

Plan Change 17 Decision

Decision of Commissioner Darryl Millar appointed by the Mackenzie District Council pursuant to the Resource Management Act 1991

- PROPOSAL:** Plan Change 17 – Vegetation Clearance – Temporary Suspension of Plan Provisions
- PROPOSAL:** Suspension of vegetation clearance exemptions available under rule 12.1.1.g (Short tussock grasslands) and 12.1.1.h (Indigenous cushion and mat vegetation and associated communities)
- HEARING DATE:** 8th June 2017

HEARING ATTENDEES

Mackenzie District Council

- Ms Patricia Harte – Planner

Submitters

- Ms Rosalie Snoyink (Mackenzie Guardians, A and M Hamblett, C Morris, S Hall and M Ralston)
- Ms Angela Johnston (Federated Farmers)
- Mr Tim Ensor (Department of Conservation)
- Mr Martin Murray (Maryburn Station)

Whilst not appearing, legal submissions were tabled on behalf of the Royal Forest and Bird Protection Society of New Zealand Incorporated.

INTRODUCTION

Introduction

1. The Mackenzie District Plan (the Plan) contains rules (12.1.1.g and 12.1.1.h) dealing with the clearance of indigenous vegetation within the rural areas of the Mackenzie Basin (the Basin). The rules, prior to the notification of PC17, included ‘exemption’ provisions that provided exclusions as follows:
 - *Rule 12.1.1.g*
Exemptions
This rule shall not apply to:
 - *Any short tussock grassland where the site has been oversown, and topdressed at least three times in the last 10 years prior to new clearance so that the inter-tussock vegetation is dominated by clovers and/or exotic grasses.*
 - *Rule 12.1.1.h*
Exemptions
This rule shall not apply to:
 - *Any indigenous cushion or mat vegetation where the site has been oversown, and topdressed at least three times in the last 10 years prior to new clearance so that the site is dominated by clovers and/or exotic grasses.*
2. The rules, as above, provided exemptions associated with pasture improvement that allowed for clearance of short tussock grasslands and indigenous cushion and mat

vegetation in certain circumstances. Ms Harte summarised this situation in paragraph 2.1 of the S42A report where it states:

“The exemption provides that the limit on the area of indigenous vegetation cleared as a permitted activity (40ha for short tussock and 10ha for cushion and mat vegetation) does not apply if oversowing and topdressing has occurred three times over a 10 year period and has resulted in the area being dominated by clovers and/or exotic grasses. In other words if this exemption relating to oversowing and topdressing is satisfied, then there is no limit on the area of indigenous vegetation that can be cleared as of right.”

3. PC17 suspends the application of the exemptions for a 12 month period ending 24th December 2017 by the insertion of the following additional text in the “exemptions” section of rules 12.1.1.g and 12.1.1.h:
“This exemption shall not apply within the period 14 December 2016 to 24 December 2017.”
4. The genesis of PC17 was in proceedings before the Environment Court initiated by the Environmental Defence Society (EDS), which had sought declarations as to the interpretation and legality of the two indigenous vegetation clearance rules. At the heart of the proceedings was a concern that the current (pre-PC17) provisions had enabled considerable clearance of indigenous vegetation that contributed significantly to the landscape and biodiversity values of the Basin.
5. The key purpose of PC17, therefore, is to establish interim provisions in the Plan which remove the exemptions and thus avoid the additional loss of such vegetation in the area. The suspension period would thereby provide the Council with an opportunity to prepare amended Plan provisions as part of the review of the District Plan. I shall return to this particular issue later in this decision, as it relates to submissions raised by the Director General of Conservation (and others)
6. PC17 was notified on 24th December 2016. An Environment Court Declaration under section 85B(3) of the Resource Management Act (the Act) and an Order under section 85D(2) specified that PC17 would have immediate effect upon notification.¹
7. The details of PC17 are contained in the plan change documentation itself, evidence and in the Council’s section 42A report.

Submissions

8. PC17 attracted 11 original submissions and further submissions. The majority of the original submissions supported the proposal in whole or part. The submitters offering ‘conditional’ support generally did so within the context of relief that sought an indefinite

¹ Environmental Defence Society Incorporated v Mackenzie District Council NZEnvC253

extension to the suspension (Department of Conservation), or sought confirmation that there would not be an extension to the timeframe (Federated Farmers). Those in opposition included Maryburn Station and further submitter Simon Pass Station.

