

MEMORANDUM

Date: 22 November 2024
To: TTPP Independent Hearings Panel
From: Alice Balme

Ecosystems and Biodiversity – Additional matters raised by submitters

1. This memorandum addresses the following matters:
 - (a) the interpretation of section 78(6)(b) of the Resource Management Act 1991 (**RMA**);
 - (b) use of the significance criteria in the National Policy Statement for Indigenous Biodiversity 2023 (**NPSIB 2023**);
 - (c) the direction in clause 3.8(5) of the NPSIB 2023; and
 - (d) implementation of the West Coast Regional Policy Statement 2020 (**RPS**).

Section 78 RMA

2. Counsel for Royal Forest & Bird Protection Society Incorporated (**Forest & Bird**) filed legal submissions dated 11 November 2024 addressing, amongst other matters, the operation of section 78(6)(b) of the RMA.
3. Section 78 of the RMA was amended by the Resource Management (Freshwater and Other Matters) Amendment Act 2024 (**Amendment Act**) and suspends the application of certain provisions in the NPSIB 2023 for a 3-year period. Aspects of section 78 were addressed in our previous Memorandum dated 8 November 2024. However, that Memorandum did not address section 78(6)(b).
4. Section 78(6)(b) provides:

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.
5. Forest & Bird submits that given the introduction of section 78(6)(b), the requirement to identify and map SNAs in the TTPP still stands.¹ In particular, Forest & Bird submits that in areas where SNAs were not mapped in the notified version of the TTPP, such as the Westland and Buller Districts, there is now an opportunity to map SNAs in the TTPP.² This

¹ Legal Submissions on behalf of the Royal Forest and Bird Protection Society of New Zealand Incorporated regarding the ecosystems and indigenous biodiversity chapter dated 11 November 2024 at [14].

² Legal Submissions on behalf of the Royal Forest and Bird Protection Society of New Zealand Incorporated regarding the ecosystems and indigenous biodiversity chapter dated 11 November 2024 at [18]-[21].

was discussed further at the hearing on 21 November 2024 where Counsel confirmed that mapping of SNAs should occur after the three year period.

6. The TTPP is a planning process, as defined in section 78(6)(b)(i). We agree therefore that the three year delay in terms of the requirement to map SNA's under the NPSIB does not apply to the TTPP. However, the practical implications of that are not significant.
7. The SNA's that have already been identified in the Grey District are all NPSIB SNAs.
8. The way that the TTPP deals with mapping of new SNAs is to create a process by which they need to be identified, mapped and included in the TTPP via a plan change before August 2028. This is consistent with the requirements of clause 3.8 of the NPSIB.
9. If there are submissions seeking that specific areas be included in the TTPP as SNAs, to the extent that the Panel considers additional areas need to be identified, or existing areas modified or removed to give effect to decisions on the TTPP (i.e., making decisions on submissions), those areas could be included in the TTPP by virtue of section 78(6)(b)(ii), provided that there is scope within submissions to do so. On that basis, those areas would also be classified as NPSIB SNAs.
10. We remain of the view that for any future planning processes that require the identification of SNAs within the 3-year period, such as a variation to the TTPP, section 78(6)(b) would not apply, and instead section 78(5) of the RMA would apply, meaning that the NPSIB 2023 would not apply to those identified areas. To that end we also agree with the submission of Mr Anderson that any plan change or variation to the TTPP should only occur after the three year delay period has ended in order to avoid double handling.

Can the significance criteria in the NPSIB 2023 be used to identify SNAs?

