

**IN THE HEARINGS COMMITTEE  
MACKENZIE DISTRICT COUNCIL**

**UNDER** the Resource Management Act 1991, schedule 1

**AND**

**IN THE MATTER OF** a submission and further submission on proposed Plan  
Change 18 to the Mackenzie District Plan

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**LEGAL SUBMISSION  
ON BEHALF OF THE ROYAL FOREST AND BIRD PROTECTION SOCIETY  
OF NEW ZEALAND INC  
March 2021**

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## **May it please the Commissioners**

### **Introduction**

1. The Royal Forest & Bird Protection Society of New Zealand Inc. (“Forest & Bird”) made a submission and further on the Mackenzie District Council’s plan change 18 to its district plan (“PC18”). Forest & Bird requested to be heard on its submissions.
2. The Mackenzie Basin ecosystem is unique in New Zealand and the world.<sup>1</sup> The Mackenzie Basin has suffered from substantial ecosystem loss related to settlement and farming, including intensive agricultural development (i.e. land use change)<sup>2</sup>, grazing and pests.<sup>3</sup> Land use change is most effectively managed through resource management planning. Forest & Bird submit that In order for the Mackenzie District Council (“MDC”) to fulfil its obligations under the Resource Management Act 1991 (“the Act”) it is vital that it stops the loss of significant indigenous vegetation and maintains the scale and intactness of the interconnected dryland ecosystem.<sup>4</sup>
3. PC 18 raises significant issues for Forest & Bird concerning the protection of significant indigenous vegetation and significant habitats of indigenous fauna (“Significant Indigenous Biodiversity”) and maintenance of indigenous vegetation and habitats of indigenous fauna (“Indigenous Biodiversity”) in the Mackenzie Basin subzone. Forest & Bird submits that PC18 does protect or maintain indigenous biodiversity in the Mackenzie Basin subzone.
4. Forest & Bird’s concern is with the Mackenzie Basin Subzone. These legal submissions will address the MDC’s obligations under the Act, proposed management regime, and biodiversity offsets.
5. Forest & Bird representative Nicky Snoyink will also provide a short submission at the hearing and provide any updates on amendments sought by Forest & Bird. Nicholas Head has provided ecological evidence on behalf of Forest & Bird.

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<sup>1</sup> Head, Statement of Evidence (“SoE”), 12 February 2021, at [4.1]

<sup>2</sup> Head, SoE, 12 February 2021, at [4.5]; Harding, s 42A – Ecology Report at [64]

<sup>3</sup> Harding, s 42A – Ecology Report at [63]

<sup>4</sup> Head, SoE, 12 February 2021, at [4.4]

## STARTING POINT FOR INDIGENOUS BIODIVERSITY AND COUNCIL OBLIGATIONS

### ***Council obligation to protect significant indigenous biodiversity***

6. Environment Court Judge Jackson adopted a summary of the scheme of Part 2 in relation to indigenous biodiversity in 3 points (footnotes excluded) in one of his earlier decisions which stated:<sup>5</sup>

[75] The Environment Court attempted to explain (in summary) the scheme of Part 2 of the RMA with respect to biodiversity in *Director-General of Conservation v Invercargill City Council*. Judge Jackson wrote (relevantly):

[Several] points should be made here about the scheme of the RMA in relation to indigenous biodiversity. First, the primary responsibility of local authorities when exercising their functions in respect of indigenous biodiversity is part of the very definition of “sustainable management”: to safeguard the life-supporting capacity of ecosystems.

Second, the recognition and protection of areas of significant indigenous vegetation, nationally important as it is, is an extension of that primary obligation. If an ecosystem or part of an ecosystem (being in either case an area of indigenous vegetation or a habitat of indigenous fauna) is found to be significant then that ecosystem is to be protected in itself, not merely to have its life-supporting capacity protected.

