BEFORE THE HEARING PANEL

UNDER THE	Resource Management Act 1991
IN THE MATTER OF	Proposed Porirua District Plan – Hearing Stream 2.

LEGAL SUBMISSIONS

FOR THE DIRECTOR-GENERAL OF CONSERVATION

27 October 2021

Hearing Stream 2

Natural Environment Strategic objectives

Ecosystems and Indigenous biodiversity

Natural Features and Landscapes

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Legal submissions before the Commissioners

Hearing stream 2

1. The Director-General of Conservation (Director-General) lodged submissions and further submissions on the proposed Porirua District Plan (proposed plan).

2. These legal submissions focus on the Director-General's submission points relating to the protection of indigenous biodiversity and wetlands within the Porirua district.

3. The Director-General is seeking amendments to the proposed plan that:

    a) provide for the identification and protection of areas of significant indigenous vegetation and significant habitat of indigenous fauna that have not been identified in the proposed plan; and

    b) provide for the maintenance of indigenous biological diversity; and

    c) require setbacks for activities from wetlands, particularly when those activities are primarily regulated by the district plan.

Evidence to be called by the Director-General

4. The Director-General calls two witnesses to provide expert evidence as follows:

    a) **Mr Graeme La Cock,** an ecologist, who has prepared evidence on indigenous biodiversity matters; and

    b) **Mr Joao Paulo Silva**, an RMA planner, who has prepared evidence on planning matters relating to the Director-General's submission on the proposed plan. Mr Silva has attached to his evidence a version of the amendments to the proposed plan that he recommends.

Functions of the Director-General of Conservation and the Department of Conservation

5. The Director-General is the administrative head of the Department of Conservation (DOC). The statutory functions of the Department under section 6 of the Conservation Act 1987 include advocating for the conservation of natural and historic resources generally.

Statutory Framework – Indigenous Biodiversity

6. There are a number of statutory imperatives in the RMA governing the maintenance, management and protection of indigenous biodiversity.

    a) Pursuant to section 6(c) of the RMA, the Council must, in achieving the purpose of the Act, recognise and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna as matters of national importance. That section 6(c) requirement is imposed on the Council whenever it is a decision maker under the RMA.

    b) Section 31(1)(b)(iii) of the RMA makes it a function of the Council to control land uses for the purpose of the maintenance of indigenous biological diversity.

    c) Under s 75(3) of the RMA the proposed plan must give effect to the Regional Policy Statement for Wellington and the New Zealand Coastal Policy Statement 2010 (NZCPS).

7. The combined statutory effect is to provide for protection of significant natural areas (SNAs) while also providing for the maintenance of indigenous biodiversity generally. Significant natural areas and the coastal environment are to be addressed specifically. The maintenance of indigenous biodiversity generally is also to be achieved through the control of land uses.

NZCPS - significance

8. Policy 11(a) in the NZCPS requires avoidance of adverse effects on taxa, ecosystems and environments that, broadly speaking, are significant. Policy 11(b)

is to avoid significant adverse effects, and avoid, remedy or mitigate other adverse effects on remaining areas that meet the relevant criteria listed.

9. It appears the distinction between policies 11(a) and 11(b) was not provided for in policy ECO-P12 as notified. However, the reporting officer recommends that it is addressed as follows:

ECO-P12 Significant Natural Areas within the coastal environment

Only allow activities within an identified Significant Natural Area in the coastal environment where it can be demonstrated that they;

1. Avoid adverse effects on the matters in Policy 11(a) of the New Zealand Coastal Policy Statement 2010, and avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities" on the matters in Policy 11(b) of the New Zealand Coastal Policy Statement 2010[63]; and
2. Protect ~~the identified~~ indigenous biodiversity values ~~in SCHED7 – Significant Natural Areas~~ in accordance with ECO-P2 and ECO-P4.

10. Mr Silva supports these amendments[1] and I submit the panel should adopt them.

Significant natural areas - definition

11. The definition of Significant Natural Area in the proposed plan is limited to areas identified in Schedule 7.

12. The Director-General's submission seeks to address the absence of a robust and flexible mechanism for the future identification and protection of SNAs within the life of the plan.

