



Te Tai o Poutini PLAN

A combined district plan for the West Coast

**Te Tai o Poutini Plan Extraordinary Committee Meeting
via Zoom
2 August 2024
3.15pm**

Meeting URL:

<https://wrcrc-nz.zoom.us/j/81786356485?pwd=hQ00zcOdzuaKjXLYDk6pQSTWizR63W.1&from=addon>

Meeting ID: 817 8635 6485

Passcode: 427068

AGENDA

3.15pm	Welcome and Apologies	Chair
3.20pm	Staff Report – Notice of Motion from Mayor Gibson	Project Manager
4.15pm	Meeting ends	

Prepared for: Te Tai o Poutini Plan Committee
Prepared by: Jo Armstrong
Date: 2 August 2024
Subject: **Notice of Motion from Mayor Gibson – Staff Report**

Introduction

1. A Notice of Motion has been received from Grey District Council Mayor Tania Gibson and Councillor Allan Gibson. This report provides staff advice in relation to the matters covered by the notice of motion.

Motion Presented

2. *I the undersigned ask that the Ecosystems and Indigenous Biodiversity hearing scheduled for end of August 2024 be delayed for minimum six months or until the Crown review of the Resource Management (Freshwater and Other Matters) Amendment Bill which includes proposed changes to the National Policy Statement for Indigenous Biodiversity has been finalised.*

Reasoning Given

3. *By all accounts, it appears that the Government review will impact key principles in relation to Indigenous Biodiversity which, if the hearing should continue will most likely require a formal Plan Change to bring the TTPP in line with the intended changes. It is noted that the s42A Officer's Report does include proposed changes however it is considered problematic that changes that have not been passed as law are being incorporated. Should the provisions not become law or be changed then the TTPP will need to be re-written and a plan change process gone through. This is not considered appropriate given the already considerable costs incurred by the TTPP process. RMA section 34A and Clause 10 of the TTPP Order in Council enable you to delegate your power to hear submissions on the pTTPP.*
4. *The Joint TTPP committee is not scheduled to meet before the hearing date which will mean that the hearing will be purely on officer reports without the benefit of committee oversight. It is respectfully suggested that this is not in line with either the letter nor the spirit of the Order in Council that created the TTPP process. It is further suggested that it will be untenable if a situation should arise where the Joint Committee may refuse to confirm the officer comment after the hearing! This is most likely to happen given that the officer's report deviates substantially from the Joint Committee's stance re SNAs, especially as it relates to Grey District.*
5. *The delay will give all concerned more time to formulate a robust input into this process knowing the outcome of the Resource Management (Freshwater and Other Matters) Amendment Bill.*

Staff Advice

6. Legal advice has been obtained from the resource management lawyers Wynn Williams and this advice is attached at Appendix One.
7. Staff note:
 - a. TTPP Committee has delegated all of its hearing powers to the panel. That includes the general power to determine the procedure for hearings under section 39 of the RMA. It is therefore the hearing panel's decision to approve extensions or delays. The Committee must make a request to the hearing panel if it seeks to delay the Ecosystems and Indigenous Biodiversity hearing (ECO hearing).
 - b. The Commissioner Chair has indicated that delaying the ECO hearing would certainly delay the ability for any decision to be delivered. This is because:



- i. A number of activities must follow the hearing – expert caucusing, site visits and s42A author response. This normally takes several months after the hearing is completed.
- ii. Some Commissioners may not be available for a hearing in six months’ time, as they have scheduled early 2025 to write their reports and have committed to other hearings processes following that. This would lead to further time delays to engage new Commissioners and familiarise them with submissions and decisions to date.
- c. There are significant inter-relationships between different parts of the Plan and the Commissioner Chair has advised it would be difficult to deliver a coherent decision on the rest of the Plan without the ECO chapter. Examples where interrelationships exist are with Mineral Extraction, the Coastal Environment, Landscape and Natural Features as well as some zoning decisions.
- d. The Committee has a duty under section 21 of the Resource Management Act 1991 to avoid unreasonable delay and exercise its functions “as promptly as is reasonable in the circumstances”. The two-year period for the completion of hearings has already finished and an extension of time will need to be sought from the Minister, with reasons.
- e. The s42A report will not be rewritten or updated regardless of a hearing deferral, unless the law changes and this alters the planning requirements.
- f. Delaying the hearing presents the possibility of getting more certainty about Central Government policy. However, as written, the Resource Management (Freshwater and Other Matters) Amendment Bill (the Bill) will not remove the requirement to identify Significant Natural Areas (SNAs) on the West Coast. The requirement to do this still exists under the National Policy Statement for Indigenous Biodiversity (NPSIB) and the West Coast Regional Policy Statement (WCRPS).
- g. A delay would provide submitters additional time to provide evidence on the ECO chapter, although the deadline has already past and only one submitter has requested an extension. All other evidence has been received.
- h. There are cost implications of delay including time charged by Commissioners on hearing preparation and reading already undertaken, staff time and cancelled travel costs.
- i. It would be extremely difficult for new commissioners to hear the ECO chapter submissions, without understanding submissions and deliberations on connected topics. Their additional time to come up to speed would come at additional cost.
- j. A hearing deferral would also increase costs for extending staff contracts.

