

BEFORE THE WAIMAKARIRI DISTRICT COUNCIL

IN THE MATTER of the Resource Management Act 1991

AND of the proposed Waimakariri District Plan

**Legal Submissions on behalf of
the Director-General of Conservation / *Tumuaki Ahurei*
Hearing Stream 7A: Ecosystems and Indigenous Biodiversity
Submitter ID: 419, Further Submitter ID: 77
Dated: 9 September 2024**

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MAY IT PLEASE the proposed District Plan Hearing Panel (the Panel)

The following submissions are made on behalf of the Director-General of Conservation Tumuaki Ahurei (Director-General).

Introduction

1. The Director-General submitted¹ and further submitted² on the proposed Waimakariri District Plan (proposed DP). The Director-General did not submit on Variation 1 or Variation 2 to the proposed DP.
2. I have previously described in general terms the areas the Department of Conservation Te Papa Atawhai (the Department) administers within the Waimakariri District.³
3. These legal submissions relate to Hearing Stream 7A: Ecosystems and Indigenous Biodiversity. The Director-General is calling two witnesses in this hearing:
 - Richard Clayton – Ecologist⁴
 - Liz Williams – Planning⁵
4. The Director-General generally supports the ECO chapter as proposed to be amended by the Council Officer's section 42A Report (s42A Report). As discussed in the evidence of Mr Clayton and Ms Williams, the Director-General has comments on:
 - ECO-P2
 - Improved pasture
 - ECO-R2
 - ECO-SCHED1, re SNA-034, SNA-048 and SNA-051
5. These legal submissions discuss preliminary legal matters and then the matters for specific comment as follows:
 - Giving effect to the National Policy Statement for Indigenous Biodiversity

¹ Submission by Director-General of Conservation Tumuaki Ahurei dated 26 November 2021, Submitter ID: 441

² Further Submission by Director-General of Conservation Tumuaki Ahurei dated 21 November 2022, Submitter ID: FS77

³ Legal Submissions on behalf of the Director-General of Conservation Tumuaki Ahurei, Hearing Stream 4, dated 17 July 2023, at para 2.

⁴ Evidence of Richard Ian Clayton on behalf of the Director-General of Conservation Tumuaki Ahurei, Hearing Stream 7A, dated 2 September 2024

⁵ Evidence of Elizabeth Moya Williams on behalf of the Director-General of Conservation Tumuaki Ahurei, Hearing Stream 7A, dated 2 September 2024

- Primacy of Strategic Directions
- The Crown Pastoral Land Act 1998 pastoral activities regime
- The D-G's evidence re the proposed DP provisions

Giving effect to the National Policy Statement for Indigenous Biodiversity (NPSIB)

6. The NPSIB took effect from 4 August 2023⁶, for the first time providing national guidance for indigenous biodiversity as a matter of national significance, and to achieve the purpose of the Resource Management Act 1991 (RMA). The first part of the sole objective of the NPSIB is:

*“to maintain indigenous biodiversity across Aotearoa New Zealand so that there is at least no overall loss in indigenous biodiversity after the commencement date; ...”*⁷

7. In my submission the proposed DP should give effect to the NPSIB where this is within scope of the notified proposed DP and submissions. I acknowledge that while informed by the 2019 draft NPSIB, the proposed DP does not fully give effect to the NPSIB, nor is it reasonably practicable for it to do so.⁸
8. As set out in the Council Officer's Section 42A Report (s42A Report)⁹, the development of the proposed DP predates the NPSIB coming into force. In July 2023 the Panel requested the Council to advise on the NPSIB requirements to assist the Panel to decide whether further information or submitter input was necessary.¹⁰
9. The Council Officer provided a Memo¹¹ summarising the NPSIB requirements, and setting out the Council's intentions. The Officer recommended a future plan change to add additional SNAs, rather than progressing a variation during the current proposed DP process.¹² The Panel noted it had received the Memo in Minute 11.¹³

⁶ This being 28 days after the day it was published in the NZ Gazette, 7 July 2023, clause 1.2 NPSIB.

