

BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2017] NZEnvC202

IN THE MATTER of the Resource Management Act 1991
AND of an application for a declaration pursuant
to s 310(h) and an application for an order
pursuant to s 86D of the Act
BY MACKENZIE DISTRICT COUNCIL
(ENV-2017-CHC-92)
Applicant

Court: Environment Judge J R Jackson

Hearing: In Chambers at Christchurch (sitting alone under section 279 of the
Act)

Date of Decision: 15 December 2017

Date of Issue: 15 December 2017

DECISION

- A: Under sections 310(h) and 313 of the Resource Management Act 1991 ("the Act"), the Environment Court declares that Rules 1.1 to 1.3 (inclusive) of Plan Change 18 have immediate legal effect within the Mackenzie Basin Subzone (upon notification) under sections 86B(1)(a) and (3) of the Act, to the extent they protect areas of significant indigenous vegetation or protect areas of significant habitats of indigenous fauna.
- B: Under sections 279(1) and 86D of the Act, the Environment Court orders that Rules 1.1 to 1.3 (inclusive) of Plan Change 18 have immediate legal effect upon notification within the Mackenzie Basin Subzone, to the extent they control vegetation clearance in areas of indigenous vegetation or habitats of indigenous fauna whether or not they are significant under section 6(c) of the Act.



- C: For the avoidance of doubt Rules 1.1 to 1.3 of PC18 – marked Appendix “A” and attached to and forming part of this Decision – have legal effect in the Mackenzie Basin Subzone on the date PC18 is notified.
- D: Costs are reserved.
- E: Leave is reserved for any person to apply, upon notice, to set aside all or part of any of orders A to C above.

REASONS

Introduction

[1] This application concerns rules 1.1 to 1.3 in Plan Change 18 (“PC18”) to the Mackenzie District Plan.

[2] On 11 December 2017 the Mackenzie District Council applied *ex parte* for:

- (a) a declaration under section 310(h) of the Resource Management Act 1991 (“the Act”) that Rules 1.1 to 1.3 (inclusive) of Plan Change 18 (“PC18”) have immediate legal effect upon notification within the Mackenzie Basin Subzone¹ pursuant to sections 86B(1)(a) and (3), to the extent they protect areas of significant indigenous vegetation or protect areas of significant habitats of indigenous fauna; and
- (b) an order under section 86D(2) of the Act that Rules 1.1 to 1.3 (inclusive) of PC18 have immediate legal effect upon notification within the Mackenzie Basin Subzone, to the extent they control vegetation clearance in areas of indigenous vegetation or habitats of indigenous fauna that are not significant under section 6(c) of the Act.

[3] The application for declaration and order (“the application”) was accompanied by the affidavit of Karina Anne Morrow in support, dated 12 December 2017 and a Memorandum of Counsel, dated 11 December 2017.

¹ Mackenzie Area Subzone is the area identified on Planning Map 61 of the Operative Mackenzie District Plan.



Grounds for the application

[4] The application is based on the following grounds² (by way of summary):

- (a) the vulnerability of the resources at issue;
- (b) the irreversible effects of clearance;
- (c) the strategic importance of the plan change;
- (d) a concern that notification may prompt an escalation in permitted clearance activity; and
- (e) a related concern that a gold rush will undermine both the intentions of the Plan review process for biodiversity values and the protections for landscape values put in place following resolution of PC13.

Consideration

Vulnerability and irreversibility

[5] The effect of PC18 will be to afford protection to significant areas and habitats that can currently be cleared as of right (subsequent to topdressing and oversowing or consequent on permitted standards)³.

[6] Despite the level of control resulting from PC13, the Council still perceives the Mackenzie Basin as an area of risk, with loopholes that could be exploited, to the detriment of the environment.⁴

Strategic importance

[7] Sections s6(c) and 31(1)(b)(iii) of the Act recognize the importance of maintaining biodiversity. This reinforces that PC18 is concerned with vulnerable resources that are of importance under the Act.⁵

[8] The matters of natural importance in s6(c) RMA is now particularised in the Canterbury Regional Policy Statement (“the RPS”). The RPS requires the protection of significant areas and habitats⁶, the halting of decline in biodiversity⁷ and attainment of “no net loss” of biodiversity where adverse effects are proposed to be brought upon areas

² Memorandum of Counsel, dated 11 December 2017 at [37].

³ Memorandum of Counsel, dated 11 December 2017 at [38]-[39].

⁴ Affidavit of K A Morrow, dated 12 December 2017, at [44].

⁵ The court agreed this was the case in the context of PC17 *Environmental Defence Society Incorporated v Mackenzie District Council* [2016] NZEnvC 253 at [57] and [58].

⁶ Canterbury Regional Policy Statement, Objective 9.2.3 and Policy 9.3.1.

