

**BEFORE THE MACKENZIE DISTRICT COUNCIL**

Under **The Resource Management Act 1991**

And

In the matter of **a submission on the proposed Plan Change 18 to the  
Mackenzie District Plan**

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**Further legal submissions on behalf of the Director-General of Conservation**

**Submitter Number: 18**

**Dated: 18 March 2021**

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## Introduction

1. The Panel asked – is it obliged to use the definition of “improved pasture” in the National Policy Statement for Freshwater Management 2020 (noting the same definition is also contained in the draft National Policy Statement on Indigenous Biodiversity November 2019)?
2. The following outlines my legal submissions in response to this question.

## Summary

3. For the reasons set out below, the Panel is not obliged to use the definition of “improved pasture” as contained in the National Policy Statement for Freshwater Management 2020 (NPSFM) (or, for different reasons the draft National Policy Statement on Indigenous Biodiversity 2019) as:
  - a. The definition of improved pasture in the NPSFM is materially different to the proposed definition in the s42A report for Plan Change 18 (PC18);
  - b. The definition in the NPSFM is used in in a different context for a different purpose;
  - c. The obligations associated with the definition in the NPSFM – what must be given effect to - are for a regional council to give effect to;
  - d. Using the definition of “improved pasture” in the NPSFM would mean the proposed plan change:
    - i. Could be unclear and uncertain for users and not “fit for purpose”
    - ii. Could result in more clearance of indigenous vegetation given the broader definition of “improved pasture” in the NPSFM
    - iii. Would not give effect to the relevant provisions of the Canterbury Regional Policy Statement (Chapter 16) (it would allow more clearance of potentially significant indigenous vegetation as a permitted activity); and
    - iv. Is not in accordance with Part 2 of the Act, s6(c) in particular.
4. Given the potential for confusion with use of the term “improved pasture” in different statutory contexts, it may be more appropriate to use a different term in PC18 e.g. “fully converted pasture”.

## “Give effect to”

5. PC18 must “give effect to” any National Policy Statement, s75(3)(a). This does not include a draft NPS, in this case the draft National Policy Statement for Indigenous Biodiversity 2019. There is also no requirement to adopt the specific wording of any NPS to give effect to it.
6. PC18 must also give effect to any Regional Policy Statement, in this case the Canterbury RPS (CRPS), s75(3)(c) the Act.
7. It is important to understand what the words “give effect to” mean, to ascertain whether there is any requirement to use the definition of “improved pasture” in the NPSFM to “give effect to” the NPSFM.

8. “Give effect to” has been held to mean “implement”<sup>1</sup>. “On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it. However, the implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way (i.e., which creates an “environmental bottom line”) may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction”<sup>2</sup>.

### Plan Interpretation

9. The Courts have held that a District Plan must be comprehensible to a reasonably informed but not necessarily expert reader. If it is not, then its validity is certainly in question<sup>3</sup>.
10. Although the National Planning Standards do not contain a definition of “improved pasture”, there is guidance on drafting principles, including:

*any definition already contained within the RMA, a National Policy Statement, National Environmental Standard or regulation under the RMA should be applied in the National Planning Standard where it is **fit for purpose**.*

### Improved pasture Plan Change 18

11. The S42A report recommended definition of improved pasture is “*means an area where as at May 2020, indigenous vegetation had been fully removed and the vegetation converted to exotic pasture or crops.*”
12. This definition, along with that of “indigenous vegetation” and “vegetation clearance”, pave the way for a permitted activity rule for clearance of indigenous vegetation within an area of improved pasture, in essence allowing for certain existing uses.
13. In his evidence, Mr Harding agreed with the concerns raised by the submitters regarding ambiguity of the notified definition of “improved pasture”<sup>4</sup> and considered that it is “poorly worded and difficult to apply”. He also:
  - a. noted that the determinations required to be made by someone assessing whether an area is improved pasture or not is difficult to make;

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<sup>1</sup> *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593

<sup>2</sup> *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593

<sup>3</sup> *Director General of Conservation v Invercargill City Council* [2018] NZEnvC 84, at [40] noting *Re Lower Hutt City Council* NZEnvC W046/07 at [10].

<sup>4</sup> Which contains elements similar to the definition in the NZCPS. The Environment Court has also noted difficulty with interpretation of “improved pasture” in the context of the NPSFM *Director-General of Conservation v Taranaki Regional Council* [2021] NZEnvC 27, [36]-[39].