13. Mr Goldwater's evidence for the Council sets out a history of involvement from multiple angles in the SNA identification process.[2] This includes desktop reviews, site visits, edits, landowner meetings, updates to SNA database and maps following site visits, responses to submissions, reviewing ecological reports provided by landowners.

14. A theme emerging is that the ecological assessment processes adopted by Council to date have been responsive, which is commended. The Director-General's submission is that responsiveness to ecological identification of SNAs must not stop once the plan is made operative.

[1] Silva Evidence at 7.46.
[2] Goldwater Evidence at para 19 – 28.

15. Mr La Cock notes 4 – 5 yearly reviews which assess conservation or threat status of biota:[3]

> *In the case of vascular plants, the expert panel identified 61 taxa as being at greater risk of extinction in 2017 (de Lange et al. 2018) compared to 2012 (de Lange et al. 2013), based on loss of populations, decreasing population sizes, or increased threat.*

16. Mr La Cock concludes the conservation status of biota does change, and likely will change during the life of the proposed plan, which in turn has the potential to impact on numbers and locations of areas that meet the rarity and distinctiveness criterion of policy 23 of the Wellington Regional Policy Statement.[4]

17. A recent Environment Court case illustrates the importance of plans providing for areas of significant indigenous vegetation and habitats of significant indigenous fauna on an ongoing basis. In *Weston Lea Ltd v Hamilton City Council*[5] the Court was considering conditions that should be imposed in relation to a subdivision consent. There was no dispute that the consent could be granted, but there was concern about the need for conditions to protect the habitat of critically threatened indigenous fauna, the long-tailed bat.

18. The Court confirmed that protection of the bats' habitat was to be considered as a matter of national importance, in line with section 6(c) of the Act. The Court also expressed surprise that the habitat of long-tailed bats had not been identified as an SNA in the plan even though significant indigenous vegetation, biodiversity and habitats had been identified as SNAs. The Court considered the failure to identify the bat habitat was an unfortunate oversight requiring urgent redress.[6]

19. The relevant plan in *Weston Lea* did allow for identification and protection of new SNAs: the Court noted there was a simple, on-going process for identifying and protecting SNAs, then adding them to the relevant schedule of the plan using the First Schedule process under the RMA.

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[3] La Cock Evidence at para 12.
[4] La Cock Evidence at para 13.
[5] *Weston Lea Ltd v Hamilton City Council* [2020] NZEnvC 189.
[6] Above note 3, at 41

20. The above case regarding significant bat habitat illustrates why the obligation in section 6(c) should not be regarded as being limited to areas of significant indigenous vegetation the Council has been able to identify at particular point in time. It is not consistent with the purpose of the Act to accept that once some areas of vegetation have been recognised as significant and protected, there is no longer any duty to consider any remaining areas or to address changing circumstances.

21. Similarly, in New Plymouth, the Environment Court found that:[7]

> *"It is recognised that ecological values are not static and will continue to change over time as areas of indigenous vegetation respond to different environmental pressures/threats. Regular monitoring of indigenous vegetation in the New Plymouth District and application of 'significance' criteria will ensure that Appendix 21 is complete. Indigenous vegetation will continue to be monitored throughout the District to determine if areas meet 'significance' criteria."*

22. In my submission, responding to the section 6(c) direction regarding matters of national importance requires plan provisions that can accommodate ongoing identification and protection of SNAs in response to new or changing information and circumstances. That would enable the Council to respond to new information that leads to identification of additional areas that meet the criteria for significance. In my view, this is not currently provided for in the proposed Porirua District Plan. There is a 10 year review and there is the ability to prepare a plan change. However, outside the 10 year review cycle there is no obligation to promote those plan changes as new SNAs emerge.

23. As such, I submit the amended definition of SNA proposed by Mr Silva[8] should be adopted. It will afford SNA protection to new areas in advance of a Schedule 1 process, which, in my view, is necessary to meet the requirements of s 6(c), s 31(1)(b)(iii) of the Act, and policy 11 of the NZCPS in the coastal environment.