Options

- 8. Staff consider there to be two options presently for the Committee, being:
 - a. **Option One:** Delay the hearing of the Indigenous Biodiversity and Ecosystems Chapter; or
 - b. **Option Two:** Proceed with the August Hearing of the Indigenous Biodiversity and Ecosystems Chapter (ECO chapter).
- 9. The pros and cons of the 2 options are laid out in the table below:

	Pros	Cons
Option 1 Delay Hearing	<ul style="list-style-type: none"> • There may be more certainty from Central Government • Opportunity for submitters to provide further evidence • Operative plan provisions still apply 	<ul style="list-style-type: none"> • Will not change the s42a report as written • RM (Freshwater and Other Matters) Amendment Bill still requires SNAs and no intention to remove SNAs is stated in the Bill • WRPS requires SNAs • Unlikely Commissioners able to deliver a decision on the rest of the Plan without hearing the ECO chapter – and the subsequent caucusing and site visits would delay the whole plan • Commissioners have existing commitments so may not be able to hear the ECO chapter in early



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		<p>2025 - so realistically could result in up to 12 month delay</p> <ul style="list-style-type: none"> • Sunk costs already expended - commissioner preparation will need repeating in 6-12 months, travel cancellations • Plan integration impacted as ECO provisions impact other chapters. Difficult to deliver a coherent Plan decision without the ECO provisions if separated out. • Difficult for district planners to implement a partial plan • More uncertain and litigious for applicants • Following Local Government elections a new Committee would take time to understand Plan and make decisions • Additional cost to resource the process falls to ratepayers • Risk of judicial review of delay – will require additional justification for extension of time from the Minister • Risk of declaration of non-compliance from High Court • Delay in getting certainty for Grey landowners. • SNA identification in Buller and Westland would need to start in 2025 to meet 2027 timeframe.
<p>Option 2 Proceed with August Hearing</p>	<ul style="list-style-type: none"> • Commissioners and staff available and prepared for August hearing • Efficient delivery – no unreasonable delay • As drafted the Bill will not dispense with the need to identify SNAS • Saving of costs already expended • Plan integration more robust • Fully operative plan easier to implement • Earlier certainty for applicants • Plan fully operative in this term of the TTPP Committee • Less risk of review and decisions being made elsewhere for the West Coast 	<ul style="list-style-type: none"> • Uncertainty of changes to the Bill



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RECOMMENDATIONS

1. That the Committee receives this report
2. That the Committee proceeds with the Ecosystems and Indigenous Biodiversity hearing as scheduled

OR if the Committee determine they wish to defer the hearing, they adopt the following motion:

The Committee directs the Project Manager to make a request to the Hearings Panel that the Ecosystems and Indigenous Biodiversity hearing scheduled for end of August 2024 be delayed for minimum six months or until the Crown review of the Resource Management (Freshwater and Other Matters) Amendment Bill which includes proposed changes to the National Policy Statement for Indigenous Biodiversity has been finalised.

