Mackenzie District Plan

Proposed Plan Change 18 - Indigenous Biodiversity

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Section 42A Officer's Reply Report

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Introduction

1. The purpose of this report is to:

    a. Summarise the key issues traversed in the hearing of proposed Plan Change 18 (PC18), to the Mackenzie District; and

    b. Identify where, in response to evidence lodged and matters traversed during the course of the hearing, I recommend further changes to PC18; and

    c. Respond to questions raised by the Hearings Commissioners.

2. Appendix 1 to this Reply Report contains additional changes recommended to the PC18 provisions, tracked against the version of the provisions contained in my Section 42A Officers report (as Attachment 1).

3. In several cases, I have outlined alternate options for the Hearings Commissioners to consider within the body of this reply report, rather than focussing only on one recommended approach. This report and Appendix 1 do not include specific changes to provisions associated with these alternate options; but changes to provisions to implement these options can be prepared if that would assist the Hearings Commissioners.

Key Issues

4. The key areas of focus traversed at the hearing are:

    a. How to most appropriately manage areas of significance, in absence of these areas having been assessed against the CRPS criteria and mapped;

    b. The extent to which ‘existing’ land use activities should be provided for;

    c. How to manage the clearance of indigenous vegetation with respect to renewable electricity generation activities, given the requirement to give effect to the NPSREG; and

    d. The application of no net loss and offsetting in the context of Mackenzie Basin.

Matters of Clarification

5. Some evidence and comments made at the hearing raise matters that I consider require clarification. These are addressed in this section.

6. Mr Harding included reference to, and a high-level example of mapping in his evidence.[1] Some submitters appear to consider that officers are recommending the maps themselves be included in the District Plan, or it could be taken from their evidence or legal submissions that they seek incorporation of the maps into PC18.[2] For the avoidance of doubt, I am not recommending that this mapping be included in the District Plan at this time. As set out in Mr Harding's evidence (in summary), the maps are based on satellite images and have not included on-site field survey work and require confirmation at a finer scale, in addition to consultation being undertaken with landowners/occupiers. At I noted in my previous report,[3] I do not consider it appropriate to introduce mapping at this stage in the PC18 process. I continue to maintain this view.

7. It also appears, in oral presentations made to the Panel, that some submitters thought that the changes proposed to the definitions would result in grazing no longer being permitted. To be clear, the recommended definitions do not apply to grazing, except, that it is recommended (through this reply) that the definition include "mob stocking". However, this would not capture any other grazing activities. I appreciate that this may be linked with the continuance of oversowing and topdressing (OSTD) to areas used for grazing, which is addressed further below.

8. Legal counsel for Mt Gerald and the Wolds also raised concerns that between Rule 12.1.1 (relating now to non-indigenous vegetation clearance only) and 12.2.1, there is an omission or lack of clarity in the rule framework, as it could be read that the only non-indigenous vegetation clearance provided for is where the standards of 12.1.1.a can be met, which only apply to riparian areas.[4] I do not share these concerns, as provided the clearance is outside the specified riparian areas, the conditions of Rule 12.1.1.a will be met and therefore the clearance will be permitted under 12.1.1. However, for the avoidance of doubt, I recommend amending Rule 12.2.1 to refer explicitly to non-compliance with the standards in 12.2.1.a.

Managing areas of significance

9. Most ecological experts consider that the current SONS do not reflect those areas within the district that are significant under section 6(c) of the RMA.[5] Concerns have also been

[1] Evidence of Harding at [48] – [49], [116] – [131] and Attachment 3.
[2] For example, Dr Walker at [33] – [38], evidence of Mr Head at [4.7], legal submissions for Forest & Bird at [21].
[3] Section 42A Report at [457].
[4] Legal submissions for Mt Gerald and The Wolds at [44].
[5] Evidence of Harding at [42] – [45]. Evidence of Dr Walker at [31]. Evidence of Mr Head at [9.2].

expressed that the provisions in the current MDP do not meet the obligations under section 75(3)(c) to give effect to the requirements of the CRPS.[6] Several parties also consider that ultimately mapping areas which meet the criteria within the CRPS as significant is most appropriate.[7] The difficulty at this point in time, is that the identification of areas meeting the CRPS criteria, and ultimately their mapping, is underway, but not complete. Various witnesses also appear to support the inclusion of the mapping in the Plan being undertaken through a plan change (or variation).[8] My understanding is also that all parties who submitted on PC18 agree that 'doing nothing', i.e. withdrawing PC18 and relying on the current MDP framework, is not the appropriate course of action. While mapping may ultimately be a more appropriate method, comprehensive and district-wide mapping of all areas meeting the CRPS criteria is costly and time-consuming and in my view it cannot be assumed that this will happen.

10. Within this context, there is a need to ensure that the provisions within PC18 provide the most appropriate framework to achieve the outcomes sought in relation to indigenous biodiversity, (and where relevant, other existing plan objectives,) at this point in time, and until such time as mapping is completed. In essence, it is about fulfilling, in the most appropriate way possible, in lieu of further assessment and mapping being undertaken, the obligations of the Council under the RMA as they relate to indigenous biodiversity.

11. One of the options proposed by some submitters,[9] is for the rule framework (either generally, or in relation to the WPS provisions) to refer to "*areas of significant indigenous vegetation and significant habitats of indigenous fauna*", as a way of determining activity status.

12. I agree with the submitters, in principle, that where areas are identified as significant, vegetation clearance as a non-complying activity would likely be appropriate. This is reflected in the (generally) non-complying activity status for those areas identified as SONS in the current plan. In my view this would work best in a situation where there is sufficient evidence on which to conclude that an area is significant, and these areas can be captured and defined, within the rule framework, in a way that is certain. This is however, not the situation at present, within which PC18 must be considered.

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[6] Legal submissions for EDS at [12], Evidence of Ms Ching at [40].
[7] Evidence of Ms Ching at [64], JWS at [8].
[8] JWS at [9], Evidence of Mr Burtscher at [25], Evidence of Ms Ching at [41], legal submissions for Mt Gerald and the Wolds at [48].
[9] Evidence of Ms Ruston at [87] and within Table 2, Evidence of Ms Ching at [58] – [68], legal submissions for Mt Gerald and the Wolds at [81].

13. The issue with the approach sought by submitters to refer to significant areas within the rule framework at this stage, is that not all significant areas are identified. Such an approach would require a case-by-case assessment of the significance of any vegetation or habitats, before being able to determine activity status. It also relies on an assessment against criteria, which may not be agreed between different ecological experts. An example of this difficulty is exemplified in the rebuttal evidence of Dr Espie, where he states that he does not agree with Dr Walker's evidence that most areas of 'un-converted' land identified by Mr Harding, would be classified as significant indigenous vegetation.[10]

14. Overall, I consider that it is problematic to rely on an assessment being undertaken in order to determine activity status, because it lacks sufficient certainty. This is, in my view, most problematic where a permitted activity status is involved[11] and could lead to enforcement issues for the Council. My understanding is that this was an issue with the current plan provisions, where a large amount of clearance has been undertaken on a permitted basis,[12] with limited to no ability for the Council to assess whether it complied with the permitted activity standards, and without a need to assess significance. My understanding is that this has been the key driver for both Plan Change 17 and Plan Change 18 and related court orders for immediate legal effect of the rules.

