

BEFORE THE ENVIRONMENT COURT

Under the Resource Management Act 1991 (“Act”)

In the matter of appeals under clause 14 of the First Schedule to the Act concerning the Proposed One Plan for the Manawatu-Wanganui Region and the topic of Biological Diversity

between **FEDERATED FARMERS OF NEW ZEALAND**
ENV-2010-WLG-000148

and **MERIDIAN ENERGY LTD**
ENV-2010-WLG-000149

and **MINISTER OF CONSERVATION**
ENV-2010-WLG-000151

and **PROPERTY RIGHTS IN NEW ZEALAND**
ENV-2010-WLG-000152

and **HORTICULTURE NEW ZEALAND**
ENV-2010-WLG-000155

and **WELLINGTON FISH & GAME COUNCIL**
ENV-2010-WLG-000157

and **MANAWATU-WANGANUI REGIONAL COUNCIL**
Respondent

Statement of Evidence in Chief of **HELEN MARIE MARR** on behalf of the Minister of Conservation and Wellington Fish & Game Council

Dated: 17 February 2012

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STATEMENT OF EVIDENCE OF HELEN MARIE MARR

1. Introduction

1.1 Qualifications and experience

1. My full name is Helen Marie Marr. I have a Bachelor of Resource and Environmental Planning (specialising in Environmental Science) degree with Honours from Massey University. I am also a qualified RMA decision-maker under the 'Making Good Decisions' programme.
2. I have over twelve years experience in resource management and planning. My particular areas of expertise are in policy and plan development and natural resource management, particularly issues relating to biodiversity and water management.
3. I am currently working as a planning consultant for Perception Planning Limited, a specialist planning consultancy, of which I am also a Director.
4. Prior to joining Perception Planning I worked for Horizons Regional Council ("Horizons") for four years. I began working on the Proposed One Plan ("One Plan") in August 2006, first as Senior Policy Analyst and Project Manager, and later as One Plan Manager. I was involved in the final stages of the consultative process prior to notifying the One Plan, managed the One Plan through the formal First Schedule process and worked with other planners, technical experts and consultants to assess the One Plan in response to submissions. I have a strong working knowledge of the One Plan, and the Horizons Region ("Region").
5. I have also worked for the Ministry for the Environment in the RMA Policy team. There I worked on preparing recommendations to select committee on the 2005 RMA Amendment. I also worked on the early stages of development of a number of National Policy Statements and National Environmental Standards.
6. I have worked for Greater Wellington Regional Council as the Policy Section Leader for the Wairarapa Division. There I led the consultation on and development of a cross council and iwi coastal development strategy. I have

also worked as a development control planner in the United Kingdom, processing planning applications for the Lake District National Park Authority.

1.2 Expert Witness Code of Conduct

7. I have read and am familiar with the Code of Conduct for expert witnesses in the Environment Court Practice Note (2011). I agree to comply with this Code of Conduct. The evidence in my statement is within my area of expertise, except where I state that I am relying on the evidence of another person. I have not omitted to consider material facts known to me that might alter or detract from the opinions I express.

1.3 My previous evidence in relation to the Proposed One Plan

8. As identified in section 1.1 above, my previous role was working for Horizons as the One Plan Manager. My role there was largely a co-ordination and leadership role, managing the work of technical and planning experts contributing to the development of the One Plan and evidence to the council level hearing. I also appeared on behalf of Horizons at pre-hearing meetings on the One Plan.
9. I prepared the section 42A report on submissions to the Hearing Panel on a limited number of topics; the overall plan hearing (submissions on consultation, form and process), Te Ao Maori (Chapter 4 of the One Plan) and Biodiversity. I presented expert evidence in relation to non-point source pollution, in response to questions from the Hearing Panel¹, and authored the non-point source planning section of the Officers' 'End of Hearing' report for the Water Hearing. My role in other hearings was limited to the co-ordination and pre-hearing work identified above.
10. I resigned from my role at Horizons in July 2010 to join Perception Planning. I was then contracted by Horizons on a short term basis as a consultant to help with notification of the Hearing Panel's decisions on submissions, and communication of the decisions to staff and to the public.

¹ Section 42A Report of Ms Helen Marie Marr on behalf of Horizons Regional Council, August 2009.

1.4 Scope of my evidence

11. In the next part of my evidence I discuss the sections of the Act, national policy documents and regional policy documents that I consider to be relevant to the assessment of the biodiversity provisions of the One Plan, identifying where I differ from Ms Barton’s assessment.

12. I will then discuss the four “Key issues” that Ms Barton has outlined in her evidence on behalf of Horizons, and which are in contention in these proceedings. Of the four Key issues, the Minister of Conservation (“MoC”) and the Wellington Fish and Game Council (“WFCG”) are appellants on the following two:

- The appropriate activity classification in rules for rare habitats, threatened habitats and at-risk habitats (‘Key issue’ 2); and
- That the decisions version of the One Plan does not provide sufficient guidance to decision-makers on the use of offsets in making decisions on resource consents (‘Key issue’ 3).

MoC and WFCG are section 274 parties in relation to Key issues 1 and 4, in support of Horizons.²

13. The last part of my evidence contains an assessment of the provisions sought by MoC and WFCG against the decisions version of the One Plan and against the provisions recommended by Ms Barton.

14. My evidence is structured as follows:

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15. I use the following terminology to describe the notified and decisions versions of the One Plan:

- The decisions version of the One Plan is described as “DV POP”.
- The notified version of the One Plan is described as “NV POP”.

2 Evidence

2.1 Approach to assessment of plan provisions

16. *Long Bay–Okura Great Park Society v North Shore City Council*³ sets out a comprehensive summary of the mandatory requirements for the assessment of district plans according to the Act’s statutory requirements. The list has subsequently been amended to reflect the changes made by the Resource Management Amendment Act 2005.⁴ These requirements have been held to be equally applicable to the evaluation of regional plans⁵ (subject to required amendments). In my view these tests are equally valid for assessing the provisions of a regional policy statement, with the appropriate amendments (including that any reference to rules do not apply because regional policy statements do not contain rules).

17. I set out below a summary of the appropriate requirements for the assessment of regional policy statement and regional plan provisions in the One Plan context based on the provisions of the Act and on this caselaw. I have combined the tests for regional plans and regional policy statement where appropriate, for ease of reference. I should note that my understanding is that the version of the Act that existed prior to the Resource Management (Simplifying and Streamlining) Amendment Act 2009 applies.⁶ This summary largely corresponds

³ ENV C A078/08, at para 34 (following *Eldamos Investments Ltd v Gisborne District Council* ENV C W047/2005).

⁴ *High Country Rosehip Orchards Ltd v MacKenzie District Council* [2011] NZ EnvC 387 (paragraphs 18 and 19).

⁵ See *Geotherm Group Ltd v Waikato Regional Council* A047/06 (paragraph 68) and Final Decision of the Board of Inquiry into the New Zealand Transport Agency’s Transmission Gully Plan Change Request dated 5 October 2011 (paragraph 159).

⁶ This is because the One Plan was notified in 2007, before the Resource Management (Simplifying and Streamlining) Amendment Act 2009 came into force. Refer section 161 of that Act which applies to a proposed policy statement or plan or a change that, immediately before 1 October 2009 (a) had been publicly notified under clause 5 or 26(b) of Schedule 1 of

with the summary provided by Ms Barton in Attachment 4 to her evidence however, as I will explain, in some respects I differ from Ms Barton in how these tests are to be applied to the provisions in the Biodiversity Chapters (Chapters 7 and 12) of the One Plan.⁷

18. I note that I have deleted the tests which Ms Barton notes in her 'assessment narrative' column as not being relevant to these proceedings, which I agree with.

2.1.1 Requirements for the assessment of the biodiversity provisions of the Proposed One Plan.

(A) General Requirements

1. A regional plan and regional policy statement should be designed to accord with and assist the regional council to carry out its functions so as to achieve the purpose of the Act (sections 30, 59, 61, 63 and 66(1)).
2. When preparing a regional plan or regional policy statement the regional council must give effect to any national policy statement, New Zealand Coastal Policy Statement and when preparing a regional plan must also give effect to the operative regional policy statement (s62(3) and 67(3)).
3. When preparing its regional plan the regional council shall have regard to any proposed regional policy statement (section 66(2)(a)).
4. When preparing a regional plan or regional policy statement the regional council must also:
 - a) Have regard to any relevant management plans and strategies prepared under other Acts, and, in the case of the regional plan, to consistency with plans, policy statements and proposed plans and proposed policy statements of adjacent regional councils (sections 61(2) and 66(2)(d));
 - b) Take into account any relevant planning document recognised by an iwi authority (s61(2A));
 - c) Not have regard to trade competition or the effects of trade competition (sections 61(3) and 66(3)).
5. The formal requirement for a regional policy statement to *inter alia* (sections 59 and 62):
 - a) provide an overview of the resource management issues of the region and state the significant issues for the region;

the principal Act; but (b) has not proceeded to the stage at which no further appeal was possible.

⁷ Barton EIC Appendix 4 "Statutory tests for a Regional Policy Statement and Regional Plan for the indigenous biological diversity provisions of Chapters 7 & 12".

- b) contain policies and methods to achieve integrated management of the natural and physical resources of the region (s 59);
 - c) states the objectives sought to be achieved by the statement, the policies for those issues and objectives and an explanation of those policies, and the methods (excluding rules) to be used to implement the policies (s 62(1)(c),(d) and (e));
 - d) states the processes to be used to deal with cross-boundary issues; and
 - e) states the local authority responsible for specifying objectives, policies and methods for the control of the use of land relating to natural hazards, hazardous substances, and indigenous biological diversity.
6. The requirement that a regional plan must also state objectives, policies and rules (if any) and may state other matters (section 67(1) and (2)).

(B) Objectives [the section 32 test for objectives]

7. Each proposed objective in a regional plan or regional policy statement is to be evaluated by the extent to which it is the most appropriate way to achieve the purpose of the Act (section 32(3)(a)).

(C) Policies and methods (including rules for regional plans) [the section 32 test for policies and rules]

8. For regional plans, the policies are to “implement” the objectives, and the rules (if any) are to implement and achieve the policies (sections 67(1) and 68(1)).
9. Each proposed policy or method (including each rule) is to be examined, having regard to its efficiency and effectiveness, as to whether it is the most appropriate for achieving the objectives (section 32(3)(b)) of the regional policy statement or regional plan:
- (a) taking into account
 - (i) the benefits and costs of the proposed policies and methods (including rules); and
 - (ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods (section 32(4)).
 - (b) if a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances (section 32(3A)).

(D) Rules

10. In making a rule the regional council must have regard to the actual or potential effect of activities on the environment (section 68(3)).

(E) (On appeal)

11. On appeal the Environment Court must have regard to one additional matter – the decision of the regional council (section 290A).

19. I will use these tests as a broad framework to structure the next part of my evidence.

2.2 Regional Council's functions

20. Ms Barton identifies the relevant statutory provisions that form part of a regional council's functions in her Attachment 2. I also set out below some additional statutory provisions that I consider relevant.

21. Ms Barton identifies the important function of a regional council in section 30(1)(ga) of the Act, and she also sets out the definition of "biological diversity". Section 30(1)(c)(iia) is also relevant. That section of the Act provides that a regional council has the following function for the purpose of giving effect to the Act in its region:

"(c) The control of the use of land for the purpose of:

...

(iia) the maintenance and enhancement of ecosystems in water bodies and coastal water."

22. This function is particularly relevant to the provisions in the One Plan which control vegetation disturbance in riparian areas and which restrict activities that may adversely affect wetland ecosystems, both in the coastal environment and inland.

23. In relation to Part II of the Act (an explicit consideration under sections 61(1) for regional policy statements and 66(1) for regional plans), Ms Barton has identified the relevance of section 6(c), which provides that it is a matter of national importance for decision-makers to "*recognise and provide for the protection areas of significant indigenous vegetation and significant habitats of indigenous fauna*".

24. I also believe that section 6(a) is relevant: "*the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development*". While the DV POP contains a specific objective (Objective 7-8) and policy (Policy 7-8A) on natural character, there is still a requirement to recognise and provide for the preservation of the natural character of wetlands, lakes & rivers and their

margins and in the coastal environment throughout the plan, and a requirement to implement the natural character policies of the RPS in the provisions of Part II of the One Plan (the Regional Plan). In this respect, Dr Gerbeaux's evidence on behalf of WFGC and MoC outlines the importance and the values of wetlands nationally and within the Region.

25. Section 7 of the Act sets out other matters that we 'shall have particular regard to'. Many parts of this section may have relevance to these proceedings, depending on the particular provision being analysed (for example clause (j) "*the benefits to be derived from the use and development of renewable energy*"). Ms Barton does discuss the relevance of sections 7(j) and 7(b) in paragraph 31(b) of her evidence. I believe that of particular relevance in these proceedings are subsections (d) ("*the intrinsic value of ecosystems*") and (e) ("*any finite characteristics of natural and physical resources*"). I explain the relevance of these sections further in paragraph 101 below.

2.3 National and Regional Policy Statements

26. I agree in large part with the national planning instruments identified by Ms Barton in her Attachment 2. I do not in all respects agree with Ms Barton's assessment or application of those provisions. I set out below some additional matters that I consider relevant.

2.3.1 New Zealand Coastal Policy Statement (NZCPS) 2010

27. I generally agree with Ms Barton's assessment⁸ of the relevance of the NZCPS 2010 to the One Plan. Section 55(2D) of the Act requires that the One Plan give effect to the NZCPS as soon as practicable if the NZCPS does not require a particular action be taken by a different time. The NZCPS 2010 does not require implementation by a certain time and therefore the One Plan must give effects to it as soon as practicable. I do not agree with Ms Barton's statement that the DV POP gives effect to the NZCPS through Chapter 9 "*The Coast*".

⁸ Barton para 31.c of EIC and para 13 of Attachment 2.