Jo Armstrong

Project Manager



Appendix 1

MEMORANDUM

Date: 31 July 2024
To: Jo Armstrong | Jocelyne Allen
From: Alice Balme | Molly McDouall

Motion to delay the hearing of the Ecosystems and Indigenous Biodiversity Chapter of the Te Tai o Poutini Plan

Introduction

1. We understand the Te Tai o Poutini joint committee (**TTPP Committee**) is considering a motion regarding the implications of the National Policy Statement for Indigenous Biodiversity 2023 (**NPS-IB**) on the Ecosystems and Indigenous Biodiversity Chapter of the proposed Te Tai o Poutini Plan (**TTPP**).
2. We have previously provided advice to the Hearings Panel regarding the implications of the changes to the NPS-IB. A copy of that advice is attached and its content is not repeated here.
3. This memorandum provides comments in respect of legal and other risks that arise from the motion.
4. We note that a decision to delay the hearing should be made by the Hearings Panel and therefore any resolution of the Committee should be framed as a request to the Hearings Panel to delay the hearing, rather than an outright decision to delay.
5. Our view is that the adverse consequences of delaying the hearing outweigh any potential benefit that can come from the delay. This is largely because the position of the section 42A report writer is focused on giving effect to the RPS. The RPS will not change irrespective of the Resource Management (Freshwater and Other Matters) Amendment Bill and therefore we anticipate that the opinion of the section 42A report writer is unlikely to change.

Practical Implications of delaying the Ecosystems and Indigenous Biodiversity Chapter

Duty to avoid unreasonable delay

6. The Committee has a duty under section 21 of the RMA to avoid unreasonable delay. When preparing a District Plan, there is a requirement in the RMA that decisions on submissions are made within two years of the Plan being notified. As the TTPP was notified in 2022, the Committee is already in breach of this requirement.
7. Where this time period is not met, the Committee is required to seek an extension in writing from the Minister to allow more time for decisions to be made. In doing so it needs to provide reasons as to the delay and should address the requirements of section 21.
8. The Committee should be seeking an extension for the current delay in meeting this timeframe. If a decision is made to delay the hearing on Ecosystems and Indigenous Biodiversity, that extension will likely need to be considerably longer. There is some risk that the Minister may not grant the extension, or may not grant an extension that is sufficient to allow a delay of this hearing. If that is the case, the consequence will likely be government intervention as it is not clear what alternatives there are.

Protection of SNAs

9. The rules in the TTPP relating to the protection of SNAs have immediate legal effect in accordance with section 86B(3) of the RMA. This means that to the extent there are rules in the TTPP that require resource consents for activities in SNAs, those rules apply. Any person who wants to carry out an activity that triggers a consent requirement in the TTPP will need to apply for consent under both the relevant



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operative plan and the TTPP. This is particularly relevant to Grey District as it is the only District that has SNAs identified.

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10. The requirement to obtain resource consents under the two district plans will remain until such time as the TTPP becomes operative. This dual consenting environment is complex and can be burdensome and complicated for both applicants and consent authorities. Accordingly, the sooner the TTPP is made operative, the more clarity the public will have regarding the consent processes.
11. Consenting under the dual plan framework is also costly as it requires assessment of an activity against two district plans. This takes more time and therefore more cost if consultants are engaged.
12. As SNAs have not been identified in Westland and Buller Districts, there is limited protection for these areas. The sooner the TTPP is complete and the SNAs are identified the sooner the risk of destroying SNAs is reduced.

Reputational risk or legal challenge

13. SNAs have been a topic of debate for the West Coast for a number of years. There are parties on both sides of the debate that are interested in this issue and are highly motivated. There is some risk that if the TTPP Committee delays its hearing on the Ecosystems and Indigenous Biodiversity Chapter further, it will be subject to media attention and public scrutiny.
14. We do acknowledge that there may be a large part of the community that is also supportive of the decision to delay.
15. It is possible that a decision to delay could interest the Government and result in some central government intervention requiring the hearing to proceed (although we consider the risk of this to be reasonably low).
16. There is also a risk that an interested party could initiate legal proceedings that may be judicial review of the decision to delay, or a declaration as to the legality of the current framework. We consider the likelihood of a judicial review to be moderate and the risk of another declaratory challenge to be low.
17. We note that a decision to delay the hearing is likely to result in a delay with the recommendations to the Panel on this part of the plan. The consequence of this delay is that the other parts of the plan might be ready to be made operative ahead of the Ecosystems and Indigenous Biodiversity Chapter. A complicated planning exercise would be required to extract all of the relevant provisions from the TTPP to make the remainder of the plan operative in advance of this Chapter.