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[7] *Royal Forest and Bird Protection Society of New Zealand Incorporated v New Plymouth District Council* [2015] NZEnvC 219

[8] Silva, Evidence para 7.45

Maintenance of indigenous biological diversity

24. Section 31(1)(b)(iii) of the Act directs that:

> *(1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:*
>
> *(a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:*
>
> *(b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of— …*
>
> *(iii) the maintenance of indigenous biological diversity:*

25. The Council's function of maintaining indigenous biological diversity is not discharged once SNAs have been identified and protected.

26. While identification and protection of SNAs may ensure that the "best" or "most important" examples of indigenous vegetation are maintained, it is likely there will be other vegetation and habitats that contribute to the maintenance of biological diversity. Potential effects on those areas, and their contribution to the maintenance of indigenous biological diversity should also be managed through the district plan.

27. The High Court has expressed a view that the protection of biological diversity is not a relative concept, concerned with only the most important or best examples of wetlands.[9] In my submission the same principle applies to vegetation and habitats (other than wetlands) which contribute to the maintenance of biological diversity. The inclusion of provisions directed at the maintenance of indigenous biological diversity, other than that in SNAs and the coastal environment, is necessary to enable the Council effectively to carry out its function under section 31(1)(b)(iii).

28. The Council's officer suggests that outside SNAs, consideration of vegetation clearance through other activities that trigger consents is adequate. However, the Director-General is concerned with that approach because:

[9] *West Coast RC v Friends of Shearer Swamp Inc* (2011) 16 ELRNZ 530 (HC)

a) Direction to consider effects on indigenous biodiversity is not comprehensive throughout the plan, particularly in relation to restricted discretionary activities[10];
b) If a consentable activity is not proposed then the vegetation can simply be cleared;
c) it creates an incentive for applicants to clear any indigenous vegetation on a site prior to lodging an application for another activity that might trigger an assessment.

New rule framework for indigenous vegetation clearance outside overlay areas

29. Mr Silva has proposed a rule framework which would limit indigenous vegetation clearance outside SNAs, ONFLs, SALs and coastal environment high natural character areas[11] without assessment.

30. It is submitted that this rule is necessary in order to implement proposed new NE-02 (Indigenous biodiversity values in the District are maintained and, where possible, restored). It would also implement the new ECO policy sought by Forest and Bird to maintain indigenous biodiversity outside SNAs.[12]

Restricted discretionary and controlled activities throughout the plan do not always point a decision maker to indigenous biodiversity when they need to

31. The Director General supported the submission by Forest and Bird to "include 'effects on indigenous biodiversity' as a standard matter of discretion in all restricted discretionary rules and as a matter for control in all controlled activity rules".[13]

32. Acknowledging the breadth of this submission, it does not seem to have been considered in this hearing stream. It is a submission that is potentially relevant to all forthcoming hearing streams. Since supporting Forest and Bird's submission, the Director-General has more closely analysed precisely where the gaps are in

[10] The DG supports Forest and Bird's submission 225.42 to "include 'effects on indigenous biodiversity' as a standard matter of discretion in all restricted discretionary rules and as a matter for control in all controlled activity rules".
[11] All of which have their own indigenous vegetation clearance rules, see Silva Evidence para 7.36.
[12] Forest and Bird submission 225.152.
[13] Forest and Bird submission 225.42

various rules throughout the plan, and is willing to make this available to assist in preparation for future hearing streams.

33. For the purposes of this hearing stream, the submission relates to controlled and restricted discretionary rules in the ONFL and NATC chapters.

34. For restricted discretionary rules in the ONFL chapter,[14] matters of discretion are limited to an assessment of effects on values and characteristics in schedules 9 (ONFL) and 10 (SAL). Each site lists "natural sciences" values and characteristics. In most cases, indigenous biodiversity will be able to be considered. However, that will be limited to how those values and characteristics are expressed.

