

INTRODUCTION

1. These legal submissions are made on behalf of the Royal Forest and Bird Protection Society of New Zealand Incorporated and relate to the Ecosystems and Indigenous Biodiversity chapter (ECO) of the Proposed Wellington District Plan (the proposed plan).
2. A critical issue for Forest & Bird is the decision to remove urban SNAs areas from the proposed plan. The Council's decision to remove urban SNAs was contrary to the National Policy Statement for Indigenous Biodiversity (the NPS-IB) and the Wellington Regional Policy Statement. Forest & Bird's position is that the urban SNAs that were removed from the proposed plan need to be provided with the same level of protection as those that were scheduled. This can occur through scheduling or general vegetation clearance rules.
3. The key issues addressed in these submissions relate to:
 - (a) the NPS-IB;
 - (b) the Resource Management (Freshwater and Other Matters) Amendment Bill (the Bill);
 - (c) Infrastructure; and
 - (d) Natural justice.
4. Before addressing these matters, key elements of Forest & Bird's original submission are discussed.

Forest & Bird's Original Submission regarding on Significant Natural Areas

5. A critical issue in Forest & Bird's original submission was SNAs and the Council decision not to notify SNAs in the urban environment.
6. The draft Plan contained provisions to identify and protect significant natural areas (SNAs) on urban allotments. However, just prior to notification, the Environment and Planning Committee of WCC moved amendment 10 and 10b to the substantive District Plan which read:

10) Note that significant natural areas on private and public and rural land are identified and protected in a manner consistent with the requirements of the Resource Management Act 1991, and directive policies 23 and 24 in the Regional Policy Statement (2013).

10B) Agree that Significant Natural Areas (SNA)s on residentially zoned properties be removed from the notified District Plan until the National Policy Statement on Biodiversity has been gazetted and a SNA incentives programme has been developed and considered by Council.

7. This had the effect of removing the SNAs in residential areas from the Plan, as well as the provisions that would have protected them.
8. Forest & Bird's original submission sought that the residential SNAs, and the provisions that protected them, need to be reinserted into the Plan. The original submission identified the following contraventions of resource management requirements associated with removing the residential SNAs.
 - (a) It fails to recognise and provide for a matter of national importance, being the protection of areas of significant vegetation and significant habitats of indigenous fauna (s6(c));
 - (b) It contravenes the Council's function to control land use for the purpose of the maintenance of indigenous biodiversity under s31(1)(b)(iii);
 - (c) It fails to give effect to policy 23 and 24 of the regional policy statement (RPS), and therefore contravenes s75(3)(c). The RPS requires identification and protection of SNAs; d. Residential SNAs that occur in the coastal environment are left without any protection under the Plan. The plan therefore fails to give effect to the NZCPS, in particular policy 11, and as such, is contrary to s75(3)(b).
 - (d) No analysis in accordance with the requirements of s32 has been provided for the removal of residential SNAs.
9. The original submission also submitted that the removal is contrary to various guidance documents.
10. Forest & Bird's fundamental concern was that waiting for the NPS-IB to come into force before meeting the requirements of the Act was not appropriate given the absence of a guarantee when that will occur.
11. The concern was that none of the rules in ECO chapter applied outside SNAs and that unless there are general vegetation clearance (and earthworks) rules elsewhere in the plan, that significant vegetation and habitats in residential zones are left completely without protection. Forest & Bird sought, either a general vegetation clearance rule needs to be included in the plan, or the SNAs in residential zones need to be reincluded.
12. The section 42A recommends the inclusion of policies and rules that provide a degree of protection to the unmapped urban SNAs. As discussed in further detail

below, Forest & Bird would prefer that the SNAs in the urban area were included in the proposed plan, but understands the challenges associated with doing so.