Subsequent changes to the TTPP

18. Any changes to the notified provisions in the TTPP will require a variation (assuming they are made before the TTPP is operative). This means that whether or not the hearing proceeds, a Variation will be required in the future to make any changes to the TTPP to give effect to the NPS-IB.
19. As the current protection of SNAs is deficient, and in breach of the RMA, a decision to proceed with the hearing will at the very least correct the current position. It will ensure that all of the other parts of the Ecosystems and Indigenous Biodiversity Chapter are considered by the Hearings Panel and still leaves the option to do a variation to change the process for identification of SNAs at a later date.

Role of section 42A Report authors

20. Section 42A Reports (**s42A Reports**) are prepared at the request of the Hearings Panel, and are intended to assist the Hearings Panel and submitters to understand and make their recommendations on submissions.¹ They are a form of expert evidence.

¹ Te Tai o Poutini Hearing Panel Minute 2 – Hearing Procedures and Timetables – dated 8 August 2023 at [20].



21. For the TTPP, all expert witnesses, in both preparing and presenting their evidence are expected to comply with the Environment Court Practice Note (**Practice Note**).² The Practice Note requires that (amongst other things):
- (a) An expert witness has an overriding duty to impartially assist the Court (or in this case the Hearings Panel), and that duty overrides any duty to the proceeding or person who engaged the expert;
 - (b) An expert witness is not and must not behave as an advocate for the party who engages them.
22. The s42A Reports prepared for the TTPP Hearings Panel details the expert opinions of the reporting officer, and must be impartial in order to be given any weight by the Hearings Panel. As the Hearings Panel has noted, while s42A Reports will evaluate all submissions on the relevant hearing topics and make recommendations to the Hearings Panel considering those topics, those recommendations are not binding on the Hearings Panel and carry no greater weight than any other evidence provided by or on behalf of any submitter.³
23. The s42A report on the Ecosystems and Indigenous Biodiversity Chapter is focused on giving effect to the RMA and the requirements of the RPS with respect to SNAs. Accordingly, even if the hearing is delayed and the Bill is enacted, we do not expect that it will change significantly.

Who is responsible for decisions to delay the hearing

24. As the Committee has delegated to the Hearings Panel its powers functions and duties in respect of holding hearings on submissions on the TTPP, the decision to delay the hearing should be made by the Hearings Panel.
25. If the Committee wants to proceed with a delay the resolution of the Committee should be as follows:

The Committee directs the Project Manager to make a request to the Hearings Panel that the Ecosystems and Indigenous Biodiversity hearing scheduled for end of August 2024 be delayed for minimum six months or until the Crown review of the Resource Management (Freshwater and Other Matters) Amendment Bill which includes proposed changes to the National Policy Statement for Indigenous Biodiversity has been finalised.

26. The Project Manager can then liaise with the chair of the Hearings Panel as to the practical implications of holding a hearing later in the year for this topic if required.

Wynn Williams



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- ² Te Tai o Poutini Hearing Panel Minute 2 – Hearing Procedures and Timetables – dated 8 August 2023 at [62].
- ³ Te Tai o Poutini Hearing Panel Minute 2 – Hearing Procedures and Timetables – dated 8 August 2023 at [24].



MEMORANDUM

Date: 17 April 2024
To: TTPP Hearing Panel
From: Lucy de Latour | Kate Dickson

Potential implications of changes to the NPS-IB for the TTPP and SNA requirements

1. The proposed Te Tai o Poutini Plan (**TTPP**) is currently being heard by an independent Hearing Panel (**Hearing Panel**) appointed by the TTPP Committee, a joint committee of the local authorities and rūnanga representatives in the West Coast region.
2. As a combined district plan for the West Coast, the TTPP is required to give effect to a number of documents, including both the West Coast Regional Policy Statement (**RPS**) and the National Policy Statement for Indigenous Biodiversity 2023 (**NPS-IB**). The NPS-IB came into force after the TTPP had been notified. We have previously advised the Hearing Panel that the TTPP must give effect to the NPS-IB to the extent that there is scope within the submissions to do so. We have also previously advised the TTPP Committee regarding its obligations in relation to the identification and mapping of significant natural areas (**SNAs**), including under the RPS.
3. Recent media statements by the responsible Ministers have indicated that changes to the NPS-IB may be forthcoming, possibly through legislation aiming to be introduced to Parliament in May 2024. We are aware that advice from Ministry for the Environment officials indicates that there may be changes to or a suspension of the operation of the clauses of the NPS-IB that require councils to assess and identify and map areas of their districts that are SNAs.
4. In light of this, you have asked:
 - (a) If the Government makes the changes they have identified (through Ministry consultation material) to the NPS-IB, will the TTPP still be required to implement SNAs under the RPS?
 - (b) If there is still a requirement to identify SNAs, what criteria will be required to be used (i.e. will this be the criteria set out in the RPS)?
 - (i) If not, what would need to happen to be able to retain and use the RPS SNA criteria?
 - (c) If the requirement in the NPS-IB 3.8(1) for a district-wide assessment of (terrestrial) SNAs remains, what will this mean for proposed TTPP Policy ECO - P1 2.(ii.), which provides for SNAs to be identified through the consent process on a case-by-case basis until a district-wide assessment is done?
 - (d) Will existing SNAs that have already been identified be affected by the changes proposed by the Government at this time?

