Hearing: at Palmerston North: 28 – 30 March and 16 April 2012

DECISION: PART 3 – INDIGENOUS BIOLOGICAL DIVERSITY

Counsel and parties participating in this topic:

P R Gardner for Federated Farmers of New Zealand
H A Atkins for Horticulture New Zealand
A J L Beatson and N J Garvan for Meridian Energy Ltd
K Serjeant for the Wellington Fish and Game Council
S J Ongley and A Camaivuna for the Minister of Conservation
J Gregory for Transpower NZ Ltd and Powerco Ltd
L C R Burkhardt for TrustPower Ltd
J W Maassen and N Jessen for the Manawatu-Wanganui Regional Council

PART 3 – Indigenous Biological Diversity **Page**

Introduction

[3-1] This part of the Decision involves the provisions on indigenous biological diversity (indigenous biodiversity for short) in both the regional policy statement and regional plan components of the POP and the land use rules applying to it.

[3-2] The Council's position was that rare and threatened habitats should receive a greater degree of recognition and protection, and that its policy and rule framework with *discretionary* activity status for activities in rare, threatened and at-risk habitats would achieve this.

The parties' positions

[3-3] The Minister of Conservation and the Wellington Fish and Game Council wanted a stronger policy and rule response, with *non-complying* activity status for activities in rare and threatened habitats on the basis that this would mean that consent could be granted only after close inquiry.

[3-4] Meridian Energy Ltd, TrustPower (adopting Meridian's submissions and sharing some witnesses), Transpower NZ Ltd and Powerco Ltd supported the Council's position on *discretionary* activity status. While there were slightly different positions on some issues, the energy companies basically sought changes to the policy and rule regime in both the RPS and the Regional Plan which would change the scope of the criteria that qualified habitats for *rare and threatened* status and treat them in the same way as *at-risk* habitats, as well as to the hierarchy of actions to be taken in considering effects on all three types of habitats. These changes were opposed by the Council, the Minister, and Fish and Game as weakening the recognition and protection of indigenous biodiversity.

[3-5] Federated Farmers submitted that there is no justification for the approach of managing indigenous biodiversity at a regional scale and opposed the rule framework. In an earlier decision in the same set of proceedings ([2011] NZEnvC 403) the Court held that the RMA empowered the Regional Council to make rules to control land use for the purpose of maintaining indigenous biodiversity - a decision

since upheld by the High Court – see *Property Rights in NZ Inc v Manawatu-Wanganui RC* [2012] NZHC 1272.

[3-6] The parties' positions evolved up to and during the hearing, which made it difficult for everyone involved. A further complication was the change in the Council's position from the provisions of the DV POP. The outcomes of mediation and the expert witness conferencing, particularly from the ecologists and the planners, were not always well aligned.

Biodiversity - the resource, issue and general approach

[3-7] The decline of indigenous biodiversity is one of the four most critical issues addressed in the POP. The Plan records that the region has only 23% of its original vegetation cover and 3% of its wetland habitat remaining. Most of the forest is found in the hill country and the ranges, with fragments scattered throughout the lower-lying and coastal areas of the Region, where typically less than 10% of original habitat remains. That remaining natural habitat is small, fragmented, and under pressure from pests and disturbance. Much of the remaining indigenous biodiversity is in poor condition and health.[1] We note here that there was evidence from ecologists that the state of indigenous biodiversity now differs from what was recorded in the POP when it was notified in 2007. For example Dr Philippe Gerbeaux, an expert on wetlands giving evidence for the Minister, says that only 2.6% of wetland habitat now remains.

[3-8] The Plan has a focus on habitats, rather than individual species or genetic diversity, as the mechanism to most effectively sustain regional indigenous biodiversity into the future. It categorises habitats into *rare, threatened* or *at-risk habitats.* The description in the s42A report of Ms Fleur Maseyk, an ecologist, broadly explains the framework:

> ... the proposed framework for protection of indigenous biodiversity is based on habitat types rather than individual species. Habitat types were largely identified using predictive modelling. Comparisons between former and current extent of habitat types was conducted to determine degree of loss. Original and current extent of indigenous vegetation cover was primarily projected using robust national spatial

[1] 7.1.2 DV POP

data sets and predictive models. The use of these national spatial data sets and predictive models is common practice for analysis of this sort, and for determining the need for priorities for protection of indigenous biodiversity. These data sets also serve as key reference data for expected spatial distribution of each habitat type.

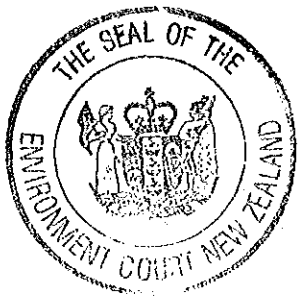
[3-9] Schedule E of the Plan identifies 32 habitats that are *rare, threatened* or *at-risk habitats*. These habitats are not depicted on the maps but are identified in the first table in the schedule (Table E.1). However, for a habitat to then qualify, it must meet at least one of the criteria described in the second table (Table E.2(a)) and not be excluded by one of the criteria in the third table (Table E.2(b)). The criteria in Table E.2(a) set thresholds (particularly size thresholds) above which a habitat type makes a major contribution to biodiversity. The exclusions in Table E.2(b) of the schedule relate to matters such as planted vegetation.

[3-10] Ecology and planning witnesses explained the advantages of this predictive approach over the traditional mapping and scheduling, or the listing of specific areas of indigenous biodiversity, as:

- habitat extent can change over time through natural or induced disturbance or successional events, and static maps can become quickly out of date
- determining the exact extent of an area of habitat in time and space is best done by in-field confirmation, guided by ecologically defined descriptions
- restrictions on activities, or a requirement to obtain a resource consent, only apply to the area of interest
- consistent treatment of the resource
- being more effective and efficient.

[3-11] There is an introductory provision to Schedule E that states:

> It is recommended that a suitably qualified expert is engaged for assistance with interpreting and applying Schedule E. This could be:
>
> (a) a consultant ecologist, or
>
> (b) the Regional Council staff, who currently provide this service free of charge, including advice and a site visit where required in the first instance. It may that following this initial provision of information, the proposal will require an Assessment of Ecological Effects to be provided as a component of the consent application. In such instances it is recommended that a consultant ecologist be engaged to conduct the assessment.



> The Regional Council can, in all cases, provide any spatial data and existing information where available as relevant to the habitat and the proposed activity.

[3-12] There was no argument about the risks posed to the habitats. No party contested the general approach, (with the exception of Federated Farmers on the regulation of biodiversity) but there was some concern about the inclusion of some habitats, notably cliffs, scarps and tors.

Cliffs, scarps and tors

[3-13] There was a challenge from Meridian, TrustPower, Transpower and Powerco to the broad description of ... *cliffs, scarps and tors*... and the extent and application of this habitat type as a *rare habitat.*

[3-14] There was some agreement between the ecologists, Ms Maseyk, called by the Council, Ms Amy Hawcroft for the Minister, and Mr Matiu Park, for Meridian and TrustPower, that the definition or description of the naturally uncommon habitat type called *cliffs, scarps and tors* in Schedule E could be further refined, given time. This habitat type includes ecosystems where the relevant background publication: - Williams et al 2007[2] - indicates that further research may be required to determine whether the ecosystem is indeed *rare.*

[3-15] In closing submissions (particularly Appendix B) the Minister put forward proposed changes to Schedule E and associated definitions of *cliffs, scarps and tors,* and also three other related habitat types that would also require amendment – *screes and boulderfields, active dunelands,* and *stable dunelands.* These were recommended by Ms Hawcroft. The proposed amendments are to ensure that only those habitats comprising ecosystems clearly identified as *rare* in Williams et al 2007, be included as *rare habitats.*

[3-16] We direct that the ecologists should confer and refine the description habitat type and prepare a joint statement which includes the reasons for that refinement. (If there is any disagreement between the ecologists that should be identified to the

[2] Williams, PA; Wiser SK; Clarkson, B; Stanley: "New Zealand's historically rare terrestrial ecosystems set in a physical and physiognomic framework" NZ Journal of Ecology (2007) NZJEcol 19.