9. A discussion on the submissions received and a commentary on the issues raised was included in Section 4 and Attachment C of Ms Harte's report. I have reviewed the submissions and Ms Harte's summary, and I am satisfied that the issues have been appropriately identified. Within this context I do not propose to repeat the summary or discuss each submission point in detail. Rather, I will discuss the relevant issues on a topic basis in the balance of this decision.

ISSUES AND FINDINGS

The Process to Date and the Environment Court Declaration and Order

10. During the Environment Court proceedings, the Council and EDS agreed to the temporary suspension of the exemptions by way of a plan change process. As part of this process the Council undertook consultation in terms of the requirements of clause 3(1) of Schedule 1 of the Act, rather than to a wider body of parties. The reason for this approach is outlined in paragraph 2.5 of Ms Harte's report.
11. When considering matters under sections 85B and 85D(2) of the Act, the Environment Court also considered matters that would be fundamental to the assessment of PC17. Ms Harte² summarised these as follows:
- *there was no expert debate i.e. no disagreement, about the importance of the flora and fauna under scrutiny and there was agreement that the area contained significant indigenous vegetation and significant habitats of indigenous fauna;*
 - *there was no dispute that station holders are increasingly seeking to carry out pastoral intensification and that the exemptions, if utilised, serve to permit vegetation clearance without any assessment of the significance of the vegetation or habitat or how the loss in biodiversity might be offset;*
 - *Dr S Walker on behalf of EDS, an ecologist specialising in conservation management of modified ecosystems on the dry eastern rain shadow zone of the South Island and Mr N Head an ecologist with the Department of Conservation provided evidence on the significant matters relating to the need for interim controls until PC13 and the District Plan review were in place;*
 - *Dr Walker considered much of the vegetation in the basin met the criteria for significant indigenous vegetation and /or significant habitats of indigenous fauna including severely degraded sites which provide some habitat for threaten plant and animal species She considered that most of the indigenous vegetation that had been cleared since 2014 would have met the significance criteria in the District Plan Rural policy 1B and the CRPS;*

² S42A report; paragraph 5.1. Direct references to the relevant paragraphs of the Court's decision are provided as footnotes in Ms Harte's report

- *Mr Head advised the despite modification of the native plant communities most ecosystems that have not been intensively developed typically retain significant ecological values and that significant areas had been lost;*
- *The Court was informed that the pace of change of land use in the Basin had significantly increased, facilitated by vegetation clearance and pastoral intensification enabled by “loopholes”, that this had caused widespread degradation or loss of endangered , vulnerable and rear indigenous ecosystems and outstanding landscape values. They also advised that high proportion of areas not identified as sites of natural significance that have not been cultivated or irrigated are likely to qualify as significant;*
- *The Court noted that the above expert opinions was not seriously contradicted by other witnesses; and*
- *Importantly the Court found that there is a need to meet the purpose of the Act and that this is best served by putting a temporary regulatory regime in place urgently, with consent authority oversight by way of a resource consent process. This will afford protection of significant indigenous vegetation and significant habitats of indigenous fauna, as well indirectly as outstanding natural landscape values in the Basin that are contributed to by indigenous flora and fauna values.*

12. I heard no contrary interpretations as to the findings of the Court. Rather, Ms Harte’s summary and conclusions were supported by Mr Ensor, featured in the Statement of Ms Snoyink and in the tabled legal submissions of Royal Forest and Bird.

13. It is clear to me that in assessing the merits of PC17, Ms Harte (and others) have relied heavily on the evidence and statements presented at the aforementioned Environment Court proceedings³ to support the need for, and form of, the change. To that end no specific evidence of the type presented to the Court was offered at the PC17 hearing. To be clear, however, I do not see this as a failing, given the clear position adopted by the Court.

Opening Statements on Merit and Issue Identification

14. The statutory framework for assessing this proposal was outlined in the report of Ms Harte and touched upon in the evidence of Mr Ensor, and in the legal submissions of Royal Forest and Bird. I did not hear any fundamentally disparate expert evidence that questioned the overall section 32 analysis contained in the PC17 documentation.

15. Within this context I accept in principle the section 32 assessments, including the assessment of alternatives, and consider overall that the Plan Change will better achieve the purpose of the RMA compared to the status quo. Having said that there is one area that requires further analysis relating to the issue of whether the fixed period of the exemptions is appropriate, or whether it should be permanent for the life of the Plan.