THE NATIONAL POLICY STATEMENT FOR INDIGENOUS BIODIVERSITY

13. The NPS-IB applies to terrestrial environments in Wellington. It came into force on 4 August 2023. Section 75(3)(a) requires the district plan to give effect to the NPS-IB.
14. The notified proposed plan partially gives effect to the NPS-IB. It cannot fully give effect to the NPS-IB because of the removal of SNAs on residentially zoned land. To the extent that submissions give scope to do so, s 75(3)(a) of the RMA requires the Council to give effect to the NPS-IB through this process.
15. The NPS-IB has a single objective: “to maintain indigenous biodiversity across Aotearoa New Zealand so that there is at least no overall loss in indigenous biodiversity after the commencement date”. This objective is achieved by seventeen policies, including the following key ones:
 - Policy 3: A precautionary approach is adopted when considering adverse effects on indigenous biodiversity
 - Policy 5: Indigenous biodiversity is managed in an integrated way, within and across administrative boundaries.
 - Policy 6: Significant indigenous vegetation and significant habitats of indigenous fauna are identified as SNAs using a consistent approach
 - Policy 7: Protection of SNAs is ensured by either avoiding, remedying or mitigating adverse effects arising from new subdivisions, land use, and development.
 - Policy 8: The importance of maintaining indigenous biodiversity outside SNAs is recognised and provided for.
 - Policy 9: Certain established activities are provided for within and outside SNAs.
16. The Council did not identify Policy 5 in its summary of key policies, presumably because the decision not to include urban SNAs is the antithesis of integrated management.
17. The Council is required to conduct a comprehensive assessment of land within its jurisdiction to identify areas with significant indigenous vegetation or habitats

of indigenous fauna, that should be classified as SNAs.¹ It has done this but has chosen not to include these in the plan in urban areas.

18. Clause 3.16, which relates to indigenous biodiversity outside SNAs, is critical in this case:

3.16 Indigenous biodiversity outside SNAs

(1) If a new subdivision, use, or development is outside an SNA and not on specified Māori land, any significant adverse effects of the new subdivision, use, or development on indigenous biodiversity outside the SNA must be managed by applying the effects management hierarchy.

(2) All other adverse effects of any activities that may adversely affect indigenous biodiversity that is outside an SNA (other than indigenous biodiversity on specified Māori land (see clause 3.18)), must be managed to give effect to the objective and policies of this National Policy Statement.

(3) Every local authority must make or change its policy statements and plans to be consistent with the requirements of this clause.

19. Forest & Bird agrees with the Council that the district plan must contain a set of provisions to manage significant adverse effects on indigenous biodiversity outside of SNAs through an effects management hierarchy. This is a requirement of the NPS-IB.

20. The effects management hierarchy means an approach to managing the adverse effects of an activity on indigenous biodiversity that requires that:

(a) adverse effects are avoided where practicable; then

(b) where adverse effects cannot be avoided, they are minimised where practicable; then

(c) where adverse effects cannot be minimised, they are remedied where practicable; then

(d) where more than minor residual adverse effects cannot be avoided, minimised, or remedied, biodiversity offsetting is provided where possible; then

(e) where biodiversity offsetting of more than minor residual adverse effects is not possible, biodiversity compensation is provided; then

(f) if biodiversity compensation is not appropriate, the activity itself is avoided.

¹ Subpart 2 of the NPS-IB

21. There is an issue about how areas known to be SNAs but not identified accordingly are to be treated. However, s 6(c) is also relevant. This requires the protection of SNAs, irrespective of whether they are included in the plan. The proposed plan does not do this so does not achieve s 6(c).

22. The amendments sought to correct this situation are set out below.

RESOURCE MANAGEMENT (FRESHWATER AND OTHER MATTERS) AMENDMENT BILL

23. Clause 21 of the Resource Management (Freshwater and Other Matters) Amendment Bill (the Bill) proposes a new section 78 which modifies the obligations of local authorities under the NPS-IB to assess and identify SNAs and include those SNAs in a proposed plan or plan change.

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...

(4) This section does not affect any function or requirement under other provisions of this Act relating to indigenous biological diversity, including in relation to areas of significant indigenous vegetation or significant habitats of indigenous fauna.

(5) However, an area of significant indigenous vegetation or significant habitat of indigenous fauna that, after commencement, is included in a policy statement, proposed policy statement, plan, proposed plan, or change is not to be treated as an SNA regardless of how it is described in that document.