Court along with the reasons for that disagreement in the normal way). The Council, in consultation with other affected parties as necessary should redraft Schedule E, with an explanation of the reasons for those amendments, and outlining suggested options for the process the Court could follow to consider and, if appropriate, to action those changes.

Objectives

[3-17] Objective 7-1: Indigenous biological diversity in the Regional Policy Statement component of the POP is not in contention. It provides:

> Protect areas of significant indigenous vegetation and significant habitats of indigenous fauna and maintain indigenous biological diversity, including enhancement where appropriate.

This objective reflects section 6(c) RMA which states that a matter of national importance to be recognised and provided for is:

> The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.

It also reflects the responsibility of the Regional Council to maintain indigenous biodiversity in the region under s62(1)(i) RMA.

[3-18] Part II, the Regional Plan component of the POP, has in Chapter 12 - *Indigenous Biological Diversity* the following Objective 12-2: (this is not in contention - other than by Federated Farmers in terms of responsibility for regulation):

> 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.

RPS Policies

[3-19] The first RPS policy (7-1) in contention apportions the responsibilities for controlling land use activities for the purpose of maintaining indigenous biological diversity in the Region, as required by s62(1)(i). The Regional Council is to be responsible for developing objectives, policies and methods to establish a region-wide approach for maintaining indigenous biodiversity, including enhancement where appropriate. The Regional Council must also develop rules controlling the use

of land to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna, and to maintain indigenous biodiversity, including enhancement, where appropriate.

[3-20] Only Federated Farmers took issue with the first policy, raising the merits of the apportionment of responsibilities, and opposing the concept of the regional plan containing rules controlling the use of land for indigenous biodiversity. Its position was that any rules should be in district plans. We return to this argument later.

[3-21] The second policy in contention (Policy 7-2A) concerns the management of activities affecting indigenous biological diversity. It introduces and differentiates between *rare and threatened habitats*, and *at-risk habitats*, with the Glossary to the POP defining these to be: - *an area determined to be* [in the particular category] *in accordance with Schedule E and, for the avoidance of doubt, excludes any area in Table E.2(b).* It then provides for their regulatory treatment. This was the focus of the hearing, along with the related policies in the Regional Plan (to which we refer and return when necessary).

[3-22] Federated Farmers also had concerns about the wording of a policy on the existing use of productive land. The Minister also had an appeal point on this clause and in closing advised that an agreement had been reached with Federated Farmers that the clause be reworded as:

> (iv) not restrict the existing use of production land where the effects of such land use on rare habitat, threatened habitat or at-risk habitat remain the same or similar in character, intensity or scale.

However Ms Barton, the planning witness for the Council, considered the qualifier *unreasonably* (which was in the original policy) should be retained. We concur with that view.

[3-23] The energy companies also had a concern about the wording of Policy 7-2A and sought cross-references to Chapter 3 the Infrastructure chapter.

[3-24] Part 1 - the RPS part of the POP - includes Chapter 3 (which is beyond challenge) on infrastructure. Chapter 3 has Objective 3-1:

> To have regard to the benefits of infrastructure and other physical resources of regional or national importance by enabling their establishment, operation, maintenance and upgrading.

[3-25] Policy 3-1 then lists the infrastructure the Council must recognise, including the national grid and electricity distribution, and pipelines and gas facilities. Policy 3-3 sets out the requirements for the regional council and territorial authorities when managing adverse environmental effects arising from new infrastructure. Policy 3-3(a) relates to existing infrastructure, (b) to new infrastructure, stating that minor adverse effects should be allowed, and (c) sets out the factors that should be taken account when assessing new infrastructure as being:

- The need for new infrastructure
- The functional, technical and operational constraints of infrastructure
- Reasonably practicable alternative locations and designs
- Offsetting more than minor effects that cannot be avoided, remedied or mitigated.

[3-26] Policy 3-4 requires the regional council and territorial authorities to have regard to the benefits of the use and development of renewable energy resources.

[3-27] For the RPS Policy 7-2A Management of activities affecting indigenous biological diversity - the Council proposed some changes pertinent to infrastructure as follows:

> For the purpose of managing indigenous biological diversity in the Region:
>
> (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:
>
> ...
>
> (ii) consider indigenous biological diversity offsets in appropriate circumstances as defined in Policy 12-5.
>
> (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].

[3-28] Transpower and Powerco wished the wording of Policy 7-2A (e)(ii) in the DV POP to remain, with the retention of the following piece in brackets which the Council proposed to remove:

> (ii) consider indigenous biological diversity offsets in appropriate circumstances as defined in Policy 12-5, [which may include the establishment of infrastructure and other physical resources of regional or national importance as identified in Policy 3-1].

The Minister was neutral as to whether clause (ii) should also state that the circumstances where offsets are considered *may include other physical resources of regional or national importance as identified in Policy 3-1.* (There was some confusion about the position of the parties on the bracketed part of (ii) with a suggestion that it may have been agreed but was omitted from the version presented to us.)

[3-29] We do not consider that the bracketed addition to Policy 7-2A(e)(ii) adds anything further than is already set out in policy in Chapter 3 which deals with infrastructure and other physical resources of regional or national importance and which refers to *offsetting more than minor effects that cannot be avoided, remedied or mitigated.* In any case, Policy 7-2A (with the associated Policy 12-5) does not impose any restriction on the types of activities that can be considered for indigenous biological diversity offsets. There has to be a limit to the extent to which there are cross-references between the various provisions in the RPS. Accordingly we do not agree to the addition of the bracketed wording.

[3-30] Appendix A of closing submissions on behalf of the Minister referred to there now being a lack of agreement on the bracketed addition to Policy 7-2A(e)(iii) [3-27], indicating that the amendment had previously been agreed between the Minister and the Council. We are not clear on the reason for the addition or for that matter the Minister's opposition to it. The clause is limited to *existing structures* and the definitions of maintenance, operation and upgrade are not open-ended. The definitions in the DV-POP in front of us impose constraints on the nature and extent of the activity and adverse effects on indigenous biodiversity (among other adverse effects). Policy 3-1 contains a long list of infrastructure and other physical resources of regional and national importance and we do not understand the Minister to have

any quibble with the content of that policy. The RMA defines *infrastructure* in terms of the Council's function of the strategic integration of infrastructure with land use through objectives, policies and methods (s30(1)(gb)). Most, if not all, of the items listed would come under that definition of infrastructure in any event. In the absence of argument, we find Policy 7-2A(e)(iii) as proposed by the Council acceptable

[3-31] Ms Helen Marr, the planning witness for the Minister, gave evidence that she generally agreed that the DV POP gives effect to the national policy statements on electricity generation and electricity transmission in part through Chapter 3 "Infrastructure, Energy, Waste, Hazardous Substances and Contaminated Land". However she noted that the obligation to give effect to these national policy statements does not end with Chapter 3 which is contained in Part I – the RPS component of the POP. Appropriate cross-reference, or specific provisions, may be required in Part II – the regional plan component of the POP. (We return to this when discussing the policy framework of the regional plan.)

[3-32] Other RPS policies were not in issue.

Other Provisions

[3-33] The RPS contains a number of non-regulatory methods which refer to biodiversity. It also has these anticipated environmental results – which were not in issue:

> Except for change because of natural processes, or change authorised by a resource consent, by 2017, the extent of rare habitat, threatened habitat or at-risk habitat is the same as (or better than) that estimated prior to this Plan becoming operative, and the number of at-risk habitats has not increased.
>
> By 2017, the Region's top 100 wetlands and top 200 bush remnants will be in better condition than that measured prior to this Plan becoming operative.

What should the approach to recognising significant indigenous vegetation and habitats be?

[3-34] The POP (both the RPS Policy 7-2A and Regional Plan policies) differs in its approach to the recognition (and subsequent policy treatment) of habitats identified in Schedule E as *rare and threatened habitats*, which are deemed to be significant

indigenous vegetation and significant habitats of indigenous fauna in terms of s6(c), and *at-risk habitats* which are not so deemed.