³ And earlier Court proceedings – PC13

16. Notwithstanding my comments above on merit, I am obliged to consider those submissions that opposed PC17, particularly with respect to the statements made at the hearing by Mr Murray and will do so later in this decision.
17. Section 74 of the RMA requires that I have regard to any Proposed Regional Policy Statement, Regional Plan, Management Plan or strategy. Section 75 requires that a Plan must give effect to, amongst other things, any Regional Policy Statement and must not be inconsistent with a Regional Plan (as it relates to Section 30(1)). I am satisfied as to the relationship between PC17 and the various Regional Council Plans. I will deal with the Canterbury Regional Policy Statement below.

The Canterbury Regional Policy Statement

18. Ms Harte’s report referenced Objectives 9.2.1 and 9.2.3 of the Canterbury Regional Policy Statement (CRPS) dealing with ecosystems and indigenous biodiversity. The objectives read:

9.2.1 Halting the decline of Canterbury’s ecosystems and indigenous biodiversity

The decline in the quality and quantity of Canterbury’s ecosystems and indigenous biodiversity is halted and their life-supporting capacity and mauri safeguarded.

9.2.3 Protection of significant indigenous vegetation and habitats

Areas of significant indigenous vegetation and significant habitats of indigenous fauna are identified and their values and ecosystem functions protected.

19. These objectives are implemented via policies 9.3.1 - 9.3.3 and policies 9.3.5 and 9.3.6. Policy 9.3.1 deals with protecting significant natural areas and identifies that the land based responsibilities for objectives and policies not surprisingly rest with the District Council. The CRPS is also clear with respect to implementation methods and that the Council “will”⁴ achieve certain outcomes. Within this context Ms Harte⁵ highlighted the following extract from the CRPS which describes the following requirements for territorial authorities⁶:

“Set out objectives and policies, and may include methods in district plans to provide for the identification and protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.

District plan provisions will include appropriate rule(s) that manage the clearance of indigenous vegetation, so as to provide for the case-by-case assessment of whether an area of indigenous vegetation that is subject to the rule comprises a significant area of indigenous vegetation and/or a significant habitat of indigenous fauna that warrants protection.”

⁴ CRPS Method 3 Policy 9.3.1 page 9-5

⁵ S42A report; paragraph 7.6

⁶ CRPS Method 3 Policy 9.3.1 page 9-5

20. Ms Harte was of the view that given the Basin was spatially extensive and presented a mosaic of overlapping communities, specific identification was problematic. Within this context Ms Harte advised that this was the reason that the Plan adopted a generic approach to the vegetation clearance rules, albeit that the exemptions that exist in rules 12.1.1g and 12.1.1h (prior to the notification of PC17) do not align well with the policy outcomes of the Chapter 9 of the CRPS.
21. Ms Harte went on to comment that the CRPS is very directive in Method 3 where it requires Plan provisions to “manage” vegetation clearance to allow a “case by case assessment.” To this end, Ms Harte considered that was the exact outcome that would be achieved by PC17.
22. I agree. With the exemptions suspended I have formed the view that this will give effect to the CRPS within the context of section 75 of the Act. If PC17 is not confirmed, the opposite will occur.
23. In principle, Mr Ensor agreed, but considered that the current proposal to remove the suspension at the end of 2017 would return the situation to a pre-PC17 position and thus the Plan would not give effect to the RPS. I agree with this to an extent and will return to the issue later.

The District Plan

24. PC17 as notified relies upon the existing objective and policy framework of the District Plan. The section 32 analysis supporting the PC17 contained an assessment of the relevant Plan objectives and policies including Objective 1 (Indigenous Ecosystems, Vegetation and Habitat), Policy 1B (identification and Protection of Special Sites), Policy 1C (Natural Character and Ecosystem Functions), Objective 3A (Landscape Values), Objective 3B (Activities in the Mackenzie Basin’s outstanding natural landscape), Objective 4 (High Country Land) and Policy 4B (Ecosystem Functioning, Natural Character and Open Space Values). The policy direction of the Plan clearly highlights the importance of identifying these indigenous communities and the need to safeguard them when considering land use practices. This occurs within an overarching section 6(c) context.
25. As noted earlier, the rule structure of the Plan (pre-PC17) provided vegetation clearance provisions with the exemptions outlined above. The Plan implementation measures for Rural Policy 1B (Identification and Protection of Special Sites) notes the following:
Review of Rules 12.1.1 (g) and 12.1.1 (h)
A review of Rules 12.1.1 (g) and 12.1.1 (h) will commence 3 years after the date at which the Plan became operative. These Rules will continue to apply until such time as the review is complete and a new Rule(s) is substituted.
26. The Plan goes on to outline a process for the review to occur. Within the context of the above statement the review should have occurred in 2007 and, clearly, this has not occurred. The issue that arises from this is that the Plan implementation measures have