35. For example, ONFL001 is "Mana Island" gives broad expression to its indigenous biodiversity values in points 1 – 7, including "a range of habitats and ecosystems present"; and "increasing indigenous ecology/habitat value through restoration". As such, it is considered indigenous biodiversity will be adequately considered.

36. However, the "natural sciences" characteristics and values of SAL sites are less comprehensive in the way they refer to indigenous biodiversity values. For example, SAL004 is Cannons Creek. Its "natural sciences" values are:

> *1. Large areas of modified landcover (pasture, exotic shelterbelts and exotic forestry) with indigenous vegetation/regeneration at Maaroa Reserve;*
> *2. Predominantly unmodified landform;*
> *3. Maara Roa Reserve promotes natural classroom values;*
> *4. Pasture with some deep gullies supporting vegetated waterways is relatively typical of this area of Porirua's rural environment.*

37. It specifically only mentions indigenous biodiversity values at Maaroa Reserve and vegetated waterways in deep gullies. That means council is precluded from considering indigenous biodiversity values elsewhere in the SAL for restricted

[14] See NFL-R1 (earthworks or land disturbance); NFL-R2 (indigenous vegetation removal);NFL-R4 (new buildings and structures).

discretionary consents for earthworks, land disturbance, indigenous vegetation removal, buildings and structures.

38. As such, I submit that NFL-S1 – NFL-S4[15] would all benefit from adding "effects on indigenous biodiversity" as a matter of discretion to fulfil Council's function to maintain indigenous biodiversity in a way that endures for these overlay areas throughout the life of the plan.

Wetlands - setbacks

39. The proposed plan, in my submission, needs to provide for setbacks from wetlands.

40. In my submission, Mr Silva sets out sound reasons why this should be so. He draws support from the NPS-FM provisions on integrated management, and the RPS direction for district plans to safeguard aquatic ecosystem health.[16]

41. Critically, there appears to be a total regulatory gap for setbacks of structures from wetlands. The Proposed Natural Resource Plan regulates setbacks for earthworks and vegetation clearance (as does the NES Freshwater). It also regulates structures *in* wetlands, but not adjacent.

42. The proposed plan requires setbacks for buildings and structures from rivers and the coast.[17] Mr Silva has identified that Plan Change 18 also has a 20-metre setback for buildings and structures from natural wetlands.[18]

43. I submit the proposed plan needs to be amended to require setbacks for structures from wetlands to address a complete regulatory gap. I also urge the panel to consider the increased setbacks from wetlands proposed by Mr Silva and other submitters, and to be consistent with what is required for Plimmerton Farms.

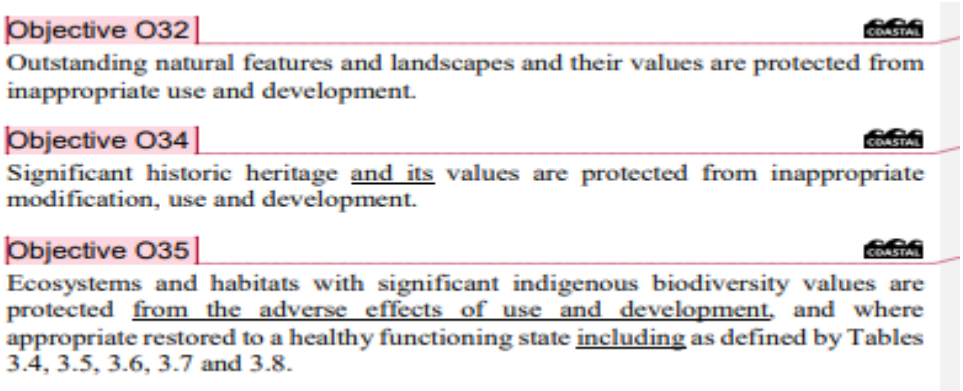
[15] Being the standards relevant to the matters of discretion in the NFL chapter.
[16] Silva Evidence, para 7.8 – 7.13.
[17] See NATC-R1 which regulates buildings and structures in coastal and riparian margins. "Riparian margins" are defined in the plan and apply only to rivers.
[18] Silva Evidence, para 7.19.