28. Chapter 9 “*The Coast*” forms part of the Regional Policy Statement component of the One Plan (Part I of the One Plan).
29. Chapter 9 of the DV POP deals only with activities in the coastal marine area (“CMA”) and broad policy in relation to the need for integrated management of the coastal environment. Chapter 17 of the One Plan regulates activities in the coastal environment but only within the CMA.
30. The NZCPS 2010 relates not only to the CMA but also the remainder of the “coastal environment”, which includes many landward elements as set out in Policy 1 (Policy 1 NZCPS contains a description of the extent of the “coastal environment”). Chapter 9 of the One Plan recognises this by stating in section 9.1.1 that “*The Regional Council manages some activities landward of MHWS through other chapters of this Plan*” (emphasis added). Activities landward of the CMA that affect biodiversity are dealt with through Chapters 7 and 12 of the One Plan. Therefore it is essential to consider both Chapters 7 and 12 of the One Plan against the objectives and policies of the NZCPS 2010.
31. Of particular relevance in the NZCPS 2010 is Policy 11: *Indigenous biological diversity (biodiversity)*:

“To protect indigenous biological diversity in the coastal environment:

(a) avoid adverse effects of activities on:

- (i) indigenous taxa⁹ that are listed as threatened or at risk in the New Zealand Threat Classification System lists;*
- (ii) taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;*
- (iii) indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare;*
- (iv) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare;*
- (v) areas containing nationally significant examples of indigenous community types; and*
- (vi) areas set aside for full or partial protection of indigenous biological diversity under other legislation; and*

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:

- (i) areas of predominantly indigenous vegetation in the coastal environment;*
- (ii) habitats in the coastal environment that are important during the vulnerable life stages of indigenous species;*

⁹ Taxa is defined in the Glossary to the NZCPS 2010 as “Named biological classification units assigned to individuals or sets of species (e.g. species, subspecies, genus, order, variety)”.

- (iii) *indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;*
- (iv) *habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes;*
- (v) *habitats, including areas and routes, important to migratory species;*
and
- (vi) *ecological corridors, and areas important for linking or maintaining biological values identified under this policy.”*

32. There is strong direction in this policy to protect indigenous biological diversity in the coastal environment by *avoiding* adverse effects of activities on habitats that are threatened or naturally rare. I understand from Ms Hawcrofts evidence¹⁰ that Policy 11(a)(iii) would apply to all habitats identified as rare habitats or threatened habitats in the One Plan that are found in the coastal environment. This is because the references to “threatened” and “naturally rare” in the Policy would generally be understood by ecologists to accord with the way threatened and rare habitats have been identified in the One Plan. Policy 11(b) contains further direction to avoid significant effects and otherwise avoid, remedy or mitigate effects on a number of other habitats types, which I understand would generally be classified as at-risk habitats in Schedule E.¹¹
33. Policy 11 must be read along with the other objectives and policies of the NZCPS 2010. I do not traverse those other objectives and policies in my evidence as I believe Policy 11 is the most relevant to the matters under appeal.

2.3.2 National Policy Statement for Renewable Electricity Generation (NPSREG) and the National Policy Statement on Electricity Transmission (NPSET)

34. I agree with Ms Barton’s assessment¹² of the relevance of the NPSREG and the NPSET to the One Plan. I generally agree that the DV POP gives effect to these documents in part through Chapter 3 “*Infrastructure, Energy, Waste, Hazardous Substances and Contaminated Land*”. However I note that the obligation to give effect to these NPS’s does not end with Chapter 3. Chapter 3 is contained in

¹⁰ Hawcroft EIC paragraph 45.

¹¹ Hawcroft EIC paragraph 47.

¹² Barton para 31.d and paras 14 – 17 Attachment 2, EIC.

Part II – the RPS component of the One Plan. The NPS's must also be given effect to in the provisions of Part II – the Regional Plan component of the One Plan. This may be by appropriate cross-reference, or it may be by specific provisions. I will discuss this in more detail in my evidence when I discuss specific provisions.

2.3.3 National Policy Statement for Freshwater (NPSFW)

35. The National Policy Statement for Freshwater Management (NPSFW) was gazetted in May 2011. The NPSFW acknowledges the importance of freshwater to New Zealand and notes lakes and wetlands in contributing to this.
36. Objectives of the NPSFW are “*to safeguard the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of freshwater...*” in sustainably managing land use, discharges (Objective A1) and water takes and use (Objective B1). The NPSFW specifically requires protection of the significant values of wetlands when managing water quality in Objective A2 and water quantity in Objective B4.
37. The NPSFW is operative, however Policy E1 of the NPS sets out a process whereby the council may decide to implement the NPS (give effect to it) over time, but no later than 31 December 2030.
38. Leaving aside any timeframe for implementation issues, I believe this NPS sets some important goals for the management of wetlands in the Manawatu-Wanganui Region. Several wetland types (including lakes) are identified as significant habitats in Schedule E of the One Plan and I believe it would be appropriate to work towards these goals when assessing the provisions of the One Plan.¹³

¹³ These implementation issues relating to the NPSFW will be further addressed by Counsel for MoC and WFGC in the hearings on the Water Quality Topic.

2.3.4 Proposed Regional Policy Statement for the Manawatu-Wanganui Region

39. Ms Barton, in her regional plan tests¹⁴, adopts the test contained in s66(2)(a) that *"when preparing or changing any regional plan the regional council shall have regard to - (a) any proposed regional policy statement in respect of the region"*. The RPS provisions contained in Part I of the One Plan are technically proposed. However, as soon as the appeals on the combined One Plan document are resolved and the RPS becomes operative then Part II of the One Plan – the Regional Plan, will be required to *give effect to* the RPS.¹⁵
40. Chapter 10A of the RPS sets out the timing for this in Method 10A-2, which states: *"Regional plans (except for Part II of this Plan which already gives effect to Part I) and district plans must be changed to give effect to Part I- Regional Policy Statement of the Plan on the first review or change or variation to the regional plan or district plan or within five years, whichever is the earliest"*.
41. In my view this means that the clear intention of the One Plan is that Part II should give effect to Part I (the proposed RPS) now. In my view this is appropriate and would promote integrated management. In this circumstance I believe the level of 'regard' had to the RPS provisions of the One Plan when forming an opinion about the provisions in Part II – the Regional Plan should be high. Indeed, if Part II does not give effect to Part I through following the resolution of appeals, there will be a 'disjunct' when the One Plan becomes operative. This would require further work to be carried out on the Regional Plan component, which is clearly not desirable.
42. My view on this is further reinforced by Objective 11A-1 which states as an Objective of the One Plan is to *"regulate activities in a manner which gives effect to the provisions of Part I of this Plan, the Regional Policy Statement"* (emphasis added). This Objective would require the Regional Plan component to *give effect to* the RPS provisions of the One Plan now.

¹⁴ Barton EIC section a.3. on page 71.

¹⁵ Under section 67(3) of the Act.

2.3.5 Management Plans and Strategies under other Acts

43. Ms Barton discusses two iwi resource management plans when discussing the requirement to have regard to any relevant management plans/strategies prepared under other Acts.¹⁶ Plans and strategies prepared under the Conservation Act 1987 and National Parks Act 1980 are also relevant under this requirement. These are the Conservation General Policy¹⁷, General Policy for National Parks¹⁸; Conservation Management Strategies¹⁹ and National Park Management Plans.²⁰ In my view, these plans and strategies prepared under conservation legislation are particularly relevant to provisions of the One Plan which allow activities undertaken for the purposes of pest plant and pest animal control, or habitat maintenance or enhancement.

2.3.6 Significant Resource Management Issues for the Region and the relevance of Non-Statutory documents

44. An early step in the preparation of plans that assists a regional council to deliver on their functions is the identification of significant resource management issues for the Region. Ms Barton's Overview Statement of evidence²¹ outlined the process that was used during development of the One Plan. Following extensive public consultation, indigenous biological diversity was identified as one of four keystone environmental issues for the Region.

45. Non-statutory documents can identify matters that are an issue at national level and which may be relevant to a regional assessment of significant issues. For this particular hearing, national non-statutory documents are relevant to assessing the national state of biodiversity, which has particular relevance under section 6 of the Act (Matters of National Importance). These documents are:

- NZ Biodiversity Strategy;

¹⁶ Pages 45 and 68 of Ms Barton's EIC.

¹⁷ May 2005, amended in June 2007.

¹⁸ April 2005, amended June 2007.

¹⁹ Tongariro Taupo Conservation Management Strategy (2002, amended 2012), Wanganui Conservation Management Strategy (April 1997), Hawkes Bay Conservation Management Strategy (1994) and Wellington Conservation Management Strategy (1996).

²⁰ Tongariro National Park Management Plan (November 2006) and Whanganui National Park Management Plan (March 1989).

²¹ 15 December 2011 "Overview Statement, as Directed by Judge Dwyer".

- NZ Statement of National Priorities; and
- Proposed National Policy Statement for Biodiversity (PNPSB).

46. Ms Hawcroft's evidence sets out the background of these documents, commencing with the NZ Biodiversity Strategy which has as its goal to halt the decline of indigenous biodiversity in New Zealand. I will briefly discuss the second two of these documents. That the Environment Court can have regard to these national policy documents was confirmed in the case *West Coast Regional Council v Friends of Shearer Swamp Inc*²².

2.3.6.1 NZ Statement of National Priorities

47. As stated by Ms Hawcroft, the Statement of National Priorities for protecting rare and threatened native biodiversity on private land was issued in 2007, as a tool to help central and local government achieve the goal of the New Zealand Biodiversity Strategy. The information about the national priorities is intended to be used by local and central government agencies and landowners to coordinate their on-the-ground actions in relation to biodiversity.

48. Ms Hawcroft outlines in her evidence (paragraph 42) the four 'national priorities'. As Ms Hawcroft²³ and Ms Maseyk²⁴ outline in their evidence, the framework proposed in the One Plan for the protection of biodiversity closely aligns with these national priorities. In particular, National Priority 1 is "*to protect indigenous vegetation associated with land environments ... that have 20% or less remaining in indigenous cover*". This aligns with the protection given to threatened habitats in the One Plan.²⁵ National Priority 2 is "*to protect indigenous vegetation associated with sand dunes and wetlands; ecosystem types that have become uncommon due to human activity*" and National Priority 3 is "*to protect indigenous vegetation associated with 'originally rare' terrestrial ecosystem types not already covered by priorities 1 and 2*". These two priorities align with the protection given to rare habitats in the One Plan.

²² High Court (Justice French) CIV-2010-409-002466 at paragraph 49.

²³ Paragraph 48 Hawcroft EIC.

²⁴ Maseyk s42A Report paragraphs 38 and 39.

²⁵ With the difference being that those were developed following an analysis of "habitats" having less than 20% remaining, rather than "land environments".

2.3.6.2 Proposed National Policy Statement for Biodiversity (PNPSB)

49. Ms Hawcroft discusses the PNPSB in paragraph 43 of her evidence and in particular Policy 2 which would provide that certain ecosystem types and habitats be regarded as “*significant indigenous vegetation*” or a “*significant habitat of indigenous fauna*” in district and regional planning documents. The ecosystem types and habitats identified are consistent with the *National Priorities* 1-4. I agree with Ms Barton’s assessment of the PNPSB²⁶ and its relevance to this appeal. I agree with paras 18 - 24 of Attachment 2 of Ms Barton’s evidence that the direction provided by the PNPSB is generally reflected by the DV POP. It is my view that the changes I propose to the DV POP are would provide better correlation with national guidance in the Proposed National Policy Statement on Biodiversity. This is particularly in respect to the hierarchal approach to adverse effects when considering offsets (Policy 5 of the PNPSB - a matter I discuss further in section 2.5.6 below).

2.4 Key Issues

50. In this section I will provide comment on the “Key issues” identified by Ms Barton in her evidence.

2.4.1 Key Issue 1 - Should indigenous biological diversity be managed on a region-wide or district-wide scale?

51. I agree with Ms Barton’s assessment of this issue and agree that managing biodiversity at the regional level is an appropriate way for Horizons to fulfil its functions in relation to biodiversity and achieve the purpose of the Act.

²⁶ Barton para 31.e of EIC and Paras 18-24 of Attachment 2.

2.4.2 Key Issue 2 – The appropriate activity classification in rules for rare habitats, threatened habitats and at-risk habitats

52. As set out by Ms Barton in her discussion on Key issue 2, the NV POP treated rare habitats and threatened habitats differently from at-risk habitats. The NV POP provided for activities within rare habitats and threatened habitats to be assessed as non-complying activities, and for activities within at-risk habitats to be considered as discretionary activities. The NV POP also contained two separate policies in Chapter 7 setting out how these activities should be managed. The DV POP changed the policy framework and made activities in all identified habitats a discretionary activity. The two relevant policies in the notified plan were amalgamated into new Policy 7-2A, and some relevant aspects carried over into new Policy 12-5.
53. The appeal of WFGC seeks that the two-tiered approach be reinstated into the policy framework of Chapter 7. This appeal point is supported by MoC. To reflect a two-tiered approach to the management of rare habitats and threatened habitats as distinct from at-risk habitats, the appeals of WFGC and MoC seek that the non-complying activity status be reinstated for activities in rare habitats and threatened habitats.
54. The One Plan acknowledges that rare habitats and threatened habitats meet the significance criteria and must be considered under s6(c) of the Act. It is my understanding that the high level of certainty of the significance of these habitats has been agreed by the ecological experts.²⁷
55. In my view the objectives and policies in both Chapters 7 and 12 set up a hierarchy of different management outcomes for the different types of habitats. Collectively they identify a goal of *protection* for habitats considered to be significant, and a goal of *maintenance* of habitats that are not considered to be significant, but that may still contribute to biodiversity in the Region.

²⁷ The ecological experts agreed to remove the words "*unless site specific assessments determine otherwise*" in Policy 7-2A, in relation to habitats determined as rare or threatened being assessed to be section 6(c) habitats: *Memorandum regarding record of Technical Conferencing on Monday 30 January 2012 on Biodiversity*.

56. The issue to be decided is which activity status will be most effective and efficient in achieving the objectives, taking into account the benefits, costs and risks of acting or not acting, (s32) and which status will achieve the policies (s68(1)).