lagged behind the policy outcomes sought. In light of the Environment Court enquiry and findings noted above, Ms Harte considered that without the suspension in place, the Plan rules would not give effect to its own policy regime. Mr Ensor agreed, but as I have noted earlier (paragraph 23), only insofar as there was a need to extend the suspension.

27. Notwithstanding Ms Ensor’s concern I find that the introduction of the suspension to the exemption provisions will better give effect to the policy platform of the Plan compared to the status quo.

Extend the Suspension Period Indefinitely

28. I was presented with different views on this issue. Mr Ensor was of the opinion that the suspension of the exemptions should be indefinite, until any new provisions established by way of the District Plan review have effect. Mr Ensor argued that there was insufficient time available within the current suspension period (i.e. by 24 December this year) to establish revised provisions. In such a scenario the pre-PC17 situation would arise again, thereby potentially leading to further vegetation loss and a failure to achieve the policy outcomes sought in the CRPS and the Plan. The tabled legal submissions of Mr Anderson (Forest and Bird) presented a similar argument.

29. The submission of Federated Farmers, and the verbal submissions made by Ms Johnston at the hearing, support PC17, but only to the extent of the temporal limitation as notified.

30. Mr Ensor argued in evidence that, from a section 32 perspective, extending the suspension would be *“the most effective and efficient option for achieving the objectives of the Mackenzie District Plan.”*⁷ He did acknowledge, however, that such an approach may give rise to increased costs (associated with consenting processes), but that there would be increased benefits accrued from the application of *“more appropriate and effective plan provisions in a situation where the reviewed District Plan is not operative prior to 24 December 2017.”*⁸

31. Ms Harte⁹ was of the view that the suspension period should be confirmed as notified given:

- the Environment Court agreed to the provisions having immediate effect on the basis of the suspension period; and
- this framed the approach taken to the Schedule 1 consultation.

32. I agree with Ms Harte’s view on the matter. That said I also accept that the issues and concerns raised by the Department of Conservation and Forest and Bird are valid. During questioning Mr Ensor agreed that there were several pathways available to the Council to

⁷ Ensor evidence; paragraph 4.6

⁸ Ensor evidence; paragraph 4.8

⁹ S42A report; paragraph 6.7

manage the risks around this issue including an additional plan change or notification, in part, of a proposed plan. In both scenarios the Council would have the ability to seek further declarations and orders of the type sought for PC17.

33. Finally, on this matter, Ms Harte advised that the Council's programme was to notify a Rural section of the proposed District Plan which, amongst other things, will address this issue ahead of the 24 December 2017 timeline.
34. Given all of the above, I am of the view that if PC17 is confirmed, it should do so with the temporal constraint as notified.

Do Not Suspend the Exemptions

35. The submission of Martin and Penny Murray¹⁰ (Maryburn Station) opposed PC17 in its entirety. The underlying reasons given in the submission related to outcomes which:
- would introduce provisions that may place them in breach of a sustainable management covenant; particularly with respect to development obligations and requirements to manage soil loss; and
 - would result in a decrease in farm production with downstream economic impacts.
36. At the hearing Mr Murray presented a range of photographs illustrating the various impacts of land improvement and irrigation, and the effects of soil loss from wind events. Mr Murray proffered that there was a need for continual improvement to avoid the adverse effects of soil loss and argued that the suspension of the exemptions did not recognise this situation. This was particularly so in his case, given that a recent tenure review had retired a significant portion of the station.
37. Ms Harte noted that PC17 did not prohibit the clearance of vegetation, but did open a pathway for resource consenting where clearance of short tussock or mat and cushion vegetation was involved. Moreover, Ms Harte noted that the Plan contained an objective and policies¹¹ that deal with land management issues and would have to be assessed as part of any resource consent process.
38. While I accepted that there are costs to the community associated with consenting processes, the approach proposed in PC17 is appropriate in my view given the current form of the Plan provisions. Within this context, I cannot support the relief sought in the Murray's submission.

