

BEFORE THE HEARINGS COMMITTEE

**IN THE MATTER of hearings on submissions
concerning the proposed One
Plan notified by the
Manawatu-Wanganui
Regional Council**

**End of Hearing Statement of Helen Marr
for the Biodiversity hearing**

INTRODUCTION

1. The purpose of this report is to answer questions raised by the hearing panel during the hearing and questions sent to us by the hearing panel following the hearing. In this report I also respond to some matters raised by experts at the hearing, which have prompted me to change my recommendations.
2. Any recommended changes are shown in the blue version of the tracked changes, dated 16 January 2009.
3. Where I have not changed my recommendation, it can be inferred that I do not agree with the evidence raised by other experts. This report does not generally detail the reasons for my disagreement and my original reasoning in my previous reports stands in those cases.
4. I am more than happy to elaborate on any of these matters if the hearing panel have any questions.

QUESTIONS RAISED BY THE HEARING PANEL AND EXPERTS AT THE HEARING

5. The following table sets out the questions raised by the hearing panel during the hearing, and any relevant matters raised by other experts at the hearing that I wish to respond to.

Helen Marr

16 January 2009

HP = Hearing Panel, MRP = Mighty River Power, Questions from the hearing panel = written questions following the hearing

	Issue	Raised by	Discussion	Recommendation
Chapter 7 scope and background				
1	Future approach, last paragraph, could we remove 'this is a tall order for individuals'? is there scope to remove this?	HP	There are no submissions asking for this, or any similar type of change. There is one submission in full support of this paragraph (Federated Farmers, 426/88) and two submissions in support of the later part of the sentence (Nga Pae o Rangitikei 427/73 and Environmental Working Party 386/73). It is possible that a change such as the one asked for in this question could be made in accordance with Clause 16 of the first schedule, but because this part of the sentence adds context to the statement that follows, I do not recommend that this be done.	No change is recommended.
Objective 7-1				
2	Should the qualifying sub clauses (a) – (c) remain or be removed?	Submitters at the hearing.	The wording for Objective 7-1 as agreed at the pre-hearing on 22 October (recorded in prehearing report 26) did not have the qualifying sub-clauses. As a result of the planning review, the qualifying subclauses were added. Some of the experts raised at the hearing that they would be more comfortable with the originally agreed wording. One of the reasons for this is that the objective to 'protect' rare and threatened habitats is absolute, and that this may be inconsistent with the policies that follow, which allow for modification of rare habitats and threatened habitats in limited	Changes to main clause of Objective 7-1 reflected in track changes blue version. Changes to subclause (c) not shown as at hearing panels discretion.

	Issue	Raised by	Discussion	Recommendation
3	If sub-clauses are to remain, then should it refer to maintaining and enhancing function of habitats?		<p>circumstances. I do not think this is a major concern, as policies often clarify or refine the objectives that they follow. In this case the policies clarify that protection is not absolute and change may be appropriate in limited circumstances. However, on balance I am of the opinion that the shorter version of the objective as originally agreed is sufficient to stand alone and would avoid any possible problems with interpretation in the future.</p> <p>If the hearing panel decides to retain the subclauses, then it would be appropriate to change the wording of subclause (c) to read “maintain and enhance biodiversity ...” and to make other changes to ensure it is consistent with the recommended changes to policy 7-4 as discussed in 12 below.</p>	
Policy 7-1				
4	Is the wording of (c) appropriate and is it necessary to state this or if it is repeating the RMA unnecessarily	HP	<p>The experts representing the TA's and the regional council are in agreement about the intent of Policy 7-1. No other parties presented evidence which disagreed with this intent.</p> <p>The agreed intent is reflected in the memo to the hearing panel following caucusing as:</p> <ul style="list-style-type: none"> a) That Horizons to take the primary role in writing rules and other methods to maintain significant habitat and vegetation covered under s6c RMA b) That TA's may write rules for protecting areas other 	No changes recommended, other than the correction identified.

