

BEFORE THE HEARING PANEL

IN THE MATTER OF the Resource Management Act 1991

AND of the proposed Timaru District Plan

Legal Submissions

For the Director-General of Conservation *Tumuaki Ahurei*

4 November 2024

Hearing D: Open Space Zones, Hazards and Risk & Natural Environment

Submitter No. 166 Further Submitter No.166

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LEGAL SUBMISSIONS BEFORE THE COMMISSIONERS

1. These legal submissions address:
 - a. The statutory framework relating to indigenous biodiversity, specifically:
 - i. the Resource Management Act 1991 (**the RMA**);
 - ii. The National Policy Statement for Indigenous Biodiversity (the **NPSIB**) including the recent Resource Management (Freshwater and Other matters) Amendment Act 2024 (the **Amendment Act**); and
 - iii. the Canterbury Regional Policy Statement.
 - b. The protection of significant indigenous biodiversity outside identified significant natural areas (**SNAs**);
 - c. The maintenance of indigenous biological diversity;
 - d. Improved pasture; and
 - e. The protection of bat habitat in the district, including bat roosting trees.
2. For the most part, the Director-General is supportive of the proposed provisions in the Proposed Timaru District Plan (**PTDP**), and the reporting officer's recommendations. There are, however, some amendments needed to ensure the plan gives effect to the higher order instruments and achieves the purpose of the RMA.

Evidence to be called by the Director-General

3. The Director-General calls three witnesses to provide expert evidence;
 - a. Mr Simon Waugh, a Senior Biodiversity Ranger, who has prepared evidence regarding long-tailed bats and their habitat in the Timaru District
 - b. Mr Richard Clayton, an Ecologist, who has prepared evidence on the indigenous vegetation and the ecosystems in Timaru district
 - c. Ms Elizabeth Williams, an RMA planner, who has prepared evidence on planning matters relating to the natural environment provisions in the proposed plan.

Statutory framework relating to indigenous biodiversity

4. There are statutory imperatives in the RMA and its subordinate instruments, governing the maintenance, management and protection of indigenous vegetation.

The RMA

5. Under the RMA:
 - i. Section 6(c) requires councils to recognise and provide for the protection of significant indigenous flora and significant habitats of indigenous fauna as a matter of national importance.
 - ii. District councils are required to prepare and change their district plans in accordance with their functions under section 31. Under section 31(1)(b)(iii), the council's function is the maintenance of indigenous biological diversity.
6. The PTDP is required to give effect to national policy statements and the regional policy statement, pursuant to section 75(3) of the RMA. "Give effect to" means "implement".¹

National Policy Statement for Indigenous Biodiversity (NPSIB)

7. The objective of the National Policy Statement for Indigenous Biodiversity (NPSIB) is no overall loss of indigenous biodiversity.² To achieve that objective, the NPSIB provides direction to Councils to protect, maintain and restore indigenous biodiversity.
8. In terms of implementation, Clause 4.1 of the NPSIB requires that local authorities must: *give effect to this National Policy Statement as soon as reasonably practicable*. What this obligation requires will be context specific.
9. In the context of the PTDP, the Director-General accepts that the PTDP was prepared before the NPSIB became operative.³ At the time submissions were made, however, the draft NPSIB was available and a number of submissions (including the Director-General's submission) referred to the draft version. The Director-General notes the position articulated in the s42A report, that: *...where changes are sought to the PDP through submissions which relate to the direction in the NPSIB, there is an*

¹ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, at 77

² NPSIB, Clause 2.1.

³ The PTDP was notified on 22 September 2022. The NPSIB was gazetted on 4 August 2023.

*opportunity to align the PDP provisions with the NPSIB.*⁴ The Director-General supports this position and approach.⁵

10. Adverse effects on NPSIB SNAs (which, as explained further below, includes SNAs identified in the PTDP) are to be managed in accordance clause 3.10 NPSIB. The requirement is to avoid the adverse effects listed in clause 3.10(2) and manage other adverse effects. The effects management hierarchy applies. The NPSIB also directs how adverse effects on areas *outside* mapped SNAs should be managed, again by reference to the effects management hierarchy/⁶