15. Where expert opinion on significance differs (like the above example), my view is that this is most appropriately tested through a plan-making or resource consent process, where there is a clear decision-making pathway for reconciling any differences in evaluation. Then, once an area is determined to be significant, the application of the rule or consenting framework is clear as to where it applies.

16. Related to this, is the approach put forward by Dr Walker to categorise significance by the use of five categories.[13] While I understand the rationale for the tables proposed by Dr Walker, I do not consider that they can be adopted into the PC18 framework, as they lack sufficient certainty. In my view to apply these tables appropriately would require either:

    a. A mapping process to be undertaken to map where these areas apply; or

[10] Rebuttal evidence of Dr Espie at [17].
[11] As suggested by Ms Ruston.
[12] Under exemptions under Rules 12.1.1.g and 12.1.1.h.
[13] Walker at Tables 1 and 2, noting that the categories proposed differ slightly as between the Mackenzie Basin Subzone and western ranges; and the eastern Mackenzie District.

b. Clear definitions of these areas being included in the Plan which are certain and unambiguous as to where they apply.

17. In my view, neither of these options can be immediately adopted into PC18 because mapping requires further assessment, ground-truthing and consultation, and should be undertaken as part of a variation or plan change process to allow for appropriate consultation. The alternate option – of being clear of which land to which the table categories applies – is reliant on determining what is 'converted', 'partially converted' and 'converted land'. I do not believe that any parties, in submissions or evidence, provided suggested drafting (e.g. rule wording or definitions), that provide clarity on where the categories would apply. I therefore do not consider this to be a viable option.

18. The proposed approach in PC18 as notified, and retained in the s42A report recommended version, provides an approach that allows for significance to be assessed (whether through a FBP under Rule 1.2.1, or under Rule 1.2.2 or Rule 1.3.1 where a FBP is not prepared), but does not rely on this to determine activity status. In my view, if the matters for discretion and the policies provide clear direction, then areas identified as significant should be able to be protected through the consenting process; including through the ability to decline a consent if it will not meet the policy direction. As recommended in the section 42A report (and further changes recommended in Appendix 1) this requires: managing land use and development within significant areas to ensure no measurable loss of the indigenous biodiversity values of significance;[14] avoiding adverse effects of activities on these areas as far as practicable;[15] and in relation to FBPs, demonstrating that use and development will be integrated with the long-term protection of significant areas.[16]

19. Notwithstanding this, in the present situation, and given the evidence before the Hearings Commissioners on the significance of areas within the Mackenzie Basin, I have less concern with significance being used to distinguish between a restricted discretionary and non-complying activity, as suggested by Ms Ching. This is because consent is required in either case, and through the consent process, the Council is able to commission a peer review of any assessment of significance and determine the applicable activity status. While I still have some reservations about this approach, I consider it could be adopted by the Hearings Commissioners, if it is considered more appropriate to ensure protection of significant areas. For completeness, I note that this

[14] Policy 2.
[15] Policy 3.
[16] Policy 8.

would need to be defined by reference to the CRPS criteria; which also avoids the uncertainty to the approach proposed in the JWS[17] to refer to *"areas identified as containing*…" because the latter is uncertain as to what is meant by "*identified".* In my view, this approach would be effective, because non-complying activity status within significant areas would send a clearer signal that clearance of indigenous vegetation within these areas is unlikely to achieve the PC18 objective; but there would be inefficiencies associated with the lack of certainty around which activity status applies.

20. If the Hearings Commissioners are concerned with activity status being uncertain until such time as an assessment is undertaken and therefore do not agree with what is proposed by Ms Ching, then a further option that they may wish to consider, is whether or not any indigenous vegetation clearance except that specified as a permitted activity, (at all, or up to a smaller maximum amount), should default to non-complying in depositional landforms[18] the Mackenzie Basin, based on Mr Harding's view that "*most undeveloped (un-converted) land on depositional landforms in the Mackenzie Basin has significant ecological values."*[19] This is, in effect, a more precautionary approach, as in the interim until mapping is undertaken, this may include some areas that may not be considered significant under the CRPS criteria. This approach is also obviously more onerous for landowners within the Basin. In my view this approach is therefore less efficient and would only be justified if it was considered that other options are not sufficiently effective.

Farm Biodiversity Plans

21. Some ecological experts have also questioned the proposed FBP approach, commenting that it: provides a loophole to continue to clear, degrade and fragment indigenous vegetation and indigenous fauna habitats in the Mackenzie Basin;[20] and that the FBP framework is not fit purpose and would facilitate ongoing loss of significant areas the Mackenzie Basin.[21] The Hearings Commissioners have also asked me to comment on how I consider the Council could administer FBPs, including obtaining ecological input to them.

22. Firstly, it is important to note that FBPs do not provide a permitted activity status for clearance of indigenous vegetation. I therefore do not agree that the requirement for a

[17] Joint Witness Statement of Ms Ruston and Dr Mitchell.
[18] A definition for this is suggested in the evidence of Dr Walker at [48].
[19] Evidence of Mr Harding at [13].
[20] Evidence of Dr Walker at [53] – [57].
[21] Evidence of Mr Head at [4.9].

resource consent creates a 'loophole'. Rather, I consider the introduction of the rule helps to address the issues or loopholes identified with the existing rule regime. Secondly, many of the comments appear to provide an assessment of the activity status and detail of the rule (and related Appendix), which in my view would more usually be considered and assessed by a planner.

23. I also note that the ecological evidence presented at the hearing and the requests made in legal submissions for Forest & Bird[22] on this matter was for submitters that did not appear to seek removal of the provision for FBPs in their original submissions.[23]

24. Of the specific concerns raised in evidence, I do not agree that under the proposed FBP approach there is no requirement to protect significant indigenous biodiversity.[24] The matters of discretion explicitly provide for consideration of methods within the FBP that will protect significant indigenous biodiversity values, while the FBP framework in Appendix Y requires ecological values to be assessed, and how the values will be managed to achieve protection of significant areas.[25] There has also been criticism of the lack of explicit requirements for an ecology peer review.[26] However, because the FBP is part of a resource consent process, and given the matters of discretion include consideration of the quality of the FBP, including its adequacy,[27] in my view there is no reason why the Council could not commission a peer review. Ultimately, the ability of the Council to commission a peer review is no different to other resource consents where expert peer review can be sought, and is not limited in any way through the proposed framework.

25. I also disagree that there is no certainty as to compliance with the FBPs.[28] Again, there are explicit matters of discretion focussed on compliance with a FBP,[29] and because the FBP forms part of the resource consent process, the Council will be able to apply conditions on any application. In my view, the enforcement of such consents is no

[22] For example, legal submissions for Forest & Bird at [27] seeks removal of FBPs from the RDA standard / condition, which would effectively result in their removal altogether.
[23] EDS raised concerns with the robustness of FBPs and whether they would ensure biodiversity values would be appropriately addressed, and sought changes to the FBP framework to address their concerns (not the removal of the FBP provisions). Forest & Bird considered that the FBP approach appeared to encourage a good management practice approach to managing effects on indigenous biodiversity, including providing for s6(c) matters to be protected. Their concern with FBPs related to uncertainly regarding the extent to which indigenous biodiversity not identified with significant values would be maintained.
[24] Evidence of Mr Head at [11.4].
[25] Appendix Y, Parts B & D.
[26] Evidence of Mr Head at [11.4].
[27] Rule 1.2.1i.
[28] Legal submissions for Forest & Bird at [25(c)(iv)].
[29] Rule 1.2.1ii.

different to those of any other consent and the use of a management plan within a consenting framework is also, in my experience, not unusual. Examples include noise management plans, construction management plans and erosion and sediment control management plans. I also note that the CLWRP includes rules that require, as part of determining activity status, the submission of a 'Farm Environment Plan' (FEP) prepared in accordance with a Schedule set out in that plan,[30] with matters of control or discretion allowing for assessment of matters set out in the FEP.[31]

26. Forest & Bird also submits that using FBPs is experimental.[32] However, the FBP framework is used in the Hurunui District Plan and although challenged through the submission phase on that district plan, was ultimately not challenged by appeal to the Environment Court. I am also aware that the Marlborough District Council has, through a voluntary approach, provided reports to landowners that include assessments of the ecological values of properties and recommendations on how to maintain or protect those values. I accept that is not as formal an approach as that proposed in PC18, but I consider it demonstrates that the concept of FBPs is not 'experimental'.