11. As outlined in our Memorandum dated 8 November 2024, the clauses in the NPSIB 2023 that have been suspended by the Amendment Act do not include the significance criteria in Appendix 1 of the NPSIB 2023.
12. Given our conclusion above with respect to the operation of section 78(6)(b) of the RMA, if the Panel considers additional areas need to be identified, or existing areas modified or removed to give effect to decisions on the TTPP, the significance criteria in Appendix 1 of the NPSIB 2023 should be used.
13. Similarly, to the extent that the TTPP creates a process to identify and map SNAs and to introduce a plan change before August 2028, it is our view that the NPSIB criteria should be applied to that exercise. This is because the plan change will likely be introduced after the 3 year delay period expires (assuming the NPSIB doesn't change).
14. In light of the evidence provided by a number of parties as to the similarities between the NPSIB criteria and the RPS criteria, if the NPSIB criteria are applied, then the RPS should also be given effect to.
15. Counsel for Forest & Bird made the submission at the hearing on 21 November 2024 that in light of the purpose of the Amendment Act, the criteria in Appendix 1 to the NPSIB should also be read as subject to the delay because to do otherwise would not be consistent with the purpose of the Act. We do not agree with this submission.
16. If the above analysis is right, and the operation of s78(6)(b) is such that the delay provisions do not apply, then the NPSIB still applies in full effect and so the NPSIB criteria must be used. Similarly, the Amendment Act does not delay the effect of clause 3.8(5) of the NPSIB (which is the requirement to ground truth existing SNAs), it simply removes the requirement to implement this section as soon as reasonably practicable. Therefore, if a Council chose to engage experts to confirm its existing SNAs under the NPSIB it would need to do so applying the Appendix 1 criteria.

Clause 3.8(5) of the NPSIB 2023

17. We understand that the Panel has asked whether clause 3.8(5) of the NPSIB 2023 continues to apply, despite section 78(6) of the RMA. In short, the answer is yes.

18. Clause 3.8(5) of the NPSIB 2023 exempts a territorial authority from undertaking a district-wide assessment to identify areas of significant indigenous vegetation or significant habitat of indigenous fauna that qualify as SNAs, in areas that were already identified as SNAs as at the date on which the NPSIB 2023 came into force. The exemption is subject to a requirement that a suitably qualified ecologist is engaged by the territorial authority within six years to confirm that the methodology originally used to identify the area as an SNA, and its application, is consistent with the assessment approach in Appendix 1 of the NPSIB.
19. Section 78(2) of the RMA suspends the application of certain provisions in the NPSIB 2023 for a 3-year period (from the date on which the Amendment Act came into force). Those clauses of the NPSIB 2023 include:
 - (a) Clause 2.2, Policy 6;
 - (b) Clause 3.8(1), (6) and (8);
 - (c) Clause 3.9(1);
 - (d) Clause 3.9(3); and
 - (e) Clause 4.1(1).
20. Section 78(3) of the RMA goes on to provide that clause 4.1(1) of the NPSIB 2023 does not apply during the 3-year period in relation to clause 3.8(5) of the NPSIB 2023.
21. Clause 4.1(1) of the NPSIB 2023 contains the requirement for every local authority to give effect to the NPSIB 2023 as soon as reasonably practicable. This means that during the 3-year period, local authorities are not required to give effect to the NPSIB 2023 in respect of the various clauses listed in section 78(2). Clause 3.8(5) is not subject to the 3-year delay and therefore must still be complied with. However, it is no longer subject to the requirement to be given effect to as soon as reasonably practicable.

Implementation of the RPS

22. A question was raised by the panel as to whether the TTPP is required to give effect to the RPS given the introduction of the NPSIB 2023, on the basis that the RPS does not give effect to the NPSIB 2023.
23. A territorial authority must prepare and change any district plan in accordance with, amongst other matters, a national policy statement.³ Further, a district plan **must** give effect to relevantly, any national policy statement **and** any regional policy statement.⁴
24. As the NPSIB 2023 came into effect after the notification of the TTPP, the TTPP can only give effect to the NPSIB 2023 through this planning process to the extent that there is scope within submissions to do so. This proposition is widely accepted by other parties. It is for submitters to invoke the policies of the NPSIB 2023 relevant to the changes that they seek to the TTPP, and to illustrate the extent to which their relief gives effect to the NPSIB 2023.
25. The RPS came into effect in 2020 and pre-dates the introduction of the NPSIB 2023. The West Coast Regional Council will need to undertake its own assessment of the provisions of the RPS to consider whether, and to what extent, the RPS gives effect to the provisions of the NPSIB 2023.
26. Simply because the RPS pre-dates the NPSIB 2023 does not automatically mean that the RPS does not give effect to it. However, that assessment is not for this Panel. This Panel is required to consider submissions on the TTPP and ensure that the TTPP gives effect to the RPS, as currently drafted, in accordance with section 75 of the RMA.

Wynn Williams

³ RMA, s 74(1)(ea).

⁴ RMA, s 75(3).