(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).

24. Forest & Bird largely agrees with the submissions of the Council on the Bill.

25. In summary, if it is passed as drafted, the Bill would not affect an SNA that is included in a proposed plan before commencement of the Bill. The Bill could apply if any SNAs not included within the notified plan were included as a response to submissions. That is because the new SNA would not have been included in the proposed plan or plan before commencement of the Bill.

26. The Council also submits that the Bill could also apply with respect to any SNAs that are proposed to be expanded beyond the notified size. This is less clear cut because the Clause 78(5) refers to an “area”. It is unclear if the reference to area is intended to be interpreted with such detail as to relate to the boundary, or whether it relates to the SNA in a more general sense, for example, its location.

The latter interpretation would be consistent with Clause 78(6), which indicates that the Bill is not intended to affect SNAs identified on the proposed plan.

27. The key issue relates to SNAs not identified in the notified plan.
28. The Council submissions also note an interpretive difficulty between subclauses (5) and (6). The Council notes the Clause 78(6) provides that proposed new section 78 does not affect an SNA included in a proposed plan before commencement, but subclause (5) appears to suggest that if a proposed plan containing an SNA became operative after commencement the SNA would not be able to be treated as an SNA.
29. Forest & Bird agrees with the Council's interpretation. SNAs included in a proposed plan can be carried into the operative plan, but there is a difficulty with including SNAs in an operative plan when they were not included in the proposed plan.
30. Before moving to Forest & Bird's position it is worth noting that too much could be read into the Bill. It is at the Select Committee stage and it likely to change. Many have submitted on the Bill. Forest & Bird's submission highlighted problems with the Bill, similar to those raised by the Council. The interpretive difficulties identified by the Council may well be ironed out by the Select Committee.

THE NATIONAL POLICY STATEMENT FOR URBAN DEVELOPMENT

31. The Council's legal submissions address the National Policy Statement for Urban Development (NPS-UD).
32. The Council's submissions do not advance things as they are unduly broad. They simply refer to a potential simply refer to a conflict and the need for "balance".
33. The key authority is *Port Otago*, which mandates an approach of policy reconciliation. This approach seeks to reconcile potentially competing policies to avoid conflict and then conduct a structured analysis if directive provisions cannot be reconciled. *Port Otago* does not refer to balance, which is a concept that had its day under the disavowed overall broad judgment approach, but is no longer appropriate.
34. If there is a potential conflict between the NPS-IB and the NPS-UD, this needs to be kept as narrow as possible. The question is whether indigenous biodiversity can be managed in accordance with the NPS-IB, while also managing urban development in accordance with the NPS-UD.
35. These policies appear reconcilable without the need for a structured analysis, or balance.

INFRASTRUCTURE

36. The provisions that apply to infrastructure as recommended by the s 42A report do not give effect to the NPS-IB.
37. The NPS-IB has specific provisions relating to infrastructure, which are less restrictive for specified infrastructure. The starting point is Clause 3.10(2) which provides for effects in SNAs that must be avoided.

3.10 Managing adverse effects on SNAs of new subdivision, use, and development

- (2) Each of the following adverse effects on an SNA of any new subdivision, use, or development must be avoided, except as provided in clause 3.11:
- (a) loss of ecosystem representation and extent:
 - (b) disruption to sequences, mosaics, or ecosystem function:
 - (c) fragmentation of SNAs or the loss of buffers or connections within an SNA:
 - (d) a reduction in the function of the SNA as a buffer or connection to other important habitats or ecosystems:
 - (e) a reduction in the population size or occupancy of Threatened or At Risk (declining) species that use an SNA for any part of their life cycle

38. Clause 3.11 provides an exception is provided for specified infrastructure

3.11 Exceptions to clause 3.10(2)

- (1) Clause 3.10(2) does not apply, and any adverse effects on an SNA of a new subdivision, use or development must be managed in accordance with clause 3.10(3) and (4), if:
- (a) the new subdivision, use or development is required for the purposes of any of the following:
 - (i) construction or upgrade (if the upgrade does not meet the requirements of clause 3.15(2)) of specified infrastructure that provides significant national or regional public benefit:

39. Specified infrastructure is defined as:

specified infrastructure means any of the following:

- (a) infrastructure that delivers a service operated by a lifeline utility (as defined in the Civil Defence Emergency Management Act 2002):

- (b) regionally or nationally significant infrastructure identified as such in a National Policy Statement, the New Zealand Coastal Policy Statement, or a regional policy statement or plan:
- (c) infrastructure that is necessary to support housing development, that is included in a proposed or operative plan or identified for development in any relevant strategy document (including a future development strategy or spatial strategy) adopted by a local authority, in an urban environment (as defined in the National Policy Statement on Urban Development 2020):
- (d) any public flood control, flood protection, or drainage works carried out:
 - (i) by or on behalf of a local authority, including works carried out for the purposes set out in section 133 of the Soil Conservation and Rivers Control Act 1941; or
 - (ii) for the purpose of drainage, by drainage districts under the Land Drainage Act 1908: (e) defence facilities operated by the New Zealand Defence Force to meet its obligations under the Defence Act 1990

40. Policy INF-ECO-P34 must give effect to these policies. As recommended in the s 42A report, it provides:

Upgrades to and new infrastructure in significant natural areas

Allow for upgrades to existing infrastructure and for new infrastructure within significant natural areas where it can be demonstrated that:

1. There is an operational need or functional need that means the infrastructure's location cannot practicably be avoided; and
2. Any adverse effects on indigenous biodiversity values within a significant natural area are managed ~~applied~~ in accordance with ECO-P52.or ;
3. If the significant natural area is located in the Coastal Environment:
 - a. Avoid adverse effects on the matters in Policy 11(a) of the New Zealand Coastal Policy Statement 2010; and
 - b. Avoid significant adverse effects of activities on the matters in Policy 11(b) of the New Zealand Coastal Policy Statement 2010; and
 - c. Manage other adverse effects accordance with the effects management hierarchy at ECO-P5.

41. It is immediately evident that the carefully considered provisions in the NPS-IB relating to specified infrastructure have not been given effect to. The requirements of Clause 3.10(2) do not apply to any infrastructure.

42. INF-ECO-P34 needs to be limited to specified infrastructure and a definition provided. Other infrastructure needs to be subject to Clause 3.10(2) of the NPS-IB.
43. The rules need to be amended accordingly. While a discretionary pathway may be appropriate for specified infrastructure, it should not apply to all types of infrastructure.

NATURAL JUSTICE ISSUES

44. The Council has addressed natural justice issues in its submissions submitting that natural justice may be a relevant consideration.

4.4 However, I also consider that in some circumstances it may be appropriate to take into account process or natural justice concerns in formulating a recommendation on plan provisions even where proposed outcomes are technically within scope. That may be the case in part here, where the Director-General of Conservation, GWRC and Forest and Bird made submissions seeking alignment of the PDP with what was at that time a draft version of the NPS-IB. This provides conceptually very broad scope for amendments to the notified provisions of the PDP, but may have been difficult for members of the public to appreciate given the NPS-IB was in draft and any changes to its direction could not at the time have been knowable to submitters.

45. Forest & Bird does not accept this position. What is being averred to is not “formulating a recommendation”. What is being proposed is ruling out a relief sought that was plainly and unambiguously within the scope of a submission because of natural justice.
46. This submission is untenable. No authority is identified to support the position that the relief sought in a submission might be prevented from occurring due to natural justice arising from a difficulty of people in interpreting planning documents.
47. There is a public notification process, which provides for further submissions. This is a complete answer to the natural justice. Any member of the public could lodge a further submission in opposition to the submissions seeking reinstatement of the SNAs in the urban area. The reference to the NPS-IB being in draft form ignores the requirement in the RPS to map SNAs.

FOREST & BIRD’S POSITION ON THE PROVISIONS

48. Forest & Bird’s position on the provisions is now set out.² Where a provision is not specifically referred to, Forest & Bird relies on its original submission.

² The position regarding the INF-ECO provisions is set out above and is not repeated.

