

BEFORE THE WHANGAREI DISTRICT COUNCIL

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

The Whangarei District Council Proposed Plan
Changes 85, 85A, 85D, 86A, 87, and 114

EVIDENCE 12
TOPIC PC85A-D, 86A-B, 87, 102, 114
SUB# Rural Plan Changes
DATE 04-07-2017

**LEGAL SUBMISSIONS ON BEHALF OF THE DIRECTOR-GENERAL OF
CONSERVATION**

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MAY IT PLEASE THE PANEL

Introduction

1. These submissions cover the following matters:
 - a) Evidence to be called by the Director-General of Conservation (Director-General);
 - b) Functions of the Director-General and the Department of Conservation;
 - c) Requirements under the Resource Management Act 1991;
 - d) The section 42A Report – outstanding issues from the Director-General's perspective;
 - e) Section 42A Report – areas of alignment with the Director-General's submission.

Evidence to be called by the Director-General of Conservation

2. The Director-General will be calling one witnesses to provide expert evidence as follows:
 - a) **Mr Andrew Riddell**, a consultant planner.

Functions of the Director-General of Conservation and the Department of Conservation

3. The Director-General is the administrative head of the Department of Conservation. The statutory functions of the Department of Conservation under section 6 of the Conservation Act 1987 include:
 - a) Managing for conservation purposes all land and other natural and historic resources held under the Conservation Act; and
 - b) Advocating the conservation of natural and historic resources generally.
4. The Director-General also has delegated authority in relation to the Minister of Conservation's statutory responsibilities under the Resource Management 1991 (RMA), including in relation to the New Zealand Coastal Policy Statement (NZCPS).

Requirements under the Resource Management Act 1991

5. The key provisions relied on for these submissions are set out below.
6. Section 31(1)(b) of the Resource Management Act 1991 (RMA) states that the control of effects of use, development, or protection of land, including for the purpose of the maintenance of indigenous biological diversity is a district council function.
7. Pursuant to section 75(3) of the RMA the proposed plan must give effect to the Regional Policy Statement for Northland (Northland RPS) and the NZCPS. The Supreme Court in *King Salmon* considered the meaning of “give effect to” as follows:¹

“Give effect to” simply means “implement”. On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it.
8. Areas where the proposed plan changes do not give effect to the NZCPS or the Northland RPS are covered in the body of these submissions.

New Zealand Coastal Policy Statement

9. The purpose of the NZCPS is to state objectives and policies to achieve the purpose of the RMA to promote sustainable management of natural and physical resources in the coastal environment.² The Minister of Conservation holds the function of preparing and recommending the NZCPS under the RMA.³
10. Relevant objectives and policies of the NZCPS for the purposes of this hearing are:
 - a) Policy 11: to protect indigenous biological diversity in the coastal environment;
 - b) Policy 13: to avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural

¹ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38, at paragraph 77.

² RMA, section 56.

³ RMA, section 28(a).

character and avoid significant adverse effects on natural character in all other areas of the coastal environment;

- c) Policy 14: in particular, to provide policies, rules and other methods directed at restoration or rehabilitation in regional policy statements;
- d) Policy 26: provide for the protection, restoration or enhancement of natural defences that protect coastal land uses or sites of significant biodiversity from coastal hazards.

Regional Policy Statement for Northland

11. Relevant methods and policies of the Northland RPS for the purposes of this hearing are:

- a) Policy 4.4.1(2): avoiding significant adverse effects and avoiding, remedying, or mitigating other adverse effects of subdivision, use and development on areas of predominantly indigenous vegetation;
- b) Policy 4.4.1(3)(c): outside the coastal area, avoiding, remedying, or mitigating adverse effects of subdivision, use and development so they are not significant on indigenous ecosystems including wetlands;
- c) Method 4.4.3(2): to amend district plans to the extent needed to ensure the plans implement policy 4.4.1 on land outside of the beds of rivers and lakes, wetlands, and the coastal marine area, including methods to control the disturbance of land and the clearance of vegetation;
- d) Policy 4.6.1: managing effects on the characteristics and qualities of natural character, natural features and landscapes; policy 4.6.1(1)(a): avoiding adverse effects of subdivision, use and development on outstanding values of areas of outstanding natural character, outstanding natural features and outstanding natural landscapes; and policy 4.6.1(1)(b)(i): avoiding significant adverse effects and avoiding, remedying or mitigating other adverse effects of subdivision, use and development on natural character, natural features and natural landscapes and ensuring form of built development is appropriate.
- e) Policy 4.6.1(3): particularly clause (a) recognising that a minor or transitory effect may not be an adverse effect and clause (c) that

there may be more than minor cumulative adverse effects from minor or transitory adverse effects;