⁷ Canterbury Regional Policy Statement, Objective 9.2.1.



or habitats of significance.⁸

[9] When the directives of the Act and the RPS are viewed with Ms Morrow's evidence, it is clear that managing the clearance of indigenous vegetation within the Mackenzie Basin Subzone is a matter of strategic importance.⁹

Preventing a Gold rush

[10] I accept that there is a potential for a gold rush within the Basin in respect of clearance. The findings of the court in decisions on PC 13 and PC 17 confirm the pressure for land conversion and, consequently, vegetation clearance.¹⁰

[11] In the *Palmerston North* decision¹¹ it was determined that the relevant question is not so much the speculative potential for there to be a rush but rather that if such a gold rush was to take place whether it would undermine the sustainable management of a vulnerable resource¹².

[12] In the context of the Mackenzie Basin, if a gold rush was to take place the proposed PC18 controls would be of diminished effect because the biodiversity will already have been lost or sanctioned for loss. Notification of the rules without legal effect would incentivize clearance to reduce the biodiversity values that remain to be assessed when a consent application for pastoral Intensification or Agricultural Conversion is made¹³.

Procedural fairness

[13] The Council's application is made on an *ex parte* basis. I accept counsel's submission that it is appropriate for the following reasons¹⁴:

- (a) whether notification is required is a statutory discretion and each case will turn on its own facts¹⁵;
- (b) Parliament must have contemplated that in the normal course of events applications pursuant to s86D will be determined by the court *ex parte*¹⁶;

⁸ Canterbury Regional Policy Statement, Policy 9.3.1(3).

⁹ Memorandum of Counsel, dated 11 December 2017, at [42].

¹⁰ Memorandum of Counsel, dated 11 December 2017, at [44].

¹¹ *Re Palmerston North City Council* [2015] NZEnvC 27 at [22] and [23].

¹² *Re Palmerston North City Council* [2015] NZEnvC 27 at [31]-[33].

¹³ Memorandum of Counsel, dated 11 December 2017, at [47].

¹⁴ Memorandum of Counsel, dated 11 December 2017, at [50].

¹⁵ *Environmental Defence Society Incorporated v Mackenzie District Council* [2016] NZEnvC 253 at [28].

¹⁶ *Re New Plymouth District Council* [2011] NZEnvC 8 at [35].



- (c) to notify the applications would invariably lead to substantial delay¹⁷ and see a reversion to the pre-PC17 rules for clearance of certain vegetation within the Basin. This would significantly diminish the worth of immediate effect having been given to PC17 which was issued in expectation of new rules coming into effect by 24 December 2017;
- (d) delay could defeat the Parliamentary purpose in allowing councils to make applications for direct referrals and the purpose of s86B(3) in the circumstances of the Basin¹⁸;
- (e) inviting wider participation could lead to premature consideration of issues best considered as part of the Schedule 1 process¹⁹;
- (f) the Council has widely consulted on the issues associated with indigenous vegetation clearance and so the public is aware the regulatory environment was about to change²⁰;
- (g) parties to the PC13 proceeding have been aware since the First Decision²¹ on PC13 (at least) that indigenous vegetation is important to both the landscape values of the Basin and biodiversity within the District;
- (h) no party to the PC17 proceeding could have expected a reversion to the status quo upon expiry of PC17²². I was advised that the PC17 proceedings were served on all parties to PC13, all station owners in the Mackenzie Basin and the holder of Certificates of Compliance for Pastoral Intensification;
- (i) PC17 only attracted 11 submissions – 1 in opposition and 10 in support (either fully or conditionally)²³;
- (j) the more focused consultation that occurred after the Issues and Options paper was released gave interested persons – particularly within the Basin – a clear signal as to Council's intention.

Outcome

[14] I consider the declaration and order should be made for the reasons given.

¹⁷ *Re Palmerston North City Council* [2015] NZEnvC 27 at [35]

¹⁸ *Environmental Defence Society Incorporated v Mackenzie District Council* [2016] NZEnvC 253 at [19], [20] and [66].

¹⁹ *Re New Plymouth District Council* [2011] NZEnvC 8 at [35].

²⁰ Affidavit of K A Morrow, dated 12 December 2017, at [81]-[94].

²¹ *High Country rosehip Orchards Ltd v MDC* [2011] NZEnvC 387 at [296], [297], [490] and Appendix A.

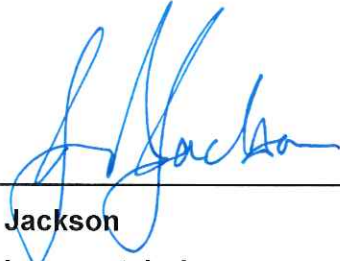
²² *Environmental Defence Society Incorporated v Mackenzie District Council* [2016] NZEnvC 253 at [66]-[68].

²³ Affidavit of K A Morrow, dated 12 December 2017, at [31].



[15] Leave will be reserved for any person affected to apply to set the orders aside²⁴.

For the court:



J R Jackson
Environment Judge



²⁴ *Re Dunedin City Council* [2015] NZEnvC 165 at [76].