Third, safeguarding (or protecting) the life-supporting capacity of ecosystems includes in each case having particular regard to each of its components including – as the definition of ‘intrinsic values’ implies ... its biological and genetic diversity, and in particular, the essential (biotic and abiotic) characteristics of:

- The ecosystem’s integrity (e.g. what space does it occupy at a given time? Is an occurrence at the limit of the ecosystem’s extent of occurrence?);

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<sup>5</sup> *Oceana Gold (New Zealand) Ltd v ORC*, [2019] NZEnvC 41 at [75] (upheld by the High Court in *Oceana Gold (New Zealand) Ltd v Otago Regional Council* [2020] NZHC 436) quoting *Director-General of Conservation v Invercargill City Council* [2018] NZEnvC 84 at [80].

- Its form (what are the characteristics of its environment – geomorphology, topography, soils, climate, indigenous and other species of flora and fauna, patterns of distribution, natural processes and other relevant constituents identified in the definition of “environment” in s2 RMA;
- Its functioning (e.g. is it a seral or ‘climax’ ecosystem? What are the external processes that apply to it? – climate change? Pest? Weeds? How are the natural cycles and feedback loops – Carbon, Nitrogen, Phosphorous cycles and others – being changed?); and
- Its resilience (e.g. at what point is a degraded ecosystem irretrievably doomed to “collapse” or can it recover?).

...

[76] It is also worth noting that ecosystems are incredibly complex and that the descriptive pigeonholes (‘integrity’, ‘form’, ‘functioning’, ‘resilience’) as used in section 2 RMA are (still) often over-simplistic despite their apparent sophistication. Further, ecosystems may be nested or may overlap. A good example is the “ephemeral wetlands” of Macraes’ Ecological District which are sometimes perceived as “tussock grasslands” and at others as “wetlands”. These complexities make translating protection of indigenous biodiversity into policies (an under other instruments, rules) very difficult.

7. ‘Protection’ is not defined in the RMA, the Canterbury RPS, the Mackenzie District Plan (“MDP”) or PC18. In the absence of any definition in these documents ‘protect’ should hold its ordinary meaning “*to keep safe from harm, injury or damage*”.<sup>6</sup> In *Royal Forest and Bird Protection Society of New Zealand Inc v New Plymouth District Council* Judge Dwyer in the Environment Court held that the only gloss to be put on that meaning “*..is that it is implicit in the concept of protection that **adequate** protection is required.*” In *Oceana Gold (New Zealand) Ltd v ORC* the Environment Court added that ‘protection’ is a “*... near synonym for “safeguard”, the word used in section 5(2)(b) of the Act ... [and s 6(c)] is worded in more absolute terms than sections 6(a) or (b).*” and is not qualified by “inappropriate subdivision, use and development.”<sup>7</sup>

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<sup>6</sup> *Royal Forest and Bird Protection Society of New Zealand Inc v New Plymouth District Council* [2015] NZEnvC ; (2015) 19 ELRNZ 122 [63] following *Environmental Defence Society Incorporated v Mangonui County Council* [1989] 3 NZLR 257; also Oxford Online Dictionary [www.lexico.com](http://www.lexico.com).

<sup>7</sup> *Oceana Gold (New Zealand) Ltd v ORC*, [2019] NZEnvC 41 at [71]

### ***District Council Functions***

8. Under s 31 the MDC has many functions including the ability to control any actual or potential effects from the use, development or protection of land for the purpose of maintaining indigenous biological diversity<sup>8</sup>. The oxford online dictionary defines 'maintain' as:
- a. *"Cause or enable (a condition or situation) to continue;*
  - b. *Provide with necessities for life or existence*
  - c. *State something strongly to be the case; assert."*
9. 'The High Court in relation to regional council functions under s 30(1)(ga) found that that section creates a mandatory obligation on regional councils to create objectives, policies and methods (which may include rules) for maintaining indigenous biodiversity.<sup>9</sup> The High Court further held that s 31(1)(b)(iii) gives territorial authorities a similar function.<sup>10</sup> Forest and Bird submit that MDC should control adverse and potential adverse effects for the purpose of maintaining indigenous biological diversity.
10. The MDC must implement a district plan<sup>11</sup> along with stating the district's objectives and policies<sup>12</sup>. The plan may include rules (if any) for the purpose of the maintenance of biodiversity and achieving the objectives and policies of the plan.<sup>13</sup> The plan must give effect to higher order planning instruments such as national policy statements and regional policy statements. In Forest & Bird's submission rules are necessary for the protection and maintenance of indigenous biodiversity. The plan must not be inconsistent with a water conservation order or a regional plan.<sup>14</sup>