Executive summary

5. Sections 6(c), 30 and 31 of the Resource Management Act 1991 (**RMA**) form the basis for the requirement to ensure the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna (commonly referred to as SNAs). One of the methods that has been adopted to give effect to these provisions is the use of identification of SNAs in planning documents.
6. While the Government has proposed changes to the identification and mapping requirements of the NPS-IB, it has not proposed to remove the NPS-IB entirely (meaning that its objectives and policies



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would likely still remain in place). Any changes are still uncertain at this stage, and the current version of the NPS-IB remains in place until any changes to it come into force.

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7. Even if the requirement to identify SNAs is removed from the NPS-IB (or indeed even if the whole NPS-IB were revoked), the RPS still requires identification and mapping of SNAs in order to give effect to the RPS. Chapter 7 Policy 1 of the RPS contains a requirement to map SNAs in relevant regional and district plans, and it is a requirement of the RMA that a district plan “gives effect to” (i.e. implements) a regional policy statement. This is also consistent with previous case law (decided prior to the introduction of the NPS-IB) where the Environment Court found a council was under a duty to identify SNAs where it had included criteria to do so in its district plan.
8. If the source of the requirement to identify SNAs reverts to the RPS, the Council would be bound to identify SNAs. At this point in time, it is difficult to conclusively say which criteria will apply to the identification of SNAs (e.g. the RPS criteria or the NPS-IB criteria, noting that as a minimum the RPS criteria would apply). Assuming that the NPS-IB criteria remain in force (as they have not been signalled by the Ministry of the Environment officials to be removed), we would expect parties to argue that the RPS criteria must be read down given that it has not yet been amended to give effect to the NPS-IB (and therefore the NPS-IB criteria are higher in the hierarchy of planning documents). If the TTPP Committee’s preference was for the RPS criteria only to apply, then it should be seeking changes to (or deletion of) the NPS- IB criteria through the upcoming consultation processes.
9. If the identification and mapping requirements in the NPS-IB were to remain, it does not appear that there would be any conflict with the approach in ECO-P1, as clause 3.8(6) of the NPS-IB provides for a similar approach, provided that each case-by-case instance is assessed in accordance with Appendix 1 of the NPS-IB and clause 3.8(2) of the NPS-IB (rather than solely the RPS criteria).
10. However, a likely avenue of challenge does still remain for parties to argue that ECO-P1 is not giving effect to the RPS policy in relation to mapping SNAs, as the TTPP is required to do. It may be easier to resist this argument while the NPS-IB is still in force, as it could be arguable currently that while ECO-P1 may not be giving effect to the RPS it is still giving effect to the NPS-IB (albeit that a future mapping exercise will still be required to fully give effect to the NPS-IB).
11. The Ministry for the Environment’s consultation material indicates that existing SNAs will not be affected by any policy changes to the NPS-IB. Existing SNAs already identified in the TTPP (for example in Grey District) are unlikely to be directly affected by any changes to the NPS-IB (except potentially to the extent there are submissions on the TTPP seeking changes to the extent of these SNAs or the rules applying to them).