⁷ Clause 2.1(1)(a) Objective NPSIB, paragraph (b) sets out matters to achieve paragraph (a).

⁸ Clause 4.1(1) NPSIB.

⁹ Officer's Report: Pūnaha hauropi me te Rerenga rauropi taketake – Ecosystems and Indigenous Biodiversity Chapter, dated 16 August 2024, section 2.5.1.1, at 43.

¹⁰ Minute 6 – Matters and Questions arising from Hearing Stream 4 and the New NPS-IB, dated 21 July 2023, at 2-3.

¹¹ Memorandum to Hearing Panel: Giving effect to the National Policy Statement for Indigenous Biodiversity, dated 25 September 2023.

¹² Supra at 10.

¹³ Minute 11 – Updated Hearing Schedule and Conflict of Interest Register, NPS-IB and Strategic Directions, dated 2 October 2023, at 6-7.

10. I note the Panel's comment re the applicability of clause 25(4) Schedule 1 RMA and that addition of new SNAs prior to two years from the proposed DP becoming operative would only apply to private plan changes. I agree with that assessment re new SNAs.
11. I acknowledge the s42A Report states the ECO provisions were partly informed conceptually by the Draft NPSIB (2019), as well as being informed by and giving effect to:¹⁴
- The New Zealand Coastal Policy Statement (NZCPS)
 - National Policy Statement for Freshwater Management 2020 (NPSFM)
 - National Environmental Standard for Plantation Forestry (NESPF)¹⁵
 - National Environmental Standard for Freshwater (NESF)
 - The Canterbury Regional Policy Statement (CRPS)
12. I agree with the s42A report the NZCPS applies in the coastal environment, and where there may be a conflict between the NPSIB and the NZCPS, then the NZCPS prevails: clause 1.4(2) NPSIB.¹⁶ Similarly, should there be a conflict between the NPSIB and the NPSFM or NESF, then the NPSFM or NESF would prevail: clause 1.4(3) NPSIB. For completeness, I do not suggest the proposed DP, in particular the ECO chapter as proposed to be amended by the s42A Report, creates any conflict between these higher order instruments.

Proposed changes to the NPSIB are yet to come into force

13. The government currently has a Bill before Parliament which if enacted would amend the NPSIB and delay the application of certain provisions of the NPSIB for 3 years.¹⁷ This Bill is currently at Select Committee stage, with the Committee's report due on 30 September 2024.¹⁸

¹⁴ S42A Report at section 2.5.1.3, at 54.

¹⁵ The NESPF was amended on 3 November 2023 to be the National Environmental Standard for Commercial Forestry (NESCF), expanding the Standard to cover exotic continuous-cover forestry and plantation forestry.

¹⁶ S42A Report at 59.

¹⁷ Resource Management (Freshwater and Other Matters) Amendment Bill, clause 21 proposing to insert new section 78 Time-limited modifications to NPSIB 2023. If enacted as introduced the following provisions of the NPSIB would not apply for a 3 year period: clause 2.2, policy 6 – identification of SNAs using a consistent approach; clause 3.8(1), (6) and (8) – assessments to identify SNAs in the District; clause 3.9(1) – notification of a plan change to include SNAs; clause 3.9(3) – 10 yearly plan review to assess whether clause 3.8(1) and (2) SNA assessments are needed; clause 4.1(2) requirement to give effect to NPSIB as soon as practicable suspended for 3 year period for listed provisions.

¹⁸ [Resource Management \(Freshwater and Other Matters\) Amendment Bill \(bills.parliament.nz\)](https://bills.parliament.nz/bills/2024/Resource-Management-Freshwater-and-Other-Matters-Amendment-Bill)

14. The Bill currently has no statutory effect, but if it is enacted, before the Panel makes its decision, then it will become a relevant matter to be considered.

