

IN THE ENVIRONMENT COURT

ENV- 2021—CHC-

I MUA I TE KOOTI TAIAO AOTEAROA

IN THE MATTER

of an appeal under Clause 14 of the First
Schedule of the Resource Management
Act 1991

AND IN THE MATTER

of Plan Change 18 of the Mackenzie
District Plan

BETWEEN

**THE ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW ZEALAND
INCORPORATED**
Appellant

AND

MACKENZIE DISTRICT COUNCIL
Respondent

**NOTICE OF APPEAL BY THE ROYAL FOREST AND BIRD PROTECTION SOCIETY OF
NEW ZEALAND INCORPORATED**

August 2021

To: The Registrar
Environment Court
Christchurch

1. The Royal Forest and Bird Protection Society of New Zealand Inc. (“Forest & Bird”) appeals against decisions of Mackenzie District Council on plan change 18 to the Mackenzie District Plan (“PC18”).
2. Forest & Bird made a submission and a further submission on PC18.
3. Forest & Bird is not a trade competitor for the purposes of section 308D of the Resource Management Act 1991.
4. Forest & Bird received notice of the decision on or about 24 June 2021.
5. The decision was made by the Mackenzie District Council.
6. Forest & Bird is willing to participate in alternative dispute resolution.

PARTS OF DECISION APPEALED, REASONS FOR APPEAL, AND RELIEF SOUGHT

7. The parts of the decision that Forest and Bird is appealing, the reasons and the relief are set out in Table 1.
8. In addition to the reasons set out in the table below, the general reasons for Forest & Bird’s appeal are that the provisions appealed against:
 - a. do not give effect to relevant provisions of the Canterbury regional Policy Statement (RPS);
 - b. are not consistent with Part 2 of the Resource Management Act (‘the Act’);
 - c. do not implement the Council’s functions under s 31 of the Act;
 - d. do not represent best resource management practice; or
 - e. Any combination of the above matters.

9. Where specific wording changes are proposed by way of relief, Forest & Bird seeks in the alternative any wording that would adequately address the reasons for its appeal.

Attachments

10. Attached to this Notice of Appeal are the following documents:
- a. A list of names and addresses of persons to be served with a copy of this notice;
 - b. A copy of Forest and Bird's original submission;
 - c. A copy of Forest and Birds further submission; and
 - d. A copy of the Mackenzie District Council's decision on PC18.

Dated: 05 August 2021



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Advice to recipients of copy of notice of appeal

How to become party to proceedings

You may be a party to the appeal if you made a submission or a further submission on the matter of this appeal.

To become a party to the appeal, you must,—

- within 15 working days after the period for lodging a notice of appeal ends, lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court and serve copies of your notice on the relevant local authority and the appellant; and
- within 20 working days after the period for lodging a notice of appeal ends, serve copies of your notice on all other parties.

Your right to be a party to the proceedings in the court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing or service requirements (see form 38).

How to obtain copies of documents relating to appeal

The copy of this notice served on you does not attach a copy of the appellant's submission or the decision (or part of the decision) appealed. These documents may be obtained, on request, from the appellant.

Advice

If you have any questions about this notice, contact the Environment Court in Auckland, Wellington, or Christchurch.

