critical component of a well-functioning urban environment. The electricity system is also critical to the transformation of New Zealand to a low-carbon economy.

ENA is pleased to have the opportunity to submit on the Exposure Draft of the National Policy Statement for Indigenous Biodiversity (NPS-IB). EDBs rely on robust planning provisions to protect and enable the distribution of electricity across regions. The nature and locational requirements of electricity distribution networks means that infrastructure is at times required to locate in areas with indigenous flora or fauna. The content of the NPS-IB therefore has implications for the construction, maintenance and upgrade of electricity distribution networks.

ENA is broadly supportive of the NPS-IB insofar as it seeks to protect, maintain and restore indigenous biodiversity under the Resource Management Act 1991 (RMA) but seeks amendments to ensure that the framework is workable from an infrastructure perspective and to ensure that perverse outcomes do not result.

This submission focuses on the key matters of interest for ENA with respect to the Exposure Draft. In particular, ENA wishes to ensure that the NPS-IB does not hinder the safe and efficient provision and functioning of the electricity distribution network, including in relation to the obligations on EDBs under the Electricity (Hazards from Trees) Regulations 2003 (the Tree Regs).

The ability to manage vegetation as prescribed by the Tree Regs is particularly important as New Zealand transitions to a decarbonised and electrified society. Cost effective and reliable supply of electricity, already of significant importance to consumers today, will be even more so as it becomes the primary way in which homes are heated and private vehicles powered. The NPS-IB has the potential to both enable or obstruct EDBs in delivering reliable and affordable electricity supply to consumers.

1.1. Locational requirements for electricity distribution networks and statutory obligations to cut and trim trees

EDBs are lifeline utilities under the Civil Defence and Emergency Management Act 2002 (CDEMA) because EDBs distribute electricity through a network to people and communities around New Zealand. EDBs are also approved requiring authorities pursuant to section 167 of the RMA.

While EDBs seek to manage adverse effects on indigenous flora and fauna as far as practicable, there are a number of other factors, such as safety to people and communities, which mean that adverse effects on local ecosystems and habitats cannot always be avoided. In particular:

- (a) The linear nature of electricity distribution infrastructure, combined with New Zealand's spread of urban development, means that electricity distribution networks at times need to traverse areas of indigenous biodiversity.

- (b) EDBs are required, pursuant to the Tree Regs, to manage trees which encroach a notice zone or growth limit zone in respect of a conductor. This involves giving notice to the tree owner of the requirement to cut or trim a tree. The Tree Regs impose penalties if a person issued with the cut or trim notice in relation to a tree fails to comply with the notice.

While the protection, maintenance and restoration of indigenous biodiversity is a key environmental objective, which ENA supports, this must be balanced against the functional and operational needs of electricity distributors, and safety of the public. Failure to properly manage these issues has the potential to seriously undermine the safety and ongoing operation of New Zealand's electricity system.

2. Identification of SNAs

The NPS-IB requires territorial authorities to identify Significant Natural Areas (SNAs) using the assessment criteria in Appendix 1. While ENA supports the inclusion of assessment criteria, it is important that this criteria be fit for purpose. In particular, it is important that the application of the criteria does not result in areas of land with low value for indigenous biodiversity being identified as SNAs.

ENA observes that the "rarity and distinctiveness" criteria, which is the presence of rare or distinctive indigenous taxa, habitats of indigenous fauna, indigenous vegetation or ecosystems does not require an assessment of the importance or value of a particular habitat for a particular Threatened and At Risk species. Rather, value or significance is assigned on presence / absence of habitat only. Given the strong directives in the NPS-IB to avoid adverse effects on SNAs, it is critical that habitat, which is assessed as having low indigenous biodiversity values are not identified as SNAs.

ENA considers that further work needs to be carried out (with input from ecologists) to consider the implications of the criteria, and to give careful consideration to whether the criteria functions as intended.

3. Management of Adverse Effects on SNAs

Clause 3.10 of the Exposure Draft requires local authorities to make or change their policy statements and plans to include objectives, policies and methods that require a range of adverse effects on SNAs to be avoided. Clause 3.11(2) however, provides an exception to the strong avoidance provisions for new specific infrastructure. If the exception applies, effects of new specific infrastructure will instead be managed by applying the effects management hierarchy.