27. I also note that EDS state that in order for the Council to meet its obligations in relation to indigenous biodiversity, FBPs need to be required as part of the consenting process.[33] I am unsure how this is not already required through Rule 1.2.1, so I have not made any further recommendations in relation to this. However I agree in principle with their point, so if there is any doubt, I agree it should be clarified.

28. Ultimately, I consider that the way that the Council could administer FBPs would not be dissimilar to how they administer other activities requiring resource consent that rely on the expertise of a particular discipline. The Council would consider the completeness of the application under s88(3), which, because of the direction in the proposed framework around what the FBPs must include, would also allow for consideration of the completeness of the FBP.[34]

[30] For example, Rules 5.44A and 5.45.
[31] For example, "*The content of, compliance with, and auditing of the Farm Environment Plan.*"
[32] Legal submission for Forest & Bird at [27].
[33] Legal submissions for EDS at [53].
[34] Because, the specificity in PC18 provides a clear expectation of information relating to the activity, including an assessment of the activity's effects on the environment, that can be reasonably expected, in terms of s88(2)(b).

29. As the alternate to the recommended provisions, EDS[35] recommends that Rule 1.2.1 be deleted in its entirety, and instead that reference to FBPs be included in the matters of discretion in Rule 1.2.2.

30. In my view, the effect of this would be that there would be little, if any, incentive for any party to prepare an FBP, given that Rule 1.2.2 limits the total amount of vegetation clearance, beyond which the activity becomes non-complying. More specifically, given the costs associated with the preparation of a FBP, which is required to cover an entire farming operation, it is unlikely that this pathway would be taken for the removal of a small area of vegetation within that entire property.

31. While accepting the difficulties associated with FBPs, which are also commented on further in the reply report of Mr Harding,[36] I do not consider that a more appropriate alternate has been put forward. In particular, the use of a FBP across a landholding allows for holistic consideration of how biodiversity will be managed across a property and therefore allows for greater and broader consideration of other activities that can be undertaken to improve biodiversity, for example, pest and weed control.

Extent to which significant areas are already protected

32. Another dimension to this issue is the evidence of Dr Espie, which as I understood, in response to questions from the Commissioners, to be that areas of significance are already protected through various mechanisms, and outside these areas, there are no habitats/vegetation that he considers significant.

33. There are two things I wish to draw to the attention of the Panel in relation to this. The first is that the District Plan is required to give effect to the CRPS,[37] which sets out criteria for determining significance[38] and directs that these criteria be used to determine significance of ecosystems and indigenous biodiversity.[39] Dr Espie's evidence did not appear to mention these criteria, nor offer any assessment against these. Instead, it appeared to rely on assessments undertaken within a different framework and for a different purpose than the obligations of the Council under the RMA, being the Protected Natural Area Survey. As he notes, the objective of this survey was to identify the "*best examples of all indigenous ecosystems in the Mackenzie for protection.*"[40] In my view,

[35] Legal submissions for EDS at [49].
[36] At [46] – [54].
[37] Section 75(3)(c) of the RMA.
[38] Appendix 3.
[39] Policy 9.3.1.
[40] Evidence of Dr Espie at [16].

that is different to the requirements under the RMA to recognise and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna (section 6(c) of the RMA) and the requirement to give effect to the direction in the CRPS.

34. The second is that, if the Hearings Panel accepts the evidence of Dr Espie, that the greatest threat to indigenous biodiversity is from competition from exotic plant species,[41] it is not clear from his evidence or the legal submissions for Mt Gerald and the Wolds the way in which PC18 should be amended to address this issue, in order to achieve the biodiversity outcomes sought. In my view, even if the evidence is accepted, the planning regime should not simply ignore other impacts, such as vegetation clearance on indigenous biodiversity. To do so would not give effect to the requirements of the CRPS in Method 3 under Policy 9.3.1.[42]

Threshold in Rule 1.2.2

35. Another dimension to this issue, is the appropriateness of the threshold used in Rule 1.2.2. As notified, this provides a restricted discretionary activity status for clearance of indigenous vegetation up to 5000m^2 within any site in a 5-year period.

36. Mr Head has raised concerns that that providing for the clearance of up to 5,000m^2 every five years could "*cause the irreplaceable loss of significant ecological values*". He suggests that the clearance area be reduce to a maximum of 100m^2 and/or that key habitats are identified where a more restrictive approach is required.[43] Mr Harding has considered, in his reply report, the ecological effects of providing (as a restricted discretionary activity) for 5000m^2 of vegetation clearance.[44] He notes that it is difficult, ecologically, to provide a threshold where there is certainty that providing for the clearance would ensure that indigenous biodiversity is protected and maintained, as there are a number of factors that influence this. He also notes that for some threatened plant species, clearance of up to 5000m^2 could completely destroy habitat.

37. I firstly note that this threshold is only used to distinguish between a restricted discretionary (up to 5000m^2) and non-complying (over 5,000m^2) status; it is not used as

[41] Evidence of Dr Espie at [19].
[42] "*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*."
[43] Evidence of Mr Head at [10.1].
[44] Reply report of Mr Harding at [55] – [59].

a permitted threshold. In my view and experience, non-complying activity status is best used for activities that are in most circumstances not expected to meet the objective and policy framework of the Plan. As currently drafted, the rule would apply to clearance of any vegetation, regardless of its significance. In my experience with other district plans, 100m^2 is a particularly low threshold at which to establish a non-complying activity status.

38. I also consider it is important to note that the restricted discretionary status does not 'allow' clearance up to whatever threshold is used within the rule. In my view, the restricted discretionary status can be relied on to achieve the necessary protection of areas that are assessed as significant, or otherwise ensure maintenance of indigenous biodiversity. This is because such a consent would be assessed against the Section 19 objective and policies, which provide clear direction for when a consent application should be declined, or what consent conditions should be imposed, to meet the policies and objective.

39. In my view, given the evidence before the Panel of the significance of the Mackenzie Basin, it might be appropriate to reduce the threshold (within the Basin, or on depositional landforms within the Basin), if a non-complying activity status for significant areas sought by Ms Ching is not adopted (refer previous section of this report). If a non-complying activity status for significant areas is adopted, then the threshold in this rule would only apply to areas of vegetation/habitats not assessed as significant, in which case, I consider that the threshold should be retained at 5,000m^2.