[3-35] All parties agreed that not all *at-risk habitats* are worthy of automatic s6(c) recognition as *significant indigenous vegetation and significant habitats of indigenous fauna.* The *at-risk* habitats are therefore subject to a second tier of assessment of significance beyond the methodology that informed the creation of Schedule E. This involves the assessment of individual areas against the criteria for assessing the significance of an area of habitat in Policy 12-6. The ecologists agreed that greater discretion is appropriate for habitats classified as *at-risk*, but areas of these habitat types are also vulnerable and subject to pressures that result in their continued decline, and therefore warrant some protection.

[3-36] The Council, the Minister, and Fish and Game consider *rare* and *threatened* habitats are, by definition, s6(c) significant indigenous vegetation and significant habitats of indigenous fauna. Accordingly, they contend that policy should reflect this. We were provided with a revised version of the policy provisions by Ms Barton at the conclusion of the hearing to make that intention clear. The Minister provided some amendments to those provisions with the intention of avoiding arguments that might arise from some of the terminology and language used. We use that version for further discussion.

[3-37] The energy companies wanted *rare* and *threatened* habitats to be treated the same way as *at-risk* habitats, and, before being determined to be a significant habitat, to go through the same additional filter (or second tier assessment) of the significance test that applies to *at-risk* habitats. In addition Mr Park proposed:

- the criteria for assessing significance of, and the effects of activities on, an area of habitat (Policy 12-6) should require *functioning ecosystem processes* as a threshold for representativeness of habitats (in addition to the other requirements).
- the condition of the habitat should be considered in assessing significance (rather than dealing with this at the stage of considering effects and the other matters in the resource consent process).

- *Should rare and threatened habitats be, by definition, significant?*

[3-38] The DV POP emphasised the importance of site visits in assessing habitats. The evidence of Ms Barton, Ms Maseyk and Ms Hawcroft confirmed that site visits have always been anticipated to check whether a habitat as it exists *in the field* meets the objective criteria for *rare* or *threatened* habitat under Schedule E, Tables 1, 2(a) and 2(b). If the criteria are met, then such habitats are determined to be *significant* within the meaning of s6(c) and no additional subjective or evaluative exercise is required.

[3-39] We find in favour of *rare* and *threatened* habitats being deemed *significant* for the following reasons:

- the highly vulnerable status of *rare* and *threatened* habitats and the state of remaining biodiversity in the region
- disturbance of *rare* habitats is very likely to cause local extinction of indigenous species, or of ecosystem type, because these habitats are spatially highly limited, meaning that species that rely on them are unable to move into adjoining suitable habitat.
- *threatened* habitats, which have less than 20% of the original extent of the habitat remaining, will show a sharp decline in the number of species likely to survive if more original habitat is lost, based on the species-area curve. Even very small losses of habitat below the 20% threshold can significantly impact on species' ability to survive.
- the scarcity of wetlands
- it reflects international biodiversity treaties and conventions New Zealand is a signatory to, and the Biodiversity Strategy.
- it reflects the Government's policy direction as stated in the *Statement of National Priorities for Protecting Rare and Threatened Native Biodiversity on Private Land* (MfE, 2007).
- the robust analytical approach to identifying rare and threatened species.
- the types of habitats, with the classifications describing the characteristics in Schedule E, are able to be identified.
- the objective, rather than subjective, nature of the characteristics.

- any deficiencies in identifying base information would be dealt with by another filter or layer, in considering the effects and the sustainability of the habitat.

- *Should 'functioning ecosystem processes' be a prerequisite to representativeness?*

[3-40] The criteria for significance are used for determining the ecological values of *at-risk* habitats, as well as being a consideration in the resource consent process. As proposed by the Council, Minister and Fish and Game, only one criterion within Policy 12-6 needs to be met for an area of habitat to be considered significant.

[3-41] Mr Park considered *functioning ecosystem processes* should be a prerequisite for representativeness, but this raised several questions. We accept that there is cause for concern: - the evidence of Ms Maseyk and Ms Hawcroft was that incorporating the concept of *functioning ecosystem processes* into Policy 12-6 as a criterion to be met, in addition to being either under-represented habitat type (criterion (i)(A)), or highly representative habitat type (criterion (i)(B)), would raise the threshold unacceptably high. It would mean that considerably fewer *at-risk* sites would pass the *significance* test, allowing for greater freedom to impact on indigenous biodiversity unrestrained by the resource consent process. This would be inappropriate given the evidence on the significance of the habitat types listed in Schedule E, and the demonstrated continued vulnerability and decline of areas of these habitat types. In addition, it would undermine the proper consideration of the values of these habitats during the resource consent process.

- *Should 'condition' be a criterion for significance?*

[3-42] Mr Park expressed concern about using *condition* in deciding the significance of habitats. As an example, he emphasised the degraded condition of the wetlands located in the Horowhenua sand dune country. However, in cross-examination, Mr Park conceded that given the rarity of these wetland habitats, a policy of avoiding adverse effects, even for wetlands in a degraded state, is appropriate.

[3-43] Ms Maseyk, Ms Hawcroft and Dr Gerbeaux were of the opinion that biodiversity which is not in good condition, or not of good quality, still has an

important role to play in biodiversity maintenance. Dr Gerbeaux referred to the same point for wetlands, making it clear that even small and modified areas of wetland habitat within the region are ecologically significant. These witnesses painted a graphic picture of the consequence of continuing to take out, or discount, the values of biodiversity across the region on the basis of its condition.

- *Conclusion on recognition of habitats*

[3-44] We agree with Ms Maseyk and Ms Hawcroft that the Council's approach reflects the appropriate process for determining ecological significance (and thus a demonstrated need for regulatory protection and a resource consent process) with the consideration of site-specific values and condition (critical to making sound management decisions) occurring at the resource consent stage. At the resource consent stage Policy 12-6 (b) requires consideration of:

> The potential adverse effects of 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 any additional ecological values and to the ecological sustainability of that habitat.

[3-45] We conclude that the effects of the additional criteria proposed by Mr Park would not achieve the Objective and Policy of the RPS, or the Objective of the Plan, or Part 2 of the Act. We accept that *condition* is brought in through the sustainability point in the Policy and can and should be dealt with at the resource consent stage when considering effects (including cumulative effects) and the other matters required under section 104. Mr Park's approach, we think, confuses these two steps and cuts across the need for a strong planning framework and a precautionary approach to a scarce and irreplaceable natural resource.

What should the policy framework for considering resource consents comprise?

[3-46] Policy 12-5 specifically relates to consent decision-making for activities in *rare, threatened* and *at-risk habitats* … and it is in issue.

[3-47] Under Policy 12-5 there is a different basis for granting consents that involve *any more than minor adverse effects* on a habitat's representativeness, rarity and

distinctiveness, or ecological context, for *rare*, *threatened* or *at-risk* habitat which is assessed to be an area of significant indigenous vegetation or a significant habitat of indigenous fauna. As proposed by the Council, the Policy contains a hierarchy of considerations, as follows:

- Avoid any more than minor adverse effects first
- Where these adverse effects cannot reasonably be avoided, remedy or mitigate adverse effects. [There are differences of opinion on whether this should only occur at the point where the adverse effect occurs, and what might be involved].
- Where these adverse effects cannot reasonably be avoided, remedied or mitigated the residual effects are to be offset. [There are differences of opinion on what an offset involves and whether it should result in a net indigenous biological diversity gain, and whether it should be the last resort.]

[3-48] The Minister preferred the rewording of Policy 12-5(b) as follows:

> Consent must generally not be granted for 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 under Policy 12-6, 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.
>
> (ii) Where any more than minor adverse effects cannot reasonably be avoided, they are remedied or mitigated at the point where the adverse effect occurs.
>
> (iii) Where any more than minor adverse effects cannot reasonably be avoided, remedied or mitigated in accordance with (b)(i) and (ii), they are offset to result in a net indigenous biological diversity gain.