Legislative and planning context in relation to SNAs

12. Before we address each of your specific questions, it is important to set out the legislative and planning context that relate to the protection of SNAs.
13. Section 6 of the RMA contains a number of matters of national importance that planning documents must “recognise and provide for”. In particular, section 6(c) provides for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna (commonly referred to as SNAs).
14. The meaning of “protection” has been considered in case law, with the Environment Court stating:¹

... The word “protection” is not defined in the RMA. The Environment Court has stated it has the ordinary meaning “to keep safe from harm, injury or damage”. In our view it is also a near synonym for “safeguard”, the word used in section 5(2)(b) of the Act.
15. The requirement to identify, and protect, SNAs has been clarified through case law, including in the *Royal Forest and Bird Protection Society v New Plymouth District Council* decision which considered these obligations in detail. The Court recognised that “the sustainable management



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¹ *Oceana Gold (New Zealand) Ltd v Otago Regional Council* [2019] NZEnvC 41, at [71].

of New Zealand’s natural and physical resources requires that on occasions the exercise of private property rights will be subject to controls.”²

16. The RMA is a three-tiered management system – with national, regional and district planning instruments. Within this system there is a hierarchy of planning documents. Those planning documents include objectives, policies and methods. Broadly speaking, objectives are set, policies (which are a course of action) implement those objectives and methods and rules implement the policies. Case law has clarified that policies may be either broad or narrow, and that a prescriptive policy may have the effect of a rule in terms of directing that certain things occur.³
17. The highest order planning documents are those that are the responsibility of central Government (specifically national policy statements and the New Zealand coastal policy statement). The RMA requires that district plans (such as the TPPP) give effect to regional policy statements, and national policy statements.⁴
18. The Supreme Court has confirmed that the phrase “give effect to” means to implement.⁵ The Supreme Court has said it is a strong directive, creating a firm obligation on the part of those subject to it. It requires positive implementation of the superior planning document.
19. In relation to SNAs and the TPPP, the RPS and the NPS-IB both contain directive policies about SNAs that must be given effect to (these are addressed further below).⁶ While the NPS-IB only came into effect after the TPPP was notified, the Hearing Panel when making recommendations on the submissions made on the TPPP must give effect to the NPS-IB to the extent that there is scope within the submissions to do so.⁷
20. This will include giving effect to the NPS-IB objectives and policies which include:
 - (a) Objective 1: to maintain indigenous biodiversity across Aotearoa New Zealand so that there is at least no overall loss in indigenous biodiversity after the commencement date.
 - (b) Policy 5: Indigenous biodiversity is managed in an integrated way, within and across administrative boundaries.
 - (c) Policy 6: Significant indigenous vegetation and significant habitats of indigenous fauna are identified as SNAs using a consistent approach.
 - (d) Policy 7: SNAs are protected by avoiding or managing adverse effects from new subdivision, use and development.
21. Clauses 3.8 and 3.9 are also specific implementation clauses in relation to assessing areas that are SNAs and identifying them in district plans.

Potential changes to the NPS-IB

22. We understand that the proposed changes to the NPS-IB that the Government is considering include suspending the direction to councils to assess their districts and areas qualifying as SNAs in plans, for three years from the date of the change taking effect.
23. Ministry consultation material indicates that this could be effected by changes to clauses 3.8, 3.9, 4.1 and 4.2 of the NPS-IB, although there may be a need to make further changes to the NPS-IB to implement the changes (potentially including transitional provisions).

² *Royal Forest and Bird Protection Society of New Zealand Inc v New Plymouth District Council* [2015] NZEnvC 219, at [95].

³ *Auckland Regional Council v North Shore City Council* [1995] 3 NZRMA 424 (CA) at 10.

⁴ RMA, s 75(3).



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- ⁵ *Environmental Defence Society Incorporated v New Zealand King Salmon Company Limited* [2014] NZSC 38 at [77].
- ⁶ The New Zealand Coastal Policy Statement also contains obligations in relation to indigenous biodiversity that will be relevant in the coastal environment.
- ⁷ *Hawke's Bay and Eastern Fish and Game Council v Hawke's Bay Regional Council* [2014] NZHC 3191, 18 ELRNZ 348 at [183] and [184].

24. We note at the outset that at this stage there is a significant level of uncertainty as to the potential changes to the NPS-IB. Although we understand some high-level consultation material on proposed changes has been provided to various councils, there is no certainty on the detail of the proposed changes, and how these may be effected in practice. Until any changes have been Gazetted or otherwise come into force, all of the current provisions of the NPS-IB will apply.
25. In addition, the changes that have been signalled are changes to the implementation requirements of the NPS-IB, rather than changes to its policy direction. For example, while the mapping and identification implementation requirements of the NPS-IB may be removed, the objectives and policies of the NPS-IB will remain, and the TTPP will still be required to give effect to these provisions to the extent that there is scope within submissions to do so.
26. This advice demonstrates our preliminary assessment of the potential impacts of the changes. Once any proposed changes have come into force, we will be able to provide a more definitive view on the impact of those changes for the TTPP in particular.