40. Finally, in relation to Rule 1.2.2 I have also been asked to consider my position on the rule referring to "any site", rather than "per 100ha". My concerns with the rule referring to "per site" are set out at in my earlier report.[45] However, if the rule is amended to refer to site or, per 100ha where a site is greater than 100ha, my concern would not arise.

Recommendation

41. In the above, I have presented various options for the Commissioners to consider, some of which are interrelated. In my view, either:

    a. The current approach, including Rule 1.2.1 relating to FBPs should be retained, but the threshold in Rule 1.2.2 should be reduced within the Mackenzie Basin. This reflects that where a FBP process is not used, a lower threshold for

[45] Section 42A report at [476].

clearance reflects the likely significance of vegetation within the Basin. The key consideration for this option is whether protection of significant areas can be achieved through the FBP framework, and whether on balance it provides a more integrated way of managing biodiversity across a property, rather than focusing only on vegetation clearance.

b. Option 2 – Include a non-complying activity status for clearance within significant areas (with a definition linked to the CRPS criteria). Retain the current threshold in Rule 1.2.2. Rule 1.2.2 would therefore only apply in circumstances where significant vegetation is not involved and therefore the assessment would focus on maintenance of indigenous biodiversity. The key consideration for this option is whether relying on a case-by-case assessment to determine activity status is appropriate.

c. Option 3 – Remove provision for FBPs within the Mackenzie Basin and either amend Rule 1.2.2 to include a lower threshold, or include a non-complying activity status for any clearance on depositional landforms within the Mackenzie Basin. Outside the Mackenzie Basin retain the current framework (FBP approach, or a 5000m^2 threshold as an RDA). The key consideration is whether, based on the majority of ecological evidence on the significance of the Basin, and the difficulties associated with Option 2, it is appropriate to take a more stringent approach to clearance within the Basin, but retain the notified framework for other areas of the District.

42. Because of the variation of options, each of which would result in various changes to the rule package (and potentially also the policy framework), and in the interests of efficiency, I have not included any changes in Appendix 1 as they relate to this matter. However, if it would assist the Hearings Commissioners, I can prepare track changes for any or all of these options.

Provision for 'existing' land use activities

43. It is apparent in evidence provided by farmers within the District that there is a high level of concern with the implications on their farming activities as a result of the recommended changes to the definitions of 'indigenous vegetation', 'vegetation clearance' and 'improved pasture'.[46] While it is important to understand the implications of definitions, it is also important to consider the purpose of the definition more broadly.

[46] Evidence of Michael Burtscher and Evidence of John Murray.

By this I mean that the concerns of these submitters could be addressed through either changes to the definitions, or when considering the use of the definitions throughout the provisions as a whole, it may be more appropriate to retain the recommended definitions but address the concerns of the submitters through specific exemptions.

44. For example, for the reasons explained by legal counsel for EDS,[47] I prefer a definition of 'indigenous vegetation' that takes into account the nature of vegetation in the Mackenzie District. My understanding of the evidence of Dr Walker and Mr Harding is that dominance (or a lower threshold of 30%) of indigenous species is not appropriate to apply in an area where there may be vegetation or habitat that meets the CRPS criteria (i.e. it is significant), but which under alternate definitions would not be considered to be indigenous vegetation and therefore would not be subject to the proposed indigenous vegetation clearance rules.[48] Notwithstanding that the impact of this definition is that more vegetation would be considered to be 'indigenous vegetation', changes to other definitions or rules could be made to ensure that the management of this vegetation is not unduly onerous, while still ensuring the definition and related provisions in Section 19 – including objectives and policies as well as rules – appropriately captures all vegetation that may have significant values, in order to ensure the CRPS is properly given effect to.

45. I have also given more thought to the point raised by Ms Ruston in response to questions from the Hearings Commissioners, in terms of whether exemptions to the definitions sit best in the definition itself or within the rule framework.[49] On reflection, I tend to agree with her, that consideration should be given to the use of the definition and how it is intended to apply, not only in the rules but also in the wider provisions. Mr Harding notes, for example, that the definition of 'indigenous vegetation' recommended in the s42A report may include plant communities that are heavily modified by exotic plants such as dense wilding pine, broom or gorse infestations.[50] He has suggested that his could be addressed by providing for that type of vegetation to be cleared, so long as it does not result in the clearance of associated indigenous plant species.[51] I have recommended that this is addressed through an exemption being added to the definition of 'indigenous vegetation', as I consider when taking into account the way the definition is used within the provisions, including within other definitions, this is most appropriate.

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[47] Legal submission for EDS at [27].
[48] Reply report of Mr Harding at [29] – [30].
[49] This matter was discussed in the Section 42A report at [501].
[50] Reply report of Mr Harding at [30]. In turn relates to evidence of Mr Thorsen at [16].
[51] Reply report of Mr Harding at [31].

46. In terms of improved pasture and vegetation clearance, I accept that the effect of the changes recommended to these definitions is such that the ability to continue to undertake farming practises on land where those practises have previously been used, relies on being able to 'prove' continuation of these activities falls within existing use rights, or otherwise would require resource consent. Ecologically, the advice of Mr Harding is that the effects of continued OSTD will depend on a number of factors,[52] and in his view, the protection of significant areas, or maintenance of indigenous biodiversity can only be assured by undertaking an assessment of the indigenous biodiversity values at any site.[53] He does note that at some areas within the Mackenzie Basin, where regular OSTD and grazing has occurred, a continuation of those activities may only have minor adverse effects on indigenous biodiversity; but considers that the only way to be certain that continued OSTD will not have such adverse effects is to survey indigenous biodiversity at the site and assess the extent to which continued OSTD will affect biodiversity values.[54]

47. I consider that this ecological advice needs to be considered in the context of these activities, where they are the same or similar in character, intensity, and scale, and may have existing use rights. I also consider the potential effects on indigenous biodiversity of OSTD activities also needs to be balanced against the costs to landowners of requiring consent, and the risk that in over-regulating farming activities, positive aspects of farming activities on indigenous biodiversity could be lost, for example, through grazing assisting in the control of pest species. There is also a need, in my view, to recognise that farming activities have operated in this environment for some time; it is a working rural environment. Overall, my view is that requiring consent for continued OSTD may be effective at achieving the outcomes sought; but it is an inefficient way of achieving them.

48. On balance, I consider that the PC18 framework should permit the ongoing use of farming activities, that are broadly of the same character, scale and intensity as what has previously occurred. Two options for addressing this have been identified in the

[52] Reply report of Mr Harding at [41].
[53] Reply report of Mr Harding at [43].
[54] Reply report of Mr Harding at [44] – [45].

legal submissions for Mt Gerald and the Wolds: amending the definition for vegetation clearance and/or improved pasture;[55] or adding an additional permitted activity rule.[56]

49. In forming a view on the most appropriate approach, I have also more thoroughly considered the existing MDP provisions, and more specifically those introduced into the Plan through PC13. My understanding of these is that within the Mackenzie Basin Subzone, *agricultural conversion*[57] and *pastoral intensification*[58] is:

    a. Permitted[59] within Farm Base Areas

    b. Controlled[60], within an area for which take and use water permit for irrigation has been granted prior to 14 November 2015 and not lapsed (and outside an area identified in c. below), with matters including reference to biodiversity[61].

    c. Non-complying[62] in a SONS, SVA, SG or LPA[63]

    d. Discretionary in all other areas not specified in a. – c. above.[64]

50. Outside the Mackenzie Basin Subzone my understanding is that pastoral intensification is permitted, provided it does not exceed 5% of a SONS (and is non-complying if the intensification involves more than 5% of a SONS.[65]) I have also assumed that in absence of any rule applying outside the Mackenzie Subzone in relation to agricultural conversion that this is permitted.