TABLE 1 - PART OF DECISION APPEALED, REASONS FOR APPEAL AND RELIEF SOUGHT

	PROVISION	REASONS FOR APPEAL	APPEAL – RELIEF SOUGHT
	Definitions		
1.	1	Improved pasture	
		<p>Forest & Bird consider a more appropriate approach to ensure the protection of significant indigenous biodiversity is to map all fully converted areas where no to very little indigenous biodiversity exists. This is located in the evidence of Mr Harding to the Commissioners. Rather than relying on a definition of improved pasture.</p> <p>However if improved pasture is retained the following matters must be addressed.</p> <p>The Commissioners adopted NPS-FM definition for ‘improved pasture’ to give effect s75(3)(a). The Commissioners could have made the definition specific to dryland ecosystems more suitable to the Mackenzie Basin. The NPS-FM definition is a nationally focussed definition in relation to freshwater ecosystems, that may be difficult or inappropriate to apply in all situations across the country. It is a bottomline definition in terms of fresh water bodies and Council’s should not use more exclusive (permissive) definitions. However, Council’s may use more specific and inclusive definitions to better meet local council obligations. In this case the NPS-FM definition of improved pasture is not the best option. The new definition is an improvement on the notified definition but it is too exclusive resulting in provisions being too permissive and will lead to further loss of indigenous biodiversity. The</p>	<p>In the first instance delete and replace with a reference to a map all fully converted areas as identified in the evidence Mr Harding which indicates all improved pasture</p> <p>In the alternative if not successful above have two definitions for the Mackenzie District. One for the Mackenzie Basin Subzone and one for all other areas of the district.</p> <p>The one for all other areas is the one proposed by the Commissioners</p> <p>The other one for the Mackenzie Basin Subzone is similar but as amended below:</p> <p>Improved Pasture within the Mackenzie Basin Subzone: means an area of land where exotic pasture species have been deliberately sown or <u>and</u> maintained for the purpose of pasture production <u>of an existing crop; or for hay, bailage or silage; or the areas of land covered by an existing farm irrigating system (excluding flood irrigation type systems);</u> and species composition and growth has been modified and is being managed for livestock grazing.</p> <p>Or such other amendments to address Forest & Bird’s</p>

		<p>problem in the Mackenzie Basin is that a great majority of the basin contains significant biodiversity even where pasture was deliberately sown. There is no spatial context in this definition. Deliberately sown pasture may not have been maintained for quite some time and the paddock could have been sown as a one off many years ago, allowing indigenous biodiversity to re-establish Also depending on the mechanism used for sowing a pasture it may be that some significant biodiversity still persists and should be protected. While in some of these areas current land use may be appropriate to continue, they are not appropriately defined as “improved pasture” or managed as such under the rule framework which would allow intensification through vegetation clearance. The only certain way to ensure significant biodiversity is protected is to map areas of improved pasture where ecological assessments have determined that no significant biodiversity exists or somehow exclusively define improved pasture so that it does not capture significant indigenous biodiversity.</p>	<p>reasons and relief in regards to the definitions on vegetation clearance, and significant indigenous vegetation and significant habitats of indigenous fauna.</p>
2.	Indigenous Vegetation	<p>Partially support the definition because the definition goes beyond what is required. It includes exclusions that should be located in their own rule. This relates to the exclusions for domestic gardens, amenity planting, shelterbelts and exotic woody pest plants.</p> <p>The RMA Quality Planning Resource “Plan Steps: Writing Provisions for Regional and District Plans” (2013) section on definitions, page 18 says to avoid: <i>writing definitions in such a way that change the status of activities or that deal with matters that should be dealt with in a rule (readers expect definitions to only relate to matters interpretation or meaning)</i></p>	<p>Amend-</p> <p>Indigenous Vegetation: means a community of vascular plants, mosses and/or lichens that includes species native to the ecological district. The community may include exotic species, but does not include vegetation that has been planted as part of a domestic garden, for amenity purposes or as a shelterbelt, or exotic woody pest plants</p>