- f) Method 4.6.3(1)(ii): the location, scale and form of buildings and structures (outside freshwater bodies and the coastal marine area);

The section 42A Reports – outstanding issues from the Director-General’s perspective

12. The body of Mr Riddell’s evidence outlines where there are outstanding issues between the Director-General’s submissions and the recommendations and reasoning in the section 42A reports. In the following section I address legal issues arising from the outstanding issues.

Subdivision, use, and development in the coastal area

Landscape Policies – minor or transitory effects

13. LAN1.3.3(a) of Plan Change 114 directs that:

within the Coastal Area, to avoid adverse effects of subdivision, use and development of the characteristics and qualities of Outstanding Natural Features and Outstanding Natural Landscapes by restricting activities to those of a scale, location and design that have only *minor or transitory adverse effects*.

14. By doing so, policy LAN1.3.3(a) fails to give effect to the Northland RPS as it misconstrues clause (a) and does not reflect (c) of policy 4.6.1(3). Clause (a) recognises that a minor or transitory effect *may not* be an adverse effect. Clause (c) recognises that there may be more than minor *cumulative adverse effects* from minor or transitory adverse effects. LAN1.3.3(a) fails to acknowledge that in some circumstances, a minor or transitory effect may be adverse. As currently drafted, LAN1.3.3(a) also risks capturing cumulative transitory effects which fails to reflect 4.6.1(3)(c).
15. The section 42A Report has justified the proposed drafting of LAN1.3.3(a) by reference to dicta from the Supreme Court in *King Salmon*:⁴

It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding.

⁴ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38, at paragraph 145.

16. However, it is important to note that this comment was made in relation to the question of whether it would be necessary to prohibit an activity, rather than a policy. The Section 42A Report also states that LAN1.3.3(a) is entirely consistent with *King Salmon*. The Director-General does not concur with this and considers that policy 4.6.1(3) of the Northland RPS better reflects *King Salmon* than does the current drafting of LAN1.3.3(a). Therefore, the drafting needs to be amended to be consistent with the Northland RPS.

17. To address this, Mr Riddell has proposed amendments in his supplementary evidence.

Coastal Area Objectives – avoiding significant adverse effects

18. The Director-General generally agrees with the recommended amendments made to CA1.2.5 in the section 42A report. However, a further amendment is required as policies 13(1)(b) and (c) of the NZCPS have not been correctly interpreted. This is because policy CA1.2.5 restricts the direction in policy 13(1)(b) to areas of the coastal environment with high natural character. This is an incorrect interpretation of policy 13(1)(b) of the NZCPS. The reference to “including by” at the end of policy 13(1)(b) indicates that areas of “high natural character” referred to in 13(1)(c) are a subset of “natural character in all other areas of the coastal environment”. There is a requirement to identify at least areas of high natural character, but this does not derogate from the direction to “avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment” that are not outstanding. The Director-General therefore seeks an additional amendment to ensure the requirement to give effect to the NZCPS (and policy 4.6.1(1)(b) of the Northland RPS) is met:

Avoid significant adverse effects, and avoid, remedy or mitigate other adverse effects on the natural character of the Coastal Area ~~and including~~ identified High Natural Character Areas.

Coastal Area Policies – visual impacts of buildings

19. The Director-General supports that Policy CA1.3.4 is amended to apply to buildings rather than just “residential buildings”. Method 4.6.3(1)(ii) of the Northland RPS directs that methods in district plans include control of the location, scale and form of *buildings and structures* (outside freshwater bodies and the coastal marine area). The introductory clause to 4.6.3 requires district plans to be amended to the extent necessary to include objectives, policies and methods (and rules where necessary) to give effect to Policies 4.6.1 and 4.6.2 or the Northland RPS. Policy 4.6.1 echoes the direction from Policy 13 of the NZCPS that adverse effects are to be avoided in areas of outstanding natural character, and that significant adverse effects are to be avoided elsewhere in the coastal environment.

20. By qualifying the type of building to “residential”, the wording supported in the section 42A Report does not adequately give effect to the Northland RPS and Policy 13 of the NZCPS.