	Issue	Raised by	Discussion	Recommendation
			<p>than those covered in a) above</p> <p>c) That there be clear separation of biodiversity functions so there is no duplication between RC and TA rules</p> <p>d) That the policy recognise that both RC's and TA's are responsible for recognizing and providing for s6(c) and having regard to s7(d) in other functions and duties.</p> <p>Subclause (c) of the policy was included to reflect the intent of (d) above. While it may be argued that this states what is already required by the RMA, the subclause was included to remove doubt and add clarity. The concern was that without this statement, then it could be argued by some that (a) may remove the TA's ability to consider s6(c) at all. This is not the intent. Clarifying the intent in the way proposed does not in my opinion distract from the other subclauses, is consistent with the RMA and could potential save costly arguments over district plans in the future.</p> <p>When I presented my reports at the beginning of the hearing, I noted that I had inadvertently left out an agreed part of the policy from the track changes version of the chapter. The most recent version of the track changes corrects this.</p>	
Policy 7-1A				

	Issue	Raised by	Discussion	Recommendation
5	Where in the POP is it explained that Schedule E is identifying section 6(c) (or section 7(d)) matters?	Questions from the hearing panel	<p>One of the key outstanding matters discussed at the hearing was whether the habitats identified in Schedule E, and protected by the provisions of the POP are significant in terms of s6(c) RMA. Based on the advice I have received from Fleur Maseyk, (and that opinion was shared by ecologists representing the Minister for the Environment and Mighty River Power) I am convinced that the habitats identified in accordance with Schedule E are significant in terms of s6(c). My opinion has not changed based on the evidence of those representing Meridian and Trust Power.</p> <p>The recognition of the 'significance' of rare habitats, threatened habitats and at risk habitats is currently implicit, rather than explicit in the provisions of the POP. That is, the habitats are given a high level of protection consistent with s6(c) but the fact that the habitats are 'significant' is not stated. I believe that explicitly stating that those habitats are recognised as significant would add clarity to the plan, and avoid any future uncertainty as to their status.</p> <p>Originally proposed Policies 7-2 and 7-3 began with a subclause stating that the habitats are identified in accordance with schedule E. This paragraph has been removed with refinement and planning review, however I consider that it would be useful to reinstate it, for clarity, and to add to it to explicitly state that the those habitats identified in Schedule E are recognised as significant. This</p>	Changes shown in track changes blue version

	Issue	Raised by	Discussion	Recommendation
			approach would be consistent to the approach taken to identifying and recognising outstanding landscapes in originally proposed Policy 7-7.	
6	Should subclause (a) refer to 'maintain and enhance' habitats?	HP	Through out the submission (particularly that from NZ Defence Force) and pre-hearing process, it was agreed that the plan should refer to maintaining habitats, as well as enhancing them. This approach would be consistent with the function of the regional council as set out in s30(1)(ga) RMA, which is <i>maintenance</i> of indigenous biological diversity. Reference to maintenance was inadvertently not carried through to the reviewed provisions, and this should be rectified.	Changes shown in track changes blue version
7	Check terminology used in (b)(ii) – is it appropriate to use recognise and provide for as this is s6(c) language?	HP	I do not think that use of the term 'recognise and provide for' the infrastructure identified in Policy 3-1 is necessarily inappropriate. It is consistent with the wording in Policy 3-1 which refers to recognising certain types of infrastructure and taking into account its benefits. However any potential confusion could be avoided by changing the wording to simply 'provide for'.	Changes shown in track changes blue version
8	Does this policy need an extra clause to provide guidance to TA's when they are carrying out their functions?	MRP/HP	When I presented my evidence at the beginning of the hearing, I noted that I agreed with the issue raised by Mr Petersen in his evidence, that Policy 7-1A now provides no guidance to how TA's should approach biodiversity issues that are within their jurisdiction. Mr Petersen's proposed solution may be slightly too narrow to cover all the relevant functions of a TA (which may include writing	Changes shown in track changes blue version