It would be inappropriate for the Strategic Directions to override all other objectives and policies in the proposed DP

15. I address this issue now, as the Director-General is unlikely to be providing further evidence or legal submissions in the proposed DP hearings.
16. The Director-General's submission generally supported the proposed Strategic Direction (SD) chapter and objectives as giving effect to the CRPS except for seeking specific amendments to SD-O3 and SD-O4.¹⁹ The Director-General further submitted in support of a submission by Heritage New Zealand Pouhere Taonga seeking an amendment to SD-O5.²⁰
17. The Director-General did not directly submit or further submit on the "primacy" argument for the SD chapter put forward by other submitters. This has been discussed in a Council Officer's Primacy Memo (Primacy Memo)²¹ provided to the Panel, with legal advice attached. The s42A Report evaluates the 'primacy' of the SD objectives in relation to the ECO chapter as noted by the Primacy Memo.
18. The Director-General supported what she understood the effect of the SD chapter to be, as set out in the Introduction to the ECO chapter (my emphasis):
- "The provisions in this chapter are consistent with the matters in Part 2 – District Wide Matters – Strategic Directions and give effect to matters in Part 2 – District Wide Matters – Urban Form and Development."*
19. This understanding is consistent with the s42A Report statement this means:²²
- The SD objectives inform the objectives and policies in other chapters (of the Plan); and
 - Objectives and policies in other chapters must be expressed and achieved as being consistent with the SD objectives.

¹⁹ Supra footnote 1, Submission 419 at page 15.

²⁰ Supra footnote 2, Further Submission 77 at page 23.

²¹ Memorandum to Hearing Panel: The issue of 'Primacy' for Strategic Directions and Urban Form and Development, dated 29 September 2023.

²² S42A Report, 2.6.1 at 72.

20. I consider it is problematic to change the approach to this understanding of the primacy of the SD objectives. It is problematic to now take the position that the SD objectives *override* all other objectives and policies in the proposed DP, in particular the ECO chapter.
21. In my submission, if it was intended that the SD objectives would override other provisions in the proposed DP, then this needed to have been clearly stated in the Strategic Directions chapter when notified. This was the case with, e.g., the proposed Selwyn District Plan, which states (my emphasis):
*“For the purposes of preparing, changing, interpreting, and implementing the District Plan, all other objectives and policies in all other chapters of this District Plan are to be read and implemented in a manner that gives effect to and is consistent with these Strategic Directions. ...”*²³
22. This indicates a clear indication that the SD objectives in the proposed Selwyn DP are intended to prevail over other objectives in that plan, and the other chapter objectives are to be applied so as to give effect to and be consistent with the Selwyn SD objectives.
23. Instead in the case of the proposed DP, as notified, the SD chapter’s Introduction, interpretation and application state (in summary, my emphasis):
- The SD objectives provide direction for more detailed provisions; and
 - For the purposes of implementation including deciding consents, the SD objectives may provide guidance, and they are to be considered together with other relevant objectives and policies of the Plan, and no hierarchy exists between them, this being both the SD objectives and the ECO objectives (and those in other chapters).
24. Accordingly, I support the s42A Report statement on the primacy of the SD objectives as they relate to the ECO chapter of the proposed DP.

²³ Refer Primacy Memo, supra, at Appendix A to attached Buddle Findlay Memo, page 14

The Crown Pastoral Land Act 1998 consents regime is complementary to the proposed DP and does not conflict with ECO-R7