¹⁰ And supporting further submissions

¹¹ Rural objective 4 and policies 4A and 4C

SECTION 32

39. As I noted in my opening commentary, the Plan Change included a section 32 assessment to accompany the Plan Change proposal. Following consideration of the assessment, and evidence and statements presented at the hearing, I am of the view that on balance the section 32 assessment remains valid.

OVERALL ASSESSMENT AND DECISION

40. PC17 proposes amendments to the rules dealing with indigenous vegetation clearance. Specifically PC17 proposes to amend existing exemptions within the Plan, for a limited period, that provide for clearance of short tussock grasslands and indigenous cushion and mat vegetation in certain circumstances.
41. PC17 is a temporary response to a situation whereby the exemption provisions drafted in 2004 were proposed to be reviewed within a three year period, and therefore a more robust Plan regime could be established for managing these indigenous communities. The review did not occur and thus proceedings before the Environment Court resulted in PC17 being notified, as a short term moratorium, to enable the Council to develop a specific planning response as part of the review of the District Plan.
42. There is no doubt in my mind as to the need for the suspension of the current exemption provisions. With PC17 in place, the Plan delivers on its obligations under the CRPS and, to an extent, section 6(c) of the Act. It also provides the outcomes anticipated by the policy framework of the Plan.
43. I accept that the approach taken in the District Plan may not, in itself, be the most effective and efficient regulatory approach for addressing the issue of indigenous vegetation clearance within an RMA context; albeit that I acknowledge the challenges the Council faces given the spatial extent of the Mackenzie Basin and the mosaic nature of the plant communities.¹² That said, PC17 does not propose to re-write the Plan framework on this issue. Rather, it provides a period of pause whereby the matter can be considered in more detail.
44. I accept also that there are arguments supporting the concept of extending the suspension indefinitely. For reasons that I have outlined earlier, however, the weight of those arguments is not such that I consider that relief is appropriate. With that in mind, I wish to be clear, however, that my view on that matter is influenced by the evidence of Ms Harte on the Council's commitment to delivering a Rural Chapter of the Plan review in the near future. It would indeed be an unfortunate situation if this was not to occur, although as discussed earlier there is an alternate option of an additional plan change process.

¹² S42A report; paragraph 7.7

45. I acknowledge also the statements and concerns of Mr Murray (and supporting further submitters), but reinforce my position that PC17 as such does not introduce prohibited activity status for indigenous vegetation clearance. Rather, it introduces a consenting regime that will require an assessment of proposals based on merit.
46. Overall I have formed the view that the proposal is aligned with the relevant statutory documents and Plans that I am required to have regard to, or give effect to. In particular I find that PC17 represents the most appropriate means of achieving the objectives and policies of the District Plan, the CRPS and the Purpose and Principles of the Act.
47. As a consequence PC17 as notified should be confirmed.
48. Given the above, Appendix One confirms the amendments to the District Plan.

Dated at Christchurch this 21st day of July 2017



**Darryl Millar
Hearing Commissioner**

Appendix One: District Plan Amendments Plan Change 17

DISTRICT PLAN AMENDMENTS

Text proposed to be added by the plan change is shown as **bold underlined**. No text is to be deleted. No changes to the Planning Maps are required.

SECTION 7 RURAL

Add the following additional text to the last bullet point of the ‘Exemption’ provisions of rules 12.1.1.g (Short Tussock Grasslands) and 12.1.1.h (Indigenous Cushion and Mat Vegetation and Associated Communities) as follows:

- Rule 12.1.1.g

Exemptions

This rule shall not apply to:

- Any short tussock grassland where the site has been oversown, and topdressed at least three times in the last 10 years prior to new clearance so that the inter-tussock vegetation is dominated by clovers and/or exotic grasses. **This exemption shall not apply within the period 14 December 2016 to 24 December 2017.**

- Rule 12.1.1.h

Exemptions

This rule shall not apply to:

- Any indigenous cushion or mat vegetation where the site has been oversown, and topdressed at least three times in the last 10 years prior to new clearance so that the site is dominated by clovers and/or exotic grasses. **This exemption shall not apply within the period 14 December 2016 to 24 December 2017.**