The SNA issue

49. Forest & Bird understands the Bill poses difficulties for its submission that the SNAs that were not included in the plan as notified should now be included.
50. In these circumstances, Forest & Bird maintains its submission that these should be included. This submission is conditional on the Bill being amended in such a way that, when it becomes law, the SNAs that Forest & Bird seeks to be included are included in such a way that they have legal effect.
51. Given the likelihood of this occurring appears low, these submissions focus on Forest & Bird's alternative relief, which is that general vegetation clearance rule needs to be included in the plan.
52. The section 42A report recommends significant amendments to the proposed plan, including such a rule. This approach is generally supported by Forest & Bird, although this support is conditional on changes to ensure that urban SNAs are given the same level of protection as those that are scheduled.
53. There is no principled basis for providing SNAs that meet the significance criteria within the urban area with less protection than those outside urban area. The Council's decision not to include urban SNAs in the plan has created a real problem.
54. The Council relies in Clause 3.16 as the basis for saying that all they are required to do is to provide that activities outside scheduled SNAs must comply with the effect mitigation hierarchy. The Council is using Clause 3.16 to defeat the NPS-IB, which provides a higher level of protection to areas meeting the SNA criteria and has the effect of frustrating Policy 5 and Policy 6.
55. The policy lacuna that arises is obvious in Policy 6 as proposed in the s 42A report.

Significant natural areas within the coastal environment

Only allow activities within significant natural area ~~within SCHED8~~ 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;
2. 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; and
3. Manage other adverse effects accordance with the effects management hierarchy at ECO-P5:

~~Protects the indigenous biodiversity values in accordance with ECO-P2.~~

56. This does not give effect to the New Zealand Coastal Policy Statement. Policy 5 provides no protection for urban SNAs in the coastal environment. This is because SNAs are defined as those set out in Schedule 8, and there are none in the urban environment.

57. Forest & Bird seeks an amendment that provides that, every time SNAs are mentioned in objectives, policies and rules, the words 'or an area meeting the criteria for significance in Policy 23 of the Wellington Regional Policy Statement' are added. This is required to ensure that the intent of the NPS-IB is met and is not inconsistent with the intent of the NPS-IB to protect SNAs.

Other amendments sought

58. There are a number of other amendments sought to ensure the plan gives effect to the NPS-IB and the RPS.

59. Policy 4 as proposed by the s 42A report is poorly drafted, and does not give effect to the NPS-IB. Policy 4 provides:

Specific activities to use effects management hierarchy

Manage the adverse effects of the following forms of new use and development on significant natural areas in accordance with the effects management hierarchy at ECO-P5:

1. Mineral extraction that provides significant national public benefit or aggregate extraction that provides significant national or regional public benefit that could not otherwise be achieved using resources within New Zealand; and
2. New use or development that has a functional or operational need to be in that particular location and where there are no practicable alternative locations for the new use or development; or
3. The construction of a single household unit on a vacant allotment that was created prior to 7 July 2023 and where there is no practicable location within the allotment where the residential unit can be constructed in a manner that avoids the adverse effects specified in ECO-P3; or
4. New use or development is for the purpose of maintaining or restoring a significant natural area that does not involve the permanent destruction of the significant natural area

60. The first drafting problem is that it is not clear that Clauses 1 and 2 are intended to be conjunctive not disjunctive. Policy 4(1) and (2) are intended to give effect to Clause 3.11(1) of the NPS-IB, which requires that:

- (a) mineral activity provides significant national public benefit or aggregate extraction that provides significant national or regional public benefit that could not otherwise be achieved using resources within New Zealand; and
- (b) has a functional or operational need to be in that particular location and where there are no practicable alternative locations for the new use or development.

61. This drafting problem could be corrected with the following amendment.

Manage the adverse effects of the following forms of new use and development on significant natural areas in accordance with the effects management hierarchy at ECO-P5:

- 1. Mineral extraction that provides significant national public benefit or aggregate extraction that provides significant national or regional public benefit that could not otherwise be achieved using resources within New Zealand ~~where the mineral or aggregate extraction has;~~ and New use or development that has a functional or operational need to be in that particular location and where there are no practicable alternative locations for the new use or development; or

62. The second drafting problem is that Clause 4 is borderline nonsensical. It provides that you can undertake restoration work as long as you don't destroy the SNA itself.