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<sup>8</sup> Resource Management Act 1991, s 31

<sup>9</sup> *Property Rights in New Zealand Inc v Manawatu-Wanganui Regional Council* [2012] NZHC 1272 at [31]

<sup>10</sup> *Property Rights in New Zealand Inc v Manawatu-Wanganui Regional Council* [2012] NZHC 1272 at [33]

<sup>11</sup> Resource Management Act 1991, s 73(1)

<sup>12</sup> Resource Management Act 1991, s 75

<sup>13</sup> Resource Management Act 1991, ss 75 and 76(1)

<sup>14</sup> Resource Management Act 1991, s 75

### ***Higher Order Planning Documents***

11. The Act sets out an hierarchy of planning documents starting with the Act itself and its purpose and principles, then national policy statements through to regional policy statements and then down to regional plans and district plans.
  
12. The Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*<sup>15</sup> observed that the hierarchy of planning instruments moves from the general to the specific.<sup>16</sup> Each level is required to “give effect to” the level above. This is a strong directive creating a firm obligation on the part of those subject to it to ensure that the document they are charged with preparing is not inconsistent with those that precede it.<sup>17</sup>
  
13. The Act, s 73(4) provides that when preparing a district plan the MDC must have regard to the RPS. The Act, s 75(3)(c) provides that a district plan must give effect to any regional policy statement.
  
14. In terms of giving effect to and interpretation of RPS and Plan policies the High Court in *Royal Forest & Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*<sup>18</sup> (“*Bay of Plenty*”) noted:

[98] ... Further, and as I have already noted, the majority’s observations in *King Salmon* are equally applicable to documents lower in the planning hierarchy which seek to implement higher order documents. ...
  
15. RPS, chapter 9 is particularly relevant to PC18. The relevant objectives are 9.2.1 (decline in indigenous biodiversity is halted and life-supporting capacity safeguarded), 9.2.2 Restore or enhance indigenous biodiversity), 9.2.3 (protect significant biodiversity). The relevant policies are 9.3.1 (Assessment of significance), 9.3.2 (priorities for protection), 9.3.3 (Integrated management), 9.3.4 (Promote ecological

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<sup>15</sup> *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* (2014) 17 ELRNZ 442 at [14]

<sup>16</sup> *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* (2014) 17 ELRNZ 442 at [14]

<sup>17</sup> *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* (2014) 17 ELRNZ 442 at [14]

<sup>18</sup> *Royal Forest & Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* (2017) 20 ELRNZ 564 at [98]

enhancement and restoration), 9.3.5 (wetland protection and enhancement), and 9.3.6 (limitations on the use of biodiversity offsets).

16. In *Federated Farmers v Mackenzie District Council*<sup>19</sup> the Environment Court took the opportunity to make a finding in regards to the RPS, its indigenous biodiversity provisions and Mackenzie Basin. It is worth repeating the Environment Court's words here (footnotes excluded):

[232] Objective 9.2.1 in Chapter 9 (Ecosystems and indigenous biodiversity) is to halt the decline of Canterbury's ecosystem and indigenous biodiversity. The second – Objective 9.2.2 – is to restore or enhance ecosystems and indigenous biodiversity; and the third objective in Chapter 9 is to identify areas of significant indigenous vegetation and significant habitats of indigenous fauna and to protect their values and ecosystem functions.

[233] Policy 9.3.1 (protecting significant natural areas) states that:

1. Significance, with respect to ecosystems and indigenous biodiversity, will be determined by assessing areas and habitats against the following matters:
  - (a) Representativeness
  - (b) Rarity or distinctive features
  - (c) Diversity and pattern
  - (d) Ecological context

The assessment of each matter will be made using the criteria listed in Appendix 3.

2. Areas or habitats are considered to be significant if they meet one or more of the criteria in Appendix 3.

3. Areas identified as significant will be protected to ensure no net loss of indigenous biodiversity or indigenous biodiversity values as a result of land use activities.