		<p>The exclusions in this definition already have their own permitted rule 19.1.1.1.(4).</p> <p>As written the definition would make the rule nonsensical.</p> <p>In the Report and Recommendations of the Hearing Commissioners at [177] accepted that exemptions should be contained within relevant rules. However, at [180] the Commissioners go onto a rely on a reply report from Ms White recommending exemptions be added to the definition. Forest & Bird has not seen the reply s42A and it does not appear on the Mackenzie District Council webpage. Forest & Bird prefers the definition recommended by Ms White in her initial s42A report without any exclusions.</p>	
3.	Significant indigenous vegetation and significant habitats of indigenous fauna	<p>Figure 1 does not show the improved pasture areas within the ecosystems. The extent of improved pasture in the Mackenzie Basin is unclear under its notified and decisions version definitions.</p> <p>This definition of Significant indigenous vegetation and significant habitats of indigenous fauna will exclude an unknown amount of land which may meet the criteria for significance.</p> <p>This is because the improved pasture definition is wide ranging and can include any piece of land that has ever been sown for pasture.</p> <p>It is important to get this definition correct because it sets the rule framework for permitted, restricted discretionary and non-complying activities.</p> <p>The definition needs to go further and fully acknowledge</p>	<p>Amend</p> <p>...</p> <p>c) includes any areas that do not comprise improved pasture within the glacial derived or alluvial (depositional) outwash and moraine gravel ecosystems of the Mackenzie Basin as shown on Figure 1.</p> <p>Or such other amendments to address Forest & Bird's reasons and relief in regards to the definitions on improved pasture , and vegetation clearance.</p>

		<p>the significance of the glacial derived or alluvial outwashes and moraine gravel ecosystems as identified in Figure 1. If areas of improved pasture determined without significant indigenous biodiversity (as explained above) can be identified they should be mapped and shown within Figure 1 as such.</p>	
4.	Vegetation Clearance	<p>Figure 1 does not show the improved pasture areas within the ecosystems. The extent of improved pasture in the Mackenzie Basin is unclear under its notified and decisions version definitions. The vegetation clearance definition will exclude an unknown amount of land. This is because the improved pasture definition is wide ranging and can include any piece of land that has ever been sown for pasture.</p> <p>The only way that the DV of this definition works is to exclusively define the area of improved pasture in the Mackenzie Basin.</p> <p>Also the RMA Quality Planning Resource “Plan Steps: Writing Provisions for Regional and District Plans” (2013) section on definitions, page 18 says to avoid: <i>writing definitions in such a way that change the status of activities or that deal with matters that should be dealt with in a rule (readers expect definitions to only relate to matters interpretation or meaning).</i></p> <p>Including improved pasture in this definition creates serious implications in Rule 19.1.1.1.</p> <p>Firstly (although we do not agree with this approach) it would mean that permitting vegetation clearance for improved pasture nonsensical and effectively there would</p>	<p>Amend</p> <p>Vegetation Clearance: means the felling, clearing or modification of trees or any vegetation by cutting, crushing, cultivation, spraying, burning, irrigation, artificial drainage, and mob stocking. It includes oversowing, topdressing or overplanting on land that is not improved pasture. Clearance of vegetation shall have the same meaning.</p> <p>And such other amendments to address Forest & Bird’s relief in regards to the definitions on improved pasture, and significant indigenous vegetation and significant habitats of indigenous fauna.</p>

		<p>be no rule for oversowing, topdressing or overplanting on land that is improved pasture.</p> <p>Secondly the current definition of improved pasture says it could be anywhere that pasture has been deliberately sown (with no spatial context). This could potentially cover a large area of Figure 1. This definition of vegetation clearance does not include oversowing, topdressing or overplanting on land that is improved pasture. Rule 19.1.1.1 would allow oversowing, topdressing or overplanting over a potentially large area of the Mackenzie Basin.</p>	
Objectives			
5.	Objective 1 intro	The objective now refers to land use and development. It is not clear if this covers all forms of activities that may have an effect on indigenous biodiversity. For example it is not clear if Objective 1 relates to subdivision activities	<p>Delete the intro (i.e. “Land use and development activities are managed to”) and retain objective 1(a) and 1(b) but separate them into individual objectives. And then reword 1(b) to read as follows:</p> <p><u>Maintain and enhance indigenous biodiversity outside areas of significant indigenous vegetation and significant habitats of indigenous fauna</u></p>
6.	Objective (c)	RMA, s 6 provides for matters of national importance and decision makers must recognise and provide for the protection of significant indigenous biodiversity. The efficient use and development of natural and physical resource is a s7(b). Section 7 matters only require decision makers to have particular regard. Recognising and providing for the Waitaki Power Scheme in Objective 1 elevates it to the same level as a s6 matter of national importance. This is not in accordance with Part 2.	Delete

