

**IN THE HEARINGS COMMITTEE
MACKENZIE DISTRICT COUNCIL**

UNDER the Resource Management Act 1991, schedule 1

AND

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

**LEGAL SUBMISSION IN RESPONSE TO COMMISSIONER QUERIES POSED AT THE PC18 HEARING
ON BEHALF OF THE ROYAL FOREST AND BIRD PROTECTION SOCIETY
OF NEW ZEALAND INC
March 2021**

Royal Forest and Bird Protection Society of New Zealand Inc.
Solicitor acting: Peter Anderson / William Jennings
PO Box 2516, Christchurch 8140
Ph 03 940 5524
p.anderson@forestandbird.org.nz / w.jennings@forestandbird.org.nz

May it please the Commissioners

Introduction

1. The Royal Forest & Bird Protection Society of New Zealand Inc. (“Forest & Bird”) appeared and made an oral submission at the hearing held on the Mackenzie District Council’s proposed plan change 18 to its district plan on 9 March 2021. At the conclusion of Forest & Bird’s presentation Commissioner van Voorthuysen posed a couple of questions to Forest & Bird’s legal counsel. The questions were:
 - a. At Forest & Bird’s legal submission para [47] is it Forest & Bird’s intention that biodiversity offsetting should not apply to significant natural areas?; and
 - b. Are the commissioners obliged to use the definition of improved pasture in the draft National Policy Statement on Indigenous Biodiversity (which is also the same definition as used in the National Policy Statement on Freshwater 2020)?
2. Forest & Bird answered the first question in the hearing. Commissioner van Voorthuysen asked Forest & Bird to respond to the later in writing.

Offsetting

3. Although Forest & Bird answered the first question in the affirmative at the hearing it would like to take this opportunity to clarify its position. Forest & Bird does not necessarily oppose the use of biodiversity offsetting in areas containing significant indigenous biodiversity so long as:
 - a. There is a clear policy setting out the management regime of adverse effects on indigenous biodiversity which:
 - i. Clearly sets out how the mitigation hierarchy will be implemented in PC18; and
 - ii. Indicates what indigenous biodiversity values must be retained or what effects must be avoided (this will have the effect of limiting the use of the mitigation hierarchy in areas with significant indigenous biodiversity); and

- b. The offsetting policy 6 sets out clear outcomes, criteria and limits to offsetting.
- 4. Forest & Bird submits that if these policies are implemented then biodiversity offsetting may be utilised in areas that contain significant indigenous biodiversity.
- 5. Why Forest & Bird said yes to excluding offsetting in areas with significant indigenous biodiversity initially is because:
 - a. based on the evidence a successful offset for significant indigenous biodiversity in the Mackenzie Basin Sub-zone is not a realistic outcome;¹ and
 - b. if the policy regime (submitted on by Forest & Bird) is implemented then this will make offsetting unavailable for a large proportion of the significant indigenous biodiversity in the Mackenzie basin sub-zone.

Improved Pasture

- 6. Both NPS-FW and the draft NPS-IB contain the same definition for ‘improved pasture’. The draft NPS-IB is yet to be recommended for gazettal by the Minister but a decision is due in July.² Forest & Bird submits that the context of the particular PC18 provision will dictate:
 - a. whether PC18 should use the definition for ‘improved pasture’ from the NPSs; or
 - b. whether PC18 should use a more stringent definition for ‘improved pasture’ from the NPSs; or
 - c. whether PC18 could or should use a different definition.
- 7. Forest & Bird submits that where the context is the same in PC18 and the NPS, then PC18 should use the same definition or a more stringent definition; but where the context is different between PC18 and the NPS then PC18 can use a different definition.

¹ Dr Walker, SoE at [45]; Harding, s42A Report, at [71]; Head, SoE, at [4.1]; and Espie, SoE, at [29]

² <https://www.mfe.govt.nz/consultations/nps-indigenous-biodiversity>

8. PC18 must give effect to any national policy statement.³ This includes the draft NPS-IB if it was operative. ‘Giving effect to’ does not necessarily mean PC18 must use the same definition of ‘improved pasture’ as found in the NPS-FW or the draft NPS-IB (if it was operative). But as stated by the Supreme Court in *Environmental Defence Society v New Zealand King Salmon*⁴: “... the fact that the RMA and the NZCPS allow regional and district council scope for choice does not mean, of course, that the scope is infinite. The requirement to “give effect to” the NZCPS is intended to constrain decision-makers.” Counsel is not aware of any specific requirement in the NPS-FW or draft NPS-IB that requires PC18 to use their exact definitions. In saying that, as a matter of good drafting; in order to avoid inconsistency where the context is the same in a regional or district plan as a NPS; and to give effect to the NPS, Forest & Bird submits that the plan should use the NPS’s definition or a more stringent definition where the context is the same.
9. ‘Improved pasture’ is not included in the Definitions List in the National Planning Standard. The Definitions List contains definitions that must be used by regional and district councils in their respective RMA policies and plans.⁵ If the Definitions List contained ‘improved pasture’ then PC18 must use it. In the National Planning Standards: Guidance for Definitions Standard it sets out the drafting principles used to formulate the Definitions List. The Guidance also provides recommendations to use when councils are drafting other definitions that are not in the Definitions List, such as ‘improved pasture’. The Guidance recommends that any definition that is already contained in a national policy statement should be applied in the national planning standard where it is fit for purpose.⁶
10. Forest & Bird submits that where the context is different between PC18 and NPSs then PC18 may create and use its own definitions because the definition of ‘improved pasture’ is not fit for purpose. For example as set out in Forest & Bird’s submission Mr Harding has mapped fully converted, and partially converted land⁷ and proposed a new definition for ‘improved pasture’.⁸ In Forest & Bird’s submission PC18 could

³ Resource Management Act 1991, s 75(3)(a)

⁴ *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd.* (2014) 17 ELRNZ 442 at [91]

⁵ National Planning Standards, standard 14

⁶ National Planning Standards: Guidance for Definitions Standard, page 3

⁷ Harding, s42A Ecological Report, Attachment 3

⁸ Harding, s42A Ecological Report, at [112]

use Mr Harding's or the s42A definition for 'improved pasture' but give it a different name and apply it to land that is mapped as fully converted. The context between the draft NPS-IB is different from this approach because the NPS-IB is concerned with pastures that may retain some indigenous biodiversity values whereas the fully converted mapped areas no longer contain any significant indigenous biodiversity values. This approach avoids any inconsistency between PC-18 and the NPS.

11. In a PC18 context the definition of 'improved pasture' in the NPS-IB seems to fit more with Mr Harding's partially converted mapped areas. This recognises that these areas are subject to deliberate changes for the purpose of pasture production but still may retain some indigenous biodiversity values which may regenerate. In saying the above PC18 could also use a more stringent definition which reflects the biodiversity of the Mackenzie basin sub-zone which is a different context in itself from the national application of the NPS-IB definition of 'improved pasture'.

Dated 12 March 2021



William Jennings
Counsel for Royal Forest and Bird Protection Society of New Zealand Inc.