***This policy implements the following objectives:***

Objective 9.2.1 and Objective 9.2.3

[234] The next relevant implementing policy is:

**Policy 9.3.2 – Priorities for protection**

To recognise the following national priorities for protection:

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<sup>19</sup> *Federated Farmers v Mackenzie District Council* [2017] NZEnvC 53 per Judge Jackson

...

#### 4. Habitats of threatened and at risk indigenous species.

“Threatened” is explained as meaning “A species facing a very high risk of extinction in the wild and includes national critical, nationally endangered, and naturally vulnerable species as identified in the [NZ] Threat Classification Lists”. A schedule of the plants on that list which occur in the Mackenzie Basin was produced by Mr N Head, a botanist called by DoC. It contains 83 species and is attached to this decision as Appendix “B”.

[235] Appendix 3 to the CRPS sets out the criteria for determining significant habitat. The methods suggest that an analysis of some of the criteria for determining significance needs to be carried out in the LWRP (but it has not yet been). Determination will need to be made by the MDC on its plan review of Appendix 3 to the CRPS under other criteria including 6 – 10. We should not decide those issues here since there are value (or policy) judgements involved in those criteria (“distinctive” – in Policy 6, “high diversity” in Policy 7, “importance” in Policies 8, 9, and 10) which should be left to the MDC on its review.

[236] Appendix 3 also contains the criterion:

**Criteria for determining significant indigenous vegetation and significant habitat of indigenous biodiversity**

***Rarity/Distinctiveness***

...

4. Indigenous vegetation or habitat of indigenous fauna that supports an indigenous species that is threatened, at risk, or uncommon, nationally or within the relevant ecological district.

...

Criterion 4 is important because the question whether there is an area of indigenous vegetation that is threatened, “at-risk”, or is uncommon is simply a question of fact to be resolved on a species-by-species basis. In large parts of the Mackenzie Basin there is not simply one species but 83 species of indigenous plants which qualify. Accordingly we find on the balance of probabilities that much of the ONL meets the Area of significant vegetation criterion, notwithstanding the presence of introduced plants or weeds. This is not a policy decision, simply a determination of fact. Then Policy 9.3.1(2) of the CRPS says that those (extensive) parts of the Mackenzie Basin are significant areas.

[237] Consequently the ONL is a significant natural area under Policy 9.3.1 of the CRPS.



17. In *Federated Farmers* the Court reminded everyone that the Environment Court in an earlier decision had found that the Mackenzie Basin is an outstanding natural landscape.<sup>20</sup> The RPS is still the same as it was when the Environment Court made the above finding.

18. Dr Walker goes on to apply the RPS, Appendix 3 criteria 6 and 8 stating for providing further reasons that Mackenzie Basin floor is a significant natural area.<sup>21</sup>

***Conclusion on MDC Obligations***

19. Forest & Bird submit that the MDC as part of its functions should in its PC18:

- a. Give effect to the RPS; and
- b. Control any actual or potential effects from the use, development or protection of land for the purpose of:
  - i. Maintaining indigenous biological diversity; and
  - ii. Protecting areas of significant indigenous vegetation and significant habitats of indigenous fauna.

**GENERAL THEME OF PC18**

20. Forest & Bird submit that PC18 does not go far enough in protecting and maintaining indigenous biodiversity in the Mackenzie Basin and does not fulfil its obligations under the Act, ss6(c) and 31(1)(b)(iii). Forest & Bird submit that the MDC should heed the expert ecologists' advice as set out below.

