
BEFORE THE HEARINGS COMMITTEE

IN THE MATTER

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

**SECTION 42A REPORT BY JOHN MAASSEN
FOR HORIZONS REGIONAL COUNCIL CONCERNING LIVING
HERITAGE/INDIGENOUS BIOLOGICAL DIVERSITY PROVISIONS
OF THE PROPOSED ONE PLAN**

COOPER RAPLEY
LAWYERS
Palmerston North & Feilding

Solicitor: J W Maassen

Address: 240 Broadway Avenue
P O Box 1945
DX PP80001
Palmerston North

Telephone: (06) 353 5210

Facsimile: (06) 356 4345

Email: jmaassen@crlaw.co.nz

Index

Page no.	Paragraph no.	Subject
3	1-2	Introduction
3	3-7	Background
4	8-12	The Background to the 2003 Resource Management Amendment Act
4	13-23	Relevant provisions of the RMA
7	24-29	Can regional plans include rules controlling land use for the purpose of maintaining indigenous biological diversity?
9	30-32	The extent of TA's role in controlling land use to maintain indigenous biodiversity in light of POP
9	33-34	What does 'significant' mean in section 6(c)

Introduction

1. My name is John Maassen. I am a resource management lawyer. I have 20 years legal experience. I am a partner of the Manawatu and Central Region law firm Cooper Rapley. In the last decade I have undertaken work for at least six local authorities in the lower North Island and top of the South Island. I also regularly act as a commissioner having completed the Making Good Decisions Program which I co-presented on behalf of the Ministry for the Environment in the lower North Island.
2. I have been requested by Horizons Regional Council (HRC) to provide legal commentary on issues relating to the provisions of Part I and Part II of the Proposed One Plan (POP) concerning indigenous biodiversity. My report is confined to legal matters.

Background

3. Part I, chapter 7 of POP is the RPS's statement on indigenous biological diversity. For many years regional councils have had a role in maintaining biodiversity through pest management responsibilities, fencing subsidies and controls on water quality as well as soil conservation.
4. Part I, POP does several things:
 - (a) confirms the primacy of the Regional Council's role in maintaining biological diversity including terrestrial biodiversity (see policy 7-1 (a) and (b) which makes it plain that territorial authorities responsibility role is limited to implementing the objectives and policies of the RPS in the context of subdivision and land use consent applications); and
 - (b) provides for the inclusion of rules in the regional plan (Part II POP) including land use controls to maintain biological diversity.
5. The inclusion of land use rules in Part II, Chapter 12 for the purpose of maintaining terrestrial indigenous biodiversity is a new and significant step by HRC that relies upon:
 - (a) the introduction of amendments to the RMA by the 2003 Resource Management Amendment Act that place great emphasis on the maintenance of indigenous biological diversity;
 - (b) the ongoing decline in the regions' indigenous biodiversity;
 - (c) the inability of territorial authorities to appropriately manage and control land use to halt the decline; and
 - (d) the enhanced functions of regional councils to maintain indigenous biological diversity as a result of the 2003 Resource Management Amendment Act.
6. Indigenous biological diversity is not solely terrestrial. It includes aquatic and marine biodiversity.
7. It is understood that HRC has consulted with territorial authorities and that there was consensus in the region that HRC would be the lead authority

providing objectives, policies and methods to maintain biological diversity including rules to maintain terrestrial biodiversity.

The Background to the 2003 Resource Management Amendment Act

8. The maintenance of indigenous biological diversity is one of New Zealand's most pressing environmental concerns. New Zealand by virtue of its geographical isolation has a high level of endemic biodiversity which makes a unique contribution to global biodiversity.
9. New Zealand is a signatory to the United Nations Environment Programme on Biological Diversity adopted at the Earth Summit in Rio de Janeiro in 1992.
10. The New Zealand Government produced the New Zealand Biodiversity Strategy in 2000 called "Our Chance to Turn the Tide". Its objective is to set a framework to stop the ongoing decline in indigenous biological diversity which has been ongoing since New Zealand's settlement. Areas of ongoing decline include extensive modification of wetlands, dune lands, river and lake systems and coastal areas.
11. The strategy recognized that a crucial element in its success was the implementation of local strategies addressing the often unique natural characteristics of regions and districts. The strategy states¹:

"The Convention on Biological Diversity emphasises the need to conserve biodiversity *in situ*, in its natural surroundings. While New Zealand needs to set national priorities and targets, biodiversity exists locally, once proprieties have been set, it is local management effort that will determine successful outcomes. The challenge regionally and locally is to translate national priorities and targets into regional and local plans and programmes, promoting the effective participation of communities and resource managers. This will be a joint effort, with central government helping to guide, co-ordinate and resource regional and local responses. "

12. It is against that background that Parliament amended the RMA in 2003.

Relevant Provisions of the RMA

13. Below are relevant provisions of the RMA. Those parts in italics were introduced by the 2003 Amendment Act. Underlining is intended to provide emphasis.
14. Biological diversity is defined in section 2 as follows:

"[biological diversity means the variability among living organisms, and the ecological complexes of which they are a part, including diversity within species, between species and of ecosystems]"
15. Section 6 lists matters of national importance which now includes section 6(c) that reads:

"The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:"

¹ Part I, pg 10:

16. Section 30(1) sets out regional councils functions as follows:

- “(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:
- (a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:
 - (b) The preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance:
 - (c) The control of the use of land for the purpose of—
 - (i) Soil conservation:
 - (ii) The maintenance and enhancement of the quality of water in water bodies and coastal water:
 - (iii) The maintenance of the quantity of water in water bodies and coastal water:
 - [(iia) the maintenance and enhancement of ecosystems in water bodies and coastal water:]
 - (iv) The avoidance or mitigation of natural hazards:
 - (v) The prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:
- [(ga) the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity:]”

17. The functions of TAs are set out in section 31. Section 31 states:

- “(1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:
- (a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:
 - [(b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—
 - (i) the avoidance or mitigation of natural hazards; and
 - (ii) the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances; and
 - (iii) *the maintenance of indigenous biological diversity:*]
 - (c) Repealed.
 - (d) The control of the emission of noise and the mitigation of the effects of noise:
 - (e) The control of any actual or potential effects of activities in relation to the surface of water in rivers and lakes:

(f) Any other functions specified in this Act.

[(2) The methods used to carry out any functions under subsection (1) may include the control of subdivision.]”

18. Section 62 sets out the matters that a regional policy statement must include. Regional policies must include under section 62(1)(i) the following:

“(1) A regional policy statement must state—

(i) the local authority responsible in the whole or any part of the region for specifying the objectives, policies, and methods for the control of the use of land—

(i) to avoid or mitigate natural hazards or any group of hazards; and

(ii) to prevent or mitigate the adverse effects of the storage, use, disposal, or transportation of hazardous substances; and

(iii) *to maintain indigenous biological diversity; and ...*”

19. Section 62(2) provides:

“(2) If no responsibilities are specified in the regional policy statement for functions described in subsection (1)(i)(i) or (ii), the regional council retains primary responsibility for the function in subsection (1)(i)(i) and the territorial authorities of the region retain primary responsibility for the function in subsection (1)(i)(ii).”

20. Section 65(1) states:

“[(1) A regional council may prepare a regional plan for the whole or part of its region for any function specified in section 30(1)(c), (e), (f), (g), or (ga).]

21. Section 65(3) has the matters which Council should consider when preparing a regional plan and states:

“(f) The restoration or enhancement of any natural and physical resources in a deteriorated state or the avoidance or mitigation of any such deterioration”

22. Section 67 RMA records what must be contained within a regional plan. In addition to the usual requirements of objectives and policies, section 67(1)(d) includes:

“(1) A regional plan must state—

(d) the methods (including rules, if any) to implement the policies;”

23. Section 68 concerns regional rules. Section 68(1) states:

“A regional council may, for the purpose of—

(a) Carrying out its functions under this Act (other than those described in paragraphs (a) and (b) of section 30(1)); and

- (b) Achieving the objectives and policies of the plan,—
include [rules in a regional plan].”

Can regional plans include rules controlling land use for the purpose of maintaining indigenous biological diversity?