3.1. Definition of specific infrastructure

"Specific infrastructure" is defined to include:

- (a) infrastructure that delivers a service operated by a lifeline utility (as defined in the Civil Defence Emergency Management Act 2002)

ENA supports the definition of "specific infrastructure" as EDBs are lifeline utilities pursuant to Schedule 1 of the CDEMA.

3.2. Exception for specific infrastructure

While ENA supports an exception to the strong avoidance provisions for specific infrastructure, in order to fall within the exception in clause 3.11(2) it must be proven that:

- (a) the new specific infrastructure provides a significant national or regional public benefit; and
- (b) there is a functional or operational need for the new specific infrastructure to be in that particular location; and
- (c) there are no practicable alternative locations for the development.

ENA considers that the thresholds in 3.11(2)(a), (b) and (c) set an unreasonably high bar for this exception because:

- (a) It is overly burdensome to require every specific infrastructure application to demonstrate that the infrastructure provides a significant national or regional public benefit. A service operated by a lifeline utility will, by its nature, provide a significant national or regional public benefit. However, requiring applicants to demonstrate this creates risk, particularly for smaller applications where the public benefit might be considered and assessed in isolation to the broader network.

It is important to recognise that the electricity system is a *system*, in which every element is required to deliver the outputs consumers expect. This includes individual customer connections which, when considered in isolation to the broader network, might not meet the national or regional public benefit threshold. However, these connections are critical to provide electricity (a lifeline service) to people and communities. In many respects, it is these smaller network connections that are most likely to impact areas with indigenous biodiversity values.

- (b) The requirement for there to be a functional or operational need and for there to be no practicable alternative locations for the new specific infrastructure is often incredibly challenging to demonstrate and burdensome for applicants.

While EDBs make every effort practicable to avoid effects on indigenous biodiversity when constructing new infrastructure, ultimately electricity distribution infrastructure needs to be located in the communities it serves. There is also a practical need to have distribution infrastructure located where it can be accessed easily to facilitate timely maintenance and repairs. ENA considers that the evidential burden required to demonstrate functional or operational need and that there are no practicable alternative locations in every application will impact on the cost of electricity for consumers and businesses, which may in turn slow or potentially prevent electrification of parts of the country. This will ultimately constrain New Zealand's ability to meet climate change objectives.

ENA seeks the following amendment to clause 3.11 to avoid perverse outcomes under the NPS-IB (amendments shown in blue underline and strikethrough):

3.11 Exceptions to clause 3.10

[...]

- (2) Clause 3.10(2) does not apply, and all adverse effects on an SNA must be managed instead in accordance with clause 3.10(3) and (4): if a new use or development is required for the purposes of

infrastructure that delivers a service operated by a lifeline utility (as defined in the Civil Defence Emergency Management Act 2002);

~~(2)~~ (3) Clause 3.10(2) does not apply, and all adverse effects on an SNA must be managed instead in accordance with clause 3.10(3) and (4):

(a) subject to clause 3.11(2), if a new use or development is required for the purposes of any of the following:

[...]

3.3. Existing activities affecting SNAs

EDBs have significant, long-standing distribution infrastructure across New Zealand. It is critical that this infrastructure can continue, and that EDBs can maintain and upgrade these assets as required to meet growing demand in regions and districts across New Zealand.

Clause 3.15(1) and (2) of the Exposure Draft require the identification of existing activities, or types of existing activities which may continue, provided that the effects on any SNAs (including cumulative effects):

- (a) Are no greater in intensity, scale, or character over time than at the commencement date; and
- (b) Do not result in the loss of extent or degradation of ecological integrity of the SNAs.

If the above conditions are not met, clause 3.15(3) requires that adverse effects be managed in accordance with clause 3.10 (the effects management hierarchy). While ENA supports the intention of this provision, amendments are required to ensure perverse outcomes do not result.

3.4. Definition of “existing activity”

The Exposure Draft of the NPS-IB defines “existing activity” as:

means a subdivision, use or development that is:

- (a) lawfully established at the commencement date, but
- (b) not a land use covered by section 10 of the Act.

The Exposure Draft then defines “new subdivision, use or development” as:

means a subdivision, use or development that is not an existing activity nor an activity captured by section 10 of the Act.

As drafted, neither definition captures authorised activities (either by a resource consent or approved designation) which have not yet been fully implemented. This is problematic when applied in the context of clause 3.15 which provides that “existing activities” can continue provided that the effects on any SNAs are no greater than at the commencement date and do not result in the loss or extent or degradation of ecological integrity of the SNA. If works authorised by a designation have not yet been fully implemented at the commencement date, it would be absurd if the requiring authority could not rely on that designation as authorising use of the land for the purpose it was obtained. If authorised but not yet fully implemented activities are excluded, this will have significant unintended consequences for the electrification of certain areas of New Zealand.