***Map fully converted, partially converted and manage vegetation clearance along those lines in the Mackenzie Basin***

21. Forest & Bird submit that based on that ecological advice PC18 should be restructured in regards to the Mackenzie Basin Subzone:

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<sup>20</sup> *Federated Farmers v Mackenzie District Council* [2017] NZEnvC 53 at [8] referring to *High Country Rosehip Ltd and Mackenzie Lifestyle Ltd v Mackenzie District Council* [2011] NZEnvC 387

<sup>21</sup> Dr Walker, SoE, 12 February 2020, at [16.1] and [16.2]

- a. Should be broken down into three areas for management as mapped by the MDC’s ecologist Michael Harding<sup>22</sup>:
  - i. The yellow areas are treated as completely converted areas of land;
    - 1. Along with a corresponding definition which reflects that there are no indigenous biodiversity values present which will also pick up new fully converted areas as they become consented<sup>23</sup>;
      - a. Forest & Bird suggest that Mr Harding’s proposed definition of “improved Pasture”<sup>24</sup> could suffice here but the term “improved pasture” should not be used because Mr Harding’s is different to what is proposed in the draft National Policy Statement on Indigenous Biodiversity (“NPS-IB”) and using the same terminology could confuse the PC18 approach when the NPS-IB become operative -
    - 2. Forest & Bird would support a permitted activity status for any incidental indigenous vegetation clearance within those converted areas-
  - ii. The blue areas are treated as partially converted areas (potentially aligning more closely with the NPS-IB definition of improved pasture) of land where there are likely to be some significant indigenous values present:
    - 1. Any a corresponding definition and policy direction for this area needs to reflect that although the area has been altered it may still retain significant indigenous biodiversity and other indigenous biodiversity values;
      - a. Forest & Bird suggest that PC18’s notified definition of “improved pasture” may suffice in conjunction

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<sup>22</sup> Harding, Technical Report - Ecology, 10 December 2020, Attachment 3; supported by Head, SoE, at [4.7]: this approach is supported in Head, SoE, at [9.4]

<sup>23</sup> Harding, Ecology Report, 10 December 2020, at [130]

<sup>24</sup> Harding, Ecology Report, 10 December 2020, at [112] – Improved pasture: *Means an area where indigenous vegetation has been fully removed and the vegetation converted to exotic pasture or crops*: This definition is supported in Head, SoE, at [9.3]

with mapping of these areas and could then be modified as needed when the draft NPS-IB becomes operative-

2. With a restricted discretionary activity status for indigenous vegetation clearance:

a. Forest & Bird recognises that farming activities are anticipated in the blue areas as mapped by Mr Harding and for that reason do not support a Non-complying activity status in this instance. However, the matters for discretion will need to be broad enough to consider adverse effects on biodiversity providing for the protection and maintenance of indigenous biodiversity-

iii. Everywhere else in the Mackenzie Basin is treated as a significant natural area:

1. All indigenous vegetation clearance activities beyond the land areas yellow and blue areas mapped by Mr Harding are non-complying.

22. This position is supported by the evidence because the completion of SONS/SNA survey work is unlikely to be completed before PC18 becomes operative,<sup>25</sup> it is necessary to protect significant indigenous biodiversity,<sup>26</sup> the MDP Appendix 1 list of SONS is inadequate and incomplete,<sup>27</sup> land that has not been fully developed (converted) still supports remnant indigenous biodiversity and may be significant,<sup>28</sup> most undeveloped (un-converted) land on depositional landforms in the Mackenzie Basin has significant ecological values,<sup>29</sup> and the Environment Court finding that:

[237] Consequently the ONL is a significant natural area under Policy 9.3.1 of the CRPS.

### ***Current RDA rules***

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<sup>25</sup> Harding, Ecology Report, 10 December 2020, at [50]

<sup>26</sup> Harding, Ecology Report, 10 December 2020, at [51]

<sup>27</sup> Harding, Ecology Report, at [42]

<sup>28</sup> Harding, Ecology Report, at [113](b)

<sup>29</sup> Harding, Ecology Report, at [44]

23. Forest & Bird's expert does not support PC18, Section 19 rule 1.2 for the Mackenzie Basin.<sup>30</sup> Forest & Bird submits that the ecological evidence necessitates that at least within the Mackenzie Basin the RDA rules need to be altered in order to protect and maintain indigenous biodiversity.

*5,000 m2 clearance*

24. Mr Head's evidence is that rule 1.2.2 could cause the irreplaceable loss of significant ecological values. Mr Head suggests changes are required such reduce the area from 5,000 m2 to 100m2 and identify key habitats where a more restrictive approach is required.