51. In addition to the above, the MDP currently includes assessment matters relating to pastoral intensification and agricultural conversion[66] - noting that for discretionary and non-complying activities the Council is not limited to these matters, but they provide a

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[55] Refer changes to the definition for 'vegetation clearance' in Appendix 1 to the legal submissions for Mt Gerald and the Wolds.
[56] Refer to proposed condition 9 of Rule 1.1.1 in Appendix 1 to the legal submissions for Mt Gerald and the Wolds.
[57] *Means direct drilling or cultivation (by ploughing, discing or otherwise) or irrigation*.
[58] *Means subdivisional fencing and/or topdressing and oversowing*.
[59] Rule 15A.1.2.
[60] Rule 15A.2.1.
[61] "*iii. The extent and form of pastoral intensification and/or agricultural conversion taking into account … c. any agreement between the Mackenzie Country Charitable Trust and landowners that secures protection of significant landscape and biodiversity values as compensation for intensification of production*
iv. Whether any threatened or at risk plants are present, including the at-risk species listed in Appendix W."
[62] Rule 15A.4.2.
[63] Sites of Natural Significance, Scenic Viewing Areas, Scenic Grasslands or Lakeside Protection Areas.
[64] Rule 15A.3.1.
[65] Rule 15A.4.1.
[66] 16.14.a.

guide on likely effects to consider. These relate not only to landscape matters, but also include matters such as: impacts on indigenous plants or animals identified at the site, particularly those which are rare, vulnerable, at-risk or endangered;[67] the extent of previous management practises and their modification of the site;[68] the effects on the ecological functioning of the area;[69] the extent to which other mechanisms, agreements or consents protect the significant natural values of the site;[70] and whether the integrity of the ecological components in Appendix X (Ecological Components of the Natural Landscape Character of the Mackenzie Basin Subzone) is compromised.[71]

52. My recommendation is therefore to remove 'irrigation', 'oversowing' and 'topdressing' from the definition of 'vegetation clearance'; because in the Basin, they are already controlled through the Section 15A rules, and an application made under those rules allows for consideration against the PC18 policy framework as well. This is because the policy framework refers to indigenous vegetation and biodiversity, and is not limited to only vegetation clearance, so could be considered for any pastoral intensification or agricultural conversion activity. A consequence of this change is that these methods will not apply to any rule which refers to vegetation clearance. This largely retains the status quo for non-indigenous vegetation clearance managed under Rule 12. Outside of the Basin, where there is less control on pastoral intensification and no control of agricultural conversion, my understanding is that irrigation, oversowing and topdressing does not have the same level of adverse effect on indigenous biodiversity as other types of clearance (like cutting) as they would within the Basin.

53. However, it should be noted that this would continue to provide a discretionary activity status for these activities in areas outside currently identified SONS. I am comfortable with this because: PC18 introduces a more targeted policy framework against which a consent triggered under the Section 15A rules can be assessed, including the assessment and protection of significant areas; and adding additional consent requirements for the same activity with differing activity status is more complicated and less efficient. For completeness, I accept that this overlap will remain in respect to 'cultivation', which is in the definition of both 'vegetation clearance' and 'agricultural conversion' but I consider it outside the scope of PC18 to address this.

[67] 16.14.a.iv.
[68] 16.14.a.iii.
[69] 16.14.a.x.
[70] 16.14.a.xiii.
[71] 16.14.a.xiv.

54. Notwithstanding the above, I do accept that the Section 15A provisions were put in place for landscape reasons, so the provisions are focussed on management of indigenous biodiversity insofar as this protection is important to management of the outstanding natural landscape. PC18 is instead focussed on the protection of significant indigenous biodiversity and maintenance of other biodiversity, in its own right. If the Hearings Commissioners do not favour reliance on the existing rule framework, which was introduced to achieve outcomes with respect to landscape, an alternate approach may be more appropriate, for example, retaining the definition of 'vegetation clearance' as recommended in the s42A report, but adding a new permitted (or controlled) activity rule as set out in the legal submissions for Mt Gerald and the Wolds.[72]

Mobstocking

55. Because mobstocking is not currently captured in the definitions for pastoral intensification and agricultural conversion I consider it appropriate to add this to the definition. I understand, from Mr Harding, that the purpose of mobstocking is to clear vegetation, or to spell pasture elsewhere on the farm.[73] While some submitters referred to the requirement for consent to erect subdivisional fencing already avoiding the ability to mobstock,[74] Mr Harding notes that the current restrictions on subdivisional fencing would not address the potential for mobstocking to be undertaken with temporary fences. In my view, adding mobstocking to the definition therefore ensures a belts and braces approach. A consequential definition for mobstocking is also recommended by Mr Harding, which I have similarly included in the recommended provisions in Appendix 1.

56. I have also considered Dr Walker's request for the definition to incorporate edge effects of development.[75] It is not clear to me how this could be addressed within the definition, but I note that the FBP approach (under Rule 1.2.1) and Rule 1.2.2 would allow for consideration of these effects in any case.

57. Having recommended this change to the definition of vegetation clearance, I consider the change to the definition for improved pasture is less problematic, in that it will not capture OSTD activities in areas that may not meet the recommended definition that

[72] Included as new condition (9) of Rule 1.1.1 in Appendix 1 of the legal submissions for Mt Gerald and the Wolds.
[73] Reply report of Mr Harding at [18].
[74] This results because the definition of pastoral intensification includes subdivisional fencing and therefore is captured by the pastoral intensification rules set out earlier.
[75] Evidence of Dr Walker at [50].

requires full removal of vegetation. I accept that an alternate approach might be to amend the definition of improved pasture, so that it captures, in some way, continuation of OSTD where it has previously occurred. I note that the definition, and evidence provided in relation to it, is considered in detail by Mr Harding.[76] I note in particular his recommended definition for 'improved pasture' (and as recommended in the s42A report) may include areas of developed land with low indigenous biodiversity values, but that his view is that this should be resolved through an on-site assessment, rather than through these areas being excluded from the definition.[77] While noting the ecological risks he is concerned about, in my view this approach is less efficient. I am comfortable that the changes I have recommended in relation to the definition of vegetation clearance overcome some of these inefficiencies.

58. I have also considered the use of the term 'improved pasture' and the definition in the NPSFM. In my view, because the use of the term is PC18 is not related to giving effect to the NPSFM, it is more important to consider the purpose of the definition within the PC18 framework, and how it works in achieving the PC18 objective. Mr Harding considers that the use of the NPSFM definition would result in significant areas being defined as areas of improved pasture.[78] In my view, taking into account the permitted activity status provided for vegetation clearance within improved pasture, application of the definition within the NPSFM within the PC18 framework would compromise the achievement of the outcomes sought and is therefore not appropriate. If the Hearing Commissioners are concerned about using a different definition, my suggestion would be instead to change the wording used, i.e. refer to 'converted land' rather than 'improved pasture'. This is included in Appendix 1.

Unimplemented consents

59. At the hearing, a query arose[79] regarding the potential effect of the rules on activities that had been granted resource consents or certificates of compliance, both under the district plan, as well as activities that had obtained consent under the regional plan but which, under the PC18 framework, require a further authorisation. The Hearings Commissioners asked me to clarify: how existing authorisations would be affected by the PC18 rules; and the extent to which regional consenting processes will have considered effects on biodiversity.

