

BEFORE THE HEARINGS PANEL

IN THE MATTER

of the Te Tai o Poutini Plan

BETWEEN

**ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED**
Submitter

**LEGAL SUBMISSIONS ON BEHALF OF THE ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED REGARDING
THE ECOSYSTEMS AND INDIGENOUS BIODIVERSITY CHAPTER**

11 November 2024

Royal Forest and Bird Protection Society of New Zealand

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MAY IT PLEASE THE PANEL

1. These legal submissions relate to the Indigenous Biodiversity and Ecosystems hearing topic and supplement the speaking notes that Forest & Bird's Canterbury / West Coast Regional Conservation Manager Nicky Snoyink will present.
2. These submissions address the Resource Management (Freshwater and Other Matters) Amendment Act 2024 (the RMAA), which came into force on 25 October 2024, and the implications for the Proposed Te Tai o Poutini Plan (PTTPP).

The Panel's Minute of 8 August 2024

3. In its minute of 8 August 2024, the Panel advised that it had postponed the hearing but decided not to "re-open" the receipt of legal submissions:
 8. In fairness to all parties, we do not propose to re-open the receipt of evidence or legal submissions however the date for submitters to specify if they:
 - i. Wish to appear and have a time scheduled at the hearing itself;
 - ii. Wish to appear virtually; and/or
 - iii. Wish to present evidence in Te Reo, Sign Language, or to use audio-visual equipment.

is now the 4th of November 2024.
4. While it may not be required, Forest & Bird seek leave to file these submissions. The grounds for leave are that the passing of the RMAA, which was given the royal assent on 24 October, is a significant development. Fairness requires submitters can address the implications of the passing of this law. In addition, these submissions are filed before the hearing and no party will be prejudiced by the panel considering them.

Resource Management (Freshwater and Other Matters) Amendment Act 2024

5. The Resource Management RMAA contains provisions relating to mapping SNAs relevant to this hearing.

6. The RMAA addresses the NPSIB requirement to map SNAs by inserting a new section 78 into the RMA. This amends the requirements set out in Clauses 2.2, 3.8(1),(6),(8), 3.9(1), (3) and Policy 6 of the NPSIB.
7. Section 78(2) suspends certain requirements regarding identifying and mapping SNAs and including mapped areas in plans for three years.
 - (2) The following provisions of the NPSIB 2023 do not apply during the 3-year period:
 - (a) clause 2.2, Policy 6 (which requires a consistent approach in identifying significant indigenous vegetation and significant habitats of indigenous fauna as NPSIB SNAs):
 - (b) clause 3.8(1), (6), and (8) (which requires a territorial authority to conduct assessments to identify areas of significant indigenous vegetation and significant habitats of indigenous fauna that qualify as NPSIB SNAs):
 - (c) clause 3.9(1) (which requires a territorial authority to notify a plan or plan change to include areas identified as qualifying as NPSIB SNAs):
 - (d) clause 3.9(3) (which requires that a local authority must, when doing its 10-yearly plan review, assess its district in accordance with clause 3.8(1) and (2) to determine whether changes are needed).
8. Section 78 defines the 3-year period as the period that—
 - (a) commences on the date on which the Resource Management (Freshwater and Other Matters) Amendment Act 2024 comes into force, and
 - (b) expires on the date that is 3 years after that date
9. Commencement is defined as the date the RMAA comes into force. Section 2 provides that the RMAA comes into force on the day after it receives royal assent, 25 October 2024.
10. Section 78(3) suspends the requirement to give effect to the NPSIB as soon as practicable.

- (3) Clause 4.1(1) of the NPSIB 2023 (which requires a local authority to give effect to the NPSIB 2023 as soon as reasonably practicable)—
 - (a) does not apply during the 3-year period in relation to clause 3.8(5) of the NPSIB 2023 and the provisions of the NPSIB 2023 specified in subsection (2) [of the NPSIB 2023], but
 - (b) continues to apply in relation to the other provisions of the NPSIB 2023.

11. Section 78(4) and (5) contain provisions relating to the inclusion of SNAs in plans after the commencement date (25 October 2024). The effect of this is that “SNAs” included in the plan after the commencement date are not to be treated as SNAs.