[3-49] The Minister's position was that if the term *offsets* is used in a plan, and is expressly available to applicants wishing to undertake activities in areas having biodiversity value, the term should be used consistently with the Business Biodiversity Offsets Programme principles (BBOP principles).

[3-50] In closing submissions the Minister put forward two optional definitions:

> For the purposes of this Policy:

> *Offset* means a measurable conservation action designed to achieve no net loss and preferably a net gain of biodiversity on the ground once measures to avoid, minimise and remedy adverse effects have been implemented.
> *Minimise* means to reduce the duration, intensity and/or extent of adverse effects.

If adopted, these definitions would need to be consistent with the policy framework.

[3-51] Meridian did not oppose the reference to and use of biodiversity offsets in policy, but opposed the hierarchy of avoid, remedy, minimise and offset, seeking flexibility so that the applicant could determine the most appropriate approach, having weighed up all factors, effects, risks, costs and benefits under the framework of the POP. Its position was that allowing flexibility of options can result in a better environmental benefit than would a rigid policy. Meridian and other energy companies also opposed the requirement for a *net gain* for a biodiversity offset.

- *What are the BBOP principles?*

[3-52] Mr Spencer Clubb, a Senior Policy Analyst with the Department of Conservation, who is leading the drafting of good practice guidance on the application of biodiversity offsetting in New Zealand, gave evidence. During technical expert conferencing all the ecological experts giving evidence agreed that the term *biodiversity offsets* should be consistent with the Business and Biodiversity Offsets Programme (BBOP) definition and principles. These were initially developed in 2006, and work since has changed the sequence of, but not the content of, the principles.

[3-53] The BBOP principles define *biodiversity offsets* as:

> ... measurable conservation outcomes resulting from actions designed to compensate for significant residual adverse biodiversity impacts arising from project development after appropriate prevention and mitigation measures have been taken. The goal of biodiversity offsets is to achieve no net loss and preferably a net gain of biodiversity on the ground with respect to species composition, habitat structure, ecosystem function and people's use and cultural values associated with biodiversity.

[3-54] The Proposed National Policy Statement on Indigenous Biodiversity similarly defines *biodiversity offsets* as:

> ... measurable conservation outcomes resulting from actions which are designed to compensate for more than minor residual adverse effects on biodiversity, where those affects arise from an activity after appropriate prevention and mitigation measures have been taken. The goal of biodiversity offsets is to achieve no net loss and preferably a net gain of biodiversity on the ground with respect to species composition, habitat structure and ecosystem function.

[3-55] There are a set of principles establishing a framework for designing and implementing biodiversity offsets and verifying their success (and criteria and indicators). Of particular relevance is Principle 3 of the BBOP principles:

> Adherence to the mitigation hierarchy: A biodiversity offset is a commitment to compensate for significant residual adverse impacts on biodiversity identified after appropriate avoidance, minimisation and on-site rehabilitation measures have been taken according to the mitigation hierarchy.

[3-56] Mr Clubb's evidence was that *minimisation* means: ... measures taken to reduce the duration, intensity and/or extent of impacts that cannot be completely avoided, as far as is practically feasible. Residual adverse effects that are left over after avoidance, minimisation and rehabilitation, are required to be offset.

[3-57] Mr Clubb said that there is a clear distinction and a clear hierarchy, that places biodiversity offsetting as a separate activity, designed to address residual adverse effects only after avoiding, remedying and mitigating those effects has taken place. He also said that biodiversity offsetting provides a means by which decisions can be made about proposals for *exchanging* or compensating for biodiversity loss in a more robust, transparent and accurate manner.

What weight should we give the BBOP principles?

[3-58] Mr Clubb went on to say that the approach to biodiversity offsetting as proposed by the Minister for the POP is consistent with international best practice. He considered the BBOP definition and principles for biodiversity offsetting are appropriate to New Zealand and that application of all the principles is necessary. He said that, by definition, biodiversity offsetting seeks to address residual adverse

effects arising from project development after appropriate prevention and mitigation measures have been taken. He said that the definition and principles of offsetting as a final step in the *mitigation hierarchy* (and often referred to in BBOP as a *last resort*) have been agreed by international consensus, including from prominent members of the ecological community in NZ and overseas.

[3-59] We also note that the Proposed National Policy Statement on Indigenous Biodiversity, on which the POP approach is modelled, reflects BBOP principles. Notwithstanding that it has no statutory effect, and the number of submissions made on it, we consider the document is worthy of respect as a reflection of considered opinion, particularly as it reflects international best practice.

[3-60] Finally, there is the evidence of the ecologists about the state of biodiversity in the region and the high risks – likelihood and consequences – of adopting any less rigorous approach.

Should offsetting be required?

[3-61] An argument was made that a biodiversity offset is a subset of remediation or mitigation (and even, potentially, avoidance) and should not be specifically referred to or required.

[3-62] Meridian submitted that the *Final Decision and Report of the Board of Inquiry into the New Zealand Transport Agency Transmission Gully Plan Change Request* has close parallels with the matters considered by the Court and that it had taken this approach. The appeal to the High Court against this decision did not deal with this particular matter.

[3-63] With respect to the Board of Inquiry, we do not consider that offsetting is a response that should be subsumed under the terms *remediation* or *mitigation* in the POP in such a way. We agree with the Minister that in developing a planning framework, there is the opportunity to clarify that offsetting is a possible response following minimisation – or mitigation - at the point of impact.

[3-64] A related argument was that the law does not allow the policy approach of a hierarchy, but requires that any proposal should be treated in the round under the *avoid, remedy or mitigate* mantra. We have already dealt with that argument in Part 2 of the decision dealing with Landscape. We find it acceptable and appropriate for the regional plan to state a preference for the way effects on biodiversity should be dealt with, including by instituting a hierarchy.

Should avoidance be the first response?

[3-65] We had understood from the planners' conferencing record that the planners agreed that avoiding significant adverse effects should be pursued before moving to the lower level of remedying or mitigating such effects. There were some questions about this in the course of the hearing. However, avoidance is the first response in the BBOP principles and we accept the reasons given to us by various ecology and planning witnesses for that.

What should the second step of remedying and mitigating provide for?

[3-66] In relation to Policy 12-5(b) and (c), the planners' conferencing record states:

> The Planners for TrustPower/Meridian, Transpower/Powerco, and Federated Farmers agreed that offset mitigation outside the affected area should be an option (not a last resort) for an applicant to propose and a decision-maker to consider, if it achieves a net indigenous biodiversity gain. The planners for MWRC and MoC/WFCG consider that wording that requires the consideration of onsite mitigation before offsite mitigation or offsetting is more appropriate.

[3-67] During the hearing, differences emerged on what onsite mitigation, as opposed to offsets, would involve. The Minister's position was that an applicant should look to mitigate adverse effects at the point where the adverse effect occurs (in BBOP terms, after *minimising*) prior to having the option of *offsetting* outside or beyond that point:

> (ii) Where any minor adverse effects cannot reasonably be avoided, they are remedied or mitigated at the point where the adverse effect occurs.

The ecology and planning witnesses for the Minister gave evidence that offsetting principles should be applied to *all* adverse effects that are *left over* after mitigating at the point of impact.

[3-68] In cross-examination Ms Maseyk said that while it was preferable for mitigation to be at the point of the area affected, it should at least be as close to possible to it, and not beyond the ecological district. Ms Maseyk also considered that remedying or mitigating could involve, for example, fencing and undertaking pest management for another area with ecological values on a farm. She did not see that it need involve *like with like*.

[3-69] Ms Barton responded to the cross-examination of Ms Maseyk by putting forward the following revision:

> (ii) Where any significant adverse effects cannot reasonably be avoided, they are remedied or mitigated within the area of habitat directly affected by the activity or if that is not possible as close as possible to the area affected but not beyond the same ecological district.

[3-70] Mr Park also took a very broad view of remedying or mitigating, although he conceded he was not a planner.

What should the third step of offsetting involve?