- b. agreed with those submitters who consider that as it was worded, the definition (and related permitted activity rule) would risk clearance of indigenous vegetation and further loss of indigenous biodiversity;
  - c. considered the identified ambiguity would create difficulties when applied within a permitted activity framework.
14. The s42A report then noted that based on the evidence of Mr Harding, the notified definition, as applied in that permitted framework, would also risk achievement of the outcomes sought by PC18.<sup>5</sup>

### National Policy Statement for Freshwater Management 2020 (NPSFM)

15. The NPSFM came into force on 3 September 2020 and applies to all freshwater (including groundwater)<sup>6</sup>.
16. The definition of “improved pasture” is contained in Part 3.21 Definitions relating to wetlands and rivers.
17. “Improved pasture” *“means an area of land where exotic pasture species have been deliberately sown or maintained for the purpose of pasture production, and species composition and growth has been modified and is being managed for livestock grazing”*.
18. “Natural wetlands” means a wetland (as defined in the Act) that is not:...
- (c) an area of **improved pasture** that, at the commencement date, is dominated by (that is more than 50% of) exotic pasture species and is subject to temporary rain-derived water pooling.*
19. “Natural inland wetland” means a natural wetland that is not in the coastal marine area.
20. Parts 3.22 and 3.23 apply to natural inland wetlands<sup>7</sup> and imposes obligations on regional councils to include certain policies about wetlands in their regional plans and to identify and map certain natural wetlands in their regions.
21. There are no obligations under Parts 3.22 and 3.23 relating to “improved pasture” for territorial authorities<sup>8</sup>.

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<sup>5</sup> S42A report, summarizing the evidence of Mr Harding, paragraphs 456.

<sup>6</sup> And, to the extent they are affected by freshwater, to receiving environments (which may include estuaries and the wider coastal marine area), 1.5 NPSFM.

<sup>7</sup> And improved pasture is relevant given the definition of natural wetland excludes improved pasture, and it is thus also excluded from the definition of natural inland wetland.

<sup>8</sup> I note the MFE guidance on NPSFM says Territorial authorities are required to update their district plans to accommodate the integrated management provisions as soon as reasonably practicable, using the process in Schedule 1 of the RMA. I do not think this changes the issue in relation to improved pasture, however.

22. The context of the definition of improved pasture, what must be given effect to and the obligation (on regional councils) means the territorial authority is not required to give effect to this aspect of the NPSFM.

*Effect of using NPSFM definition of improved pasture*

23. Although not obliged to use the definition in the NPSFM, it is open to the Panel to consider it, but it is important to note:
- a. The NPSFM definition of improved pasture leaves open the possibility indigenous vegetation may be present.
  - b. Mr Harding's definition specifically does not apply to, and therefore not allow clearance of indigenous vegetation as a permitted activity within, any partially converted areas. Mr Harding noted that within the Mackenzie District, most areas that have not been fully developed/converted still support remnant indigenous vegetation (and habitat) and are frequently ecologically significant<sup>9</sup>.
  - c. Using the NPSFM version, given it can include areas with indigenous vegetation, would also clearance of indigenous vegetation as a permitted activity within what MR Harding describes as "partially converted areas".
  - d. The NPSFM definition would not give effect to the CRPS, or Part 2, particularly s6(c) of the Act.
24. Further, as the term is the same but used in different contexts with different obligations for different territorial authorities, some confusion could arise with use of the term, even if the definition is different, in a different context (in the District Plan indigenous vegetation provisions).

The Panel might consider adopting a different "label", i.e., keeping the definition of improved pasture but labeling it something different e.g. "fully converted pasture". This would become the activity currently permitted in Rule 1.1.1.6 " ...The clearance of indigenous vegetation within an area of ~~improved pasture~~ fully converted pasture and the clearance is not within a location specified in Rule 1.3.2.

**Draft National Policy Statement on Indigenous Biodiversity**

25. The definition of improved pasture if the NPSFM is also used in the draft National Policy Statement on Indigenous Biodiversity (**dNPSIB**)
26. The purpose of dNPSIB is to set out objectives and policies in relation to maintaining indigenous biodiversity and to specify what local authorities must do to achieve those objectives.<sup>10</sup>
27. The matter of national significance to which the National Policy Statement relates is the maintenance of indigenous biodiversity<sup>11</sup>. The dNPSIB also requires the assessment of

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<sup>9</sup> S42A report paragraphs 460

<sup>10</sup> Clause 1.3 Purpose of National Policy Statemen, draft NPSIB, page 6.

<sup>11</sup> Clause 1.4 Matter of national significance, draft NPSIB page 6.

indigenous vegetation within the District to identify and map areas of significance in accordance with specified criteria, within 5 years.