Resource Management (Freshwater and Other Matters) Amendment Act 2024

11. Until very recently, the NPSIB included obligations on district councils to identify and map SNAs in district plans and to do so as soon as reasonably practicable.⁷ However, on 25 October 2024 the Resource Management (Freshwater and Other Matters) Amendment Act 2024 commenced (the **Amendment Act**). The Amendment Act inserts a new section 78 to the RMA. It defers requirements to identify and map new SNAs for 3 years from the commencement date of the Amendment Act. As explained below, it does not dis-apply any SNAs already identified in the PTDP.
12. The Amendment Act includes a definition of “NPSIB SNA”, which means a significant natural area as defined in clause 1.6 of the NPSIB.
13. The definition of SNA in Clause 1.6 of the NPSIB is:

SNA, or significant natural area, means:
(a) any area that, after the commencement date, is notified or included in a district plan as an SNA following an assessment of the area in accordance with Appendix 1; and
(b) any area that, on the commencement date, is already identified in a policy statement or plan as an area of significant indigenous vegetation or significant habitat of indigenous fauna (regardless of how it is described); in which case it remains as an SNA unless or until a suitably qualified ecologist engaged by the relevant local authority determines that it is not an area of significant indigenous vegetation or significant habitat of indigenous fauna.
14. The commencement date is the date on which the NPSIB came into force, in 2023.⁸

⁴ S42A report Ecosystems and Indigenous Biodiversity, Natural Character, and Natural Features and Landscapes, Paragraph 5.3.2. See also evidence of Elizabeth Williams, Planning, at paragraph 29.

⁵ See evidence of Elizabeth Williams, Planning, at paragraph 29.

⁶ NPSIB, Clause 3.16.

⁷ NPSIB, Clauses 3.8 and 3.9.

⁸ The NPSIB was gazetted on 4 August 2023 and came into force 28 days later, pursuant to NPSIB Clauses 1.2 and 1.6.

15. The PTDP was notified on 22 September 2022 and is a “plan” for the purposes of the above definition (the NPSIB definition of ‘policy statements and plans’ includes proposed plans).⁹
16. The SNAs that were identified in the PTDP when it was notified are, therefore, NPSIB SNAs for the purpose of both the NPSIB and the Amendment Act.
17. In addition to deferring the identification and mapping obligations described above, the Amendment Act confirms that if, during the 3-year deferral period, a new significant natural area is identified then that new area is not an NPSIB SNA (section 78(5)). However, the 3-year deferral does not affect any existing NPSIB SNA included in a proposed plan notified before 25 October 2024¹⁰ or a proposed plan change that was commenced but not completed before commencement of the Amendment Act.¹¹ Section 78(3) also confirms that the obligation in Clause 4.1 (for the Council to give effect to the NPSIB as soon as reasonably practicable): “..*continues to apply in relation to the other provisions of the NPSIB 2023*”.
18. The result is that the Amendment Act does not change the obligations that apply to the Council in relation to the NPSIB in the context of the PTDP, or affect the position outlined above at paragraph 9.

Canterbury Regional Policy Statement

19. The Canterbury Regional Policy Statement continues to apply. For the purpose of giving effect to the Regional Policy Statement, areas that meet any of the significance criteria in Appendix 3 are significant natural areas to which section 6(c) of the Act applies. That is still the case, whether or not such areas are NPSIB SNAs.

The protection of significant indigenous biodiversity outside identified significant natural areas

20. The 3-year deferral of the requirement in the NPSIB to map SNAs does not diminish the duty that section 6(c) imposes on the council, as a matter of national importance, to protect significant indigenous biodiversity, including that which has not yet been formally identified in the plan. Likewise, the Council must give effect to the CRPS, which includes as Objective 9.2.3: *Areas of indigenous vegetation and significant*

⁹ NPSIB, Clause 1.6, Interpretation.

¹⁰ Resource Management Act, s 78(6)(a),

¹¹ Resource Management Act, 78(6)(b)

habitats of indigenous fauna are identified and their values and ecosystem functions protected [emphasis added].¹²

21. Mr Mike Harding has provided ecological evidence that it is *likely* additional areas that are significant habitat for indigenous species lie outside the SNAs listed in Schedule 7 of the PTDP.¹³ Mr Clayton agrees with that assessment.¹⁴
22. The word protection is not defined, but a series of cases has confirmed it means to keep safe from harm, injury or damage.¹⁵ Adequate protection is required. The provisions in the plan to achieve protection may include policies, rules or other methods.¹⁶
23. Ms Williams' evidence includes recommended provisions to manage indigenous vegetation clearance outside identified SNAs. Such provisions are needed to enable the Council to identify and assess any remaining indigenous biodiversity that has not yet been included in the plan, and then implement measures to protect it, (consistently with section 6(c)) if significant.