[3-71] The Minister considered that offsetting principles should be applied to *all* adverse effects that are *left over* after mitigating at the point of impact. For these *residual* adverse effects, a net biodiversity gain is to be achieved. The Minister submitted that this principle should apply to any exchanges in biodiversity values, even where an applicant proposes to address such adverse effects *within* property boundaries, and even if that is at the *farm scale*.

[3-72] Other parties rejected the requirement for a net gain or even no net loss. Some argued that such a strict approach may not align with a regional council's function under s30(1)(ga) which requires only the maintaining of indigenous biodiversity. TrustPower submitted that a net indigenous biological diversity gain approach is at least a high-end approach to maintaining biological diversity, if not more than that. TrustPower also opposed the approach on the basis that the RMA is not a *no-effects* statute requiring all adverse effects to be fully avoided, remedied or mitigated in all circumstances and that the net indigenous biological diversity gain approach is unnecessarily restrictive. It also submitted that s6(c) of the RMA does

not automatically mean a no loss or net gain approach. There was also a suggestion that offsetting residual adverse effects should be an aspirational goal.

[3-73] Mr Clubb gave evidence that biodiversity offsetting represents an exchange of biodiversity, even where it is like-for-like, and that there are good reasons for offsetting being last in the hierarchy. He said that any exchange of biodiversity, even if it is within quite close proximity, represents a certain loss of biodiversity value for an uncertain gain in biodiversity values elsewhere. If the BBOP principles are not applied to such exchanges then, over time, biodiversity will not be maintained.

[3-74] We had evidence from ecologists that without a net gain, there will be the continued loss of biodiversity. Also that non-compliance with the BBOP principles would result in the *continued nibbling away* of habitats, allowing further fragmentation and greater cumulative loss across the region.

Should there be greater flexibility for the use of offsets?

[3-75] Meridian and TrustPower opposed prescribing what they considered to be a rigid approach to the use of biodiversity offsets such as the proposed avoid, remedy, mitigate, offset hierarchy, requiring every adverse effect to be avoided, remedied, mitigated or offset and establishing policy criteria around what sorts of offsets should be provided in what circumstances. TrustPower submitted that it would use biodiversity offsets as a means of addressing biodiversity effects, but wanted flexibility which it considered to be consistent with the framework and purpose of the RMA.

[3-76] We accept the evidence of the planners, Mr Clubb, and some of the ecologists, that too much flexibility would certainly contribute to the continuing loss of biodiversity. Ms Marr and Ms Barton gave evidence that while the approach with the various steps is prescriptive, there is the opportunity to step-down the policy hierarchy when designing and consenting proposals. Mr Clubb said that the existence of the *mitigation hierarchy* would not unreasonably constrain biodiversity offsetting as a means of achieving good biodiversity outcomes: - the requirement to minimise effects within the area affected is to be followed as far as is practically feasible. While it is clear that all feasible efforts must be undertaken to mitigate

within the site, this does not preclude good biodiversity outcomes from being achieved through an offset where this will be a better approach than impractical or unfeasible on-site mitigation.

[3-77] We accept Mr Clubb's opinion that uncertainty associated with achieving biodiversity gains through offsetting is one reason why it is further down the *mitigation hierarchy* than avoidance and minimisation, which have more certain outcomes for biodiversity. As Mr Clubb said, mitigation and compensation not required to meet the principles of biodiversity offsetting is even less certain to deliver desired biodiversity outcomes.

[3-78] We do not accept TrustPower's proposition that the policy approach is so narrow as to be likely to inhibit or confine innovative approaches which lead to sound and desirable biodiversity outcomes. Nor does it act as a veto to infrastructure proposals of national significance which may have significant adverse effects.

[3-79] In addition, we do not accept the suggestion made by some witnesses that the approach makes for additional complexity. The approach has the benefit of setting down clear steps which a resource consent application, evidence and decision-making have to address in a logical and robust manner. This is likely to result in improved analysis and evaluation of proposals, thereby reducing the risk of further biodiversity loss.

- *Are there problems with the application of biodiversity offsetting?*

[3-80] TrustPower submitted that there are a number of practical difficulties associated with implementing such an approach.

[3-81] The Minister accepted that biodiversity offsetting, and the methodologies surrounding it, are a developing field. However, the Minister's position was that the basic principles and definition of offsetting will not change and are now well established.

[3-82] Mr Clubb said that of particular importance is the explicit calculation of biodiversity losses and gains at matched impact and offset sites. He said there must

be a form of rigour, otherwise it is impossible to demonstrate that gains match or exceed losses.

[3-83] Mr Clubb also gave evidence that the Department of Conservation is currently managing a three-year Biodiversity Offsets Research Programme. This is to be used to develop best practice guidance, consistent with international best practice. The programme is due for completion in mid 2012 and it is hoped best practice guidance will be available in draft form at about the same time.

[3-84] We will later consider the proposal from the Minister to add a provision to Policy 12-5(d), so that any biodiversity offsetting calculation is proportionate to the effects, and will overcome the potential difficulties raised by opponents of the approach.

[3-85] We also note that biodiversity offsetting was recently applied by the Environment Court in the *MainPower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384 – a windfarm case.

- *Should the test be 'reasonably' or 'reasonably practicable'?*

[3-86] The BBOP principles use the term *as far as is practically feasible* as the criterion or point for when decision-making should cascade down to another level on the hierarchy.

[3-87] In her evidence in chief Ms Marr used *reasonably practicable* and proposed the following definition:

> *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.

[3-88] She said that this was broadly based on the definition of *to the extent practicable* adopted in the *Transmission Gully Plan Change* report (see para 3-62]). Ms Marr said that this wording would capture the concepts of whether alternatives are available, based on current states of knowledge and financial implications, or conversely whether the constraints were such that alternatives were not available.

She said that it would involve more explicit recognition of the provisions in the renewable electricity generation and electricity transmission national policy statements and Chapter 3 (the RPS) of the POP. We note that the wording also contains elements of the definition of the *best practicable option* in the RMA.

[3-89] Ms Marr's approach was rejected by the other planners at their conferencing with a preference for simply using the word *reasonably* and leaving that word undefined. However, Mr Schofield, planning witness for Meridian, subsequently recommended using the phrase *reasonably practicable*.

[3-90] The Minister submitted that the inclusion of a definition of *reasonably practicable*, or explicit recognition of constraints, is not necessary in order to give recognition to the provisions in the energy National Policy Statements and Chapter 3 of the One Plan, but if *reasonably practicable* is to be used, it should be defined.

[3-91] In closing submissions the Minister preferred *reasonably* and so do we. As with *reasonably practicable* farming practices (which we discuss in Part 5) this concept is hard to nail down. The definition proposed by Ms Marr illustrates the subjective nature of what needs to be considered and ultimately weighed. *Reasonably* is an objective test, capable of being applied by decision-makers.

- *Conclusion on hierarchy of responses*

[3-92] We accept the approach of a hierarchy reflecting the BBOP principles. We find that the provisions put forward by the Minister of Conservation, in closing submissions with some amendments, better provide for maintaining indigenous biodiversity.

What should the biodiversity offset policy contain? What should an offset allow?

[3-93] Policy 12-5(d) contains the approach to (criteria for) an offset. The Council version provides that an offset must:

> (i) provide for a net indigenous biological diversity gain within the same habitat type, or where that habitat is an *at-risk habitat,* provide for that gain in a *rare habitat* or *threatened habitat* type, and

(ii) generally be in the same ecologically relevant locality as the affected habitat, and

(iii) not be allowed where inappropriate for the ecosystem or habitat type by reason of its rarity, vulnerability or irreplaceability, and

(iv) have a significant likelihood of being achieved and maintained in the long term and preferably in perpetuity, and

(v) achieve conservation outcomes above and beyond that which would have been achieved if the offset had not taken place.

These place limits on what can be provided and counted (or considered) as a net indigenous biological diversity gain in the assessment of a resource consent. They also provide for a biodiversity offset not to be allowed in certain circumstances. We had evidence that these criteria draw on the BBOP principles.