	Issue	Raised by	Discussion	Recommendation
			rules relating to subdivision for example). I recommend wording that is slightly broader but that is still consistent with the separation of functions discussed in Policy 7-1 above: "when exercising functions and powers under the RMA as set out in Policy 7-1 above, Territorial Authorities shall..."	
9	Consequential change as a result of the above		As a result of the changes I recommend above, I also recommend a consequential change of the title of this policy. The recommended changes make the policy about more than 'regulation'. These changes are appropriate, and reflect an appropriate policy framework for the RPS (which must guide more than the regional plan), and the title of the policy should be changed to reflect this.	Changes shown in track changes blue version
Policy 7-4				
10	Is it appropriate to refer to 'representative' in Policy 7-4?	MRP	At the hearing it was discussed whether it was appropriate to refer to 'representative' habitats, given the confusion between this phrase and other similar phrases commonly used by ecologists. I recommend that this phrase is removed so that any possible confusion is avoided. I also recommend that the reference to rare, threatened and at risk habitats is removed. This policy reflects a non-regulatory approach which may extend to habitats that would not meet the thresholds set out in Schedule E, and it is appropriate that this wider application is reflected in the wording.	Changes shown in track changes blue version
11	Is it appropriate to limit the policy to Schedule E habitats?			
Policy 7-6				

	Issue	Raised by	Discussion	Recommendation
12	Should Clause (b) refer to land use consents (instead of activities) and should it also refer to notices of requirement?	HP	Policy 7-6 currently only refers to decisions on subdivision and land use activities. Relevant decisions made by TA's that may affect the introduction of pest plants into habitats also include notices of requirements and decisions on plan provisions (which, for example, may influence activity status for activities). It is appropriate to use the broader wording I recommend for Policy 7-1A above, to ensure the policies are consistently worded.	Changes shown in track changes blue version
Methods				
13	Are all of the links to policies correct, particularly to Policy 7-5?	HP	The methods have been reviewed and appropriate changes in response to the panels comments have been made.	Changes shown in track changes blue version
14	Is waterways the appropriate term to use in these methods? Should it be river for example?			
15	Waterway owners may not be appropriate, adjacent land owners may be more appropriate.			
16	Method 7-8 still refers to 'project' should this be changed to method?			
17	Method 7-7, target date is 2008, this needs to be reviewed.			
AER				
18	4 th column, is it within scope of this	HP	No. If appropriate, this change should be recommended to the	Changes shown in track

	Issue	Raised by	Discussion	Recommendation
	hearing to make changes to this AER?		panel hearing landscape matters. This change was made in error and this has been corrected in the most recent version of the track changes.	changes blue version
Explanations and principal reasons				
19	Reference to 'less than 20 %' should be '20% or less'	HP	These changes have been made to ensure consistency.	Changes shown in track changes blue version
20	Reference to 33% should be 50% to be consistent with Fleur technical evidence.	HP		
Policy 12-4				
21	No policy is given to guide decisions under Rule 12-7 which deals with treeland rule, should this be dealt with in Policy 12-4	MRP	Currently there is no specific policy guidance given for decisions made under Rule 12-7. I agree with Richard Petersen's view that it would be appropriate to consider these activities under Policy 12-4.	Changes made in track changes blue version to reflect recommendation.
22	Are offsets referring to application, works and services, or financial contributions? Does the policy need to be reworded to make this clear?	HP	As discussed at the hearing, it is anticipated that offsets could be provided for as part of the application, as a condition of consent requiring works, or as a financial contribution towards another suitable project. The current policy wording is appropriately broad, and I do not consider that it needs to be reworded.	No Changes recommended.
23	Is it appropriate to change practicable to reasonably practicable?		This change is appropriate and would make the policy more consistent with other, similar policies in the plan.	Changes shown in track changes blue version
24	Ensure (c) is giving guidance to decision makers on assessing applications	HP	I have reviewed subclause (c) with two things in mind; first, is it specific enough to give decision makers guidance and secondly, is	Changes made in track changes blue version