Maintenance of Indigenous biodiversity

24. Policy 8 of the NPSIB is that *the importance of maintaining indigenous biodiversity outside SNAs is recognised and provided for*.
25. That policy, which aligns with the function in section 31(1)(b)(iii) of the RMA, underpins the Director-General's submission regarding the need to include mechanisms in the plan to manage effects on indigenous biodiversity that does not meet the criteria for significance, but which is integral to the maintenance of biological diversity in the district.
26. Mr Clayton has provided examples of such areas, and Ms Williams proposes amendments that build on the reporting officer's proposed Policies. Applying the effects management hierarchy, both within and outside of SNAs, is proposed.

Improved pasture

27. Uncertainty about the practical application of the definition of improved pasture is a concern when considering the extent to which clearance of indigenous vegetation

¹² Evidence of Elizabeth Williams, paragraph 43.

¹³ Ecological evidence of Mike Harding, paragraph 58.

¹⁴ Evidence of Richard Clayton, at paragraph 31.

¹⁵ *Royal Forest Protection Society of New Zealand Inc v New Plymouth District Council* [2015] NZEnvC 219, at 63

¹⁶ Above note 11, at 66-67

within areas of improved pasture should be allowed. The Director-General supported Forest and Bird's submission proposing that areas of improved pasture should be identified and mapped, to provide certainty.

28. In some types of ecosystems, including those present in Timaru district, it has proven to be notoriously difficult for parties to agree on the distinction between, or extent of, areas of indigenous vegetation and areas of improved pasture where there is a matrix of exotic pasture species and indigenous vegetation. Mr Clayton's evidence includes examples where there would likely be different perspectives on the boundaries or extent of an *area* of improved pasture, and whether or not the indigenous vegetation present is *within* an area of improved pasture.
29. Unconstrained clearance of indigenous vegetation with areas of improved pasture may be inconsistent with the ongoing protection and/or maintenance of indigenous biological diversity. If the submission seeking mapping of areas of improved pasture is rejected, other mechanisms are required to ensure significant indigenous biodiversity is protected and indigenous biological diversity is maintained.
30. The NPSIB addresses improved pasture in Clause 17: Maintenance of improved pasture for farming. While it provides for clearance of indigenous vegetation within areas of improved pasture, the NPSIB also recognises that areas of improved pasture may become an SNA, and that there is a risk maintaining improved pasture may adversely affect threatened species. It guards against the loss of significant indigenous biodiversity by limiting the circumstances in which indigenous vegetation within areas of improved pasture may be cleared.
31. Within the Timaru district, it is evident that some indigenous vegetation has been maintained in conjunction with traditional farming practices, including non-intensive grazing, topdressing and oversowing. However, more intensive activities that may result in the loss of indigenous ecosystems which qualify as significant or contribute to the maintenance of biodiversity should be managed.
32. A specific concern is the permitted activity rule for clearance of indigenous vegetation within an area of improved pasture in sensitive areas¹⁷ (riparian margins, the coastal environment, within 20 metres of waterbodies, over 900 metres, slopes greater than 30 degrees) which is anomalous when compared to the rules that apply in other areas.¹⁸ Ms Williams has proposed amendments to address that inconsistency, and

¹⁷ ECO-R1.2- PER-4(d)

¹⁸ ECO-R1.1, PER-6 and ECO-R1.4, PER-1(7) and (8)

to protect or maintain indigenous biodiversity within areas of improved pasture as appropriate.

Indigenous biodiversity - Bats

33. Long-tailed bats are absolutely protected under the Wildlife Act 1953. While that Act protects the animals themselves, the RMA is the primary means of ensuring the habitat they depend on – roost trees – persists.

34. The extension of the bat habitat protection area to guard against loss of their roost trees will help ensure the bats persistence in Timaru District.

35. The remaining matter to be addressed is whether data from an automatic bat monitor can be relied on when not produced by a suitably qualified expert. Mr Waugh's evidence is that any data produced will only be reliable if provided by an expert.¹⁹ Ms Williams suggests amendments to ensure that decisions affecting bats will be based on information that is accurate and reliable.²⁰

Conclusion

36. In relation to the current topics, the Director-General is seeking the amendments set out in her submission and further submission and as generally supported in the evidence of Ms Williams.



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4 November 2024

¹⁹ Evidence of Simon Waugh, at paragraphs 26 – 29.

²⁰ Evidence of Elizabeth Williams, at paragraphs 53 – 56.