[3-94] Some parties opposed the requirement in (i) for a net indigenous biological diversity gain, with Mr Schofield seeking its replacement with reference to *maintaining indigenous biodiversity*. For the reasons given earlier we hold there is good reason to retain Policy 12-5(d) in its current form.

[3-95] In closing submissions the Minister proposed two changes which we accept. These are to reword (d) as follows:

(i) provide for a net indigenous biological diversity gain within the same habitat type, or where that habitat is not an area of significant indigenous vegetation or a significant habitat of indigenous fauna, provide for that gain in a rare habitat or threatened habitat type, and

(ii) reasonably demonstrate that a net indigenous biological diversity gain has been achieved using methodology that is appropriate and commensurate to the scale and intensity of the residual adverse effect, and ...

[3-96] The first is to avoid any confusion regarding significant areas and the second should answer some of the concerns about the methodology in requiring it be proportionate to the nature and scale of the residual effect on biodiversity.

[3-97] With the above amendments proposed by the Minister we find the criteria for an offset based on the BBOP principles appropriate.

Should there be regulation at a regional level?

[3-98] Before considering the rule framework in detail we consider the challenge from Federated Farmers about the allocation of responsibilities for managing biodiversity through policy, and more particularly the requirement for regional rules administered by the Regional Council. Mr Gardner for Federated Farmers submitted that leadership by the Regional Council should not involve regulation, but regulation (if any) should be left to territorial authorities.

[3-99] Mr Gardner repeated many of the arguments put forward at the earlier hearing that the legal context supports responsibility for biodiversity at a regulatory level being with the territorial authorities. We did not, and still do not, agree. The RMA makes it clear that a regional plan may adopt a regulatory approach to biodiversity. However, we cover off the points he made for completeness.

[3-100] Mr Gardner submitted that s33 of the RMA provides local authorities with the power to transfer their responsibilities to another public authority, and this had not occurred for biodiversity. That may be so, but it is a function which a regional council may undertake under s30(1)(ga), and no transfer is necessary for the Regional Council to undertake this function.

[3-101] He went on to submit that the practicalities and dynamics of achieving the integrated management of biodiversity are such that any rules relating to biodiversity should appear in district plans and not the regional plan. Federated Farmers' main concern was the way in which existing use rights apply, alleging control under the regional plan amounts to the expropriation of rights granted under the RMA through the district plan. This is on the basis that existing lawful uses that contravene a district plan rule may continue if their effects are the same or similar in character, intensity and scale to those which existed before the rule, but activities that contravene a regional rule must apply for consent within six months. He said this was equally applicable to instruments such as resource consents and certificates of compliance granted by the territorial authorities. Mr Gardner submitted that very clear wording is needed for legislation to be read as expropriating rights without compensation.

[3-102] Ms Lynette Neeson a farmer, Dr Tessa Mills, a policy analyst, and Mr Shane Hartley, a planner, gave evidence for Federated Farmers.

[3-103] Policy 7-2A in the RPS portion of the POP specifically provides that the Regional Council and territorial authorities must not unreasonably restrict the existing use of production land where the effects of such land use on rare, threatened or at risk habitats remain the same or similar in character, intensity and scale.

[3-104] We find that there are sound resource management reasons for the approach of regulating biodiversity through the POP to achieve the objectives of the Plan and the *sustainable management of natural resources*. These include:

- the benefits of a consistent regional approach
- the links between biodiversity and water quantity and quality issues that are the responsibility of the region
- the parlous state of indigenous biodiversity in the region and the immediate need for regulation.

Discretionary v non-complying activity status

[3-105] The Council approach (supported by others) is that *discretionary* activity status, supported by strong policy, is sufficient to achieve the objectives of the POP and Part 2 of the RMA.

[3-106] The position of the Minister and Fish and Game is that activities in *rare* and *threatened* habitats should be *non-complying* and not *discretionary*. The Minister and Fish and Game propose the following to address issues raised by the parties:

- Bundling – a possible exemption for activities requiring consent as a result of indigenous biodiversity rules (a technical issue).
- Recognition of infrastructure in consent consideration matters (covered separately under the *exemption* heading).

- *A bundling exemption*

[3-107] The energy companies raised concerns about the legal principle of bundling of consent status for infrastructure proposals, based on the *non-complying* status for

indigenous biodiversity rules. They regarded it as comprising a major hurdle for the consenting of worthwhile energy projects.

[3-108] The Council had initially proposed (but later moved away from) the following as a way of getting around the bundling issue:

> Where there is a proposal involving electricity generation or electricity transmission and the proposal involves, as a component of it, an activity that triggers a non-complying classification because of its effect on rare habitats or threatened habitats then [that activity will be assessed separately and] the classification of the other elements of the proposal and its constituent activities must not take on the non-complying classification by virtue of the bundling principle.

[3-109] The primary position of the Minister was that there is no need for a non-bundling policy or rule, as the case law on bundling is appropriate. The Minister considered that it is not the case that components of Policy 12-5 would get *picked-off* for separate consideration and the Policy must be read as a whole.

[3-110] As a secondary position, the Minister was prepared to delete the words in brackets in para [3-108] or alternatively, to add to the words after Policy 11A-7 Sites with multiple activities, and activities covering multiple sites:

> There may be circumstances where individual activities are considered at their given classification rather than the most stringent activity classification. Such circumstances will include activities associated with electricity generation or electricity transmission where a more stringent activity classification would otherwise apply to elements of the proposal by virtue of a component activity that triggers non-complying classification because of its effect on rare habitats or threatened habitats.

[3-111] The other parties questioned whether any exemption provisions (even a Rule) would work, raising doubts about the legality of such an approach. We find that there is no justification for including such an exemption from the bundling principle. We conclude that there is a discretion for the exercise of the bundling principle in law (as is already recognised in Policy 11A-7). That is sufficient.

- *The gateway test of 'not contrary to' objectives and policies?*

[3-112] Clearly the *effects* gateway test under s104D is not the target, given the consent policy applies to *any more than minor adverse effects.*

[3-113] The Council prefers *discretionary* activity status because:

- The same, if not better, results can be achieved through *discretionary* activity status.
- The policy framework is strong and actively discourages activities in and effects on *rare* and *threatened* habitats.
- Practical application and workability, tested in practice under POP, resulting in workable outcomes for land owners and protection of important areas of indigenous biodiversity. The biodiversity provisions are a trigger for an on-site discussion with landowners on their activity, resulting in elective avoidance of Schedule E listed habitat. Biodiversity can also be discussed alongside water quality provisions and rules regarding land to determine the best outcome.
- The history and nature of *non-complying* activity status. A historical argument as to the origin, roots and changes in the nature of what was a specified departure under the Town and Country Planning Act.
- A more philosophical approach, based on there being few *non-complying* activities in the Plan, with *discretionary* activity status generally the default category.
- There is a potential for technical knock-out through the gateway test rather than a focus on achieving a sound environmental outcome.
- *Discretionary* activity status does not result in trade offs that automatically rule out *rare* and *threatened* habitats to avoid *non-complying* status when a better biodiversity outcome may be able to be achieved involving activities in these habitats.

[3-114] The energy companies also added:

- Infrastructure, such as power transmission and reticulation and access to infrastructure, cannot avoid *rare* and *threatened* habitats.

- There is the potential for a worse result, with *at risk* habitats opted for rather than *rare* and *threatened* habitats, when the effects might be greater.
- The option selection and consent process is made more complex and costly.
- The flexibility of *discretionary* activity status is particularly needed to choose paths or routes for infrastructure.
- The policy framework is not suitable for an evaluation of whether a proposal is contrary to objectives and policies.
- It is difficult to find out whether a *rare* and *threatened* habitat and therefore *non-complying* activity status is involved.
- An application for a *discretionary* activity needs to be just as robust and a consent authority has to undertake a robust assessment, the objectives and policies provide clear direction to decision makers so issues will not be missed and there is greater certainty for applicants.