*Farm Biodiversity Plans ("FBPs")*

25. The ecologists do not support the use of FBPs to determine activity status.<sup>31</sup> The reasons why range from FBPs are not fit for purpose to FBPs would facilitate ongoing loss of significant indigenous vegetation.<sup>32</sup> Mr Head provides in his evidence:

- a. The FBP framework as outlined undermines key ecological attributes in the Mackenzie Basin;
- b. Likely to facilitate ongoing loss of significant indigenous biodiversity
- c. There is considerable uncertainty over the efficacy of FBPs because there:
  - i. Is no requirement for ecologist peer review;
  - ii. Is no requirement to protect significant indigenous biodiversity;
  - iii. Is uncertainty as to whether the council will decide that significant indigenous biodiversity can be exchanged; and
  - iv. Is no certainty as to compliance with the FBPs.

26. Additionally, Forest & Bird submits that a rule condition which would require the adequacy of a farm plan (that it is prepared in accordance with Appendix Y) in order

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<sup>30</sup> Head, SoE, at [4.8]; it's worth noting that Mr Harding was not asked to comment on the RDA rules or the use of FBPs

<sup>31</sup> Head, SoE, at [4.9], Dr Walker, SoE, at [53] – [57]

<sup>32</sup> Head, SoE, at [4.9]

to determine rule activity status in inappropriate. Not only does it create uncertainty for applicants in determining which rule status will apply, it potentially overrides any further consideration of adequacy through the consenting process should the application be accepted as RDR.

27. Forest & Bird also submits that using FBPs is experimental and should not be used where it could result in the loss of significant indigenous biodiversity particularly in the nationally and internationally unique Mackenzie Basin subzone environment. Forest & Bird submits FBPs should be removed from the RDA standard / condition.

#### ***Definition of Vegetation Clearance***

28. Forest & Bird submit that the definition of vegetation clearance should be amended in line with that of Harding and Head<sup>33</sup> and include 'intensive grazing'. Vegetation clearance should also recognise the degradation of natural ecosystems caused by edge effects.<sup>34</sup>

#### ***Offsetting***

29. The RPS provides criteria for offsetting residual adverse effects. Proposed policy 6 in PC18 mirrors RPS, policy 9.3.6. In saying this PC18 does not include some critical aspects of the RPS to give it full effect. Only giving effect to certain elements of the RPS is not sufficient to ensure the maintenance of indigenous biodiversity or the protection of significant indigenous biodiversity.

30. The RPS in its "Principle reasons and explanation" for policy 9.3.6 explains in summary that:

- a. The most desirable form of offsetting will be achieved in situ or adjacent to the area affected;
- b. There will be cases where the indigenous biodiversity at risk is so significant that it should not be significantly modified or destroyed under any circumstances, in such cases offsetting cannot be considered (i.e. a bottom line);

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<sup>33</sup> Head, SoE, at [10.3]:Harding, Ecology Report, 10 December 2020, at [91] & [92]

<sup>34</sup> Head, SoE, at [10.4]; Harding, Ecology Report, 10 December 2020, at [98]

- c. There are also situations where residual effects cannot be fully compensated because the biodiversity is highly vulnerable or irreplaceable, in such cases offsetting cannot be considered (i.e. a bottom line);
- d. The goal of a biodiversity offset is to achieve “no net loss” which means that the compensation provided by an offset should represent like for like in terms of the species or habitats that are adversely affects; and
- e. There also needs to be certainty that the proposed offsets will occur.

31. The above statements amount to limits for offsetting. PC18, policy 6 as written does not provide for any of these critical elements and provides no limits and may not maintain indigenous biodiversity or protect significant indigenous biodiversity.