21. The authors of the section 42A Report justify this clause by way of reference to policies CA1.3.1 and 3 of Plan Change 87, which in their view, addresses the visual effects of non-habitable buildings. While these policies can be seen to give effect to Policy 13 of the NZCPS, policy CA1.3.4 is nonetheless out of step with these similar policies, and leaves scope for Method 4.6.3(1)(ii) of the Northland RPS and Policy 13 of the NZCPS to be undermined.

22. As raised in Mr Riddell’s evidence, there are similar issues with Policy CA1.3.21. CA1.3.21 allows the building of non-habitable rural production zones, but does not address issues of height and building reflectivity, which is contrary to objectives CA1.2.2 and CA1.2.5.

23. Mr Riddell has proposed amendments both rules in his evidence to ensure the Northland RPS and Policy 13 of the NZCPS are given effect to.

Coastal Area Policies – earthworks scarps

24. As noted in Mr Riddell’s evidence, CA1.3.14 of Plan Change 87 directs that significant adverse visual effects on High Natural Character Areas and

coastal landscapes are avoided, remedied or mitigated “as far as practicable”. By adding the phrase “as far as practicable”, the Plan Change 87 fails to adequately give effect to policy 13 of the NZCPS and policy 4.6.1 of the Northland RPS required under section 75(3) of the RMA.

25. The Director-General agrees with Mr Riddell’s recommendation to delete the phrase. Without the deletion, the proposed plan would be diluting what the Supreme Court considers to be a firm obligation to “give effect” to these two instruments, and therefore would not be meeting the requirements in section 75(3) of the RMA.

Coastal Area Rules – Restoration of sand dunes

26. Mr Riddell has recommended that the five listed exceptions to rule CA2.3.3 are acceptable. However, where there have been earthworks associated with a weed or pest management programme, a temporary military training activity, or the burial of marine mammals, there needs to be a requirement to reinstate the original dune form. The Director-General concurs with this. This will ensure that Plan Change 87 implements policy 14(b) and policy 26 of the NZCPS. Mr Riddell has recommended amendments to rule CA2.3.3 to ensure that the rule better aligns with the NZCPS.

Coastal Area Rules – Earthwork exceptions

27. With regards to rules CA3.1.2 and CA4.2.1, Mr Riddell has noted the exceptions contained within each rule should be deleted, apart from the exception of the burial of marine mammals. The Director-General agrees with this. The reason the exceptions should be deleted is that they are too open-ended and because most listed activities would fall within the noted threshold.
28. The Department of Conservation has a statutory obligation to manage marine mammals, and regulates the interaction with marine mammals, including dead marine mammals. Section 18(2) of the Marine Mammals Protection Act 1978 also provides that dead marine mammals are to be disposed of in accordance with the advice of an officer appointed under the Act or a person authorised by the Minister of Conservation. Moreover, the size of a stranded marine mammal cannot be predicted. As Mr Riddell

notes in his evidence, there are also health and safety concerns that necessitate there be no undue delay in burial. The Director-General therefore considers the exception in relation to the burial of marine mammals is appropriate.

Coastal Area Rules – Earthworks cut faces

29. As set out in the evidence of Mr Riddell, rule CA4.2.1 does not apply a cut/batter height limit and earthworks cut faces can have significant adverse effects. This leaves a loophole in Plan Change 87, in terms of Policy 13 of the NZCPS and Policy 4.6.1(1)(b)(i) of the Northland RPS.
30. Policy 13 was specifically considered by the Supreme Court in *King Salmon* and the majority decision of the Court states that policies 13(1)(a) and (b) “provide something in the nature of a bottom line”.⁵ Policy 13(1)(a) directs the avoidance of significant adverse effects on the natural character of the coastal environment with outstanding natural character. The Supreme Court in *King Salmon* also considered the meaning of “avoid” and stated that it “has its ordinary meaning of “not allow” or “prevent the occurrence of””.
31. Accordingly, the Director-General supports that significant adverse effects caused by earthworks cut faces are prevented. To address this, a maximum face height standard needs to be inserted in rule CA4.2.1.

Indigenous biodiversity

Indigenous vegetation clearance rules

32. Mr Riddell’s evidence notes the ambiguity with the drafting of rules RPE2.3.5, CA2.3.4 and CA4.2.2. Both rules are unclear as to whether the intention is that the destruction or clearance of indigenous vegetation is a cumulative total for the life of the plan or whether it is a clearance limit per clearance event. If it is the latter, as is the case with LAN3.1.4.1, this undermines the protections set out in policy 11 of the NZCPS and policy 4.4.1(2) of the Northland RPS. It is acknowledged that further work is to be done to address indigenous biodiversity, however in the interim it is

⁵ Paragraph 132.

important that the rules are clear enough to give effect to these instruments.