	Issue	Raised by	Discussion	Recommendation
			<p>it covering all of the appropriate considerations.</p> <p>In relation to the first question, this subclause differs from the similar on in Policy 12-6 which deals with rare habitats and threatened habitats in that it identifies the relevant factors as being factors to consider, rather than factors to be preferred. Evidence was given by a number of the ecological experts at the hearing that it is appropriate to treat these types of habitats differently, because rare habitats and threatened habitats may be irreplaceable, whereas at risk habitats may have an element of interchangeability. This assessment needs to be made on a case by case basis for at-risk habitats. Taking those factors into consideration I consider that the currently recommended wording is giving decision makers as much specific guidance as is possible in the absence of site specific information.</p> <p>Fleur Maseyk has done a brief review of the literature relating to offsets, to identify the 'best practice' factors that are considered when assessing the appropriateness of offsetting an effect. She is of the opinion that the current wording encapsulates the relevant factors well, with the exception of a consideration of the degree, duration and time-lag of the adverse effect. Policy 12-7 now incorporates consideration of degree, duration and timing of effects. When this assessment is done (as required under 12-4(a) and (b) it will provide decision makers with the information to assess the appropriateness of an offset.</p>	

	Issue	Raised by	Discussion	Recommendation
Policy 12-6				
25	Consider MRP's additional infrastructure clause??	MRP	Richard Petersen's evidence suggested that Policy 12-6 did not appropriately consider all the factors relevant to infrastructure of regional and national importance, and recommended a broad reference to provisions of chapter 3 be included. At the hearing Mr Petersen clarified that the primary missing factor from this policy is consideration of functional constraints. I consider that reference to functional constraints is appropriate, particularly when considering what is or is not 'reasonably practicable' and that a specific reference is preferable to the generic reference originally recommended by Mr Petersen.	Track changes blue version
26	Do provisions (b) and (c) provide the intended hierarchy?	HP	The originally recommended provisions did not accurately reflect the intended hierarchy of considerations and was potentially confusing. I recommended changes be made to make it clear that first avoidance must be considered and only if that is not reasonably practicable then remedy, mitigation or offset may be considered. Likewise the offset considerations should state that preference should be given to an offset of the same habitat type and in the same location (not either one or the other). This would be consistent with best practice considerations for offsets of very rare habitat types.	Track changes blue version
Policy 12-7				
27	Does the title of this policy accurately	HP	The purpose of this policy and table is to guide decision makers to	Track changes blue version

	Issue	Raised by	Discussion	Recommendation
	reflect its purpose?		assess the values that contribute to a sites significance, and what impacts the proposed activity will have on those values. A site is already considered to be significant if it meets the criteria in Schedule E. No further significance test is required, and the title of this policy should be changed to reflect this intent.	
Rules general				
28	Impacts of biodiversity rule on forestry sector if small fragments are found or establish within a forest and will be damaged by logging operations.	Forestry industry	The forestry industry representatives raised concerns with the proposed plan framework. Small fragments within forests which would trigger need for resource consent. These could either have been present before the forest was planted or established during the growth of the plantation. Any areas of regrowth within a plantation are unlikely to meet the thresholds in schedule E, because they will not grow to forest within the life of the plantation. Problems may arise where the regrowth is left for a second forest rotation or existing regrowth, such as that left around riparian areas, does become forest during the growth of the forest. In these circumstances the habitat could be damaged by logging operations. The forestry industry put a proposed solution forward to the reconvened land hearing. This includes a number of exclusions which would allow for incidental damage to occur to habitats as a result of logging operations. I agree with the intent (although I believe the wording should be altered to add certainty) of the proposed solution for Rule 12-2 which would allow those companies acting in accordance with their FSC accreditation to	No changes shown in track changes, at hearing panels discretion.

	Issue	Raised by	Discussion	Recommendation
			<p>continue to operate in these areas. I am comfortable with this because I am comfortable that the requirements of the FSC certification place a high level of responsibility on the foresters that is generally beyond what we would require of them through the resource consent process. I am less comfortable with the exclusion being carried over to other accreditation schemes (such as PEFC) or to the controlled activity rule because I have seen no evidence that those other schemes or environmental management systems include high enough standards of controls relating to biodiversity.</p> <p>As a compromise I would be comfortable that forestry activities which inadvertently or unavoidably damage Schedule E habitats, that are not FSC accredited become a restricted discretionary activity. Whether this is most appropriately done by altering Rule 12-5 or by including a new rule will depend on the decisions made by the hearing panel relating to these rules.</p> <p>I believe that a non-notified restricted discretionary activity would be an appropriate level of restriction to allow for incidental and unavoidable damage and should not be unduly onerous for the forestry sector.</p>	
Rule 12-1				
29	If Rule 12-1 is to be the permitted activity	Questions from	It is unintended, but it is possible that the situation raised in the	No changes shown in track