[76] Reply report of Mr Harding at [3] – [17].
[77] Reply evidence of Mr Harding at [17].
[78] Reply report of Mr Harding at [13].
[79] Arising from questions asked by the Hearings Commissioners of Mr Valentine.

60. In terms of how existing resource consents and certificates of compliance are affected by the PC18 rules, in my view, these would only authorise indigenous vegetation clearance to the extent that the clearance is specified in the consent/certificate and this will ultimately depend on the specific detail of those authorisations.

61. I also note that a situation may arise where the 'initial' clearance of vegetation may have been authorised and undertaken, but given the definitions recommended in the s42A report for 'vegetation clearance', 'improved pasture' and 'indigenous vegetation', further clearance of the same areas might require further authorisation under the PC18 rules. In my experience this is not an uncommon situation that arises as plans evolve and issues arise that require changes to be made to planning provisions. As noted above, I have recommended changes to the definition of 'vegetation clearance' to address this, to the extent that I consider it appropriate to achieve the outcomes sought in PC18.

62. In terms of regional consents, I have been advised by ECan staff, that for irrigation permits in the Mackenzie Basin, there has, in the last decade, been some consideration of the effects of irrigation on terrestrial ecosystems, but that for any given consent, the degree of robustness of that consideration has differed. Mr Harding also notes that in his experience providing advice to the Mackenzie District Council, areas that have been consented for irrigation by the regional council do support indigenous biodiversity, including areas of significance.[80]

63. As pointed out by Mr Willis at the hearing, the CRPS directs[81] that territorial authorities are solely responsible for specifying provisions for the control of the use of land for the maintenance of indigenous biological diversity on all land outside of wetlands, the coastal marine area, and beds of rivers and lakes. Moving forwards, new water permit applications would be subject to the PC18 framework, and effects on indigenous biodiversity arising from the application of irrigation water would be addressed through the MDC consenting process. In my view, PC18 must therefore ensure appropriate controls and considerations are provided in relation to the use of land for the maintenance of indigenous biodiversity. I also note that section 91 of the RMA enables regional irrigation consents and district land use consents to be heard together.

64. However, this does leave in question the extent to which PC18 should manage the clearance of indigenous vegetation resulting from the implementation of regional council consents that have already been issued, pre-PC18, but not yet implemented. In my view,

[80] Reply report of Mr Harding at [61].
[81] At page 104.

given the varying degree to which effects on indigenous biodiversity values may or may not have been considered through the regional consenting process, it is not appropriate to simply permit clearance activities arising from the implementation of regional consents. I also understand that the potential need for two consents that might have irreconcilable differences is a matter that was considered within the decision for PC13 and more recently in declaration proceedings and that it was not considered unusual. Ultimately, PC18 seeks to insert a new framework, and resource consents required under Section 19 need to be considered against the provisions, which seek to better recognise and provide for the matters identified in section 6(c) of the RMA and meet the obligations of MDC under section 31 to maintain indigenous biodiversity.

Fencing

65. In terms of bettering providing for established farming activities, I have also reconsidered the activity status for the installation of fencing, where such fences are required to exclude stock from waterways.[82] I still consider that the Council should retain some control over the location of fencing, but I tend to think that a restricted discretionary status, which can be declined, could result in conflict between the outcomes sought in different planning documents, which have different aims. I consider this is better addressed through a controlled activity status, where the Council reserves control around the location of fencing and methods for installing the fence in order to minimise impacts on indigenous biodiversity as much as practicable.

REG Activities

Opuha Power Scheme

66. I accept from Ms Crossman's evidence that the HEPS generates electricity from all stored water released from the Dam, and that in operational terms, the electricity generation facility could not operate without the Dam and therefore the dam forms part of REG facility. What I was seeking to avoid, was the application of the separate policy and rule framework to the irrigation scheme components of the Opuha Scheme. My understanding of Ms Crossman's evidence is that this would not arise from the amendments to provisions that she is recommending. On the basis that the NPSREG applies to the HEPS, I consider the WPS-related framework should also apply to the HEPS.

[82] Discussed in the Section 42A report at [427].

Objective and Policy Framework

67. To a large degree, I agree with the changes sought to the objective and policy framework sought by the JWS. Where I disagree is explained below.

68. Having considered the additional comments provided by Ms McLeod,[83] I accept that Objective 3B is limited to landscape matters and therefore does not provide sufficient guidance on the outcomes sought for the WPS in relation to indigenous biodiversity matters. However Objective 11 is still relevant, which seeks rural infrastructure that enables the District and the wider community to maintain their economic and social wellbeing. In saying that, I do tend to agree that if REG activities are not able, in some instances, to achieve the outcomes sought in limbs a) and b) of proposed Objective 1, then an additional clause might be useful. In legal submissions for Meridian, this is referred to as a "*foreseeable conflict in values*".[84] However, my understanding is that neither Meridian nor Genesis have provided evidence to demonstrate that these activities cannot be undertaken in a way that ensures the maintenance of indigenous biodiversity or the protection of significant areas. This is important because the legal submissions for Meridian assume that a tension will arise that needs to be reconciled at the objective level; but this does not appear to have been established in the evidence.

69. If the Hearings Commissioners accept that there is a need for the objective to reconcile potential tensions, then it is important that the drafting of limb c) actually does so. At present the JWS drafting[85] only requires the 'management' of effects on indigenous biodiversity and provides no guidance on what that management is to achieve in biodiversity terms. Ms McLeod also expresses a concern that the proposed JWS drafting is "*expressed in a manner more akin to a policy and fails to clearly articulate the outcome to be achieved.*"[86]

70. Legal counsel for Meridian considers that the objective should focus on 'management' of the refurbishment and upgrade activities affecting indigenous vegetation; with the provisions then fleshing out "the machinery and values of the management ethic."[87] If the objective remains focussed on 'management' as suggested in the JWS, then it is necessary to ensure that the subsequent policy and rule framework does this in a

[83] Revised Evidence of Ms McLeod, replacement paragraphs [29], [29A] and [29B].
[84] Legal submission for Meridian at [21(b)].
[85] "*to recognise and provide for the national significance of the Waitaki Power Scheme when managing effects on indigenous biodiversity from the Scheme's development, operation, maintenance, refurbishment and upgrade*"
[86] Revised Evidence of Ms McLeod at [29A].
[87] Legal submission for Meridian at [6(c)].

manner that implements the relevant provisions of the CRPS. I turn to this further below. However, at an objective level, I consider it more appropriate that clause (c) allows for an 'out' for REG activities, only where, in providing for REG activities, (a) and (b) cannot be achieved. My preferred drafting (which is included in Appendix 1) is therefore:

Land use and development activities are managed to:

a) ensure the maintenance of indigenous biodiversity; and

b) protect and where practicable enhance, areas of significant indigenous vegetation and significant habitats of indigenous fauna ~~and riparian areas;~~ and

c) in relation to renewable energy generation activities and the electricity transmission network, achieve (a) and (b) as far as practicable, when providing for the development, operation, maintenance, refurbishment and upgrade of these activities.