- (4) This section does not affect—
 - (a) any function or requirement under other provisions of this Act relating to indigenous biological diversity, areas of significant indigenous vegetation, or areas of significant habitats of indigenous fauna, or
 - (b) any obligations of local authorities and other decision-makers under this Act to give effect to provisions in policy statements and plans relating to indigenous biological diversity.
- (5) However, if, during the 3-year period, a new area of significant indigenous vegetation or significant habitat of indigenous fauna is included in a proposed policy statement, proposed plan, or change,—
 - (a) the new area is not an NPSIB SNA regardless of how it is described in that document; and
 - (b) the NPSIB 2023 does not apply to the new area.

12. There is an exception for plans that were notified before the commencement date.

- (6) This section does not affect—
 - (a) any NPSIB SNA included in a policy statement, proposed policy statement, plan, proposed plan, or change before commencement (see also clause 40 of Schedule 12); or

- (b) any of the following matters that commenced but were not completed before commencement (see also clause 40 of Schedule 12):
 - (i) a proposed policy statement, proposed plan, or change (a planning process) that has been notified under Schedule 1; and
 - (ii) the identification, modification, or removal of an area to give effect to decisions on that planning process.

THE EFFECT OF THE RMAA ON THE TTPP

13. The RMAA is relevant in two key ways: the requirement to identify and map SNAs and the implications for SNAs that were or were not mapped.
14. By operation of s 78(6)(b), the RMAA will not affect the requirement to identify and map SNAs in the PTPP.
15. In relation to the requirement to identify and map SNAs, this is a change from the situation that would have applied if the Resource Management (Freshwater and Other Matters) Amendment Bill (the Bill) passed unchanged. If the Bill had passed unchanged s 78(6)¹ would have applied to SNAs included in the notified plan and allowed them to be included in the operative plan. SNAs not included in the notified plan would not have been able to be included in the operative plan.
16. The Bill would have suspended the requirement to identify and map SNAs. However, s 78(6)(b) was added to the RMAA through the select committee process and has the effect of not suspending the NPSIB in relation to plans that have been notified.
17. SNAs mapped in the Grey District are covered by s 78(6)(a) and can be included in the TTPP. This is because they were included in the PTPP.

¹ The Bill proposed to include s 78(6) in the RMA which would have provided:
(6) This section does not affect any SNAs that are included in a policy statement, proposed policy statement, plan, proposed plan, or change before commencement (see *also* **clause 40 of Schedule 12**).

18. The position is more complicated although the result is ultimately the same in the Westland and Buller Districts, where SNAs were not mapped in the PTPP, and Grey District for SNAs not included in the PTPP.
19. As noted above, if the Bill had become law unchanged, there probably would not have been an opportunity to include SNAs in the operative plan that had not been notified. This is because what is now s 78(6)(a) only applies to SNAs included in the proposed plan.
20. This would have implications for the Westland and Buller Districts, which did not include SNAs, and for SNAs in Grey District outside those mapped.
21. However, section 78(6)(b)(i) of RMAA provides that proposed plans that were notified before the commencement of the RMAA are unaffected by s 78 of the RMAA.

The requirement to give effect to the NPSIB is unchanged

22. This means the NPSIB must be given effect to as soon as reasonably practicable within the scope of the plan as notified and submissions. That is, if there is scope to give effect to the NPSIB, the Panel must do so.
23. This submission is consistent with the Officer Report, which notes, “the NPSIB must be given effect to as soon as reasonably practical. Because the PTPP was developed prior to the NPSIB, it only partially gives effect to it – in as much as has been possible within the constraints of the scope of submissions made to the Plan”.² The legal submissions of DOC also support this approach.³
24. Forest & Bird agrees with the DOC submission that, while the WCRPS was prepared before the NPSIB, it cannot be assumed that WCRPS does not give effect to it.⁴
25. Forest & Bird would go further and say that no aspects of the WCRPS materially conflict with the NPSIB. The criteria for identifying SNAs are equivalent, and both the WCRPS and the NPSIB require that SNAs be identified and mapped.