	Issue	Raised by	Discussion	Recommendation
	rule for activities in rare, threatened and at-risk habitats, is the reference to "grazing...of grass" in condition (i) wide enough? Does stock graze on vegetation other than grass in those habitats? Could the reference to grazing infer that vegetation clearance can include activities done by animals and could someone argue that damage to vegetation by stock movement itself (eg "crushing") without grazing could be within the definition of vegetation clearance and caught by the rules? Could land owners be in the position of having to fence those habitats to comply with the rules? (This question is also asked in relation to the Land hearing).	hearing panel	question could arise. The wording could be changed to "damage caused by stock, including grazing." or similar to avoid this possibility.	changes, at hearing panels discretion.
Rule 12-7				
30	Why is the latter part of Rules 12-7 to 12-9 (activity e) worded differently from the equivalent provision in Rule 12-1 condition (iv)? Are these conditions wide enough to enable land owners or occupiers to deal with	Questions from hearing panel	Condition 12-1(iv) permits section 9 land use activities for the purpose controlling pests and activity 12-7-9(e) permits the discharge of agrichemical to control pests. In my opinion these permit the primary methods of controlling pests (cutting, burning, crushing and spraying). There is a minor difference in the wording between the two types of provisions, the wording of 12-1(iv) is	Track changes blue version

	Issue	Raised by	Discussion	Recommendation
	all relevant pests on their properties?		probably the more accurate and flexible and could be adopted into the other rules for consistency.	
31	Delete 'over' in discretion column	HP	Correction made	Track changes blue version
32	Discretion column, clause (d), does 'crucial life supporting habitat' require definition or explanation?	HP	I recommend that this clause be amended to refer only to plant species, and to refer to the New Zealand threat classification system and lists. This is the most specific reference possible and protects the intended species.	Track changes blue version
33	Discretion column, clause (d), should this include reference to threat classification references?			
34	Discretion column, clause (e), ecological context criteria is missing.	HP	The omission that has been corrected.	Track changes blue version
35	Are the policy references in the 'links' column correct?	HP	Reference should be to Policy 12-4 (policy relating to treeland) and Policy 12-7 (policy relating to assessment of values and effects). Reference to Policy 12-5 is incorrect as this policy has been deleted.	Track changes blue version
Rule 12-8				
36	Rule title and activity description could include a note excluding treeland.	HP	Change made for clarity.	Track changes blue version
37	Consider activity clause (ea) – does planting include cultivation? If yes should this be explicitly stated? How recently does 'already used' imply? How does this	HP	Changes have been made to Schedule E to limit the riparian habitat to woody vegetation only. No normal existing cultivation, or planting should now be affected by this rule. This condition can now be removed.	Track changes blue version

	Issue	Raised by	Discussion	Recommendation
	impact on only occasional use of the land for cropping?			
38	Are the policy references in the 'links' column correct?	HP	Reference should be to Policy 12-4 (policy relating to at risk habitats) and Policy 12-7 (policy relating to assessment of values and effects). Reference to Policy 12-5 is incorrect as this policy has been deleted, and 12-6 relates to rare habitats and threatened habitats.	Track changes blue version
39	Activity column clause (h), should this be reworded to only include more restrictive activity classes?	HP	Yes, the intention is if another rule applies a more restrictive activity class then that should apply, not a less restrictive activity class.	Track changes blue version
Rule 12-9				
40	Should the rule title and activity description include a note excluding treeland?	HP	Changes made.	Track changes blue version
41	Are the policy references in the 'links' column correct?	HP		
42	Activity column clause (h), should this be reworded to only include more restrictive activity classes?	HP		