32. The RPS also includes definitions for biodiversity offset and No net loss. No net loss is defined as:<sup>35</sup>

In relation to indigenous biodiversity, “no net loss” means no reasonably measurable overall reduction in:

- a. The diversity of indigenous species or recognised taxonomic units; and
- b. Indigenous species’ population sizes (taking into account natural fluctuations) and long term viability; and
- c. The natural range inhabited by indigenous species; and
- d. The range and ecological health and functioning of assemblages of indigenous species, community types and ecosystems

33. The RPS, defines biodiversity offset as:<sup>36</sup>

means a measurable conservation outcome resulting from actions which are designed to compensate for significant residual adverse effects on biodiversity arising from human activities after all appropriate prevention and mitigation measures have been taken. The goal of a biodiversity offset is to achieve no net loss and preferably a net gain of biodiversity on the ground with respect to species composition, habitat structure and ecosystem function. They typically take the form of binding conditions associated with

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<sup>35</sup> RPS, page 240

<sup>36</sup> RPS, page 149

resource consents and can involve bonds, covenants, financial contributions and biodiversity banking.

34. It is notable that the RPS became operative in 2013 and may not reflect current more recent guidance or direction. For example, although only in draft form the draft National Policy Statement on Indigenous Biodiversity defines offsets as arising to compensate for “more than minor residual adverse effects” rather than “significant residual adverse effects” as provided above.

35. There are also aspects of the RPS’s explanation that mingle concepts of compensation with offsetting. For example the RPS provides (bold my emphasis):

In some circumstances the restoration of a degraded area or the creation of a new area that replicates the original habitat lost may provide appropriate compensation. There is a preference for the re-establishment or protection of the same type of ecosystem or habitat to avoid the difficulty of assessing relative values of different ecosystems or habitats of different species. **Trade-offs involving different species** will not always adequately compensate for the loss of the originally threatened species. However, the policy does recognise that where significant indigenous biodiversity benefits can be achieved, and where those significant benefits are considered to outweigh the adverse effects on the ecosystem or habitat, the **protection of other habitats** may be appropriate.

36. Trade-offs involving different species is not an offset but compensation. Protection of other habitats rather than the affected habitat i.e. it is not a like for like offset but compensation. These ambiguities are reflected in RPS, policy 9.3.6 and PC18, policy 6 themselves where they state:

Offsets should re-establish or protect the same type of ecosystem or habitat that is adversely affected, unless an alternative ecosystem or habitat will provide a net gain for indigenous biodiversity.

37. Aspects of the RPS’s policy 9.3.6, and its explanation are at odds the definition of biodiversity offset and the definition of “no net loss”. In *Oceana Gold (New Zealand) Ltd v Otago Regional Council*<sup>37</sup> Justice Osborn quoting from the Environment Court wrote (bold my emphasis):

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<sup>37</sup> [2020] NZHC 436 at [86]

[86] As we have stated, the PORPS elaborates on the offsetting idea in policy 5.4.6 and the related definition. It provides that “offsetting must achieve no net loss (of species abundance, habitat structure and ecosystem function)”. Conversely “biodiversity compensation” is not required to maintain the specific species or ecosystems being impacted. **Therefore it may not “maintain biodiversity” if impacts on the species affected or ecosystems are severe ... Clearly the circumstances in which biodiversity compensation should be permissible (or not permissible) need to be identified...**

38. Forest & Bird submits that the RPS conflates offsetting and compensation in its explanation. Mr Head provides evidence that words “*unless an alternative ecosystem or habitat will provide a net gain for indigenous biodiversity*” is inappropriate for offsetting in the Mackenzie Basin. Forest & Bird submits that the RPS does not provide for environmental compensation in any objective or policy framework.
39. The RPS, does however set down limits for the use of biodiversity offsetting in the statements listed above in the RPS explanation (i.e. bottom lines) and by only referring to its availability in two places.
40. In terms of setting bottom lines as stated above the RPS explanation in summary provides:
- a. There will be cases where the indigenous biodiversity at risk is so significant that it should not be significantly modified or destroyed under any circumstances, in such cases offsetting cannot be considered (i.e. a bottom line);
  - b. There are also situations where residual effects cannot be fully compensated because the biodiversity is highly vulnerable or irreplaceable, in such cases offsetting cannot be considered (i.e. a bottom line);
41. These two statements clearly acknowledge that the offset concepts of no net loss or like for like whilst may be technically achievable that in certain circumstance an offset could still result in unacceptable impacts on indigenous biodiversity. The Environment Court in *Oceana Gold (New Zealand) Ltd v ORC*<sup>38</sup> whilst considering