57. In relation to the application of the tests in section 32 of the Act, I note that the “objectives” referred to under the section 32 test appear to be confined to the objectives in the Regional Plan.²⁸ I have identified below objectives from both the RPS and the Regional Plan because:

- (a) the relevant objective in the Regional Plan component of the One Plan is very similar to Objective 7-1 of the RPS of the One Plan; and
- (b) the Regional Plan has a separate general objective to ‘give effect’ to the objectives of the RPS.²⁹

58. I will begin by identifying the relevant objectives and some relevant policies of the Regional Plan and RPS. I will then assess the differences between and the relative merits of discretionary activity and non-complying activity. I will then identify any relevant guidance as to when it is appropriate to apply a non-complying activity status. I will then address the ‘practical implementation’ and ‘bundling’ issues that have been identified by Ms Barton. I will also address the question whether non-complying activity status creates too high a ‘barrier’ for applicants wishing to carry out activities in rare and threatened habitats. Finally in this section of my evidence, I will analyse the relative merits of discretionary and non-complying activity options against section 32 of the Act.

2.4.2.1 Relevant objectives

59. Objective 7-1 “*Indigenous biological diversity*” sits in Part I – the RPS component of the One Plan, and is the only RPS objective that refers to the outcomes sought in relation to managing indigenous biological diversity. The decisions version of this objective reads:

²⁸ Section 32 of the Act does not refer to a combined planning document, and the definition of “regional plan” is set out in section 43AA of the Act.

²⁹ Objective 11A-1(b).

“Protect areas of significant indigenous significant habitats of indigenous fauna and maintain indigenous biological diversity”, including enhancement where appropriate.” (emphasis added)

60. Objective 11A-1 sits in Part II: the Regional Plan and reads:

“(a) The regulation of activities in a manner which maximises certainty and avoid unnecessary costs on resource users and other parties.

(b) The regulation of activities in a manner which gives effect to the provisions of Part 1 of this Plan, the Regional Policy Statement.”

(emphasis added)

Objective 12-2 (also part of the Regional Plan) reads:

“The regulation of vegetation clearance*, land disturbance*, forestry* and cultivation* and certain other resource use activities to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna or to maintain indigenous biological diversity”, including enhancement where appropriate.”

(emphasis added)

61. I discuss these objectives in more detail in part 2.5 of my evidence. I am not aware of any outstanding appeals on the substance of these objectives.

2.4.2.2 Objectives and Policies of Chapter 11A

62. Ms Barton quotes Chapter 11³⁰ which sets out what the various activity classifications mean and defines discretionary activities³¹ as well as non-complying activities³². This section is intended only to summarise the provisions of the Act, not to provide policy guidance as to status of activities.

63. I believe Chapter 11A provisions to be more relevant. Chapter 11A sets out the overall objectives and policies for Part II – the Regional Plan.

64. I have already set out Objective 11A-1 above.

³⁰ Barton EIC para 55 page 20.

³¹ 11.1.2(d) “If an activity is described as a **discretionary** activity, a resource consent is required and the Regional Council will decide whether or not to grant the consent. The decision will depend on how consistent the proposed activity is with provisions of the RMA and the objectives and policies set out in this Plan”.

³² 11.1.2(e): “If an activity is described as a **non-complying** activity, a resource consent is required. Consent can only be granted if the Regional Council is satisfied that either the adverse effects on the environment will be minor, or the activity will not be contrary to the objectives and policies of this Plan.”

65. Policies 11A-1 and 11A-2 set out the necessary activity classifications for activities regulated in the Regional Plan. Policy 11A-2 refers back to Policy 11A-1 where the decision is made to regulate land use activities (which I understand is not in contention for biodiversity) so I will refer to that Policy for the purpose of this evidence. Policy 11A-1 states that regional rules must be adopted which:

*(d) classify as **discretionary** those activities for which the Regional Council needs to retain its discretion to decline consent owing to the potentially significant levels of adverse effects, and it is not practicable to restrict the exercise of the Regional Councils discretion to a specified list of matters.*

*(e) classify as **non-complying** those activities for which the Regional Council would generally not grant a resource consent owing to the potential for very significant adverse effects on the environment.*

It is my understanding that there are no outstanding appeals on this Chapter.

66. In my view these policies give a strong direction around certainty of outcome for plan users and giving effect to the provisions in the RPS. The policies are very directive about the activity status that should be adopted for regional rules. Both Objective 11A-1 and Policies 11A-1 and 11A-2 are relevant considerations when assessing the appropriate activity status for activities in rare habitats and threatened habitats under s32(3). As I set out below, the policy direction in Policy 12-5 (*“Consent decision-making for activities in rare habitats, threatened habitats and at-risk habitats”*) is to generally *not* grant consent for activities in rare habitats and threatened habitats, recognising that there is potential for very significant adverse effects on the environment. I believe the criteria in clause (e) of Policy 11A-1 (non-complying activities) are more relevant for activities in rare and threatened habitats than the criteria in (d).

2.4.2.3 Differences between discretionary and non-complying activity status

Statutory framework for discretionary and non-complying activities

67. A non-complying activity is described in section 87A(5) and a discretionary is described in section 87A(4) as set out below:

87A Classes of activities

...

- (4) *If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a discretionary activity, a resource consent is required for the activity and—*
- (a) *the consent authority may decline the consent or grant the consent with or without conditions; and*
 - (b) *if granted, the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.*
- (5) *If an activity is described in this Act, regulations (including a national environmental standard), a plan, or a proposed plan as a non-complying activity, a resource consent is required for the activity and the consent authority may—*
- (a) *decline the consent; or*
 - (b) *grant the consent, with or without conditions, but only if the consent authority is satisfied that the requirements of section 104D are met and the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.*
- (emphasis added)

68. Therefore the difference between the definition of a discretionary and non-complying activity, as described in section 87A, is the application of section 104D to non-complying activities.

69. Section 104D states:

104D Particular restrictions for non-complying activities

- (1) *Despite any decision made for the purpose of section 95A(2)(a) in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—*
- (a) *the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or*
 - (b) *the application is for an activity that will not be contrary to the objectives and policies of—*
 - (i) *the relevant plan, if there is a plan but no proposed plan in respect of the activity; or*
 - (ii) *the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or*
 - (iii) *both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.*
- (2) *To avoid doubt, section 104(2) applies to the determination of an application for a non-complying activity.*
- (emphasis added)

70. Section 104D establishes a 'gateway' for non-complying activities, whereby consent may only be granted if a consent authority is satisfied either that the

adverse effects of the activity on the environment will be minor or that the activity will not be contrary to the objectives and policies of the relevant plan.

71. Resource consents for both discretionary and non-complying activities (that pass the 104D 'gateway') are assessed under section 104.
72. An application for a discretionary activity has to be considered under section 104 but need not pass through the section 104D 'gateway' tests.
73. It is often stated that the s104D gateway tests are the only difference between the consideration of a non-complying activity and a discretionary activity. Although I agree, in my view the closer consideration which must be given to the objectives and policies under the second gateway test for non-complying activities in section 104D, can be particularly useful.
74. Parliament must have also considered the non-complying activity status to have utility. The non-complying gateway tests remain available as a tool under the Act despite proposals by Government to remove them.³³

Consideration of objectives and policies under s 104(1)

75. Under section 104(1), relevant objectives and policies (in addition to other relevant provisions of a plan or proposed plan, such as rules) are only one matter that the decision maker must "have regard to" under section 104(1)(b)(vi). The words "have regard to" have been considered in various Court cases and can be considered to mean that the decision maker must 'turn their mind' to the various matters and 'give them genuine attention'³⁴ but that it is up to the decision maker in each circumstance to decide which matters are relevant and the weight that should be given to each.³⁵
76. While this requirement to "have regard to" the provisions of the plan is relevant to both discretionary and non-complying activities, for discretionary activity applications, examination of relevant objectives and policies is limited to this

³³ Most recently in the Resource Management (Simplifying and Streamlining) Amendment Bill clauses 147-152.

³⁴ *Foodstuffs (South Island) Limited v Christchurch City Council* [1999] NZRMA 481(HC) 487.

³⁵ *Stirling v Christchurch City Council* (High Court, Christchurch, CIV-2010-409-2892, 19 September 2011).

particular provision and there is no additional examination required under section 104D.

77. In the decision making process for a non-complying resource consent application where the adverse effects are more than minor (and the application therefore cannot meet the first gateway test), the decision maker is required to examine whether the proposal is contrary to the objectives and policies of the relevant Plan. The test of "contrary to" in section 104D(1)(b) is a high one, and the activity would have to be opposed to in nature, different, opposite to the objectives and policies to not pass this test.³⁶
78. Making the assessment as to whether the proposal is contrary to the objectives and policies of the plan requires a careful consideration of the plan provisions as a whole³⁷, and for the decision maker to specifically consider the intent of the plan as a whole and assess application against this. The requirement for consideration of a non-complying activity that the proposal not be contrary to those provisions and the *direction and intent* of the relevant plan(s) is significantly different from the requirement to simply 'have regard to' the plan provisions when considering a discretionary activity. In my view this means that when considering a non-complying activity, the provisions, direction and intent of the plan are given more weight. This is a significant and useful difference between the two activity classifications. A decision-maker is allowed less discretion under a non-complying activity status because the decision maker may not turn their mind to and then disregard policies, as with a discretionary activity, but must be satisfied that a proposal is not contrary to them. As I discuss below, rather than being a valueless exercise, this can create significant efficiencies.
79. I note here that this difference between a non-complying and discretionary activity is not particularly significant or useful if the objectives and policies of the plan do not contain clear guidance or direction. The Quality Planning Website³⁸ contains a practice note on writing plan provisions and, in relation to writing non-

³⁶ *NZ Rail Ltd v Marlborough DC* [1994] NZRMA 70 (HC).

³⁷ *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110 at paragraph 74.

³⁸ The Quality Planning Website was developed by the Ministry for the Environment in association with other bodies to promote best practice by sharing knowledge about all aspects of practice under the RMA.

complying rules, the practice note emphasises the importance of including clear, strong objectives and policies to accompany the non-complying rule, to ensure that the threshold for s104D(1)(b) is not inadvertently set too low “*inadvertently allowing consents to be granted where it may not otherwise have been desirable to do so*” and to provide “*clear, strong, guidance to guide decision-makers on the desired outcome and means to achieve that outcome when considering non-complying consent applications*”. This was a problem often identified when assessing non-complying activities against the sometimes vague objectives and policies contained in some first generation plans. I have considered the biodiversity provisions of the One Plan and I do not consider that those provisions are vague. I consider that it would be clear to a decision maker whether or not a proposal was contrary to the direction set by these provisions. As I explain below, further clarity would be provided if the changes that I recommend for these policies were accepted.

Summary

80. A non-complying activity requires more careful and focussed consideration of the objectives and policies of the plan than a discretionary activity does in circumstances where an activity will have more than minor adverse effects. This makes it a useful and appropriate tool in the situation where it is important that the objectives and policies achieved for most, if not all, consent applications coming before the consent authority. The objectives and policies of the One Plan relating to terrestrial biodiversity are sufficiently directive such that the non-complying activity status would not be a “toothless” mechanism if applied to activities within rare and threatened habitats under the One Plan.

2.4.2.4 When is it appropriate to apply a non-complying activity status?

81. Non-complying activity status may be desirable when an activity is generally not appropriate and where it is intended that a proposal show that it can be distinguished from the generality of cases before consent is granted.³⁹
82. The Quality Planning Website practice note on writing plan provisions provides guidance on when non-complying activity status may be appropriate⁴⁰: “*The non-complying activity status can be useful for situations where it is intended that*

³⁹ *Briggs v Christchurch City Council* (Environment Court, C045/08, 24 April 2008).

⁴⁰ Above footnote 38.

consents only be granted in exceptional circumstances (for example in managing cumulative adverse effects on a resource that is at, or close to, capacity)."

83. Non-complying activity status may also be appropriate when the effects of an activity reaches a threshold where there is the potential for adverse effects on the receiving environment⁴¹. The Quality Planning Website practice note on writing plan provisions notes that "*This activity status is often reserved for those activities where the potential adverse effects are great but do not necessarily warrant prohibition*". I agree with these statements.
84. Non-complying activity status is also a very useful tool when it is clear that the sustainable limit of a resource is approaching. The paper "*When is enough, enough? Dealing with cumulative effects under the Resource Management Act*"⁴² referenced in the Quality Planning guidance on activity status notes that the non-complying activity status "*signals the grant of further consents will generally not be appropriate and that consents will only be granted in limited circumstances. This is the tool to signal that extra caution is required (an amber light)*." I agree and consider that the need to set a limit to deal with *cumulative* effects applies in relation to effects on threatened habitats in particular (Ms Hawcroft explains ongoing losses to these habitats, even in recent times, often from small individual clearances).⁴³

2.4.2.5 Efficiency

85. In my view there is a clear understanding, at least amongst planners, that a resource consent application for a non complying activity will have to make a strong case and distinguish that activity from the generality of cases before it is granted. In the One Plan, this is clearly signalled through Policy11A-1(e). The extra gateway tests imposed by s104D are seen as an extra hurdle. These factors often create a 'deterrent effect' where only the most well thought through activities proceed to making an application for resource consent and then only after giving careful consideration to both adverse effects and the policies of the plan.

⁴¹ *Geotherm Group Ltd v Waikato Regional Council* (Environment Court, A151/06, 19 November 2006).

⁴² P Milne, February 2008.

⁴³ For example, Ms Hawcroft's evidence paragraphs 14 – 22.

86. This 'deterrent effect' in my view creates important efficiencies. Fewer resource consent applications will be made, and applications that will not meet policy tests will not be made. Without this deterrent effect there is a risk that applications will be made that will waste time and resources for applicants, councils and also submitters, such as groups with an interest in biodiversity. Non-complying activity status, as distinct from a 'strong' discretionary activity status, will create less unnecessary cost to applicant, the council and community.