ENA seeks that the definition for "existing activities" be amended as follows (amendments shown in blue underline):

means a subdivision, use or development that is:

- (a) lawfully established or authorised at the commencement date, but
- (b) not a land use covered by section 10 of the Act.

3.5. Implementation problems with clause 3.15

The reality of clause 3.15(1) and (2) on their own is that existing electricity distribution infrastructure within SNAs would not be able to expand. While new clause 3.15(3) provides that if existing activities exceed the effects "cap", then adverse effects of the activity on the relevant SNA must be managed in accordance with clause 3.10, ENA does not consider this to be sufficiently certain or enabling of specific infrastructure. This is because if existing activities fall within one of the exceptions in clause 3.11, the direction 3.15(3) produces an internal contradiction.

ENA seeks the following amendments (in blue underline):

3.15 Existing activities affecting SNAs

[...]

- (3) If an existing activity does not meet the conditions described in subclause (2), the adverse effects of the activity on the relevant SNA must be managed in accordance with clauses 3.10 and 3.11 as applicable.

4. Fundamental Concepts, Objectives and Policies

4.1. Maintenance of indigenous biodiversity

The NPS-IB includes a description of the term "maintenance of biodiversity" in section 1.5. This is framed as a fundamental concept and sets the scene for the NPS-IB. "Maintenance of biodiversity" is described as follows:

The maintenance of indigenous biodiversity requires at least no reduction, as from the commencement date, in the following:

- (a) the size of populations of indigenous species:
- (b) indigenous species occupancy across their natural range:
- (c) the properties and function of ecosystems and habitats:
- (d) the full range and extent of ecosystems and habitats:
- (e) connectivity between, and buffering around, ecosystems:
- (f) the resilience and adaptability of ecosystems.

While ENA supports the maintenance of biodiversity as a fundamental concept in the NPS-IB, the requirement that there be "at least no reduction" in the matters (a) to (f) is highly directive and may have unintended consequences in practice. For example, requiring at least no reduction in the size of populations of indigenous biodiversity would mean that the loss of a single species member would be regarded as important against the policy framework (i.e., Policy 8). While no reduction is obviously the gold standard, the NPS-IB recognises that there are situations where adverse effects on indigenous biodiversity cannot be avoided in their entirety. This is particularly the case for specific infrastructure whereby effects are managed by applying the effects management hierarchy.

Similarly, requiring that there be no reduction in the occupancy of indigenous species across their natural range is overly restrictive and contains no concept of materiality. For example, this requirement could be read to mean that occupancy be preserved at every single location, even if the reduction has only a minor effect on indigenous biodiversity. Requiring no reduction in the full range and extent of ecosystems and habitats could also be read to require no reduction in the locations where indigenous flora and fauna may be found. Again, the NPS-IB recognises that there are situations where adverse effects on indigenous biodiversity cannot be avoided in their entirety.

ENA seeks that the description of "maintenance of biodiversity" in clause 1.5(3) be amended as follows (amendments shown in blue underline):

The maintenance of indigenous biodiversity requires at least no net reduction, as from the commencement date, in the following:

- (a) the size of populations of indigenous species:
- (b) indigenous species occupancy across their natural range:
- (c) the properties and function of ecosystems and habitats:
- (d) the full range and extent of ecosystems and habitats:
- (e) connectivity between, and buffering around, ecosystems:
- (f) the resilience and adaptability of ecosystems.

4.2. Adoption of a precautionary approach

Policy 3 provides:

A precautionary approach is adopted when considering adverse effects on indigenous biodiversity

ENA considers that to require that the precautionary approach be adopted in all situations would be overly restrictive. In particular, this requirement is inconsistent with clause 3.7 which requires that local authorities adopt a precautionary approach toward proposed activities where the effects on indigenous biodiversity are uncertain, unknown, or little understood, but where those potential effects are potential significantly adverse.

To provide clarity as to when the precautionary approach should be adopted, ENA seeks the following amendment to Policy 3 (amendments shown in blue underline):

A precautionary approach is adopted when considering adverse effects on indigenous biodiversity, where:

(a) the effects on indigenous biodiversity are uncertain, unknown, or little understood; but

(b) those effects are potentially significantly adverse.