² [117]

³ DOC legal submissions at [9]

⁴ DOC legal submissions at [14]

Mapping of SNAs required

26. In relation to the mapping of SNAs, Wynn Williams provided legal advice to the Panel, which was that even if the requirement to identify SNAs is removed from the NPSIB through the Bill (or indeed even if the whole NPSIB were in the future revoked), the RPS still requires the PTTTP to identify and map SNAs. This is necessary to give effect to the RPS. Forest & Bird agrees.

27. The NPSIB definition of SNA anticipates that mapping of SNAs will have occurred and that they are included in the plan as required by the NPSIB and the RPS:

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.

28. The definition of SNA in the RPS anticipates the reality that some SNAs have been mapped in Grey District but not Westland or Buller. The WCRPS glossary describes a Significant Natural Area as meeting the criteria listed in Appendix 1 (or 2 for wetlands) of the WCRPS:

Significant Natural Area, or SNA, means an area of significant indigenous vegetation and/or significant habitats of indigenous fauna that has been identified using the criteria listed in Appendix 1 or 2 and included on maps in a regional or district plan as a SNA, or an area which although not included as a SNA in a regional or district plan nevertheless meets one or more of those criteria listed in Appendix 1 or 2.

29. The second aspect of this definition is relevant to the Westland and Buller Councils and the identification of further SNAs in Grey District. This means an area that meets the criteria listed in

Appendix 1 of the WCRPS but was not included as a mapped SNA in the PTTTP is an SNA under the WCRPS.

30. The mapped SNAs within the Grey District would also be captured under clause (b) of the NPSIB definition. Under the NPSIB, these areas must remain “SNA” unless or until determined otherwise.
31. While the definitions in the NPSIB and RPS are different, they are not in conflict. They are consistent with respect to mapped SNAs. The RPS criteria deal with the circumstance where SNAs have not been mapped, which is a reality on the West Coast. The NPSIB does not address this reality.

Implications for the objectives, policies, and rules

32. At a high level, Forest & Bird supports the overall approach of the PTTTP, which has objectives for protecting significant Indigenous vegetation and habitats of Indigenous fauna and maintaining Indigenous biodiversity.
33. These objectives are implemented by policies identifying SNAs and including them in the plan. In principle, Forest & Bird also supports policies that provide for activities with no more than minor effects, enhancement and restoration, eco-tourism, Māori purpose zoned land, and the processing of resource consents.
34. There are some particular issues regarding Policy 1, which provides for the identification of new SNAs and their inclusion in the plan through a plan change. The RMAA suspending the effect of new SNAs raises some challenges for such a policy.
35. A policy seeking to include SNAs would be futile when those SNAs would not have legal effect. On the other hand, as noted above, the RPS requires the identification of SNAs.
36. However, as the s 42A report recommends, Policy 1 is not futile. Section 78(6) provides for a three-year period where new SNAs will not have effect, which expires in October 2027. Policy 1 provides for the plan change to be introduced no later than August 2028. This means there is a window after the three-year suspension period before August 2028 when the SNAs can be included in the plan by way of a plan change.

37. It is submitted that the references to the NPSIB in Policy (1) – (3) should be replaced with references to the RPS. This is because the suspension of the NPSIB obligation regarding SNAs means that the responsibility to identify and map SNAs comes from the RPS.
38. The government has signalled a possible change to the approach to SNAs. However, at the current time, any changes are speculative, and the obligation to give effect to the RPS prevails.
39. The absence of mapped SNAs means that the vegetation clearance rules must be relatively stringent to ensure that the SNAs are protected as required by s 6(c) and the RPS, and indigenous biodiversity is maintained as required by s 31(2)(b)(iii).
40. Forest & Bird has comments on the objectives, policies, and rules, which are addressed by Ms Snoyink.

Dated: 11 November 2024

A handwritten signature in black ink, appearing to read 'P Anderson', is centered on the page. The signature is written in a cursive, slightly stylized font.

P Anderson
Counsel for Royal Forest and Bird Protection Society of New Zealand
Incorporated