2.4.2.6 Planning practicalities

87. Ms Barton makes three general statements in regards to planning practicality of the plan provisions.⁴⁴ I summarise her statements as:

- a) workability of provisions;
- b) onsite discussions leading to applications not being made in rare and threatened habitats; and
- c) ease of granting consents for scrub clearance.

88. In relation to a), Ms Barton states that a number of resource consents have been granted under the DV POP provisions in which components of biodiversity were 'in large measure' protected. In response to a request from MoC to provide documentation relating to the examples that Ms Barton is relying upon, Horizons provided consent applications, decisions reports and technical advice documents relating to eight resource consent applications. I have briefly analysed these resource consent documents in relation to activity status and summarise my analysis in Appendix 2 to my evidence. In summary, of the eight consents provided:

- 5 were processed under the NV POP, as non-complying activities; and
- 3 were processed under the DV POP, as discretionary activities.

89. All the non-complying activities were found to have 'no more than minor adverse effects' and pass the 104D(1)(a) test (without need to further reference the policy gateway test).

90. Because the majority of the resource consents which I understand Ms Barton to rely on were actually processed under the NV POP as non-complying activities, I

⁴⁴ Barton EIC page 19.

do not think that the examples provided support the conclusion that a discretionary activity status of the DV POP is achieving a better outcome than a non-complying activity status did or would. The non-complying activity status does not appear to have been a barrier to the identification of habitat types, adverse effects or mitigation mechanisms that Ms Barton refers to.

91. In relation to Ms Bartons b), I agree that on-site discussion about plan provisions is good practice and that where activities can be re-sited to avoid adverse impacts on an identified habitat that is a good outcome. However I am unsure exactly what role Ms Barton feels that discretionary activity status has had to play in this outcome. In my view that same outcome could also be achieved with non-complying activity status, and in fact the deterrent effect I discuss above would actually aid in this outcome.
92. Ms Barton states in relation to her c) that consents for scrub clearance (as she describes the activity) are granted under another rule stream. I agree, but again, I am unsure how this is an argument for retention of discretionary activity status over non-complying for activities affecting rare habitats and threatened habitats. As Ms Barton acknowledges, the resource consents are being granted under rules developed for fulfilling another regional council function (soil conservation⁴⁵), so the relevance of these consents is doubtful. I am unsure what argument Ms Barton is making here.

2.4.2.7 Bundling

93. Ms Barton identifies in her paragraph g) on page 22 of her evidence that one of the 'planning rationales' for not considering a non-complying activity status appropriate is the risk that the larger proposal (of which the non-complying application is part) are 'bundled' into the non-complying activity status. This argument warrants further examination.
94. The bundling principle is not stated in the Act but has been developed by the Courts. I understand the principle has developed following the decision in *Locke v Avon Motor Lodge*.⁴⁶

⁴⁵ Under s 30(1)(c)(i) and as a related consequence, the function to maintain and enhance water quality under 30(1)(c)(ii).

⁴⁶ (1973) 5 NZTPA 17 (SC).

95. Ms Barton considers “*there is an appreciable risk the application of the bundling principle will have unintended and undesirable consequences from a planning administration perspective and in achieving the RMA’s overall purpose*”. Ms Barton does not elaborate on what these undesirable consequences might be. However in the memorandum filed by Counsel for the Respondent on biodiversity⁴⁷ it is noted that bundling “*may create unnecessary impediments to the assessment of projects that otherwise merit full discretionary consideration under section 104 under Part II and national policy statements*”.

96. As I have outlined, non-complying status implements a gateway test through which an application must pass in order for its merits to be fully considered or evaluated. Whether this is called an ‘impediment’, it is correct that this is a stricter test as compared to other categories of resource consent. If the relief sought by WFGC and MoC is accepted, this stricter test would apply at least to the *part of a broader proposal which affects a rare and threatened habitat*. I consider this is warranted. Whether that test would also apply to the remainder of the proposal would depend on whether the part of the proposal affecting a rare habitat or threatened habitat overlapped, or had consequential flow-on effects, with the other parts of the proposal. This would be determined on a case-by-case basis, which I consider to be the appropriate outcome.

97. That is, the question of whether a project or proposal merits full discretionary consideration under section 104 and Part II of the Act must be considered on a case-by-case basis. Part of this consideration will involve whether parts of the proposal can be considered discretely as a non-complying activity (such as those parts which touch on a rare or a threatened habitat), or whether such parts of the proposal are overlapping, in which case a holistic approach is warranted and the entire proposal may need to be considered as a non-complying activity.

2.4.2.8 Ability for a proposal to be considered on its merits

98. The other part of the consideration of whether a project merits full consideration under section 104 and Part II will be assessment of that proposal against the gateway tests. Unlike prohibited activity status, the tests still allows for a degree

⁴⁷ Respondent’s Memorandum Relating to case management of Unresolved Appeal Points on the Topic of Biodiversity dated 23 November 2011.

of flexibility, allowing for developments which are innovative, or sensitively-conceived. In my view, appropriate policy in the One Plan to recognise situations where adverse effects should be weighed carefully against the benefits of an activity will be sufficient to 'open' the 104D gateway and allow justifiable applications to be considered on their merits. For Policy 12-5 (*"Consent decision-making for activities in rare habitats, threatened habitats and at-risk habitats"*) I recommend wording which would allow for benefits to be assessed and for appropriate avoid, remedy and mitigate options to be considered in a methodical way. The offset provisions of the policy also potentially open a policy gateway for a well thought through application. In my view appropriate policy 'gateways' built into the plan for appropriate circumstances is preferable to lowering the activity status across the board.

99. I do not consider non-complying status effectively prohibits an activity, but rather that in the appropriate circumstances proposals could be designed so as to 'open' one of the section 104D gateway tests, either by virtue of effects being minor, or where a well-balanced proposal is developed in such a way that it is not contrary to Policy 12-5.

2.4.2.9 Conclusion on appropriate activity status

100. The ecological evidence is that the Manawatu-Wanganui Region now only has 23% of its original vegetation cover remaining⁴⁸ and 2.6% of its wetland habitat⁴⁹. There has been a disproportionate loss to habitats in the Region's lower lying and coastal areas, where areas most suited to productive land uses have experienced the most severe extent of loss⁵⁰. Ms Hawcroft states that these lower lying areas have high species richness compared to upland communities, therefore the disproportionate loss of these habitats has made a large number of species vulnerable to extinction.⁵¹ Remaining habitat is small, fragmented and under pressure from pests and human disturbance.⁵² It is my understanding that the habitats identified in Schedule E are vulnerable, and that further loss or damage to these areas may cumulatively result in their loss from the Region.

⁴⁸ Hawcroft evidence paragraph 16.

⁴⁹ Gerbeaux evidence paragraph 28.

⁵⁰ Maseyk Key Message 2 on page 27 *Section 42A Report on behalf of Horizons Regional Council concerning Indigenous Biological Diversity*; Hawcroft paragraphs 16-19.

⁵¹ Hawcroft paragraph 20.

⁵² Ms Hawcroft evidence Part 4.2 and *Section 42A Report of Fleur Maseyk on behalf of Horizons Regional Council concerning Indigenous Biological Diversity* Part 6.

Further, activities within these habitats have a high likelihood of causing significant adverse effects on the habitats and that even very small losses of such habitat may have disproportionately negative effects, including impacting on species' ability to survive.⁵³

101. Rare habitats and threatened habitats as identified in Schedule E meet the current technical understanding of what constitutes a significant habitat in terms of section 6(c) of the Act. Therefore they must be protected as a matter of national importance. Section 7(d) of the Act requires us to have regard to the “*intrinsic values of ecosystems*”. In addition to their *intrinsic* values, Ms Hawcroft and Dr Gerbeaux explain the important *tangible* values that ecosystems provide.⁵⁴ Section 7(e) of the Act refers to “*any finite characteristics of natural and physical resources*”. It is clear that within this Region the habitats described in Schedule E are finite resources, and indeed some such habitats represent finite resources not only to the Region but nationally⁵⁵.

102. In section 2.3 I have set out the relevant national instruments and national guidance relating to indigenous biodiversity and concluded that those instruments also provide strong direction to ensure that these habitats are protected, and that adverse effects are avoided as much as possible. This includes the operative New Zealand Coastal Policy Statement, and in particular Policy 11 which requires the management response of *avoidance* in relation to rare and threatened habitats in the coastal environment.

103. Rare habitats and threatened habitats contribute to the biodiversity of the Manawatu-Wanganui Region and so maintaining them is necessary to fulfil Horizons function under section 30(1)(ga) of the Act. “*Maintenance*” of these habitats cannot be achieved if any more than minor further losses of their area and extent occur. In this respect, it is relevant that losses to habitat not only affect the immediate geographical area, but also have ‘flow-on’ effects through fragmentation of biodiversity across the landscape - including exposing

⁵³ Hawcroft paragraphs 56, 59 and 132-133 and *Section 42A Report of Fleur Maseyk on behalf of Horizons Regional Council concerning Indigenous Biological Diversity* paragraph 98.

⁵⁴ Ms Hawcroft's EIC section 2.3 and Mr Gerbeaux paragraphs 22-24.

⁵⁵ Some habitats on private land in the Region are nationally significant including lowland forest remnants, wetlands, dune ecosystems and some karst ecosystems (Hawcroft paragraph 10). The Region is a stronghold for certain threatened species (Hawcroft paragraph 13).

remaining habitat to pests and weed invasion and potentially reducing buffering and connectivity values.⁵⁶

104. This high level of vulnerability of remaining biodiversity in the Region, and need for protection of significant habitats, is reflected in the Objectives and Policies of the One Plan. I believe the Objectives of the RPS and RP reflect the matters set out above, and appropriately achieve the purpose of the Act.
105. Objective 12-2 Regional Plan is to regulate activities in order to “*protect areas of significant indigenous vegetation and significant habitats of indigenous fauna or to maintain indigenous biological diversity, including enhancement where appropriate*” (emphasis added). This is very similar to the relevant objective in the Regional Policy Statement (Objective 7-1). The policies implementing this Objective (particularly with the changes I recommend) also establish a strong and prescriptive policy direction.
106. Further, as I set out in section 2.4.2.2, the plan itself gives a strong direction in Policy 11A-1 as to the activity status that must be adopted to avoid unnecessary costs and give effect to the RPS.⁵⁷ In my view the guidelines for adopting non-complying activity status set out in this Policy are applicable in this instance. As I discuss above, this Policy creates a useful signal to applicants. The ‘deterrent effect’ of a non-complying activity will reduce time and costs in considering ill thought out applications.
107. In my view, a non-complying activity status is the most effective and efficient regulatory method to achieve these Objectives. As I set out in more detail in section 2.4.2.3 above, in any decision-making process for a discretionary activity, Objective 12-2 will be of uncertain weight. The decision-maker need only ‘turn its mind’ to this Objective and associated policies. In contrast, Objective 12-2 and implementing policies would occupy a position of importance in an application for activities in rare habitats and threatened habitats if they are considered as a non-complying activity.

⁵⁶ Part 4.2 of Ms Hawcroft's evidence.

⁵⁷ Referring to Objective 11A-1.

108. Because the objectives and policies in this case are so clear, so directive and so clearly setting up a framework to deter all but the most well balanced of applications, then in my view a non-complying activity status is more appropriate than the more 'open minded' approach of a discretionary activity.

109. I have taken into account the potential costs associated with a non-complying activity status raised by other parties to this appeal. I have dealt in detail with bundling in section 2.4.2.7. I believe that there are reasonable 'policy gateways' in my recommended Policy 12-5 such that the merits of a well-designed proposal could in the appropriate circumstances be considered. The wording I recommend for clause (a)(v) of the Policy contributes to this by directing the decision-maker to recognise benefits of electricity transmission and renewable energy proposals, consistent with the NPS's on these matters.

110. I do not find the argument that discretionary activity status allows for better outcomes through conversations with applicants outside of the consent process (as indicated by Ms Barton) persuasive. I believe those same conversations and outcomes can be achieved more effectively and efficiently with a non-complying activity.

111. In my view, for the reasons set out above, the non-complying activity status will be more effective in achieving the objectives of the Regional Plan and achieving and implementing the relevant policies. I also believe it would be more efficient.

112. I have recommended wording for a non-complying activity in Appendix 1.

2.4.3 Key Issue 3 - That the DV POP does not provide sufficient guidance to decision-makers on the use of offsets in making decisions on resource consents.

113. The MoC's appeal sought strengthening of the reference to biodiversity offsets in the plan to better reflect international best practice about offsets.

114. The biodiversity experts agreed at technical caucusing that the Business and Biodiversity Offsets Programme ("BBOP") principles are the appropriate tool to

guide the consideration of offsets. Mr Clubb has provided evidence on the BBOP definition and principles.

115. I agree with Ms Bartons conclusion (para 65) that the Policy would benefit from amendments to clarify the mitigation hierarchy and guide the appropriate application of offsets consistent with the BBOP principles. However I do not agree that the changes to Policy 12-5 that she proposes would achieve the proper reflection of the mitigation hierarchy. I discuss this in more detail in my more detailed analysis of Policy 12-5 below.

2.4.4 Key Issue 4 - Should sites of rare habitat, threatened habitat and at-risk habitat be identified on maps in the POP?

116. I agree with Ms Bartons conclusion (para 74) that the use of habitat descriptions as contained in Schedule E is a more effective and efficient method for identifying rare habitats, threatened habitats and at risk habitats than mapping.

2.5 Provisions of the Proposed One Plan

117. I will now go through each of the provisions of the One Plan that relate to the biodiversity topic of this hearing. I will comment on the decisions version of those provisions, what has been proposed by Horizons in response to appeals and the alternatives put forward by MoC and WFGC. I will make a recommendation on wording changes where I believe that is necessary to better achieve the purpose of the Act and meet the statutory tests identified in section 2.1 above.

2.5.1 Objective 7-1 Indigenous biological diversity

118. As I have stated previously, Objective 7-1 sits in Part I – the RPS component of the One Plan and is the only objective in the RPS that refers to the outcomes sought in relation to managing indigenous biological diversity. The decisions version of this objective reads:

“Protect areas of significant indigenous significant habitats of indigenous fauna and maintain indigenous biological diversity⁵⁸, including enhancement where appropriate.”