Policies			
7.	Policy 2	<p>Policy 2 is the protection mechanism which gives effect s6(c).</p> <p>RMA, s 6 provides for matters of national importance and decision makers must recognise and provide for the protection of significant indigenous biodiversity. The efficient use and development of natural and physical resource is a s7(b). Section 7 matters only require decision makers to have particular regard. Recognising and providing for the Waitaki Power Scheme in Objective 1, and providing for priority over policy 2 elevates it to the same level as a s6 matter of national importance. This is not in accordance with Part 2</p>	Amend: ... or is otherwise consistent with Policy 5.
8.	Policy 3 & 4	<p>Significant residual adverse effects has a different meaning to that as normally understood in a RMA context.</p> <p>The wording significant residual adverse effects comes from the <i>New Zealand Government - Guidance on Good Practice Biodiversity Offsetting in New Zealand (August 2014)</i>. The first principle of this document states:</p> <p><i>Adherence to the mitigation hierarchy:</i> <i>A biodiversity offset is a commitment to compensate for significant residual adverse impacts on biodiversity identified after appropriate avoidance, minimisation and on-site rehabilitation measures have been taken according to the mitigation hierarchy.</i></p>	<p>Either amend:</p> <ul style="list-style-type: none"> • By deleting the word significant from in front of all references to residual adverse effects (e.g., significant residual adverse effects <p>Or define significant residual adverse effects to reflect the intention of the term in the <i>New Zealand Government Guidance on Good Practice Biodiversity Offsetting in NZ</i></p> <ul style="list-style-type: none"> • Significant residual adverse effects refers to effects that are ecologically meaningful or of non-minor ecological importance. This will need to be determined on a case-by-case basis

		<p>The New Zealand Government Guidance on Good Practice Biodiversity Offsetting in NZ (August 2014) section 4.3 page 18 states that:</p> <p><i>It should be noted that the term ‘significant residual adverse impacts’ is taken from the BBOP and is not analogous to the use of the term ‘significant’ under the RMA or the CA. Rather, it can be thought of as referring to effects that are ecologically meaningful or of non-minor ecological importance. This would need to be determined on a case by case basis. Box 2 provides a comparison of BBOP and RMA terminology with the mitigation hierarchy. If the total residual impact is very small (taking into account that a number of small effects may still accumulate into a significant effect), it may not be worth the investment in a comprehensive good practice biodiversity offset, particularly if the relevant legislative tests allow for minor adverse effect occur. ...</i></p> <p>Retaining a BBOP term such as significant residual adverse effects in an RMA Plan creates confusion for plan readers and administrators. By just using the term residual adverse effects the plan ensures that effects which are less than significant in an RMA context can be considered for offsetting and it removes any assumption created by retaining the term significant.</p> <p>If the term significant is retained – Forest & Bird suggests that a definition of “significant residual adverse effects” is added to the pMEP.</p>	
9.	Policy 3	It is not clear if environmental compensation is part of the	If it is intended to include environmental compensation as