28. The definition of “improved pasture” in the dNPSIB is the same as the NPSFM i.e.

*Improved pasture “means an area of land where exotic pasture species have been deliberately sown or maintained for the purpose of pasture production, and species composition and growth has been modified and is being managed for livestock grazing”.*

29. The context of the definition of improved pasture in the dNPSIB is different, however. Policy 10 provides for appropriate existing activities that have already modified indigenous vegetation and habitats of indigenous fauna.

30. Policy 10 is to be implemented through Part 3.12 (existing activities in significant natural areas (SNA’s)<sup>12</sup> which provides (highlighting mine):

(1) This clause applies to the management of the effects of existing activities<sup>13</sup> on SNAs.

(2) **Regional councils** must make or change their policy statements to specify where, how and when plans must provide for existing activities that may adversely affect indigenous biodiversity.

(3) In providing for existing activities in their policy statements and plans, local authorities must –

a) ensure the continuation of an existing activity will not lead to the loss, including through cumulative loss, of extent or degradation of the ecological integrity of any SNA; and

b) ensure the adverse effects of an existing activity are of no greater character, intensity or scale than they were before the National Policy Statement commencement date.

(4) In regions and districts where **pastoral farming** is an existing activity, local authorities must ensure their policy statements and plans recognise that –

a) indigenous vegetation may regenerate in areas that have previously been cleared of indigenous vegetation and converted to **improved pasture**; and

b) as long as the regenerating indigenous vegetation has not itself become an SNA in the time since the last clearance event, the periodic clearance of indigenous vegetation as part of a regular cycle to maintain **improved pasture** is unlikely to compromise the protection of SNAs or the maintenance of indigenous biodiversity;

31. The purpose of definition in the dNPSIB has been stated as *“intended to ensure periodic clearance of indigenous vegetation on areas of improved pasture is generally provided for as a permitted activity. It also sets out circumstances when an assessment of effects of the clearance of regenerating indigenous vegetation to maintain improved pasture may be required through a resource consent or plan change process.”*<sup>14</sup>

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<sup>12</sup> Insert definition

<sup>13</sup> Existing activity is defined as

32. Once approved, the dNPSIB requires a two-step process for existing activities that involve clearance of indigenous vegetation:
- a. Regional Councils must make or change their policy statements to specify where, how and when plans must provide for existing activities that adversely affect indigenous biodiversity (and if that includes pastoral farming, there are additional matters to include, Part 3.12(4)).
  - b. After the above changes are made, then councils provide for existing activities in their plans.
33. As the dNPSIB is currently worded there is a similarity in purpose between the two definitions and context, but the dNPSIB does not account for the particular circumstances of the Mackenzie Basin. and it is important there is no comprehensive significant indigenous vegetation or significant habitats of indigenous fauna mapping .
34. As the dNPSIB is a draft, there is no obligation to give effect to the definition of improved pasture. To do so now would be problematic for several reasons:
- a. No consideration has been given (as the Regional Council is obliged to do) to the to the “where, how and when” plans must provide for existing activities that adversely affect indigenous biodiversity;
  - b. As mentioned above, there is no comprehensive significant indigenous vegetation or significant habitats of indigenous fauna mapping
  - c. The proposed definition:
    - i. would not give effect to the CRPS, Chapter 16
    - ii. is not in accordance with Part 2 of the Act, in particular s6(c).
  - d. The proposed definition, used in a different context, would create confusion and uncertainty for district plan users.

## Conclusion

35. For the reasons set out above, the Panel is not obliged to use the definition of “improved pasture” as contained in the National Policy Statement for Freshwater Management 2020 (NPSFM) (or, for different reasons the draft National Policy Statement on Indigenous Biodiversity 2019) as:
- a. The definition of improved pasture in the NPSFM is materially different to the current s42A proposed definition in PC18;
  - b. The definition in the NPSFM is used in in a different context for a different purpose;
  - c. The obligations associated with the definition in the NPSFM – what must be given effect to - are for a regional council to give effect to;
  - d. Using the definition in the NPSFM would mean the proposed plan change:
    - i. Could be unclear and uncertain for users and not “fit for purpose”
    - ii. Could result in more clearance of indigenous vegetation given the broader definition of improved pasture in the NPSFM

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<sup>14</sup> Section 32 report, section 7.10

- iii. Would not give effect to the relevant provisions of the Canterbury Regional Policy Statement (Chapter 16) (it would allow more clearance of potentially significant indigenous vegetation as a permitted activity; and
- iv. Is not in accordance with Part 2 of the Act, s6(c) in particular.

36. Given the potential for confusion with the term “improved pasture” in different statutory contexts, it may be more appropriate to use a different term in PC18 e.g. “fully converted pasture”.

A handwritten signature in black ink, appearing to read 'Clare Lenihan', written in a cursive style.

Clare Lenihan

18 March 2021