119. I am not aware of any outstanding appeals on this objective. I will refer to this objective when analysing the other policies and methods of the RPS and consider it ‘settled’ for that purpose.

2.5.2 Policy 7-1 Responsibilities for maintaining indigenous biological diversity

120. Policy 7-1 sets out the local authority responsibilities for controlling land use for the shared function of ‘maintaining indigenous biological diversity’, as required by s62(1)(i) of the Act. It identifies the Regional Council as having primary responsibility for writing plan provisions to maintain indigenous biological diversity and for controlling the use of land to protect significant habitats and maintain indigenous biological diversity. The Court has made a preliminary decision on the power of Horizons to make rules for the control of land use for biodiversity purposes.⁵⁸ Key issue 1 affects this Policy. As I have stated when discussing Key issue 1, I agree with Ms Barton that managing biodiversity at the regional level is appropriate in the context of this Region.

2.5.3 Policy 7-2A Regulation of activities affecting indigenous biological diversity

121. Policy 7-2A is the only policy in the RPS section of the One Plan that provides guidance on the management of activities in rare habitats, threatened habitats and at-risk habitats. This policy will guide the provisions of the Regional Plan section of the One Plan (Part II), and (where relevant, given the allocation of responsibilities in Policy 7-1) district plans must also give effect to this policy direction. This policy and the policies that follow relating to the management of the habitats and pest animals and plants (Policies 7-4, 7-5 and 7-6) must work together to achieve Objective 7-1.

⁵⁸ Decision No [2011] NZEnvC 403; 21 December 2011.

122. According to the reasons for their decisions⁵⁹ the Regional Council's Hearing Panel intended for this policy to do four things:

- a) set out the approach to determining significance of identified habitats;
- b) 'deal with' activities that will need resource consent;
- c) minimise potential adverse effects; and
- d) contain guidance about certain activities being allowed or not unreasonably restricted.

123. In my view, these are appropriate matters for this policy to deal with, however I would modify the concept I have identified as c) above to identify 'how potential adverse effects on the identified habitats should be managed.'

124. I do not agree that these goals have been appropriately achieved in the decisions version of Policy 7-2A. I will deal with each of the policy 'goals' identified in a) – d) above and set out the changes I believe are necessary in order to appropriately achieve the objective in the context of this policy. WGFC's relief requested on this Policy is to reinstate the original policies 7-2 and 7-3 as notified, including reinstating policy direction specific to the level of protection required for rare and threatened habitat types as distinct from at-risk habitat types. Matters a) – d) are all relevant to the relief requested in this appeal.

2.5.3.1 (a) the approach to determining significance of identified habitats.

125. The decisions version of Policy 7-2A does contain an approach to determining the significance of habitats, dealing with rare habitats and threatened habitats at 7-2A(a) and at risk habitats at 7-2A(b). However in my view the approach does not appropriately reflect the ecological evidence. I will deal first with rare habitats and threatened habitats in 7-2A(a).

126. Ms Hawcroft's⁶⁰ and Ms Maseyk's evidence⁶¹ is that all habitats identified as rare and threatened in Schedule E of the One Plan (and which are not excluded by Table E.2) satisfy the current understanding of being areas of significant

⁵⁹ 5.5.3.7 Volume 1 Part 5 of the Council Hearings Panel decisions.

⁶⁰ Hawcroft EIC paragraph 91 - 92.

⁶¹ Maseyk section 42A Report on behalf of Horizons Regional Council Table 8 pages 43-44.

indigenous vegetation and significant habitats of indigenous fauna.⁶² My understanding of the evidence and the outcome of the conferencing of ecological experts is that no 'site specific assessment' is required to determine the significance of these habitats as described in Schedule E, and in any event no site assessment would determine that the criteria are not satisfied. Therefore in my view the words "*unless site specific assessments determine otherwise*" should be removed from this Policy. I understand this deletion was agreed during expert conferencing.

127. Ms Hawcroft does state in her evidence that some identified habitat types identified as rare in Schedule E may, following further research, be found not to be originally uncommon or rare in New Zealand (my understanding is that 'rarity' in this context is based on originally comprising less than 0.5% of the landscape)⁶³. She considers that, if it is not considered that there is sufficient certainty that these habitats were naturally uncommon in New Zealand, Horizons may wish to change the following habitat-types from the rare to the at-risk categories: *Screes and boulderfields* and *Cliffs, scarps and tors*. However the current state of knowledge *is* that these habitats were originally uncommon.

128. DV POP Policy 7-2A b) sets out the approach to determining significance in relation to at risk habitats:

"At-risk habitats require site*-specific assessments to determine their ecological significance."*

129. My understanding of the technical evidence⁶⁴ is that at-risk habitats may be significant, but there is a lower level of confidence in this than for rare habitats or threatened habitats. The habitats must be specifically assessed in order to determine if they are significant.

130. It is also my understanding that the criteria by which significance is to be determined has been agreed by the technical experts to be that set out in Policy

⁶² Referring to the criteria for significance in Policy 12-6, rare habitats would satisfy the current understanding of "*originally ... uncommon within New Zealand, and supports an indigenous species or community of indigenous species*" and threatened habitats would generally meet the current understanding of "*comprises indigenous habitat type that is under-represented (20% or less of known or likely former cover)*".

⁶³ Hawcroft EIC paragraphs 102 – 107.

⁶⁴ For example Hawcroft EIC paragraph 109.

12-6. In the interests of certainty, Policy 7-2A(b) would benefit from reference to that specific criteria, and I recommend wording in my Appendix 1 – Recommended Track Changes versions of provisions.

2.5.3.2 (b) ‘dealing with’ activities that will need resource consent

131. The decisions version of Policy 7-2A identifies at (c) which activities within the identified habitats will require resource consent. In my view the incomplete list and then broad reference in this clause to “*certain other resource use activities*” is vague and uncertain. This wording potentially leaves it open for it to be argued that some resource use activities do not have to meet the goals of this policy⁶⁵. I have recommended alternative simplified wording in my Appendix 1.

132. Also, under the NV POP Policy 7-2A(c) currently does not identify what outcome is sought through the management of activities. It can be inferred by the reference to ‘significance’ that the outcome sought is to *protect* rare, threatened and significant at-risk habitats. However there is no guidance as to what outcome is sought by the regulation of activities in at-risk habitats that are *not* found to be significant. For these habitats, Objective 7-1 directs us to “*maintain indigenous biological diversity ^, including enhancement where appropriate.*” In order to effectively and efficiently achieve the Objective I believe it is appropriate to give guidance as to the outcome sought explicitly in this policy. Changes I have recommended to Policy 7-2A(c) achieve this. I have also recommended a consequential change to the heading of the Policy.

133. These recommended changes appropriately return the Policy to reflect a ‘two-tiered’ approach to management of activities in significant and non-significant habitats.

2.5.3.3 (c) minimising potential adverse effects

134. The DV POP of this policy only dealt with adverse effects in clause (d), and then only in relation to forestry. In my view this is a major gap in the policy, which should provide guidance on how adverse effects are to be dealt with. I

⁶⁵ Such as discharges of contaminants to land or water, or drainage or diversion of water – activities that were explicitly mentioned in the notified version of Policies 7-2 and 7-3.

believe the changes I have recommended to clause (c) discussed above remedy this deficiency.

135. However, leaving clause d) as it is in the decisions version potentially sets up a different regime for dealing with adverse effects on the identified habitats caused by forestry operations than for adverse effects caused by other activities. I am not aware of any technical evidence to suggest it is ecologically appropriate to manage forestry activities differently to those of other activities in relation to effects on habitats. However this doesn't appear to be in contention, and I am aware that the definition for vegetation clearance specifically excludes commercial forestry, and that forestry rules which will deal with the adverse effects of forestry are being dealt with at another hearing. However, leaving my high level reservations to one side, I believe that some minor wording changes are required to make the policy clearer. Habitats identified as rare habitats, threatened habitats and at-risk habitats may be found within or *adjacent to* areas of commercial forestry. It is appropriate that the policy reflect this, and my recommended wording would add the words "*adjacent to*".

2.5.3.4 (d) contain guidance about certain activities being allowed or not unreasonably restricted.

136. I agree that it is appropriate for this policy to set out some criteria where activities that would otherwise be restricted are expressly allowed. This would appropriately reflect the 'balancing' provisions of section 5 of the Act. I believe it is possible and desirable to do this rather than leave this assessment solely to the broad overall judgement required under section 5. The decisions version of the policy contains clause (e) which sets out direction on this topic.

137. Ms Barton's has recommended that sub-clause (ii) be altered to replace the word "allow" with the word "consider". I agree that the word "allow" in relation to biodiversity offsets is inappropriate. I do not believe that it is appropriate to require (as the wording "must allow" indicates) the decision maker to allow mitigation off-sets in this context – they do require a case-by-case assessment and may not always be appropriate in the circumstances mentioned in the Policy.

138. In addition, the technical caucusing of biodiversity experts⁶⁶ agreed that the use of the term 'biodiversity offsets' should be consistent with the definition and principles contained in the BBOP. The current reference to offsets is not defined in this way, and a future decision maker could interpret the concept of offsets in a way which is not consistent with the BBOP principles. I believe it is appropriate to provide more guidance on the appropriate application of offsets.

139. The term offsets could be defined in policy or in the glossary. I have recommended changes to Policy 12-5 which would clarify the way in which offsets should be used when considering resource consent applications. This is the most appropriate place for the clarification. Rather than repeat those matters in this higher level (RPS) policy, I recommend reference to offsets in Policy 7-2A be removed entirely in order to avoid any possible future mis-interpretation.

140. I also agree in principle with Ms Barton that it is appropriate to allow the operation of existing structures as well as their maintenance and upgrade. However I note that the definition of operation in the DV POP "*means the use of any structure^, system, facility or installation, including ancillary resource use.*" "*Ancillary resource use*" may include the taking of water from or discharging of a contaminant to a habitat. In my view it is not appropriate to always allow these activities. I understand that this was discussed at mediation and that the outcome recorded⁶⁷ was to add the qualifying phrase after the DV POP definition:

"For the purposes of Chapter 3 only, 'ancillary resource use' in this definition excludes the discharge of contaminants and the abstraction of water. This exclusion does not apply to ancillary resource use for the purposes of renewable electricity generation or which is permitted by a rule."

141. I also understand that it was agreed by some parties that the qualification to the definition of 'operation' would include Chapter 7 but that this was subject to the expression of view by other parties to the biodiversity provisions.

142. In my opinion that is appropriate and would ameliorate the issue I have identified above. I am not sure if that definition is the subject of this hearing, but I

⁶⁶ Memorandum regarding record of Technical Conferencing on Monday 30 January 2012 on Biodiversity.

⁶⁷ Memorandum IE1 regarding Mediation Agreement on Appeal Concerning Objective 3-1, Policies 3-1 and 3-3 and the Tern 'Operation' dated 15 August 2011.

have included recommended wording in my Appendix 1 in accordance with the discussion above and the mediation agreement.

143. Clause (ii) states that when regulating activities the Regional Council and territorial authorities must “*not unreasonably restrict the existing use of production land*”. Both MoC and WFGC seek the removal of this clause. Ms Barton considers it reasonable to give consideration to the existing use of production land. I do not necessarily disagree with that sentiment, but I do not think that is what this clause achieves.

144. I consider the clause as currently worded to be vague and to be capable of numerous different interpretations. Because of this it does not give clear direction to decision makers and may lead to situations where the Objective is not achieved.

145. In relation to production land, the rules in the Regional Plan do not restrict grazing of significant habitats. The definitions of “Vegetation clearance ” and “Land disturbance” contain a number of exclusions to allow reasonable farming activities to continue to occur – including “*clearance or disturbance by animals including grazing*”; “*the maintenance or upgrade of existing tracks, structures (including fences), or infrastructure*” and “*maintaining shelterbelts (including cutting of shelterbelt roots)*”. If parties to these appeals are concerned that the rules place an undue burden on their existing activities then it would be appropriate for them to identify those specific areas so that the plan provisions could be reviewed to address those specific concerns. It may be appropriate for these concerns to also be addressed in Policy 7-2A in some way however, without more specificity, the provision remains ambiguous and potentially open to abuse.

2.5.4 Objective 12-2

146. This objective is the only objective in the Regional Plan section dealing specifically with terrestrial biodiversity. I understand its substance is not in contention in these proceedings.

Objective 12-2: Regulation of activities affecting indigenous biological diversity[^]

The regulation of vegetation clearance, land disturbance*, forestry* and cultivation* and certain other resource use activities to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna or to maintain indigenous biological diversity[^], including enhancement where appropriate.*

147. I recommend what I consider to be a consequential change to this objective in order to make it consistent with my recommended changes for Policy 7-2A. This is to remove the generic references to “*certain other resource use activities*”. This is contained in my recommended track changes in Appendix 1.

2.5.5 Policy 12-5A

148. I am not aware that Policy 12-5A is in contention. However as a consequential change to my recommended changes to Policy 7-2A (and Objective 12-2), I recommend some changes to remove reference to “*certain other resource use activities*” and replace that phrase with more accurate wording. This is shown in Appendix 1.

149. I also note that this Policy requires regulation to be in accordance with the Objectives and Policies in Chapter 11A, including Objective 11A-1 and Policies 11A-1 and 11A-2 as I set out above.

2.5.6 Policy 12-5

150. Policy 12-5 is the main policy in Chapter 12 which guides decision makers in making decisions for activities that require resource consent.
151. In a table in Appendix 3 I have analysed the changes proposed by Ms Barton and the changes requested by MoC and WFGC and made a recommendation as to the most appropriate form for the policy to take. My recommended changes are in two main areas. First is the appropriate incorporation of a mitigation hierarchy where adverse effects are first sought to be avoided, then remediation and mitigation are considered. Secondly, I recommended changes to appropriately reflect the best practice approach to biodiversity offsets contained

in the BBOP principles, as set out in Mr Clubb's evidence. I will discuss these two types of changes in more detail below. The reasons for all other changes recommended to Policy 12-5 are set out in the last column of the table. My recommended Policy 12-5 is also set out in my Appendix 1.