33. While the authors of the section 42A Report indicate that rules such as CA4.2.2 provide a one-off opportunity to undertake vegetation clearance, the Director-General supports amending the plan rules to clarify that the destruction or clearance may only occur over the life of the plan (within the limits specified in each rule).
34. Mr Riddell has proposed further amendments to clarify this in his supplementary evidence.

Prohibiting cats and dogs

35. As set out in the evidence of Mr Riddell, imposing “no cats and dogs” conditions can result in avoidable adverse effects on threatened indigenous species, including the North Island brown kiwi. While the current drafting of RA4.1.1(j) of Plan Change 85 is broad, it is still not clear whether it is broad enough to empower the imposition of conditions prohibiting cats and dogs. The current drafting leaves room for doubt as to whether conditions relating to cat and dog restrictions can be imposed. The reference to “pest management” in RA4.1.1(j) could be argued to only encompass feral or stray cats and dogs, as opposed to domestic pets. To avoid any potential ambiguity, the Director-General is seeking that RA4.1.1(j) makes explicit reference to measures to control cats and dogs.

Section 42A Reports – Areas of alignment with the Director-General’s submission

36. Mr Riddell’s evidence sets out areas of alignment between the section 42A Report and the Director-General’s submission or further submission points.
37. Where there is agreement on the recommendation in the section 42A Report, the Director-General also supports the reasoning as set out by the reporting officers. In these submissions, I emphasise some of the areas of agreement.

Subdivision, use, and development in the coastal area *Coastal Area Objectives – Outstanding Natural Character Areas*

38. The Director-General supports the Reporting Officer's rejection of the Federated Farmer's submission seeking that objective CA1.2.4 be amended to include the word "significant" before "adverse effects".⁶ This suggested amendment deviates from policy 13(1)(a) of the NZCPS and policy 4.6.1(a) of the Northland RPS. Therefore, the Director-General supports the recommendation that CA1.2.4 is retained to align with both policy instruments, as required under the RMA.

Indigenous biodiversity

Earthworks affecting wetlands

39. The Reporting Officer has recommended the retention of rule RA3.3.1(p). The Director-General supports this recommendation, as RA3.3.1(p)(ii) sits within the District Council's function as set out in section 31(1)(b) of the RMA. This also gives effect to the Northland RPS (Method 4.4.3(2) and Policy 4.4.1(3)(c).

40. Upon reflection, the Director-General supports the of the other wetland destruction rules RPE2.3.4 and RUUE2.3.7. It is acknowledged that these fall outside the functions of District Councils.

Miscellaneous matters

New infrastructure policy

41. The Reporting Officer has recommended the rejection of Transpower New Zealand's⁷ submissions requesting the addition of two new policies. The Director-General supports the Reporting Officer's recommendation.


42. First, the suggested clauses go beyond what is provided for in Policy 8 of the National Policy Statement on Electricity Transmission (NPSET), which requires that (emphasis added):

The planning and development of the transmission system *should seek to avoid adverse effects* on outstanding natural landscapes, areas of high natural character and areas of high recreation value and amenity and existing sensitive activities

⁶ 253/32.

⁷ 476/3.

43. The clauses sought by Transpower may allow significant adverse effects if outweighed by the overall benefits of the proposal. This is not reflected in the NPSET as the direction is to seek to avoid all adverse effects.
44. Secondly, the clauses sought by Transpower are contrary to the direction in the NZCPS to avoid adverse effects in areas in the coastal environment with outstanding natural character.
45. I note that while policy 8 of the NPSET refers to “seek to avoid adverse effects,” whereas the direction to avoid adverse effects is absolute in the NZCPS, both directions must be provided for. Mr Riddell’s evidence addresses the relationship between the NPSET and the NZCPS.
46. The Director-General’s view is that one instrument cannot derogate from the other, and that both instruments should be read together so far as possible. Reconciling any conflict should be determined on a case-by-case basis in a resource consent process.
47. If Transpower NZ’s proposed text were to be accepted, then Mr Riddell’s recommended amendment provides a satisfactory method of providing for both instruments.



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