RPS requirements to identify SNAs

27. We have previously provided advice to the TTPP Committee, prior to the introduction of the NPS-IB, regarding the requirement to identify SNAs.
28. In short, even if the requirement to identify SNAs is removed from the NPS-IB, the RPS still requires identification and mapping of SNAs in order to give effect to the RPS (which reflect the obligations under section 6(c) to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna.
29. The RPS includes the following policy and explanation:⁸

(1)(a) Areas of significant indigenous vegetation and significant habitats of indigenous fauna will be identified using the criteria in Appendix 1; they will be known as Significant Natural Areas (SNAs), and will be mapped in the relevant regional plan and district plans.

...

Policy 1 recognises that using regionally consistent criteria for determining and identifying Significant Natural Areas (SNAs) assists with achieving sustainable management. It is best practice to map SNAs in plans, so that when a subdivision, use or development proposal is put forward, robust decisions can be made regarding its appropriateness.

30. Given the RPS has set out a direction that SNAs will be mapped in regional and district plans, not including maps in the relevant district plan would not give effect to the RPS. This means that even if the requirement to identify SNAs in the NPS-IB is removed or suspended, the requirement to map them under the RPS still remains (and the TTPP is required to give effect to this requirement).
31. This is also consistent with the Ministry's consultation material on the proposed NPS-IB changes to date, which states "Processes initiated before the NPS-IB came into force, including existing SNAs and biodiversity protection rules already in plans and policy statements, would also stay".
32. Previous case law has considered that the relevant council had a duty to map SNAs where the council had included in its plan criteria for identifying SNAs, but did not map or identify all of the SNAs that met the criteria. The Court made a declaration that "New Plymouth District Council has a duty to recognise and provide for the protection of SNAs within its District which have been identified using the process contained in Appendix 21.1 of its District Plan".⁹



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⁸ WCRPS, Policy 7-1(a) and explanation.

⁹ *Royal Forest and Bird Protection Society of New Zealand Inc v New Plymouth District Council* [2015] NZEnvC 219, at [114(1)].

Criteria used to identify SNAs

33. You have asked us if there is still a requirement to identify SNAs, what criteria will be required to be used (i.e. will this be the criteria set out in the RPS?). If not, what would need to happen to be able to retain and use the RPS SNA criteria?
34. As set out above, irrespective of the NPS-IB requirements, there is a requirement in the RPS to identify and map SNAs. At this point in time, it is difficult to conclusively say which criteria will apply (e.g. the RPS criteria or the NPS-IB criteria). We note that while the four main criteria in both the RPS and NPS-IB are the same, the guidance and how they should be applied differs.
35. To date, the information provided by Ministry officials has not indicated that the effect of the NPS-IB Appendix 1 criteria will be suspended, further we understand that the objectives and policies in the NPS-IB are not proposed to be amended (these include Policy 6 as identified above which requires that “Significant indigenous vegetation and significant habitats of indigenous fauna are identified as SNAs using a consistent approach”).
36. Assuming that the NPS-IB criteria remain in force, we would expect parties to argue that the RPS criteria must be read down given that it has not yet been amended to give effect to the NPS-IB (and therefore the NPS-IB criteria are higher in the hierarchy of planning documents). Irrespective as a minimum the RPS criteria would apply to any assessment of SNAs.
37. It would be helpful to understand from an ecological point of view what the difference between the two sets of criteria is (e.g. does one result in more or less area qualifying as an SNA). If the TTPP Committee’s preference was for the RPS criteria only to apply, then it should be seeking changes (or deletion of) to the NPS-IB criteria through the upcoming consultation processes (although we have no sense of what the appetite for the Government changing the criteria might be).