25. The s42A Report notes a submission by Federated Farmers in opposition to Rule ECO-R7 on the basis that this could “override permissions provided under other legislation, such as the Crown Pastoral Land Act 1998 (CPLA).²⁴
26. To assist the Panel, I advise the CPLA was substantially amended by the Crown Pastoral Land Reform Act 2022 (CPL Reform Act), with a new system to classify and manage pastoral activities on pastoral land taking effect from 18 November 2022.
27. The CPLA has a new purpose providing for the administration of pastoral land²⁵ to achieve the following outcomes:²⁶
- (a) *maintaining or enhancing inherent values across the Crown pastoral estate for present and future generations, while providing for ongoing pastoral farming of pastoral land:*
 - (b) *supporting the Crown in its relationships with Māori under te Tiriti o Waitangi/the Treaty of Waitangi:*
 - (c) *enabling the Crown to get a fair return on its ownership interest in pastoral land.*
28. The CPL Reform Act inserted a new Part 1 which established a classification system for pastoral activities on pastoral land in section 6 and Schedule 1AB, replaced sections 7 (burning of vegetation) and 8 (activities affecting or disturbing soil), and provided a process for applications to undertake these pastoral activities on pastoral land in replaced sections 9 – 11 inclusive and Schedule 1ABA.
29. Schedule 1AB classifies pastoral activities into three types:
- Permitted – consent not required under CPLA but may still be required under other Acts;

²⁴ S42A Report section 3.13.2.1, at 450.

²⁵ As per section 2 CPLA, “pastoral land” is Crown land previously classified under section 51 of the Land Act 1948, which retains that land classification. Section 51 was amended by the CPLA, and no further Crown land available for disposal may now be classified as pastoral land.

²⁶ Section 1A Crown Pastoral Land Act 1998

- discretionary – the Commissioner of Crown Lands may consent to or decline the activity; or
 - prohibited – the activity cannot have consent given.
30. This classification of pastoral activities is similar to RMA activity categories. However, it is not the same. The CPLA consents regime has specific criteria applying (in Schedule 1ABA) which are different to the factors applicable under the RMA, reflecting the different purpose of the CPLA which is not like the sustainable management purpose of the RMA.
31. The purpose of the RMA system is broader, and it applies to all natural and physical resources wherever situated. By contrast, the CPLA consents regime has a different purpose with some criteria focused on the ability to continue to farm pastoral land.²⁷ The CPLA activity classification acknowledges some permitted pastoral activities may still require other permissions, and I consider this must also apply to discretionary pastoral activities.
32. For these reasons, I submit the CPLA consents regime is complementary to, but does not replace, the RMA system.

The Director-General's comments on the s42A Report on the ECO chapter

33. As set out in the evidence of Mr Clayton²⁸ and Ms Williams²⁹ (no relation), the Director-General seeks amendments to ECO-P2, ECO-R4 and supports the retention of SNA-034, SNA-048 and SNA-051 as notified. Both also comment on maintenance of improved pasture under the proposed DP.
34. Other than these matters, the Director-General supports the s42A Report and the proposed amendments to the ECO chapter recommended there, including to SD-O1 to make that objective more consistent with the NPSIB objective.

²⁷ Schedule 1ABA CPLA, e.g. clause (1)(a): *“whether the pastoral activity forms part of the periodic clearance of vegetation as part of a regular cycle to maintain existing pasture created by oversowing, top-dressing or cultivation”*.

²⁸ Supra footnote 4, Evidence of Richard Ian Clayton for Director-General of Conservation dated 2 September 2024.

²⁹ Supra footnote 5, Evidence of Elizabeth Moya Williams for Director-General of Conservation dated 2 September 2024.

The removal of a distinction between mapped and unmapped SNAs is supported

35. The Director-General supports the removal of any distinction between mapped and unmapped SNAs, as being consistent with the NPSIB sole objective at clause 2.1 and giving effect to policy 3 by taking a precautionary approach when considering adverse effects on indigenous biodiversity. As discussed by Mr Clayton, there are limited areas of the Waimakariri District which retain and support indigenous biodiversity.³⁰
36. Ms Williams supports an amendment to ECO-P2 and ECO-R2 to enable the application of Rule ECO-R1 when an unmapped area meets the criteria for an SNA set out in ECO-APP1. This will ensure that areas meeting the criteria for an SNA are managed as if they were an SNA, thereby meeting the objective of the NPSIB to maintain indigenous biodiversity so that there is no overall loss, as well as protecting areas of significant indigenous vegetation and/ or significant habitats of indigenous fauna under s6(c) RMA.