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<sup>38</sup> *Oceana Gold (New Zealand) Ltd v ORC*, [2019] NZEnvC 41 at [95]



whether to delete, keep the same or include in the proposed Otago Regional Policy Statement a proposed bottom line that prevented the offsetting of individual “rare or vulnerable species” held:

[95] the reason we hold that individual plants or animals should not be lost is that while the ‘no net loss’ policy 5.4.6(b) is generally adequate for indigenous biological diversity (noting that it allows for loss of individual plants or animals on one site provided others are established elsewhere in the region) it is too risky to extend that method of management to threatened species. Accordingly we consider that proposed policy 5.4.6(c) is likely to be effective in achieving objectives 3.1 and 3.2 of the PORPS provided its reference to the NZTCS is made express. Similarly we consider 5.4.6(a) should be amended in a minor way by the addition of the word ‘residual’ to emphasise the place of offsetting in the mitigation hierarchy.

42. Forest & Bird submits the explanation to RPS policy 9.3.6 clearly indicates that there are limits to offsetting and PC18 should give effect to these limits. Mr Head’s evidence is also supported by the RPS in that offsetting is not appropriate in all respects. Mr Head states that:

Offsetting is not appropriate for the depositional ecosystems of the Mackenzie because of their rarity, threat, habitat complexity and distinctiveness. Any reduction of these ecosystems’ extent will cause permanent net loss that cannot be offset or compensated.

43. Mr Harding goes further when he states:

... In my view, it is unlikely that a biodiversity offsetting proposal in the Mackenzie Basin would be able to meet the CRPS Policy 9.3.6 criteria.

44. The ecologists’ position was summed up by Dr Walker in her evidence where she reiterates that “...*there is no realistic remediation, mitigation or offsetting options for significant indigenous vegetation and fauna habitat (policy 3) ...*”.<sup>39</sup>

45. It’s also clear in Forest & Bird’s view that the RPS did not envision the availability of offsets for every activity that could not avoid, remedy or mitigate all adverse effects

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<sup>39</sup> Dr Walker, SoE, at [45]

on indigenous biodiversity. In relation to the offset availability it is only mentioned in two aspects. RPS, policy 16.3.5 for electricity generation and the other one is in RPS, method 5.3.10 for telecommunication infrastructure.

46. PC18 must give effect to higher order documents (i.e. the RPS). In order to do that properly PC18, policy 6 needs to go further in giving effect to RPS policy 9.3.6. Forest & Bird submits that policy 6 should rather than mirror RPS policy 9.3.6 go deeper and give effect to its explanation and requirements. Forest & Bird submits:

- a. That its submission provides a framework from which to impose offsetting limits; and
- b. Any references that would allow environmental compensation should be removed.

47. Forest & Bird also submits that the policy direction in PC18 needs to provide clear guidance as to when offsetting is available. Currently there is no policy direction in regards to the application of the mitigation hierarchy of policy 3 added by the s42A amendments.

### **New Policy 3**

48. The s42A recommendations add in policy direction for the management of adverse effects. Forest & Bird submits that this hierarchy will not provide for the protection of significant indigenous biodiversity. Without clear objective and policy for the protection of significant indigenous biodiversity values there is no basis to consider that avoidance would be practicable to achieve that protection. Likewise there is no direction on when avoidance may not be practicable, for example in relation to national grid infrastructure. Without clear policy direction “practicable” can be interpreted synonymous with feasible which then leads to the provision of activities over the of protection.

49. Forest & Bird submits that clear policy direction for the protection of significant indigenous biodiversity such as the avoidance of adverse effects on significant

indigenous biodiversity values is needed within the PC18 policy framework to ensure council fulfils its functions and responsibilities.

### **Conclusion**

50. Forest & Bird submits that the MDC will not be able to fulfil its obligation to protect significant indigenous biodiversity and maintain indigenous biodiversity in the Mackenzie Basin if it uses PC18 as notified. Forest & Bird submits that PC18 requires substantial amendments for the MDC to fulfil its obligations these include such as:

- a. A new mapping regime;
- b. New rules;
- c. New definitions; and
- d. Amendments to policies.

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