APPENDIX A

RULES**INDIGENOUS VEGETATION CLEARANCE****1. Indigenous Vegetation Clearance excluding indigenous vegetation clearance associated with the Waitaki Power Scheme****1.1 Permitted Activities – Indigenous Vegetation Clearance**

1.1.1 Clearance of indigenous vegetation is a permitted activity provided the following conditions are met:

1. The clearance is for the purpose of maintenance or repair of existing fence lines, vehicle tracks, roads, firebreaks, drains, stockyards, farm buildings, water troughs or airstrips;
2. The clearance is of indigenous vegetation which has been planted and is managed specifically for the purpose of harvesting and subsequent replanting of plantation forest within 5 years of harvest;
3. The clearance is of the indigenous understorey to plantation forest, and is incidental to permitted or otherwise authorised plantation forest clearance;
4. The clearance is of indigenous vegetation which has been planted and/or is managed as part of a domestic garden or has been planted for amenity purposes or as a shelterbelt;
5. The clearance is essential for compliance with the Regional Pest Management Strategy;
6. The clearance is of indigenous vegetation within an area of improved pasture (refer Definitions);
7. The clearance is not within a Site of Natural Significance or on land above 900m in altitude;
8. The clearance is not within:
 - a) 100m of a lake
 - b) 20m of the bank of a river
 - c) 100m of an ecologically significant wetland
 - d) 50m of all other wetlands

1.2 Restricted Discretionary Activity – Indigenous Vegetation Clearance

1.2.1 Unless permitted under Rule 19.1 the clearance of indigenous vegetation clearance is a



restricted discretionary activity provided the following conditions are met:

1. The farm enterprise has a Farm Biodiversity Plan (see Definitions).
2. The clearance is not within a Site of Natural Significance or on land above 900m in altitude.
3. The clearance is not within:
 - a) 100m of a lake
 - b) 20m of the bank of a river
 - c) 100m of an ecologically significant wetland
 - d) 50m of all other wetlands

The Council will restrict its discretion to the following matters:

1. The quality of a Farm Biodiversity Plan, including whether the Farm Biodiversity Plan:
 - a) Achieves the purpose set out in in Appendix Y;
 - b) Adequately identifies the biodiversity values, and in particular significant indigenous vegetation or habitat of indigenous species using the criteria provided in Appendix 3 of the Canterbury Regional Policy Statement, and also identifies actual and potential threats to those values;
 - c) Includes methods that will adequately protect the significant biodiversity values identified; and
 - d) Includes appropriate monitoring and reporting methods to adequately protect the biodiversity values identified.
 2. Compliance with a Farm Biodiversity Plan
 - a) Whether the proposal achieves no net loss of indigenous biodiversity values identified as significant.
 - b) The actual or potential impacts on biodiversity or ecological values expected to occur as a result of the proposal, particularly the impact on significant values including the values significant to Ngāi Tahu.
 - c) The extent to which species diversity or habitat availability could be adversely impacted by the proposal.
 - d) Any potential for avoiding, remedying, mitigating or otherwise offsetting or compensating for adverse effects on significant indigenous vegetation and significant habitats of indigenous fauna.
 - e) Monitoring requirements including collection, recording and provision of information and how these can be adapted over time in response to information on the effectiveness of measures to avoid, remedy of mitigate adverse effects on indigenous biodiversity.
 - f) Conditions to ensure obligations in respect of biodiversity endure, including beyond any changes of ownership (wholly or partially) of the landholding and review of conditions.
 - g) The benefits that the activity provides to the local community and beyond.
- 1.2.2. Unless provided for in Rule 19.2.1 any indigenous vegetation clearance up to 5000m², within any site in any 5-year continuous period provided the following conditions are met:

1. The clearance is not within a Site of Natural Significance or on land above 900m in altitude.



2. The clearance is not within:
- a) 100m of a lake
 - b) 20m of the bank of a river
 - c) 100m of an ecologically significant wetland
 - d) 50m of all other wetlands

The Council will restrict its discretion to the following matters:

1. The actual or potential impacts on biodiversity or ecological values expected to occur as a result of the proposal, particularly the impact on significant values including the values significant to Ngāi Tahu.
 2. The extent to which species diversity or habitat availability could be adversely impacted by the proposal.
 3. Any potential for mitigation or offsetting of effects on ecosystems and biodiversity values.
 4. Any technical and operational constraints and route, site and method selection process.
4. The benefits that the activity provides to the local community and beyond.

1.3 Non-Complying Activity – Indigenous Vegetation Clearance

The following activities are Non-complying activities unless specified as a Permitted Activity, Restricted Discretionary Activity or Discretionary Activity:

1.3.1 Any indigenous vegetation clearance of more than 5000m² within any site in any 5-year continuous period.

1.3.2 Any indigenous vegetation clearance in the following location:

1. Within a Site of Natural Significance.
2. Above 900m in altitude.
3. Within 100m of a lake, 20m of the bank of a river, 100m of an ecologically significant wetland or 50m of all other wetlands