4.3. Recognition of specific infrastructure in the policy framework

ENA considers that the policy framework of the NPS-IB should be strengthened to specifically provide for infrastructure and recognise the locational constraints of such infrastructure.

While Policy 10 seeks to recognise and provide for activities that contribute to New Zealand's social, economic, cultural and environmental well-being, this is expressed in general terms and does not specifically provide for essential infrastructure, such as electricity distribution infrastructure. Sustainable management cannot be achieved without enabling the necessary infrastructure to service communities and provide for their economic and social well-being.

The NPS-IB needs to clearly recognise and provide for the essential infrastructure to ensure that local authorities actively provide for essential infrastructure when undertaking planning within their regions and cities / districts. This will ensure the NPS-IB does not artificially constrain the infrastructure that is critical to well-functioning urban environments and meeting the broader economic and social needs of our communities.

5. Biodiversity Offsetting and Compensation

ENA broadly supports the inclusion of Appendices 3 and 4 (principles for biodiversity offsetting and compensation) and considers that these principles will assist in ensuring national consistency and certainty. However, there are a number of challenges with the way these appendices are framed which may have unintended consequences for applicants seeking to rely on biodiversity offsetting or compensation to manage adverse effects on SNAs.

5.1. Principles for biodiversity offsetting and compensation

In particular, Appendices 3 and 4 of the NPS-IB include the principles for biodiversity offsetting and biodiversity compensation. Both appendices state that the principles represent a standard for biodiversity offsetting / compensation and "must be complied with for an action to qualify" as a biodiversity offset / compensation. ENA considers that the requirement for all principles to be complied with in the NPS-IB before an action qualifies as an offset / compensation will have unintended consequences because there may be situations where not all principles are relevant, meaning that on a strict interpretation, an action does not comply with every principle.

This could have significant implications for infrastructure, given that offsetting and compensation are the final options for proposals to meet the effects management hierarchy.

ENA seeks that the NPS-IB be amended to reflect the approach in the Exposure Draft of the NPS-FM as follows (in blue underline and strikethrough):

Appendix 3: Principles for biodiversity offsetting

The following sets out a framework of principles for the use of biodiversity offsets. These principles apply to the use of biodiversity offsets if applied to manage the adverse effects of an activity. ~~represent a standard for biodiversity offsetting and must be complied with for an action to qualify as a biodiversity offset.~~

[...]

Appendix 4: Principles for biodiversity compensation

The following sets out a framework of principles for the use of biodiversity compensation. These principles apply to the use of biodiversity compensation if applied to manage the adverse effects of an activity. ~~represent a standard for biodiversity compensation and must be complied with for an action to qualify as biodiversity compensation.~~

[...]

ENA also seeks the following related changes to the definitions of "biodiversity offset" and "biodiversity compensation" (in blue underline):

biodiversity compensation means a conservation outcome that complies with the principles in Appendix 4, as appropriate, and [...]

biodiversity offset means a measurable conservation outcome that complies with the principles in Appendix 3, as appropriate, and results from actions that:

[...]

5.2. Use of the terms "irreplaceable", "irreplaceability" and "vulnerability"

Appendix 3, Principle 2 provides the following example of where a biodiversity offset would be inappropriate:

(a) residual adverse effects cannot be offset because of the irreplaceability or vulnerability of the indigenous biodiversity affected:

Similarly, Appendix 4, Principle 2 provides that biodiversity compensation would be inappropriate where:

(a) the indigenous biodiversity affected is irreplaceable or vulnerable.

The Exposure Draft does not contain definitions for either "irreplaceability" / "irreplaceable" or "vulnerable" and it is unclear what is meant by these terms. ENA considers that there is the potential for these terms to be interpreted broadly and inconsistently which would preclude offsetting and/or compensation in a large number of cases. Again, this could have significant implications given that offsetting and compensation are the final options for proposals to meet the effects management hierarchy.

ENA seeks that definitions be added to the NPS-IB for "irreplaceability", "irreplaceable" and "vulnerable".

5.3. Appendix 3: Principles for biodiversity offsetting

Principle 3 of Appendix 3 (Principles for biodiversity offsetting) to the NPS-IB provides:

Net gain: the biodiversity values to be lost through the activity to which the offset applies are counterbalanced and exceeded by the proposed offsetting activity, so that the result is a net gain when compared to that lost. Net gain is demonstrated by a like-for-like quantitative loss / gain calculation of the following, and is achieved when the ecological values at the offset site exceeded those being lost at the impact site across indigenous biodiversity:

- (a) types of indigenous biodiversity, including when indigenous species depend on introduced species for their persistence;
- (b) amount; and
- (c) condition.