2.5.6.1 Mitigation hierarchy

152. As I have said, the Objectives in both the Regional Plan (Objective 12-2) and RPS (Objective 7-1) both set a direction of *protection* of significant habitats, reflecting the direction in section 6(c) of the Act.

153. Rare habitats and threatened habitats are acknowledged as being significant in Policy 7-2A, so in order to achieve the Objectives, it is appropriate for this policy to direct decision makers in a protective direction.

154. In my view a mitigation hierarchy is an appropriate way to provide for protection of significant areas, and achieve the purpose of the Act. It provides clear direction that first everything than can practically be done to *avoid* an adverse effect should be done. Avoidance may include consideration of altering design, methodology, geographical areas or footprints. Only after this exercise has been carried out should the lower-level responses of mitigation and remediation be considered. I do not oppose the words "*as far as reasonably practicable*" in the Policy qualifying the word "*avoidance*", however I consider those additional words must be defined in order to provide sufficient certainty as to what is required. I have recommended a definition in my Appendix 3.

155. The DV POP Policy 12-5(b) arguably⁶⁸ does set out a mitigation hierarchy for dealing with any more than minor adverse effects on rare habitats and threatened habitats. The changes proposed by Ms Barton to Policy 12-5(b) seem to move the policy further away from imposing a mitigation hierarchy. In

⁶⁸ I say arguably because in my view the policy could be read in either of two ways. First, that more than minor adverse effects should be avoided as far as reasonably practicable and after that test has been satisfied mitigation or remediation can be considered. Secondly it could be read that effects should be avoided as far as reasonably practicable or they could be mitigated or remedied. From reading the Hearing Panel's decision I believe they did not intend for the 'or' interpretation to apply, as they specifically sought to include more guidance than the 'avoid, remedy, mitigate', "*as better guidance should be given about what is expected.*" (Decisions on submissions, Volume 1: Reasons for Decisions, Part 5 Biodiversity and Heritage Hearing, page 5-36)

my view this is inappropriate, and the inclusion of a mitigation hierarchy (albeit in a modified form to that in the DV POP policy as I discuss in Appendix 3) is a more effective way of achieving the protection objective for significant habitats.

156. Policy 12-5(c) sets out a clear mitigation hierarchy for significant adverse effects on habitats not assessed to be significant. I believe this is appropriate and should be retained, with the changes I recommend in Appendix 3.
157. For activities that occur in identified habitats in the *coastal environment*, the hierarchy of management actions proposed for Policy 12-5(b) and (c) appropriately gives effect to the NZCPS, Policy 11. Without this hierarchy, which requires an initial response of *avoidance* before other lower-level responses are considered, I do not believe that Policies 12-5(b) or (c) would give effect to Policy 11 of the NZCPS 2010. I also note that Policy 5 of the PNPSIB seeks to ensure no net loss of biodiversity of significant areas by imposing a mitigation hierarchy, which also includes offsets (although I have acknowledged this national policy statement is not yet operative).
158. Clauses (b) and (c) of Policy 12-5 also refer to the consideration of biodiversity offsets to deal with effects that are not avoided, remedied or mitigated. The best practice principles of biodiversity offset set out in the BBOP documents and discussed in Mr Clubb's evidence. Principle 3 is that an offset should only be considered after applying a mitigation hierarchy. The international terminology used is different to that contained in the Act, however the principle of 'first seek to avoid' is clear. I discuss the issue of offsets in more detail in my next section, and I believe it is appropriate for this Policy to apply the best practice principles of offsetting, including the imposition of a mitigation hierarchy.

2.5.6.2 Offsets

159. As stated, the record of caucusing of biodiversity experts⁶⁹ sets out as agreed that 'biodiversity offsets' should be consistent with the definition and principles of the BBOP. The experts did not agree on the appropriate application of these

⁶⁹ "Record of technical conference on biodiversity in accordance with Environment Court Practice Note 2006 and Minute of Environment Court Dated 18 May 2001", Dated 30 January 2012

principles in the plan framework however. Mr Clubb's evidence sets out the BBOP principles. I have assessed those principles and the changes sought by MoC and provided for them within an amended version of this policy, as set out in Appendix 3 and Appendix 1.

160. My recommendations on this policy largely agree with those of Ms Barton, but differ in two aspects. First, I have recommended inclusion of sub-clause (d)(vi) which is not included in Ms Barton's version, and which expresses BBOP Principle 2 ("*achieve conservation outcomes above and beyond which would have been achieved if the offset had not taken place*"). This is sometimes referred to the principle of 'additionality'. Secondly, I have recommended more directive wording for the policy. In order to achieve the Objective of the maintenance of indigenous biological diversity, it is important that offsets are carefully applied. It is agreed by the biodiversity experts that the BBOP principles reflect the careful consideration necessary to ensure biodiversity maintenance. In my view it is more appropriate to give clear direction to decision makers on this subject, than to give as much discretion as Ms Barton's wording "*have regard to...desirability of*" allows. This comment applies particularly to the principle that a biodiversity offsets not be allowed where it is inappropriate for the ecosystem or habitat type by reason of its *rarity, vulnerability or irreplaceability*. As illustrated in Dr Gerbeaux's evidence⁷⁰, there are certain ecosystem or habitat types where offsets will *not* be appropriate. Given the importance of these ecosystems and habitats, and following BBOP Principle 4, there should be clear direction within the Policy regarding these limitations.

2.5.6.3 Effects not subject to the policy

161. I note here that not all adverse effects must be considered under the mitigation hierarchy and offset principles described above. These parts of the policy only apply to "more than minor" effects on significant habitats⁷¹, and to "significant" adverse effects on at-risk habitats not assessed to be significant.

⁷⁰ Gerbeaux EIC paragraphs 57 and 58.

⁷¹ That is, all rare habitats and all threatened habitats and any at-risk habitat that meets criteria for assessing significance in Policy 12-6.

162. This means that for significant habitats, effects that are less than minor are not subject to Policy 12-5, and fall to be considered under the general 'avoid, remedy or mitigation' provisions of the Act. For at-risk habitats that are not significant, all effects that are less than significant fall outside the Policy, and are also considered under the general 'avoid, remedy or mitigation' provisions of the Act.

163. Flexibility is provided for in relation to those effects which are outside those dealt with in Policy 12-5. Conversely, little flexibility is provided for significant effects, or effects on significant habitats - these must be managed in a way consistent with the mitigation hierarchy and the BBOP principles as reflected in the Policy. I believe this provides an appropriate mix of flexibility and certainty.

2.5.7 Policy 12-6

164. As I have discussed above in the context of my comments on Policy 7-2A, it is my understanding that the ecology experts are in agreement that rare habitats and threatened habitats are determined to be significant without the need to complete a further significance assessment. On this basis the experts have agreed to the change to Policy 7-2A(a) as described above (and in my Appendix 1). This requires a consequential change to Policy 12-6(a). My recommended wording is set out in Appendix 1. I also show other changes to the wording to Policy 12-6(a)(i) agreed as a result of expert caucusing, which I agree are appropriate.

2.5.8 Agreed changes to Rules

165. The MoC appeal sought inclusion of exemption to the rule(s) controlling activities in the identified habitats for:

*"(i) Activities carried out for the purposes of controlling pests pursuant to a Pest Management Strategy prepared under the Biosecurity Act 1993; and
(ii) Activities carried out for the purpose of protecting or enhancing the habitat."*

166. These activities were exempted in the NV POP of Rules 12-7 (at risk habitats) and 12-8 (rare and threatened habitats). It is not clear from the Hearing Panel's reasons for their decision why these exceptions were removed.

167. Re-inclusion of these exemptions was discussed and agreed at mediation⁷², however the mediation agreement does not provide track changes. Ms Barton recommends different wording from that sought by MoC. She states that this wording is consistent with the agreed wording in mediation for the Air Topic.
168. The changes recommended by Ms Barton would only allow the identified activities if they are for the purpose of pest control. They would not allow other activities undertaken for the purpose of protecting or enhancing the habitat such as planting trees, or clearing vegetation to create open habitat for a particularly vulnerable species. This would not appropriately give effect to Policy 7-2A (e)(i) *“allow activities undertaken for the purpose of pest plant and pest animal control or habitat maintenance or enhancement”*.
169. While consistency between similar provisions throughout the One Plan is certainly desirable, in my view the exemptions for activities in the Air Chapter and the Biodiversity Chapter are dealing with different activities and it is appropriate to have different wording. I recommend slightly revised wording in my recommended provisions in Appendix 1.

2.5.9 Rule 12-6

170. Rule 12-6 in the DV POP is a discretionary activity rule dealing with activities within rare habitats, threatened habitats and at-risk habitats. Appeals by MoC and WFGC seek to have activities in rare habitats and threatened habitats removed from this rule and dealt with as a new non-complying rule.
171. As I have set out in my evidence, I believe that a non-complying activity status for activities in rare habitats and threatened habitats is appropriate. I therefore recommend removing reference to those habitats in this rule.

2.5.10 Rule 12-7

172. The appropriate activity status for activities in rare habitats and threatened habitats is one of the primary issues in contention. I have addressed the relative

⁷² Paragraph 9 Memorandum Regarding Mediation Agreement, 17 June 2011, TB 4.

merits of non-complying activity status versus discretionary activity status in my evidence under the heading “Key issue 2”.

173. In my view, for the reasons I have set out, the non-complying activity status will be more effective and efficient at achieving the objectives, and achieving and implementing the policies, of the One Plan.

174. I have recommended wording for a non-complying activity in Appendix 1.

2.6 Appendices

2.6.1 Appendix 1 – Recommended Track Changes versions of provisions

Policy 7-2A: Regulation Management of activities affecting indigenous biological diversity[^]

For the purpose of managing indigenous biological diversity[^] in the Region:

- (a) Habitats determined as rare habitats* and threatened habitats* must be recognised as areas of significant indigenous vegetation and significant habitats of indigenous fauna ~~unless site*-specific assessments determine otherwise.~~
- (b) At-risk habitats* that are assessed to be significant under Policy 12-6 must be recognised as areas of significant indigenous vegetation and significant habitats of indigenous fauna ~~require site*-specific assessments to determine their ecological significance.~~
- (c) The Regional Council shall protect Rare habitats* and threatened habitats* and at risk* habitats identified in (b) and maintain and enhance other at-Risk Habitats* by regulating the activities through its regional plan and through decisions on resource consents.
~~Vegetation clearance*, land disturbance, cultivation and certain other resource use activities within rare habitats, threatened habitats and at risk habitats must obtain a resource consent.~~
- (d) Potential adverse effects[^] on any rare habitat*, threatened habitat* or at risk habitat* located within or adjacent to an area of forestry* must be minimised.
- (e) When regulating the activities described in (c) and (d), the Regional Council must, and when exercising functions and powers described in Policy 7-1, Territorial Authorities[^] must:
 - (i) allow activities undertaken for the purpose of pest plant and pest animal control or habitat maintenance or enhancement,
 - (ii) ~~allow indigenous biological diversity[^] mitigation offsets in appropriate circumstances, which may include the establishment~~
of infrastructure[^] and other physical resources of regional or national importance as identified in Policy 3-1,
 - (iii) allow the maintenance*, operation* and upgrade* of existing structures[^], including infrastructure[^] and other physical resources of regional or national importance as identified in Policy 3-1, and
 - (iv) ~~not unreasonably restrict the existing use of production land[^].~~

Objective 12-2: Regulation of activities affecting indigenous biological diversity[^]

The regulation of vegetation-clearance^{*}, land-disturbance^{*}, forestry^{*} and cultivation^{*} and certain other resource use activities to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna or to maintain indigenous *biological diversity[^]*, including enhancement where appropriate.

Policy 12-5A: Regional rules[^] for activities affecting indigenous biological diversity[^]

The Regional Council must require *resource consents[^]* to be obtained for vegetation clearance^{*}, land disturbance^{*}, and cultivation^{*}, bore^{*}, discharges of contaminants into or onto land or water, taking, use, damming or diversion of water and activities in the beds of rivers or lakes within rare habitats^{*}, threatened habitats^{*} and at-risk habitats^{*}, and for forestry^{*} that does not minimise potential adverse effects[^] on those habitats, through *regional rules[^]* in accordance with Objectives 11A-1, 11A-2 and 12-2 and Policies 11A-1 to 11A-8.

Policy 12-5: Consent decision-making for activities in rare habitats^{*}, threatened habitats^{*} and at-risk habitats^{*}

- (a) For activities regulated under Rule 12-6 and Rule 12-7, the Regional Council must make decisions on consent applications and set consent *conditions[^]* on a case-by-case basis, having regard to:
- (i) the Regional Policy Statement, particularly Objective 7-1 and Policy 7-2A,
 - (ii) the significance of the area of habitat, in terms of its representativeness, rarity and distinctiveness, and ecological context, as assessed under Policy 12-6,
 - (iii) the potential adverse effects[^] of the proposed activity on that significance, and
 - (iv) for activities regulated under ss13, 14 and 15 RMA, the matters set out in Policy 12-1(h) and relevant objectives and policies in Chapters 6, 13, 15 and 16, and
 - (v) for electricity transmission and renewable energy generation activities, any national, regional or local benefits arising from the proposed activity.