Maintenance of improved pasture needs to meet appropriate limits

37. Ms Williams accepts the s42A Report's recommendation re indigenous vegetation clearance to maintain improved pasture outside SNAs.³¹ She acknowledges the definition reference to a date and benchmark is helpful.
38. Mr Clayton's evidence highlights that nevertheless, maintenance of improved pasture has allowed destruction of indigenous vegetation in other Districts, and some threatened plant species are present in a predominantly farmed landscape.³²
39. This evidence demonstrates the importance of ensuring that (assuming the area has not become an SNA) maintenance of improved pasture is no more than continuation of periodic maintenance as part of a regular cycle, the effects are no greater than those of previous maintenance, and the maintenance of the pasture will not adversely affect a Threatened or At Risk (Declining) species.³³

³⁰ Mr Clayton's evidence, supra footnote 4, at 23-35.

³¹ Ms Williams's evidence, supra footnote 5, at 26.

³² Mr Clayton's evidence, supra at 40-41.

³³ NPSIB, clause 3.17(2)

The increased irrigation setbacks in ECO-R4 should include wetland SNAs

40. The Director-General acknowledges the s42A Report recommendation that irrigation setbacks from SNAs (mapped or unmapped) be increased to 50m for all SNAs apart from wetlands. The expert evidence of Ms Steel for the Council³⁴ gives advice acknowledging the complexity of the setbacks issue, including as these relate to wetlands.
41. The s42A Report rejects Ms Steel's proposal that if some irrigation could be beneficial to wetland SNAs, this should be confined to water only as being: "... *an unreasonable layer of administration for landowners ...*".³⁵ The recommended wording for ECO-R4 would allow all types of irrigation to occur up to 0m away from wetland SNAs.
42. Mr Clayton's evidence discusses the irrigation setbacks from SNAs in ECO-R4, demonstrating out that it is problematic to exclude wetland SNAs from the application of this rule. In part this arises because of a misunderstanding of the range of wetland ecosystems and the complexity of their hydrology. Not all wetlands are permanently wet, and effects from constant repeated irrigation, be it water or something-else, may damage some wetland SNAs rather than protecting them.³⁶
43. Ms Williams's evidence proposes that no distinction be made between wetland SNAs and other SNA types in the rule, with the irrigation setback applying to all SNAs. Again, this adopts the precautionary approach in policy 3 NPSIB as well as protecting SNAs to avoid adverse effects in accordance with s6(c) RMA.

The Director-General opposes the proposed reduced area for certain mapped SNAs

44. Three SNAs – SNA-034, SNA-048 and SNA-051 – are recommended to be reduced in area by the s42A Report.

³⁴ S42A Report, Appendix C, Expert Evidence of Ms Steel at pp 10-11 (p 325-326) and pp 32-34 (pp 347-349).

³⁵ S42A Report section 3.23.1, at 761.

³⁶ Mr Clayton's evidence supra at 43-44.

45. The evidence of Ms Williams sets out why it is unnecessary to reduce the size of SNA-051 on the basis the proposed DP might restrict the landowner's proposed actions to enhance the SNA and its indigenous biodiversity.³⁷
46. Mr Clayton's evidence discusses all three SNAs where area reductions are proposed. In relation to SNA-034, reducing parts of the SNA to the canopy of individual trees will create isolated islands. Similarly, Mr Clayton's evidence is that the proposed exclusion areas for SNA-048 and SNA-051 are likely providing a buffer protecting the remnants of indigenous vegetation at the core of these sites.³⁸ Mr Clayton suggests: "*A better compromise would be including a continuous amount of regenerating scrub that directly surrounds these remnant trees....*"
47. For these reasons, the Director-General seeks the three SNAs are retained with the site boundaries as notified, to ensure they continue to protect the SNAs and avoid or manage adverse effects from new activities.



Pene Williams
Counsel Rōia for the Director-General

³⁷ Ms Williams's evidence supra at 34

³⁸ Mr Clayton's evidence supra at 46-47.