63. Clause 4 is intended to give effect to Clause 3.10(3) of the NPS-IB.

- (3) If a new use or development is for the purpose of maintaining or restoring an SNA and does not involve the permanent destruction of significant habitat of indigenous biodiversity, clause 3.10(2) does not apply, and any adverse effects on the SNA must be managed:
 - (a) in accordance with clause 3.10(3) and (4); or
 - (b) under any alternative management approach that is consistent with the objectives, policies and methods developed for the purpose of clause 3.21.

64. The clause refers to the destruction of significant indigenous biodiversity, not the SNA. The following amendment is suggested:

- 4. New use or development is for the purpose of maintaining or restoring a significant natural area that does not involve the permanent destruction of the significant indigenous biodiversity ~~natural area~~

65. Rule 1 has several permitted activities, which are generally supported. However, drafting could be improved. It is unclear why Rule 1.1(a)(ix) is required. This does not seem necessary given that Rule ECO-R3 applies. If it is retained the reference to Rule-R3 could be amended as follows:

- ix. Enable restoration and maintenance of a significant natural area ~~under~~ where ECO-R3 is complied with;

66. A similar amendment could be made to Rule 1.1(a)(x):

- x. Enable maintenance and repair of existing buildings or structures where ~~and~~ ECO-S2 is complied with.

67. The is consistent with the drafting of Rule 1.1(a)(iix).

68. Rule 1 in the Quarry Zone is a permitted rule for trimming, pruning, or removal of vegetation within a significant natural area. The s 42A report considers it is appropriate to allow relatively minor clearance for continued operation and maintenance, but not expansion.

512. I do agree in part with the submitter that a new clause be added to the policy in respect of the operation and maintenance of existing quarries. In my assessment of ECO-R1 I have specified compliance with ECO-S2 in recognition that a SNA has been identified within the operational area of the Quarry Zone at Kiwi Point and on the periphery of Horokiwi Quarry. It is my view reasonable, acknowledging the regional significance of such strategic assets, to allow for relatively minor clearance for continued operation and maintenance, but not expansion.

69. This is not carried through to the rule, which does not include a reference to not allowing expansion. The following amendment is suggested:

3. Activity status: Permitted Where:

a. The trimming or removal of vegetation is to:

- i. Enable the continued operation and maintenance, but not expansion, of quarries for aggregate extraction ~~and~~ where ECO-S2 is complied with

3. Activity Status: Restricted Discretionary Where:

a. Compliance with the requirements of ECO-R4.1 or ECO-R4.2. is not achieved.

Matters of discretion are:

ECO-P2, ECO-P5 and ECO-P8

Section 88 information requirements for applications:

Applications for a resource consent under this rule must contain an ecological assessment in accordance with APP15 – Ecological Assessment.

Notification status: An application for resource consent made in respect of this rule is precluded from being either publicly or limited notified.

70. The reference to policies as matters of discretion is not supported. A policy is not a matter of discretion.
71. The notification status is not supported. This rule applies to unmapped SNAs, the removal of which could have significant adverse effects. Non-notification is not appropriate in this case.

CONCLUSION

72. The Council's decision to remove urban SNAs from the proposed plan has a number of undesirable consequences. It is now not possible to simply give effect to the NPS-IB, which, for now, requires that SNAs are mapped.
73. The general vegetation clearance rules are a good start at addressing the lacuna created by removing the urban SNAs from the plan. However, there is a real problem with simply applying Clause 3.16 of the NPS-IB to these unmapped areas. A key part of the NPS-IB, Clause 10.2, would not apply. This is contrary to s 6(c) .
74. Forest & Bird seeks to address this anomaly by adding the requirement to consider areas that meet the significance criteria as if they were SNAs. Forest & Bird has also suggested a number of further amendments to the proposed plan to implement the higher order documents and also to address some poor drafting.

Dated: 10 September 2024



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