- (b) Consent must generally not be granted for ~~vegetation clearance*, land disturbance*, forestry* or cultivation* and certain other resource use activities in a rare habitat*, threatened habitat*, or at-risk habitat*~~ assessed to be an area of significant indigenous vegetation or a significant habitat of indigenous fauna, unless:
- (i) any more than minor adverse effects[^] on that habitat's representativeness, rarity and distinctiveness, or ecological context assessed under Policy 12-6 are avoided as far as reasonably practicable, ~~or otherwise remedied or mitigated, or~~
 - (ii) any more than minor adverse effects[^] which cannot reasonably be avoided, are remedied or mitigated within the area affected by the activity, or are offset to result in a net indigenous biological diversity[^] gain.
 - (iii) in appropriate circumstances, any more than minor adverse effects that cannot be avoided, remedied or mitigated within the area affected by the activity are offset, resulting in a net indigenous biological diversity gain.
- (c) Consent ~~must generally~~ may be granted for ~~vegetation clearance*, land disturbance*, forestry* or cultivation* and certain other resource use activities in an at-risk habitat*~~ assessed not to be an area of significant indigenous vegetation or a significant habitat of indigenous fauna when:
- (i) there will be no significant adverse effects[^] on that habitat's representativeness, rarity and distinctiveness, or ecological context as assessed in accordance with Policy 12-6, or
 - (ii) any significant adverse effects[^] are avoided, as far as reasonably practicable, ~~or otherwise remedied or mitigated, or~~
 - (iii) any significant adverse effects[^] which cannot reasonably be avoided, are remedied or mitigated within the area affected by the activity, or are offset to result in a net indigenous biological diversity[^] gain.
 - (iv) In appropriate circumstances, any significant adverse effects that cannot be avoided, remedied or mitigated within the area affected by the activity are offset, resulting in a net indigenous biological diversity gain.
- (d) When assessing An offset assessed in accordance with (b)(i-iii) or (c)(iii-iv), decision-makers must have regard to:
- (i) ~~the desirability of providing for a net indigenous biological diversity gain within the same habitat type, or where that habitat is not significant, provide for that gain in a rare habitat or threatened habitat type, and~~
 - (ii) ~~the desirability of providing for a net gain generally be in the same ecologically relevant locality as the affected habitat, and~~
 - (iii) ~~the appropriateness of establishing infrastructure[^] and other physical resources of regional or national importance as identified in Policy 3-1;~~
 - (iv) ~~not be allowed where inappropriate for the ecosystem or habitat type by reason of its rarity, vulnerability or irreplaceability, and~~
 - (v) ~~have a significant likelihood of being achieved and maintained in the long term and preferably in perpetuity, and~~

- (e)
 - (vi) achieve conservation outcomes above and beyond that which would have been achieved if the offset had not taken place. In the application of this policy:
 - (i) "appropriate circumstances" may include electricity transmission and renewable energy generation activities of national benefit.
 - (ii) "Reasonably practicable" requires consideration of the nature of the activity, the sensitivity of the receiving environment to adverse effects, possible alternative locations, designs or methods based on the current state of knowledge, the likelihood of successfully achieving avoidance, and financial implications.

Policy 12-6: Criteria for assessing the significance of, and the effects[^] of activities on, an area of habitat

- (a) One or more of the criteria below will contribute to the significance of an area of *rare habitat*^{*}, or *threatened habitat*^{*}. An area of *or-at-risk habitat*^{*} may be recognised as being an area of significant indigenous vegetation or a significant habitat of indigenous fauna if:
 - (i) in terms of representativeness, that habitat:
 - (A) comprises indigenous habitat type that is under-represented (20% or less of known or likely former cover), or
 - (B) is an area of indigenous vegetation typical of the habitat type in terms of species composition, structure and diversity, or that is large relative to other areas of the same habitat in the Ecological District or Ecological Region, with indigenous species composition, structure and diversity typical of the habitat type, and or has functioning ecosystem processes.
 - (C) ~~has functioning ecosystem processes.~~
 - or
 - (ii) in terms of rarity and distinctiveness, that habitat supports an indigenous species or community that:
 - (A) is classified as threatened (as determined by the *New Zealand Threat Classification System and Lists*^{*}), or
 - (B) is distinctive to the Region, or

- (C) is at a natural distributional limit, or
 - (D) has a naturally disjunct distribution that defines a floristic gap, or
 - (E) was originally (ie., prehuman) uncommon within New Zealand, and supports an indigenous species or community of indigenous species.
- or
- (iii) in terms of ecological context, that habitat provides:
 - (A) connectivity (physical or process connections) between two or more areas of indigenous habitat, or
 - (B) an ecological buffer (provides protection) to an adjacent area of indigenous habitat (terrestrial or aquatic) that is ecologically significant, or
 - (C) part of an indigenous ecological sequence or connectivity between different habitat types across a gradient (eg., altitudinal or hydrological), or
 - (D) important breeding areas, seasonal food sources, or an important component of a migration path for indigenous species, or
 - (E) habitat for indigenous species that are dependent on large and contiguous habitats.
- (b) The potential adverse effects^a of *vegetation-clearance**, *land-disturbance**, *forestry** or *cultivation**—an activity on a rare habitat*, *threatened habitat** or *at-risk habitat** must be determined by the degree to which the proposed activity will diminish any of the above characteristics of the habitat that make it significant, while also having regard to the ecological sustainability of that habitat.

Rule	Activity	Classification	Conditions/Standards/Terms	Control/Discretion
<p>12-6</p> <p>Some activities within <i>rare habitats*</i>, <i>threatened habitats*</i> and <i>at-risk habitats*</i></p>	<p>Except as regulated by Rules 13-2, 13-10, 13-22, 15-5B, 15-9, 16-3, 16-5, 16-6, 16-8 in relation to any existing small dam structure[^], 16-13 and 16-14, any of the following activities within a <i>rare habitat*</i>, <i>threatened habitat*</i> or <i>at-risk habitat*</i>:</p> <p>(a) <i>vegetation clearance*</i>, <i>land disturbance*</i> or <i>cultivation*</i> pursuant to s9(2) RMA</p> <p>(b) <i>forestry*</i> pursuant to s9(2) RMA that does not meet <i>condition[^]</i>, standard or term of Rule 12-2 (b)(iii) or (c)</p> <p>(c) the drilling, construction or alteration of any <i>bore*</i> pursuant to s9(2) RMA</p> <p>(d) activities restricted by s13(1) or s13(2) RMA in the <i>beds[^] of rivers[^] or lakes[^]</i></p> <p>(e) the taking, using, damming or diverting of <i>water[^]</i> pursuant to s14(2) RMA</p> <p>(f) <i>discharge[^] of water[^] or contaminants[^] into water[^] or onto or into land[^]</i> pursuant to s15(1) or s15(2A) RMA.</p>	Discretionary		Control/Discretion Non-Notification

Rule	Activity	Classification	Conditions/Standards/Terms	Control/Discretion Non-Notification
<p><u>12-7</u> <u>Some activities within rare habitats* and threatened habitats*</u></p>	<p>This rule does not apply to the activities described in paragraphs (a) to (f) where they are carried out for the purposes of protecting or enhancing the habitat, including the control of pest animals and pest plants.</p>			
<p><u>12-7</u> <u>Some activities within rare habitats* and threatened habitats*</u></p>	<p>Except as regulated by Rules 13-2, 13-10, 13-22, 15-5B, 15-9, 16-3, 16-5, 16-6, 16-8 in relation to any existing small dam structure[^], 16-13 and 16-14, any of the following activities within a rare habitat* or threatened habitat*:</p> <p>(a) <u>vegetation clearance*, land disturbance* or cultivation* pursuant to s9(2) RMA</u></p> <p>(b) <u>forestry* pursuant to s9(2) RMA that does not meet condition[^], standard or term of Rule 12-2 (b)(iii) or (c)</u></p> <p>(c) <u>the drilling, construction or alteration of any bore* pursuant to s9(2) RMA</u></p> <p>(d) <u>activities restricted by s13(1) or s13(2) RMA in the beds[^] of rivers[^] or lakes[^]</u></p> <p>(e) <u>the taking, using, damming or diverting of water[^] pursuant to s14(2) RMA</u></p>	<p><u>Non-complying</u></p>		

Rule	Activity	Classification	Conditions/Standards/Terms	Control/Discretion Non-Notification
	<p>(f) discharge^A of water^A or contaminants^A into water^A or onto or into land^A pursuant to s15(1) or s15(2A) RMA.</p> <p>This rule does not apply to the activities described in paragraphs (a) to (f) where they are carried out for the purposes of protecting or enhancing the habitat, including the control of pest animals and pest plants.</p>			

Glossary

Operation means the use of any structure, system, facility or installation, including ancillary resource use. For the purposes of Chapters 3 and 7 only, 'ancillary resource use' in this definition excludes the discharge of contaminants and the abstraction of water. This exclusion does not apply to ancillary resource use for the purposes of renewable electricity generation or which is permitted by a rule.

2.6.2 Appendix 2 Brief analysis of resource consent examples provided by Horizons Regional Council

Consent name and number	Activity	Date granted	Activity status	Notified or decisions version of plan
Department of Conservation Kapiti 104995	Filling drain, constructing new drain	13 July 2009	Non-complying (threatened habitat, wetland and <i>powelliphanta</i>)	Notified version
Ruapehu District Council 105180	Road maintenance and upgrade. Remove vegetation from berm of road for widening	19 April 2010	Non-complying (threatened habitat)	Notified version
Taumata Plantation Limited 104868	Construction of track for plantation forest harvesting	20 April 2009	Non-complying (threatened habitat)	Notified version
Palmerston North City Council 105168	Harvest commercial forest including tracking and stream crossings	4 March 2010	Non-complying (threatened habitat, <i>powelliphanta</i>)	Notified version

Consent name and number	Activity	Date granted	Activity status	Notified or decisions version of plan
Palmerston North District Council 105273	Track works in Kahutara Reserve	7 May 2010	Non-complying (threatened habitat, habitat for <i>powelliphanta</i> snails)	Notified version
Palmerston North City Council 105716	Remove willows from Hokowhitu Lagoon	7 April 2011	Discretionary (threatened habitat)	Decisions Version
New Zealand Transport Agency 105877	Re-alignment of road, replace bridge with culvert	12 August 2011	Discretionary (threatened habitat)	Decisions version
Schroeder 106132	Selective logging indigenous timber	23 December 2011	Discretionary (threatened habitat)	Decisions version

2.6.3 Appendix 3 – Comparison of wording for Policy 12-5

2.6.3 Appendix 3 – Comparison of wording for Policy 12-5

Horizons Regional Council recommended wording	Helen Marr recommended wording (Evidence on behalf of MoC and WFCG)	Reasons for differences proposed
(a) For activities regulated under Rule 12-6, the Regional Council must make decisions on consent applications and set consent <i>conditions</i> [^] on a case-by-case basis, having regard to:	(a) For activities regulated under Rule 12-6 <u>and Rule 12-7</u> , the Regional Council must make decisions on consent applications and set consent <i>conditions</i> [^] on a case-by-case basis, having regard to:	I recommend adding new Rule 12-7 to regulate activities in rare habitats and threatened habitats as a non-complying activity. It is appropriate that this Policy refer to the new rule.
(i) the Regional Policy Statement, particularly Objective 7-1 and Policy 7-2A,	(i) the Regional Policy Statement, particularly Objective 7-1 and Policy 7-2A,	No significance differences.
(ii) the significance of the area of habitat, in terms of its representativeness, rarity and distinctiveness, and ecological context, as assessed under Policy 12-6,	(ii) the significance of the area of habitat, in terms of its representativeness, rarity and distinctiveness, and ecological context, as assessed under Policy 12-6,	
(iii) the potential adverse <i>effects</i> [^] of the proposed activity on that significance, and	(iii) the potential adverse <i>effects</i> [^] of the proposed activity on that significance, and	
(iv) for activities regulated under ss13, 14 and 15 RMA, the matters set out in Policy 12-1(h) and relevant objectives and policies in Chapters 6, 13, 15 and 16.	(iv) for activities regulated under ss13, 14 and 15 RMA, the matters set out in Policy 12-1(h) and relevant objectives and policies in Chapters 6, 13, 15 and 16, <u>and</u>	
	<u>(v) for electricity transmission and renewable energy generation activities, any national, regional or local benefits arising from the proposed activity.</u>	I believe it is appropriate to recognise the benefits of electricity transmission and renewable energy generation activities in this policy. This appropriately gives effect to the NPSREG and NPSET. There is policy in Chapter 3 relating to the benefits of renewable energy generation. However that policy is in the RPS part of the One Plan. Only policy in the Regional Plan can be considered as part of the 104D tests and the reference to benefits arising from electricity transmission and renewable energy generation activities should be able to be considered as part of the second gateway test. If the activity status for activities in rare habitats and threatened habitats remains as discretionary, as recommended by Ms Barton (rather than non-complying as I recommend), then this clause is not necessary and should not be included.
(b) Consent must generally not be granted for <i>vegetation clearance</i> [*] , <i>land disturbance</i> [*] , <i>forestry</i> [*] or <i>cultivation</i> [*] and certain other resource use activities in a <i>rare habitat</i> [*] , <i>threatened habitat</i> [*] or <i>at-risk habitat</i> [*] assessed to be an area of significant indigenous vegetation or a significant habitat of indigenous fauna, unless:	(b) Consent must generally not be granted for <i>vegetation clearance</i>[*], <i>land disturbance</i>[*], <i>forestry</i>[*] or <i>cultivation</i>[*] and certain other resource use activities in a <i>rare habitat</i> [*] , <i>threatened habitat</i> [*] , or <i>at-risk habitat</i> [*] assessed to be an area of significant indigenous vegetation or a significant habitat of indigenous fauna, unless:	I recommend removing the incomplete list of activities, for the reasons set out in section 2.5.3 of my evidence. This policy should apply to all activities regulated under Rules 12-6 and 12-7. The second change that I recommend is the insertion of a comma after 'threatened habitat'. Provisions of this clause are intended to apply to all habitats that are considered to be significant under s6(c). Changes to Policy 7-2A, with the agreement of the technical experts, remove reference to a site specific assessment in relation to rare habitats and threatened habitats and make it clear that all rare habitats and threatened habitats are to be considered 'significant'. The omission of a comma in this policy could be read to mean that threatened habitats need to go through some other type of assessment to determine their significance. This type of assessment is only necessary for at-risk habitats.
(i) any more than minor adverse <i>effects</i> [^] on that habitat's representativeness, rarity and distinctiveness, or ecological context assessed under Policy 12-6 are avoided as far as reasonably practicable, or otherwise remedied or mitigated, or and	(i) any more than minor adverse <i>effects</i> [^] on that habitat's representativeness, rarity and distinctiveness, or ecological context assessed under Policy 12-6 are avoided as far as reasonably practicable, or otherwise remedied or mitigated, or	Ms Barton's changes remove the clear mitigation hierarchy contained in the DV POP. In my view Ms Barton's changes do not provide a clear mitigation hierarchy: it would be open to either avoid, remedy or mitigate as an applicant or decision maker sees fit. I believe it appropriate to impose this hierarchy in this circumstance as discussed in my evidence in section 2.5.6.1. MoC and WFCG also sought removal of the term " <i>as far as reasonably practicable</i> " in their appeals. I believe that in this circumstance those words should be retained, albeit with reference to a definition as I discuss in the last