71. For completeness I consider the alternate drafting suggested by Ms McLeod is preferable to that of the JWS (and not dissimilar to that recommended above), but only refers to maintenance of indigenous biodiversity and therefore does not distinguish between significant and non-significant areas. If her drafting is preferred, I recommend the following changes (tracked against her wording):

c) provide for vegetation clearance associated with the development, operation, maintenance, refurbishment and upgrade of the Waitaki Power Scheme while, to the extent practicable, protecting areas of significant indigenous vegetation and significant habitats of indigenous fauna and maintaining indigenous biodiversity ~~is maintained.~~

72. The JWS also seeks changes to Policy 9 so that it only refers to mitigating effects on indigenous vegetation and habitats of indigenous fauna, rather than referring to ecological processes, ecosystem functions and linkages between significant areas. This is based on verbal advice previously given to me by Mr Harding that these are matters that are important to consider when assessing whether indigenous biodiversity is maintained.

73. The JWS also seeks that Policies 3 and 5 are amended so that they do not apply to activities associated with WPS. This is contrary to Ms Ruston's original evidence[88] that Policy 7 would not be read in isolation of other policies in PC18. The difficulty I have with not applying policies 3 & 5 to the WPS, is that Policy 7 does not apply a hierarchy like Policy 3 does. While the new Clause in Policy 7 proposed in the JWS (which I agree

[88] Evidence of Ruston at [80].

with) is effectively the same as Policy C2 of the NPSREG, in my view, what it provides direction on is how residual effects, following avoidance, remediation and mitigation measures, are to be considered. However, it does not preclude REG activities being subject to additional direction in relation to those avoidance, remediation and mitigation measures. Therefore, I do not consider that the application of Policy 3 to the WPS is at odds with the NPSREG. Similarly, there is nothing Policy 5 that I consider is contrary to the NPSREG.

74. Also relevant is that the CRPS seeks, in relation to REG activities,[89] that adverse effects are avoided on significant natural resources and where this is not practicable, remedied or mitigated, with other adverse effects on the environment appropriately controlled.[90] Policy 16.3.5.(2)(b) more specifically directs that in enabling the upgrade and development of electricity generation infrastructure, site, design and method selection avoids adverse effects on significant natural resources where practicable, or remedies, mitigates or offsets them, and appropriately controls other adverse effects. This is applicable to areas within the WPS that are already identified as SONS, and requires avoidance of adverse effects on these areas in the first instance.

75. In my view, application of Policies 3 & 5 to the WPS is sufficiently consistent with the direction in the CRPS, and altering them to not apply to the WPS would not give effect to the direction in the CRPS set out above. If Policies 3 & 5 are not applied to the WPS, then in my view another policy would be required to expressly give effect to Objective 16.2.2 and Policy 16.3.5.2(b) because this is not covered in Policy 7.

Rules

76. In the s42A Report, I indicated that based on Mr Harding's evidence regarding the values associated with areas of the WPS, that I had some concerns that the proposed WPS rule framework might not implement the policy direction.[91] I noted however that the ecological evidence needed to be considered in light on the NPSREG and in terms of the extent that indigenous vegetation clearance might be required to maintain and operation the WPS. This latter point has been addressed by the evidence of Ms Bryant. I have also given more thought to the direction in the CRPS at Policy 16.3.5(4), which directs the maintenance of generation output and enablement of the maximum electricity

[89] Objective 16.2.2.
[90] This direction also applies more broadly in Chapter 5 (Policy 5.3.9(2)(b)) to the expansion of existing infrastructure and development of new infrastructure.
[91] Section 42A report [305] – [309].

supply benefit to be obtained from the existing electricity generation facilities "*where this can be achieved without resulting in additional **significant** adverse effects on the environment which are not fully offset or compensated"* (emphasis added).

77. Mr Harding has provided evidence that within those areas of the WPS identified as SONS, clearance could have adverse effects on indigenous vegetation and habitats.[92] He suggests that the level of risk associated with vegetation clearance for operation and maintenance of the WPS could be reduced by limiting those activities, where within Operating Easements, to those within the vicinity of existing structures.[93] I am satisfied, in light of the evidence about the nature of clearance associated with operation and maintenance activities, that these activities do not appear likely to result in significant adverse effects. I am therefore comfortable that the retention of the permitted activity status gives effect to the CRPS direction.

78. In terms of refurbishment, as noted earlier, I do not agree with an assessment of significance (against the CRPS criteria) being required in order to determine if an activity is permitted. I therefore consider there are difficulties with 'splitting' the WPS rules as proposed in the JWS. Given that there are existing SONS within the Plan that apply to the WPS, if the Panel agrees with Ms Ruston that refurbishment activities outside significant areas should have a permitted activity status, I consider this is more appropriately tied to the already defined SONS areas.

79. However, Ms Bryant notes that refurbishment activities could result in additional clearance of indigenous vegetation,[94] which I have taken to mean could involve the disturbance of vegetation that has not previously been impacted by the existing activities. Ms Ruston also notes that "*refurbishment activities can sometimes involve activities beyond the current area of activity*" which could result in permanent effects on the values of significant areas.[95] Legal submissions presented for Meridian also note that there is uncertainty about what indigenous vegetation may be affected by the refurbishment (and upgrade) of the WPS and hence uncertainty about potential effects on biodiversity.[96] I therefore continue to have concerns with refurbishment being a permitted or controlled activity. It also appears at odds with Ms Ruston's comment that "*enabling refurbishment does not ignore the potential adverse environmental effects that*

[92] Evidence of Mr Harding at [85] and reply report of Mr Harding at [79].
[93] Reply report of Mr Harding at [79].
[94] Evidence of Bryant at [8.17 – 8.18].
[95] Evidence of Ruston at [95].
[96] Legal submissions for Meridian at [5(c)].

may be associated with such an activity, since the act of enabling can be subject to appropriate management of such potential effects".[97] While I agree with this statement, in my view this is reliant on appropriate management of potential effects being achieved through either a consent process, or at the least through conditions placed on a permitted or controlled activity where there is sufficient certainty that such conditions appropriately address potential effects. However, there are no conditions proposed in the JWS attaching to the proposed controlled activity status for refurbishment.

80. It is also important to bear in mind that parts of the WPS are located in identified SONS. Taking the above into account, in my view refurbishment in these areas, where there could be additional clearance required, requires a consenting pathway. I note that in undertaking refurbishment activities where vegetation is not disturbed, consent would not be triggered, so the rule would only come into play in circumstances when refurbishment would affect indigenous biodiversity.

81. I have also taken into account that the legal submissions made for Meridian are that refurbishment falls within the concept of "*maximum electricity supply benefit*".[98] As such, Policy 16.3.5(4) of the CRPS would apply, which requires this benefit to be enabled "*where this can be achieved without resulting in additional significant adverse effects on the environment which are not fully offset or compensated."* The difficulty I have with a controlled activity status, is the extent to which this requirement can be met through a consent process within which a consent cannot be declined. I therefore continue to prefer a restricted discretionary activity status. However, if the Hearings Commissioners are satisfied that the direction in Policy 16.3.5(4) can be ensured through matters for control, then I consider a controlled activity status would be acceptable.