[3-115] We agree with the Minister and Fish and Game that *non-complying* activity status is the better approach. Our reasons are:

- The evidence of Ms Maseyk, Ms Hawcroft and Dr Gerbeaux informed us that there are few activities affecting *rare* and *threatened* habitats which would have minor adverse effects.
- *Non-complying* status sends a strong signal.
- If there is no s104D gateway, the consent authority need only have regard to the biodiversity policy framework, among other matters, including Part 2. Under s104(1) the decision-maker must give genuine attention and thought to any relevant provisions of a plan, but has discretion to decide there are countervailing considerations outweighing the strict application of even a strongly expressed policy. The greater discretion afforded to a decision-maker under a *discretionary* activity rule is inadequate to ensure biodiversity is maintained in the region. *Non-complying* activity status results in a more focussed examination of the biodiversity objectives and policies: -these are not just one of a number of plan provisions to have regard to.
- Section 6(c) is not a veto, but it has more weight if it is a s6(c) type gateway, and not only one of the matters to have regard to.

- The need for some caution comes with the need to be satisfied that the proposal is not contrary to the objectives and policies.
- Other similar uses in the Plan involving resources at their limit (e.g. water) have *non-complying* activity status. Water is similar in that it involves a consent applicant obtaining information from the Council on the resource e.g. volumes already allocated.
- It would be clear to a decision-maker whether or not a proposal was contrary to the direction set by the provisions. A proposal would only meet the objectives and policies if it can demonstrate that it is designed to take reasonable measures to, first, avoid more than minor adverse effects, and, second, take reasonable measures to remedy or mitigate these effects and finally offset residual effects.
- *Non-complying* status need not militate against the process of working with landowners.

[3-116] In conclusion, we are not assured that a better, or even a similar, biodiversity result could potentially be achieved through considering proposals in the round through a *discretionary* activity status. Even though Part 2 provisions infuse the decision-making process under s104(1) they do not provide the same level of certainty that biodiversity will be maintained. While the policy is strong, there is the opportunity for applicants to step-down or work through the hierarchy and pass the gateway test for objectives and policies even where it is not possible to avoid all rare and threatened habitats. We therefore do not accept there is a high risk of technical knock-out arguments militating against sound proposals.

Should there be an exemption for certain activities?

[3-117] If *non-complying* activity status was to be decided upon, Meridian, TrustPower, Transpower and Powerco sought an exemption for renewable electricity generation and transmission activities within *rare* and *threatened* habitats as *discretionary* activities on the basis of:

- their strategic importance and national benefits
- the national policy statements applicable to these activities
- particular problems with the bundling approach for these projects, which may extend across property and regional boundaries

- whether *non-complying* activity status gives effect to the RPS.

These considerations were advanced on the basis of not being relevant to other less constrained activities such as farming.

[3-118] A primary reason advanced for seeking an exemption was a concern about the ability of renewable energy and reticulation projects under the POP to pass the gateway tests in s104D RMA. A particular problem was perceived as infrastructure proposals being contrary to the specific indigenous biodiversity objectives and policies of the regional plan where (as was highly likely) these involved significant adverse effects on *significant habitats.* A related concern was that Chapter 3 in the RPS dealing with infrastructure and energy was not relevant to the gateway test, as the objectives and policies were not in, or referred to, or the matters contained in them, reflected in the regional plan.

[3-119] Ms Marr did not accept that renewable electricity and transmission projects should be given a separate (or *discretionary*) activity status as opposed to other activities. She considered that it would be preferable to alter Policy 12-5 to address the various concerns and to include direct consideration of the benefits of transmission or renewable energy generation rather than to lower the activity status across the board.

[3-120] In the Regional Plan part (Part 2) of the POP, Policy 12-5 on consent decision-making for activities in *rare habitats, threatened habitats* and *at-risk habitats* contains as its first limb the requirement (among other things) to have regard to (for all activities):

> (i) the Regional Policy Statement, particularly Objective 7-1 and Policy 7-2A

Ms Marr proposed the addition of the following in a new subclause (v), which was supported by Transpower and Powerco: …

> for electricity transmission and renewable energy generation activities, any national, regional or local benefits arising from the proposed activity.

In that circumstance she still considered that assessing the Policy against the *not contrary to* test remains a useful exercise.

[3-121] Mr Le Marquand, planner for Transpower, Mr Schofield, Mr Hartley and Ms Barton considered that the amendments proposed by the Minister and Fish and Game Council indicated a willingness to attempt to recognise and deal with issues with *non-complying* activity status for energy and electricity transmission. However, all considered it more efficient and effective to retain the certainty of the policy intent while requiring *discretionary* activity consent.

[3-122] In closing submissions the Minister proposed splitting Policy 12-5A into two parts - (1) and (2) - in order to enable an elevated consideration for electricity transmission and renewable energy activities in a new sub-clause 2, and provided a rewording. The proposed addition is:

> (2) For electricity transmission and renewable energy generation activities, providing for any national, regional or local benefits arising from the proposed activity.

That would be different from Ms Marr's earlier proposition to include a specific reference to having regard to the benefits of electricity transmission and renewable energy generation activities.

[3-123] We accept the proposal advanced by the Minister, but not the exemption to *non-complying* activity status sought by the energy companies. We find the compass of the new Policy 12.5A(2) will ensure the benefits of electricity transmission and renewable energy generation activities are factored into the decision-making without cutting across the hierarchy of consideration and treatment of adverse effects on significant indigenous vegetation and significant habitats of indigenous fauna.

[3-124] Transpower and Powerco still proposed the addition of the following criterion:

> (vi) when assessing offsets, the appropriateness of establishing infrastructure and other physical resources of national or regional significance.

This was advanced on the basis of its inclusion in the DV POP. This is limited to offsets rather than the hierarchy of consideration of adverse effects and uses the word *appropriateness* which rather begs the question. Along with our concerns about the wording, we do not accept there is a need for such a provision.

Giving Effect to the National Policy Statements

[3-125] Section 62(3) RMA requires a regional plan to give effect to a National Policy Statement (NPS). There are three relevant National Policy Statements.

[3-126] We considered the NPS Renewable Energy Generation 2011 (NPS REG) in Part 2 – Landscape. In that decision we commented that the NPS recognises that there may be adverse environmental effects from generation activities that cannot be avoided, remedied or mitigated, and that the possibility of offsetting is specifically raised. But we also said that there is no affirmation that this sort of infrastructure occupies so special a place in the order of things that it may be established no matter what its effects may be and that the regime that applies to generation infrastructure is the same regime that applies to other uses and developments. That must surely also be the case for the activity status for renewable energy generation.

[3-127]Turning to the NPS Electricity Transmission 2008 (NPS ET), the objective is to recognise the national significance of the electricity transmission network by facilitating the operation, maintenance and upgrade of existing and the establishment of new transmission resources *while* managing the adverse environmental effects of the network. While there are many policies directed at ensuring that the benefits, and practical constraints of, operating, maintaining, developing and upgrading the electricity reticulation network are factored into decision-making, there are also policies on managing the environmental effects of transmission. These include:

> Policy 3
>
> When considering measures to avoid, remedy or mitigate adverse environmental effects of transmission activities, decision-makers must consider the constraints imposed on achieving those measures by the technical and operational requirements of the network.
>
> Policy 4
>
> When considering the environmental effects of new transmission infrastructure or major upgrades of existing transmission infrastructure, decision-makers must have regard to the extent to which any adverse effects have been avoided, remedied or mitigated by the route, site and method selection.

As with the NPSREG, we do not find that the NPSET gives electricity transmission activities so special a place in the order of things that it should override the regime

that applies to indigenous biodiversity. In any case we were not persuaded that this regime would present insurmountable obstacles to continuing to operate and expand the electricity transmission network to meet the needs of present and future generations.

[3-128] There is also the *New Zealand Coastal Policy Statement 2010* to be given effect to. NZCPS Policy 11 is to protect indigenous biological diversity in the coastal environment and contains a strong policy direction to avoid all adverse effects of activities on the matters referred to in part (a). That includes indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare.

[3-129] In our view there is nothing in the NPS documents that means *non-complying* activity status would be inappropriate for renewable electricity generation and electricity transmission under the policy and rule framework proposed for the regional plan.