		<p>mitigation hierarchy of PC18</p> <p>If it is part of the hierarchy PC18 should provide policy guidance and also provide limits to compensation</p>	<p>part of mitigation hierarchy then include policy framework when it can be used and the limits to compensation.</p>
10.	Policy 4 (formerly 6)	<p>There are no recognition to the limits of offsetting. Also there is no recognition of the concept of additionally.</p> <p>Also there is no requirement in the policy that the applicant actually demonstrate to the Council how an offset will meet the policies requirement.</p> <p>This is accordance with the <i>New Zealand Government Guidance on Good Practice Biodiversity Offsetting in NZ</i> (August 2014)</p>	<p>Amend:</p> <p><u>For any indigenous biodiversity offsets apply the following criteria-Except where adverse effects are required to be avoided in accordance with the policies of this plan, where a biodiversity offset is proposed, the applicant must apply and demonstrate how the following will be met in order for the proposal to qualify as a biodiversity offset:</u></p> <p>...</p> <p><u>(h) the offsetting will not be applied to justify impacts on vulnerable or irreplaceable biodiversity; or where the effects of the proposed activity on biodiversity are uncertain, unknown, or little understood, but potentially significantly adverse;</u></p> <p><u>(i) that actions undertaken as a biodiversity offset are demonstrably additional to what otherwise would occur, and are additional to any remediation or mitigation undertaken in relation the adverse effects of the activity;</u></p>
11.	Policy 5	<p>This policy now states: “Despite Policy 2,”. Policy 2 is the protection mechanism which gives effect s6(c).</p> <p>RMA, s 6 provides for matters of national importance and decision makers must recognise and provide for the protection of significant indigenous biodiversity. The</p>	<p>Amend: Despite Policy 2...</p>

		efficient use and development of natural and physical resource is a s7(b). Section 7 matters only require decision makers to have particular regard. Recognising and providing for the Waitaki Power Scheme in Objective 1, and providing for priority over policy 2 elevates it to the same level as a s6 matter of national importance. This is not in accordance with Part 2	
Rules			
12.	19.1.1.	Relying on Rule 1.3.2 under the current definitions does not provide appropriate protection for significant indigenous biodiversity. There is a significant issue with the way in which improved pasture is defined and mapped in PC18. At the moment the definition will include an unknown amount of significant indigenous biodiversity. This rule will permit removal of indigenous biodiversity including significant indigenous biodiversity which policy 2 specifically directs the avoidance of.	Until “improved pasture” can be accurately defined or mapped within Figure 1 replace references to Rule 1.3.2. as amended in the below relief for Rule 19.1.3.2
	19.1.2.2	Condition 1(a) fails to capture all areas of significant indigenous biodiversity because the definition for significant indigenous vegetation or a significant habitat of indigenous fauna excludes improved pasture from Figure 1. There is a significant issue with the way in which improved pasture is defined and mapped in PC18. At the moment the definition will include an unknown amount of significant indigenous biodiversity. This rule will make the removal of indigenous biodiversity including significant indigenous biodiversity, which policy 2 specifically directs the avoidance of, a restricted discretionary activity.	Until “improved pasture” can be accurately defined or mapped within Figure 1 amend Rule 1.2.2 condition 1(a) as follows: a) an area of significant indigenous vegetation or a significant habitat of indigenous fauna <u>as defined in (a) and (b) (but not including (c) of its definition) and Figure 1 areas of glacial derived or alluvial (depositional) outwash and moraine gravel ecosystems of the Mackenzie Basin,</u>
13.	19.3.2	The rule refers to significant indigenous vegetation or	Until “improved pasture” can be accurately defined or

	<p>significant habitat of indigenous fauna. As discussed above the definition of significant indigenous vegetation or significant habitat of indigenous fauna relies on an inadequate definition of 'improved pasture'. Until the definitions are adequately defined the rule should refer specifically to areas that remove the ambiguities related to the definition of improved pasture. This will protect significant indigenous biodiversity as required by s6(c) and objective 1 and policy 2.</p>	<p>mapped in Figure 1 replace references to Rule 1.3.2(1):</p> <p>Within an area of significant indigenous vegetation or a significant habitat of indigenous fauna <u>as defined in (a) and (b) (but not including (c) of its definition) and Figure 1 areas of glacial derived or alluvial (depositional) outwash and moraine gravel ecosystems of the Mackenzie Basin</u></p>
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