82. In considering the above, I have also considered the supplementary evidence of Ms Ruston in relation to the controlled activity status provided for the WPS under the CLWRP.[99] In my view, it is important to note that the WCWARP Rule 15A relates to the use, taking, damming and diversion of water and the CLWRP Rule 5.125A relates to the discharge of contaminants. They do not, in any way, address effects of indigenous vegetation clearance.[100] In my view, ensuring the direction in Policy 16.3.5(4) of the CRPS is more relevant than the activity status of water-related rules in the CLWRP. In

[97] Evidence of Ruston at [74].
[98] At [30].
[99] Supplementary evidence of Ms Ruston at [10] – [15].
[100] Rule 15A of the WCWARP restricts control to adverse effects on flows and Rule 5.125A restricts control to water quality outcomes and effects of the *discharge* on the environment.

addition, the evidence of Ms Bryant did not appear to indicate that refurbishment works were likely to be "*inextricably linked*" to application for replacement consents to the WPS. It therefore appears more likely that refurbishment works would be the subject of a separate application and therefore the differing activity status between the MDP and the CLWRP and WCWARP rules and the potential for them to be bundled does not seem likely to arise.

Electricity Transmission Network within the WPS

83. I generally agree with the changes sought by Ms McLeod in relation the electricity transmission network.[101] This includes clarifying, in the definition of 'Waitaki Power Scheme' that reference to the "*transmission network"* is to those components of the Scheme that connects them to each other and to the National Grid. I have also been asked to comment on whether an advice note could be used to provide this clarification, instead of amending the definition. While I am not opposed to an advice note being used to provide greater clarity, in my view, the change to the definition is a more straightforward way to provide such clarity and is therefore my preference.

No Net Loss and Offsetting

No Net Loss

84. In legal submissions for EDS, concern is raised that Policy 2 (as recommended) conflates the concepts of 'no net loss' and 'protection', which they submit are separate and distinct concepts.[102] In particular, EDS submit that 'no net loss' is a term associated with the use of biodiversity offsetting, and envisages the loss or degradation of one area on the basis of gains in another. They consider that this does not achieve protection, and rather, the goal of no net loss is consistent with Council's obligation to maintain indigenous biodiversity across the District. They state that protection of significant sites is a key tool to achieving no net loss of indigenous biodiversity more broadly.[103] Dr Walker's evidence is that the term no net loss introduced to promote offsetting, which involves a compromise between continued development and mitigation. She also considers that the latter differs from 'protection'.[104]

[101] This assumes that the Hearings Commissioners are satisfied that the matters of scope have been addressed.
[102] Legal submissions for EDS at [39].
[103] Legal submissions for EDS at [42].
[104] Evidence of Dr Walker at [44].

85. If I have understood it correctly, the argument of submitters is that significant areas must be protected, and if they are appropriately protected, this will assist in achieving a no net loss outcome of indigenous biodiversity more broadly; however aiming for 'no net loss' on its own is not sufficient to achieve protection.

86. Related to this, Dr Walker[105] and Mr Harding[106] consider that the significant ecosystems that occur in the Basin and elsewhere in the District cannot be protected by an exchange of development and mitigation. Dr Walker's evidence is that the remaining indigenous ecosystems and plant communities of the Mackenzie Basin floor are irreplaceable, and clearance of indigenous vegetation is not capable of being offset to ensure no net loss of indigenous biodiversity. In her view, the clearance will cause permanent loss that cannot be offset of compensated for.[107]

87. The Hearings Commissioners have asked me, in light of this, to consider if the concept of no net loss should be amended in PC18 so that it does not apply to significant areas. In considering this, I have noted that the direction in the CRPS, which PC18 is intended to give effect to, states, at Policy 9.3.1, which is titled "*Protecting **significant** natural areas"*, that:

    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.* (emphasis added).

88. The only other place in the CRPS that refers to no net loss is Policy 9.3.6 (and its related principle reasons and explanation) which sets out the limitations on the use of biodiversity offsets. Because of this, I have understood that the concept of no net loss is intended to apply to significant areas, rather than being an outcome sought for maintaining indigenous biodiversity more broadly.

89. However, if the evidence is accepted that clearance of indigenous vegetation within the Mackenzie Basin is not able to be offset to ensure no net loss of indigenous biodiversity, and that a goal of no net loss will not achieve protection, then the outcome sought for significant areas (being their protection) will likely not be achieved. I have recommended changes to Policy 2 to remove reference to no net loss and instead refer to ensuring land use and development in areas identified as significant only occurs in a way that

[105] Evidence of Dr Walker at [17] and [44].
[106] Evidence of Mr Harding at [66] – [71].
[107] Evidence of Dr Walker at [17].

results in no loss of those values that contribute to the significance of the vegetation or habitat. As an alternate to the reference to values, the policy could instead be amended to refer to protection of the integrity, form, functioning and resilience of the vegetation or habitat. A further alternative, along the lines of that suggested by Dr Walker[108] would be to delete the current policy and replace it with one along the lines of: "*To avoid harm to, and the reduction in extent of, areas of significant indigenous vegetation and fauna habitats*."

90. Also related to this discussion are the legal submissions for Meridian, which argue that Policy 2 should be limited to land development and pastoral activities, because the CRPS expressly provides for offsetting and compensation for upgrading and new generation. They state that a no net loss policy cannot and should not preclude those options.[109]

91. I agree that the direction in Policy 16.3.5 of the CRPS is to enable the development of new, or upgrade of existing, electricity generation infrastructure. This is subject to a proviso, in (2)(b), which, as noted earlier, is that as a result of site, design and method selection, adverse effects on significant natural resources are avoided, where practicable, or remedied, mitigated or offset, and other adverse effects are appropriately controlled. I accept the argument made by Meridian that this should not be limited by the requirement for no net loss. I have therefore suggested changes to Policy 2 to exclude its application to those activities managed under Policy 7 (renewable energy generation activities and the electricity transmission network).

Offsetting

92. I have also been asked by the Hearings Commissioners, in light of the evidence given by Mr Head, Mr Harding and Dr Walker in relation to offsetting, to consider if the offsetting should be amended in PC18 so that it does not apply to the Mackenzie Basin.

93. Mr Harding's evidence is that it is "unlikely" that a biodiversity offsetting proposal in the Mackenzie Basin would be able to meet the CRPS Policy 9.3.6 criteria.[110] Dr Walker similarly considers it is "improbable" that any proposal would meet CRPS Policy 9.3.6

[108] Evidence of Dr Walker at [45].
[109] Legal submission for Meridian at [46] – [48].
[110] Evidence of Mr Harding at [71].

criteria or proposed Policy 6.[111] Mr Head considers that biodiversity offsetting in the Mackenzie Basin would be inconsistent with CRPS Policy 9.3.6 criteria.[112]

94. I considered Mr Harding's evidence on this matter in my section 42A report and for the reasons set out in that report,[113] I continue to consider that it is appropriate, to give effect to the CRPS, to include the option of offsetting within the MDP. The concern of the experts appears to be that within the Basin, offsetting would be unlikely to meet the criteria. If this is the case then an offsetting proposal which did not meet the criteria would be unlikely to succeed. One possible option to make this clearer might be to amend the stem of Policy 6 to state "*A biodiversity offset will only be accepted where the following criteria are met".*

95. Notwithstanding the above, if the Hearings Commissioners wish to preclude the option of offsetting within the Mackenzie Basin, the words "*outside of the Mackenzie Basin"* could be added to the start of clause (d) of Policy 3 to achieve this. However, to align with the direction in Policy 16.3.5 of the CRPS, this addition should not be applied to renewable energy generation activities and the electricity transmission network.

[111] Evidence of Dr Walker at [55].
[112] Evidence of Mr Head at [12.1].
[113] Section 42A report at [237].