ECO-01 should not be qualified by "inappropriate use and development"

44. ECO-01 reads[19] "*The values of Significant Natural Areas are protected from inappropriate subdivision, use and development and, where appropriate, restored".* Section 6(c) in the Act is not qualified by "inappropriate subdivision, use and development". It is worded in more absolute terms than section 6(a) and (b).[20] Policy 11 of the NZCPS gives expression to section 6(c) in the coastal marine area and coastal environment. It does not have this qualifier.

45. I acknowledge the s 42A report in noting that the relevant RPS policy 24 contains this qualifier. However, it does not follow that the proposed plan needs to have the qualifier to give effect to the RPS. I submit that ECO-01 should be amended to effect to the NZCPS, and be consistent with section 6(c) of the Act by removing the words "from inappropriate subdivision, use and development".

46. Indeed, the Proposed Natural Resources Plan for Wellington does not have this qualifier in its objective for significant indigenous vegetation and habitats (compared with landscapes, features and historic heritage):[21]



Objective O32

Outstanding natural features and landscapes and their values are protected from inappropriate use and development.

Objective O34

Significant historic heritage and its values are protected from inappropriate modification, use and development.

Objective O35

Ecosystems and habitats with significant indigenous biodiversity values are protected from the adverse effects of use and development, and where appropriate restored to a healthy functioning state including as defined by Tables 3.4, 3.5, 3.6, 3.7 and 3.8.

47. S74(2)(a)(ii) of the RMA requires a territorial authority to have regard to a proposed regional plan of its region in regard to any matter of regional significance.

[19] S42A report version
[20] Oceana Gold (New Zealand) Ltd v Otago Regional Council [2019] NZEnvC 41 at [71].
[21] Appeals version dated 13 October 2021, accessed 27.10.2021: Chapter-3-Objectives-Appeal-version-2019-12-updated-for-CO-dated-13-October-2022.pdf (gw.govt.nz)

48. I submit that ECO-01 should be amended as sought to remove the qualifier and therefore give effect to the NZCPS, RPS and be consistent with section 6(c) of the Act.

ECO-P3 should be an exhaustive list

49. ECO-P3 sets out what is appropriate use and development in SNAs. The list is expressed as an inclusive, rather than exhaustive one. The officer's report favours the inclusive list with proposed rules providing an exhaustive list. However, I submit this reasoning overlooks two matters:
    a) An inclusive list will have implications for what is or is not contrary to the policy for the purposes of assessing a non-complying activity at the gateway test – s 104D; and
    b) The rule framework is not exhaustive in terms of types of development in respect of which a resource consent application could be made. ECO-R9 is a default rule for any activity not otherwise listed to be non-complying (or discretionary as proposed in the s 42A report). Those discretionary activities will be assessed against ECO-P3. Without an exhaustive list, that policy fails to give clear direction as to the type of use and development that might be appropriate (with the proviso that it is of a scale and nature that maintains the biodiversity values).

ECO-R9 should be non-complying, not discretionary

50. ECO-R9 is the default rule for activities within SNAs not otherwise given an activity status. It was notified as non-complying, but is recommended in the officer's report to be changed to discretionary.

51. Mr Silva disagrees saying non-complying status for SNAs sends a clear signal to discourage development in a sensitive area, and discretionary status will prevent assessment under section 104D of the RMA.

52. Mr Silva's view is supported by case law which says non-complying status is intended to signal the proposals in breach of a control will be subject to a higher

degree of scrutiny and have to meet a sterner test.[22] In my submission, it is appropriate to put proposals for subdivision, use and development within SNAs (that are not otherwise anticipated in the plan) through the gateway tests in s 104D of the Act.

27 October 2021

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[22] *Mighty River Power v Porirua District Council* [2012] NZEnvC 213 at [32] as cited in *Auckland Council v Cabra Rural Developments Ltd* [2019] NZHC 1892 at [156].