Implications for ECO-P1

38. You have also asked us what it would mean for ECO-P1 if clause 3.8(1) of the NPS-IB and its requirement to undertake a district-wide assessment of SNAs remains in force.
39. As we understand it, ECO-P1 states that areas of significant indigenous vegetation and fauna habitat in the Grey District are to be identified in accordance with Schedule Four of the TTPP (ECO-P1(1)), meaning SNAs for the Grey District have already been identified.
40. Within the Buller and Westland Districts, the policy intends that an assessment of significance will be undertaken at the time any resource consents are applied for, on a case-by-case basis (ECO-P1(2)).
41. In respect of ECO-P1(2), clause 3.8(6) of the NPS-IB requires that where a territorial authority becomes aware, as a result of a resource consent application, notice of requirement or other means, that an area may be an SNA, the territorial authority must conduct an assessment in accordance with the criteria in Appendix 1 of the NPS-IB and the principles set out in clause 3.8(2).
42. Therefore, if clause 3.8(1) of the NPS-IB remained in force, along with the other subclauses of clause 3.8, the Council would be able to identify SNAs through the consenting process on a case-by-case basis (and must do so as soon as practicable) up until such as time as a district wide assessment is completed. The proposed approach in ECO-P1(2) is therefore relatively consistent with the approach taken in the NPS-IB.
43. However, it is important to reiterate that the regional council (and by extension the TTPP Committee, being the body required to be delegated the ongoing district plan making functions) would still be required to assess each potential SNA using the criteria set out in Appendix 1 of the NPS-IB and principles in clause 3.8(2), in include these in a future plan change in order to give effect to the NPS-IB.
44. Difficulties could arise where the criteria differ between the NPS-IB and the RPS – for example where under the NPS-IB an area would be considered an SNA, but not under the RPS. If this is the case (and the NPS-IB requirement remains in force), we consider that any

areas identified under *either* the RPS or NPS-IB criteria should be considered to be an SNA. The NPS-IB is clear that the TTPP Committee would also be required to include any such SNAs in the next appropriate plan or plan change (clause 3.8(6)(b)).

45. In respect of time limits, clause 4.2(1) requires local authorities to publicly notify any policy statement or plan (or changes to these) necessary to give effect to clauses relating to SNAs within five years. There is nothing in the NPS-IB to suggest that clause 3.8(6)(b) cannot be relied on at any point before the deadline in clause 4.2(1). Therefore, the “next appropriate plan or plan change” could well be the plan or plan change that satisfies the deadline in clause 4.2(1), being five years from July 2023.
46. For this reason, there does not appear to be conflict between the NPS-IB as it stands and the approach in ECO-P1(2), provided the assessment of each case-by-case SNA is assessed in accordance with Appendix 1 of the NPS-IB and clause 3.8(2) of the NPS-IB and that a further plan change (or variation depending on the timing for the TTPP) is promulgated in accordance with the time limits in clause 4.2 of the NPS-IB.
47. However, irrespective of the NPS-IB, given the directive nature of the RPS policy in relation to mapping, if the NPS-IB mapping obligations are suspended, we expect the TTPP will face challenges regarding whether ECO-P1 gives effect to the RPS given it does not require the identification or mapping of all SNAs. Further, we expect that parties will potentially argue that in order to give effect to the NPS-IB objectives and policies (rather than the implementation clauses) that SNAs are required to be identified and mapped (rather than simply relying on identification through resource consent processes).
48. We do consider that there is a potential argument against further mapping of SNAs occurring in circumstances where the NPS-IB is still in force (compared to if only the RPS applies given its directive policy about mapping). This is because the NPS-IB clearly provides a time period within which to map areas identified as SNAs (compared to the RPS, which simply directs mapping).

Are existing SNAs affected by changes?

49. You have asked whether existing SNAs that have already been identified in the TTPP will be affected by the changes proposed by the Government at this time.
50. First, it is important to reiterate that any press releases or statements made by Ministers or officials regarding the future of the NPS-IB have no legal status at this point in time. If the TTPP or any of the affected councils made decisions based on those statements alone they would open themselves to legal challenge.
51. However, we have interpreted your question as to what the implications will be, assuming the changes proceed as currently indicated. Based on the information provided on the potential changes to date, we do not consider that existing SNAs will be affected. The Ministry consultation material provided indicates that “processes initiated before the NPS-IB came into force, *including existing SNAs* and biodiversity protection rules already in plans and policy statements, would stay” [emphasis added].
52. This means that any SNAs already identified as part of the TTPP (for example those in the Grey District) are unlikely to be affected by any proposed changes to the NPS-IB.

Conclusion

53. We trust that our advice assists. Please do let us know if you have any further questions.

Wynn Williams