ENA has concerns that if the term "like for like" is interpreted in the extreme, it could be that an offset can never be achieved for a particular ecosystem or habitat type. Habitat types include multiple features (attributes) that cannot all be replaced in exactly the same manner and configuration. Further, the requirement for net gain to be demonstrated by a like for like "quantitative" loss/gain calculation adds further uncertainty. Quantitative offset models cannot be applied to most biodiversity values at the consenting or plan change stage of a project and so are of little use in determining whether a net gain offset is likely to be achieved.

Amendment requested

ENA therefore seeks the following amendment (in blue underline and strikethrough):

Net gain: the biodiversity values to be lost through the activity to which the offset applies are counterbalanced and exceeded by the proposed offsetting activity, so that the result is a net gain when compared to that lost. Net gain is demonstrated by a like-for-like quantitative loss / gain calculation of the following, and is achieved when the ecological values at the offset site exceeded those being lost at the impact site across indigenous biodiversity:

- (a) types of indigenous biodiversity, including when indigenous species depend on introduced species for their persistence;
- (b) amount; and
- (c) condition

For the purposes of this principle, "like-for-like loss / gain" means an offset that generates benefits to the same species, species assemblage, or ecosystem type that is impacted.

6. Relationship with other Acts / Regulations

ENA has serious concerns that the provisions of the NPS-IB may mean that tree owners / EDBs need consent to cut or trim trees encroaching the electricity distribution network. This is because trees encroaching the distribution network will not always be within the designated corridor and may be located on third party land. As set out above, the cutting or trimming of trees is a requirement of the Tree Regs and is necessary in order to protect the security of electricity supply and public safety.

This is potentially caught by clause 3.11(5)(a), however, that is not entirely certain.

Tree trimming activities are carried out routinely across the EDBs' networks every week. Accordingly, any consent requirement will have significant impacts on all EDBs, potentially triggering hundreds of consents for little if any ecological benefit. However, delays caused by widespread consenting requirements could result in a significant public safety risk, as well as impacts on the reliability of electricity supply.

Given the relevant effects will have been considered when the location of the relevant lines were confirmed, it is appropriate that routine tree trimming be provided for as a permitted activity under the NPS-IB, or alternatively that it be an exception to the provisions of the NPS-IB (allowing the activity to be controlled under the relevant district plan, as currently occurs).

Accordingly, ENA seeks that clause 3.11(5)(a) is amended as follows (in blue underline and strikethrough):

(5) Clause 3.10 does not apply to adverse effects on an SNA:

(a) from any use or development required to address a very high risk to public health or safety, including any activities required under the Electricity (Hazards from Trees) Regulations 2003 (or any subsequent version or replacement regulations of these); or

6.1. Alignment with other national direction and reform

MfE has recently consulted on proposed changes to the NPS-FM and National Environmental Standards for Freshwater. ENA observes that there are a number of inconsistencies between the Exposure Draft of the NPS-FM and the Exposure Draft of the NPS-IB. For example, similar to the NPS-FM, clause 3.17 of the NPS-IB replicates the definition of improved pasture. It is unclear as to why the NPS-IB includes this definition, particularly when the Exposure Draft of the NPS-FM seeks to change this definition. ENA considers that the NPS-FM and NPS-IB should have consistent application in this regard to ensure its provisions are robust and workable, and seeks that the NPS-IB replicate the new approach to improved pasture as amended through the NPS-FM.

7. Contact

The ENA's contact person for this submission is Richard Le Gros (richard@electricity.org.nz or 04 555 0076).

8. Appendix A

The Electricity Networks Association makes this submission along with the support of its members, listed below.

Alpine Energy
Aurora Energy
Buller Electricity
Centralines
Counties Energy
Eastland Network
Electra
EA Networks
Horizon Energy Distribution
Mainpower NZ
Marlborough Lines
Nelson Electricity
Network Tasman
Network Waitaki
Northpower
Orion New Zealand
Powerco
PowerNet
Scanpower
The Lines Company
Top Energy
Unison Networks
Vector
Waipa Networks
WEL Networks
Wellington Electricity Lines
Westpower