Horizons Regional Council recommended wording	Helen Marr recommended wording (Evidence on behalf of MoC and WFCG)	Reasons for differences proposed
		clause of this policy. Strong policy preference for avoidance is appropriate, however some guidance as to the circumstances in which avoidance is not absolutely required should be set out, and I recommend a definition within this policy which will achieve this.
<p>(ii) any more than minor adverse effects[^] which cannot reasonably be avoided, remedied or mitigated are offset to result in a net indigenous biological diversity[^] gain.</p>	<p>(ii) any more than minor adverse effects[^] which cannot reasonably be avoided, are remedied or mitigated <u>within the area affected by the activity; or are offset to result in a net indigenous biological diversity[^] gain.</u></p>	<p>Ms Barton's changes remove the mitigation hierarchy, which as discussed above I do not believe to be appropriate.</p> <p>The changes I recommend impose a mitigation hierarchy. These changes also provide an additional direction, that any more than minor effects are first sought to be mitigated within the affected site, before consideration of mitigation off site or an offset.</p> <p>This is consistent with the Principle 3 of the BBOP principles (adherence to the mitigation hierarchy) discussed in Mr Clubb's evidence.</p>
<p>(ii) mitigation may include consideration of the use of biodiversity offsets that result in a net indigenous biological diversity[^] gain, particularly where mitigation outside the affected area would result in a better indigenous biological diversity[^] outcome than remedying or mitigating adverse effects within the area affected.</p>	<p>(iii) in appropriate circumstances, any more than minor adverse effects that cannot be avoided, remedied or mitigated within the area affected by the activity are offset, resulting in a net indigenous biological diversity gain.</p>	<p>Ms Barton recommends the changes set out in the Joint Memorandum to the Court from MoC and WFCG.⁷³</p> <p>I have reviewed those changes and I do not believe that they properly apply the BBOP principles, particularly the mitigation hierarchy set out in Principle 3, which expresses a preference for consideration of onsite mitigation first.</p> <p>The changes I recommend to clauses (b)(i) – (iii) are an appropriate reflection of these principles.</p>
<p>(c) Consent must generally be granted for <i>vegetation clearance*</i>, <i>land disturbance*</i>, <i>forestry*</i> or <i>cultivation*</i> and certain other-resource use activities in an <i>at-risk habitat*</i> assessed not to be an area of significant indigenous vegetation or a significant habitat of indigenous fauna when:</p>	<p>(c) Consent must generally <u>may</u> be granted for <i>vegetation clearance*</i>, <i>land disturbance*</i>, <i>forestry*</i> or <i>cultivation*</i> and certain other-resource use activities in an <i>at-risk habitat*</i> assessed not to be an area of significant indigenous vegetation or a significant habitat of indigenous fauna when:</p>	<p>I recommend two changes to this clause. The first is a change from 'must generally' to 'may' be granted for consents in at-risk habitats which are not significant. Simply because the habitat is not significant in terms of s6(c) does not <i>automatically</i> mean the consent should be granted. Other values of the site such as amenity, cultural, heritage and natural character values amongst other will also need to be considered by decision makers. Other policies in the One Plan guide decision makers in this consideration. It is not appropriate for this policy to appear to trump those policies by using language such as 'must generally be granted'. Use of the word 'may' more accurately reflects the situation.</p> <p>The second change is to remove the incomplete list of activities, for the reasons set out in section 2.5.3 of my evidence.</p>
<p>(i) there will be no significant adverse effects[^] on that habitat's representativeness, rarity and distinctiveness, or ecological context as assessed in accordance with Policy 12-6, or</p>	<p>(i) there will be no significant adverse effects[^] on that habitat's representativeness, rarity and distinctiveness, or ecological context as assessed in accordance with Policy 12-6, or</p>	<p>I agree with Ms Barton recommendation to retain this sub-clause.</p>
<p>(ii) any significant adverse effects[^] are avoided, as far as reasonably practicable, <u>and any residual adverse effects that cannot reasonably be avoided are remedied or mitigated, or and</u></p>	<p>(ii) any significant adverse effects[^] are avoided, as far as reasonably practicable, <u>or otherwise remedied or mitigated, or</u></p>	<p>Ms Barton's recommendation to retain the wording from the DV POP in my view does not provide a clear mitigation hierarchy. The changes I recommend make this mitigation hierarchy clearer.</p> <p>I believe it appropriate to impose this hierarchy for significant adverse effects as discussed in my evidence in section 2.5.6.1.</p>
<p>(iii) any significant adverse effects[^] which cannot reasonably be avoided, remedied or mitigated are offset to result in a net</p>	<p>(iii) any significant adverse effects[^] which cannot reasonably be avoided, <u>are remedied or mitigated within the area affected by the activity, or are offset to</u></p>	<p>Ms Barton's changes weaken the mitigation hierarchy, which as discussed above I do not believe to be appropriate.</p>

⁷³ Memorandum relating to appeals on the topic of biodiversity filed on behalf of the Minister of Conservation and Wellington Fish & Game Council. Dated 9 December 2011

Horizons Regional Council recommended wording	Helen Marr recommended wording (Evidence on behalf of MoC and WFCG)	Reasons for differences proposed
indigenous <i>biological diversity</i> [^] gain.	result in a net indigenous <i>biological diversity</i> [^] gain.	The changes I recommend impose a clear mitigation hierarchy. They also provide an additional direction, that any significant adverse effects are first sought to be mitigated within the affected site, before consideration of mitigation off site or an offset. This is consistent with the Principle 3 of the BBOP principles (adherence to the mitigation hierarchy) discussed in Mr Clubb's evidence.
<u>(iii) mitigation may include consideration of the use of biodiversity offsets that result in a net indigenous <i>biological diversity</i>[^] gain, particularly where mitigation outside the affected area would result in a better indigenous <i>biological diversity</i>[*] outcome than remedying or mitigating adverse effects within the area affected.</u>	<u>(iv) In appropriate circumstances, any significant adverse effects that cannot be avoided, remedied or mitigated within the area affected by the activity are offset, resulting in a net indigenous biological diversity gain.</u>	Ms Barton recommends the changes set out in the Joint Memorandum to the Court on behalf of MoC and WFCG. ⁷⁴ I have reviewed those changes and I do not believe that they properly apply the BBOP principles, particularly Principle 3, which expresses a preference for consideration of onsite mitigation first. The changes I recommend to clauses (c)(i) – (iv) are an appropriate reflection of these principles.
(d) When assessing an offset in accordance with (b)(ii) or (c)(iii), decision-makers must have regard to:	(d) When assessing An offset assessed in accordance with (b)(ii-iii) or (c)(iii-iv), decision-makers must have regard to:	The changes I recommend change the application of this offsets clause from a list of matters that must be had regard to (in the DV POP version) to a list of matters that must be satisfied. If an offset is to meet the BBOP principles, then all these matters must be <i>applied</i> , not merely considered. Offsets that do not meet the BBOP principles may not achieve the objective of the plan to protect significant habitats and maintain biodiversity. I therefore consider it appropriate for the policy to contain strong direction on this matter. This is discussed in section 2.5.6.2 of my evidence.
(i) the desirability of providing for a net <u>indigenous biological diversity gain</u> within the same habitat type,	(i) the desirability of provideing for a net indigenous biological diversity gain within the same habitat type, or where that habitat is not significant, provide for that gain in a rare habitat or threatened habitat type, and	The first changes I recommend to this policy are minor wording changes to ensure the wording follows clearly from the introductory statement. I agree with Ms Bartons recommendation to refer to indigenous biological diversity. This sub-clause expresses the 'like for like' concept as explained in Mr Clubb's evidence paras 27-33. I have also recommended additional wording to provide for the concept of 'trading up' as explained in Mr Clubb's evidence (para 34) where it may be appropriate to deviate from the 'like for like' concept of the BBOP guidelines by providing for an offset that clearly addresses biodiversity of a higher priority than that affected by the activity.
(ii) the desirability of providing for a net <u>indigenous biological diversity gain</u> in the same ecologically relevant locality as the affected habitat, and	(ii) the desirability of providing for a net gain generally be in the same ecologically relevant locality as the affected habitat, and	The changes I recommend here are minor wording changes to ensure the wording follows clearly from the Introductory statement. This clause deals with the importance of proximity of an offset to the site impacted. The evidence of Dr Gerbeaux gives examples illustrating the importance of proximity.
(iii) the appropriateness of establishing <i>infrastructure</i> [^] and other physical resources of regional or national importance as identified in Policy 3-1.	(iii) the appropriateness of establishing <i>infrastructure</i>[^] and other physical resources of regional or national importance as identified in Policy 3-1.	I recommend removing this general reference to infrastructure and its benefits here, and replacing it with a more specific reference in clauses (a)(v) and (e)(i). The principles of offsetting do not discriminate between particular types of activities as such. However I believe it is appropriate to recognise the benefits of electricity transmission and renewable energy, and I believe the recommended wording in (a)(v) and (e)(i) does this. The inclusion of clause (a)(v) will enable the benefits of electricity transmission and renewable energy generation activities to be considered even if an offset is not involved.
<u>(ii) whether offsets are inappropriate for the ecosystem (or habitat)</u>	<u>(iv) not be allowed where inappropriate for the ecosystem or habitat type by</u>	This sub-clause expresses BBOP Principle 4 'Limits to what can be offset'. I agree with Ms Barton that it is appropriate to include this principle, and my

⁷⁴Above-cited.

Horizons Regional Council recommended wording	Helen Marr recommended wording (Evidence on behalf of MoC and WFCG)	Reasons for differences proposed
<u>type by reason of its rarity, vulnerability or irreplaceability, and</u>	<u>reason of its rarity, vulnerability or irreplaceability, and</u>	recommendation differs from hers in wording necessary to ensure this sub-clause agrees with the wording I recommend for the introductory sentence and by providing stronger direction (as explained earlier). In addition, Ms Hawcroft's evidence explains that the word "type" should not qualify the word "ecosystem" and therefore I suggest removing the brackets around the words "or habitat".
<u>(ii) the importance of ensuring offsets have a significant likelihood of being achieved and maintained in the long term and preferably in perpetuity.</u>	<u>(v) have a significant likelihood of being achieved and maintained in the long term and preferably in perpetuity, and</u>	This sub-clause expresses BBOP Principle 8 'Long-term outcomes'. I agree with Ms Barton that it is appropriate to include this principle, and my recommendation differs from hers only in wording necessary to ensure this sub-clause agrees with the wording I recommend for the introductory sentence.
	<u>(vi) achieve conservation outcomes above and beyond that which would have been achieved if the offset had not taken place.</u>	This sub-clause expresses BBOP Principle 2 'Additional conservation outcomes'. Mr Clubb explains the importance of this in paragraphs 35 – 37. In order to truly achieve the direction of a 'net biodiversity gain' expressed in this policy, it is important to ensure the offset is not one that would have happened in the absence of the resource consent process.
	<u>(e) In the application of this policy:</u> <u>(i) "appropriate circumstances" may include electricity transmission and renewable energy generation activities of national benefit.</u>	This policy refers to allowing offsets 'appropriate circumstances'. I believe it is helpful to provide some explanation for what might be 'appropriate circumstances'. This clause does not limit the application of 'appropriate circumstances'. However I understand it was considered desirable to explicitly state that transmission and renewable energy generation are considered appropriate circumstances to consider an offset in order to avoid doubt. My recommendation differs somewhat from the version provided in the Memorandum to the Court on behalf of MoC and F&G. ⁷⁵ I have recommended removing reference to benefits outweighing costs which was included in the previous wording suggested by MoC and WFCG, after considering feedback provided to the Court on behalf of Meridian and TrustPower ⁷⁶ that this does not accurately reflect the direction given in the NPSREG and NPSET
	<u>(ii) "Reasonably practicable" requires consideration of the nature of the activity, the sensitivity of the receiving environment to adverse effects, possible alternative locations, designs or methods based on the current state of knowledge, the likelihood of successfully achieving avoidance and financial implications.</u>	Clauses I recommend in clause (b)(i) of Policy 12-5 included the retention of the term 'reasonably practicable'. Appeals from MoC and WFCG sought removal of this term on the basis that it is unclear what it means. I agree with that concern. If the term is to remain I believe guidance on the definition of this term is necessary to enable the application of the policy in a manner that effectively achieves the objectives of the plan. A similar matter was considered by the recent Board of Inquiry into plan changes sought in relation to Transmission Gully proposal ⁷⁷ . That Board considered the use of the term 'extent practicable' in circumstances very similar to the use of the term 'reasonably practicable' in this policy. My recommended definition of reasonably practicable is based on the definition of 'extent practicable' decided in that Inquiry. I have tailored the definition for Policy 12-5, including for the purpose of integrating the definition with the remainder of the Policy.

⁷⁵ Above-cited.

⁷⁶ Joint Memorandum of Counsel on behalf of Meridian Energy Limited and TrustPower Limited relating to the biodiversity topic dated 15 December 2011: "Including the matter of 'costs' introduces a new dimension beyond that required under the National Policy Statements for electricity transmission and renewable electricity generation."

⁷⁷ "Final Decision and Report of the Board of Inquiry into the New Zealand Transport Agency Transmission Gully Plan Change Request Produced under Section 149R of the Resource Management Act 1991" Board of Inquiry into the New Zealand Transport Agency Transmission Gully Plan Change Request, October 2011, Publication No: EPA 0072 (Chaired by Environment Court Judge Dwyer).