Outcome on discretionary v non-complying

[3-130] We conclude that there is no justification for an exemption from the activity status for renewable electricity generation and electricity transmission under the policy framework in the Regional Plan portion of POP. All activities should be *non-complying*.

[3-131] In terms of effectiveness we have already covered the reasons why *non-complying* activity status would be more effective in maintaining indigenous biodiversity. These reasons equally apply to electricity generation and reticulation activities.

[3-132] A lot of emphasis was put on the difficulties infrastructure proposals might face, with functional, operational or other constraints and in avoiding significant adverse effects on rare and threatened habitats, such as may be the case with route selection for transmission lines. We consider the evidence of planning witnesses that these difficulties would translate into problems with meeting the objectives and policies to be overstated. There is a cascade in the policy with a series of steps to be

followed to evaluate significant adverse effects on significant indigenous biodiversity. There are appropriate responses which allow such constraints to be considered. The hierarchy of consideration and treatment includes as a last resort the ability to offset residual adverse effects.

[3-133] We do not accept that it is difficult to find out whether a *rare* and *threatened* habitat is involved, particularly as witnesses explained the extensive information gathering and comprehensive environmental assessment that would be undertaken for example for route selection for new major reticulation.

[3-134] We recognise that renewable energy and electricity transmission projects may involve large areas or corridors of land and multiple activities and that this *may* involve the bundling of these activities together for assessment. However, a decision-maker has a discretion as to whether to bundle such activities.

[3-135] We do not accept that *non-complying* activity status would be an impediment to the assessment of projects that would otherwise merit full consideration under s104 and Part 2 of the RMA. We do not accept that there is a high risk of technical knock-out arguments militating against sound proposals.

[3-136] For those reasons, we find that the proposed policy and rule framework would give effect to the National Policy Statements and the RPS.

[3-137] Section 7(j) of the RMA requires that all persons exercising functions and powers under the RMA, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to the benefits to be derived from the use and development of renewable energy. Those benefits include, in economic terms, enhancing the security of supply and strengthening the diversity of generation sources as well as environmental benefits. The revised policy now proposed by the Minister appropriately allows the consideration of the benefits of such infrastructure projects under the policy and rule regime.

[3-138] After considering the many matters in Part 2 (besides s6(c)), the intrinsic values of ecosystems in s7(d), maintenance and enhancement of the quality of the

environment in s7(f) and the finite characteristics of natural resources in s7(g) that relate to indigenous biodiversity, there is also the need to safeguard the life supporting capacity of ecosystems as part of the *sustainable management of natural and physical resources.* We find that that an exemption for electricity generation and transmission as a discretionary activity would not promote *sustainable management.*

Summary of conclusions: Part 3

A. The ecologist witnesses should confer and refine the description of habitats and the Council should then report to the Court. Para [3-16].
B. Policy 7-2A should be redrafted in accordance with Paragraphs [3-27] to [3-30].
C. Rare and threatened habitats should, by definition, be significant in terms of s6. Paragraph [3-39].
D. Policy 12-6(a)(i) on representativeness should have *functioning ecosystem processes* as an alternative criterion and not a prerequisite. Paragraphs [3-41] and [3-45].
E. *Condition* should not be a criterion for significance. Paragraphs [3-44] and [3-45].
F. BBOP principles are a sound basis for policy. Paragraphs [3-58] to [3-60].
G. Offsetting is better not regarded as remediation or mitigation and comes last in the hierarchy. Paragraphs [3-63] to [3-64].
H. The term *reasonably* throughout Policy 12-5 is preferable to *reasonably practicable.* Paragraph [3-91].
I. Provisions should be added to Policy 12-5(d) to better describe and to qualify the methodology for evaluating net indigenous biodiversity gain. Paras [3-95] to [3-97].
J. There are sound resource management reasons for regulating biodiversity through the POP. Paragraph [3-104].
K. There is no justification for the Plan attempting an exemption to the bundling principle. Paragraph [3-111].
L. Non-complying activity status is the correct approach. Paragraph [3-115] and [3-116].

M. There is no justification for exempting renewable energy and electricity transmission from non-complying activity status. Paragraph [3-130] and [3-138].

N. The POP regional plan provisions give effect to NP Statements and the RPS Paragraph [3-136].

Result and Directions

[3-139] We generally approve the amendments proposed in Appendix A to the Closing Submissions for the Minister - (with some limited exceptions). We attach the relevant parts of that Appendix, noting that we have made no decisions on the optional definitions (*offset* and *minimise*) put forward by the Minister. We direct the Council to prepare the necessary amendments and consequential amendments to the POP to give effect to this part of the decision after consulting, as appropriate, with the other affected parties.

Appendix A
(As presented by the Minister of Conservation)

Policy 7-2A: Management of activities affecting indigenous biological diversity

For the purpose of managing indigenous biological diversity in the Region:

(a) Habitats determined to be rare habitats and threatened habitats under Schedule E must be recognised as areas of significant indigenous vegetation or significant habitats of indigenous fauna.
(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.
(c) The Regional Council must protect rare habitats, threatened habitats, and at-risk habitats identified in (a) and (b), and maintain and enhance other at-risk habitats by regulating the activities through its regional plan and through decisions on resource consents.
(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) consider indigenous biological diversity offsets in appropriate circumstances as defined in Policy 12-5, 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 restrict the existing use of production land where the effects of such land use on rare habitat, threatened habitat or at-risk habitat remain the same or similar in character, intensity and scale.

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

The regulation of 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, cultivation, bores, 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,

(1) For all activities, having regard to:

(i) the Regional Policy Statement, particularly Objective 7-1 and Policy 7-2A,

(ii) a rare habitat or threatened habitat is an area of significant indigenous vegetation or a significant habitat of indigenous fauna,

(iii) the significance of the area of habitat in terms of its representativeness, rarity and distinctiveness, and ecological context, as assessed under Policy 12-6,

(iv) the potential adverse effects of the proposed activity on significance, and

(v) 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.

(2) For electricity transmission and renewable energy generation activities, providing for any national, regional or local benefits arising from the proposed activity.

(b) Consent must generally not be granted for 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 under Policy 12-6, 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.

(ii) Where any more than minor adverse effects cannot reasonably be avoided, they are remedied or mitigated at the point where the adverse effect occurs.

(iii) Where any more than minor adverse effects cannot reasonably be avoided, remedied or mitigated in accordance with (b)(i) and (ii), they are offset to result in a net indigenous biological diversity gain.

(c) Consent may be granted for 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 under Policy 12-6 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.
  (iii) Where any significant adverse effects cannot reasonably be avoided, they are remedied or mitigated at the point where the adverse effect occurs.
  (iv) Where significant adverse effects cannot reasonably be avoided, remedied or mitigated in accordance with (c)(ii) and (iii), they are offset, to result in a net indigenous biological diversity gain.

(d) An offset assessed in accordance with (b)(iii) or (c)(iv), must:
  (i) provide for a net indigenous biological diversity gain within the same habitat type, or where that habitat is not an area of significant indigenous vegetation or a significant habitat of indigenous fauna provide for that gain in a rare habitat or threatened habitat type, and
  (ii) reasonably demonstrate that a net indigenous biological diversity gain has been achieved using methodology that is appropriate and commensurate to the scale and intensity of the residual adverse effect,
  (iii) generally be in the same ecologically relevant locality as the affected habitat, and
  (v) not be allowed where inappropriate for the ecosystem or habitat type by reason of its rarity, vulnerability or irreplaceability, and
  (vi) have a significant likelihood of being achieved and maintained in the long term and preferably in perpetuity, and
  (vii) achieve conservation outcomes above and beyond that which would have been achieved if the offset had not taken place.

Optional definitions proposed by the Minister of Conservation:

For the purposes of this Policy:
Offset means a measurable conservation action designed to achieve no net loss and preferably a net gain of biodiversity on the ground once measures to avoid, minimise and remedy adverse effects have been implemented.

Minimise means to reduce the duration, intensity and/or extent of adverse effects.