24. Questions of interpretation are approached in accordance with the Interpretation Act 1999. Section 5 requires the intention to be ascertained from the text and in light of its purpose. Where applicable canons of constructions are also applied².
25. Section 9, RMA is the statutory restriction on the use of land which contravenes rules. Section 9 precludes use of land that contravenes a rule in a regional plan (section 9(3)). Prior to the 2003 Amendment Act land use controls in regional plans were for the purpose of soil conservation.
26. The 2003 Amendment Act provides:
- (a) regional councils have the function of establishing, implementing and reviewing objectives, policies and methods for maintaining indigenous biological diversity (section 30(1)(ga));
 - (b) regional councils can prepare regional plans relating to their function in section 30(1)(ga) (see section 65(1));
 - (c) regional councils can include rules (which are included within the term 'methods') (see section 67(1)(d)).
27. It is considered that a regional council can include rules controlling land use to maintain indigenous biological diversity because:
- (a) that is the only interpretation available on the plain and ordinary meaning of the foregoing sections;
 - (b) such an interpretation is consistent with the purpose of the 2003 Amendment Act which is to ensure the decline in indigenous biological diversity is halted through the integrated management of natural resources. Ecosystems containing significant biological diversity often contain both terrestrial and aquatic elements such as wetlands. There is therefore sense in providing the opportunity for regional councils to have powers both in relation to land use and water use.
28. Use of extraneous aids is sometimes permissible. The interpretation advanced is consistent with the report of the Local Government and Environment Committee on the 2003 Resource Management Amendment Act. The committee said:

“We consider that this provision should proceed though with the term 'terrestrial eco-systems' substituted with 'indigenous biological diversity' (commonly referred to as 'biodiversity'). Now is an appropriate time to promote the profile of indigenous biodiversity in the Act. At present, there is no specific mandate in the Act for biodiversity responsibility, although it has been inferred. Territorial authorities have taken on responsibility for biodiversity under section 31(a) through both regulatory and non-

² The canons of construction relied upon are obtained from *Bennion on Statutory Interpretation* 5th Edition Lexis Nexus.

regulatory methods and this should continue. Most regional councils already exercise biodiversity functions, either through their pest management responsibilities or through assistance schemes such as fencing subsidies. Regional councils also have responsibility for resources that directly influence biodiversity, such as water quality and quantity and soil conservation. We therefore recommend that the biodiversity function be retained and that a further provision be added to allow regional councils to contribute to biodiversity management through the establishment of methods as well as policies and objectives. The ability to establish methods for this purpose was not included in the bill as introduced. [Emphasis added]

29. The alternative argument is that the above mentioned sections do not provide regional councils with the power to introduce land use controls in a regional plan. This argument (although not supported) might rest on the following propositions:
- (a) the express power to control land use from section 31(1)(c) does not refer to the control of land use for the maintenance of indigenous biological diversity. If that was intended Parliament would have made express provision for control of land use for that purpose in section 30(1)(c);
 - (b) the reference to methods in section 30(1)(ga) does not include rules.
30. This argument has a number of deficiencies beyond the overwhelming point that it would require an interpretation of the provisions of the Act referred to above other than in accordance with their plain and ordinary meaning. These deficiencies are:
- (a) the argument rests on implying an intention on the part of Parliament to prevent regional councils controlling the use of land by providing for indigenous biological diversity as a discrete matter in section 30(1)(ga) by not including it in section 30(1)(c). The wording however, does not lead to that inference alone. There are other plausible inferences in particular:
 - (i) Parliament wished to deal with indigenous biological diversity as a stand alone matter; and/or
 - (ii) treating indigenous biological diversity as a discrete matter has the virtue of simplicity and economy since indigenous biological diversity is not limited to terrestrial biodiversity but also aquatic and marine biodiversity;
 - (b) implying an intention contrary to the express words of section 30(1)(ga) offends the canon of construction *expressum facit cessare tacitum*. This canon holds that to state a thing expressly ends the possibility that something inconsistent with it is implied;
 - (c) plainly methods must include rules. This is plain from section 67(1)(d) and section 32 RMA. 'Methods' in section 30(1)(ga) must have a similar meaning to the meaning given to methods in other sections. This is consistent with the canon of construction *noscitur a sociis*.
 - (d) section 62(1)(i) states that:

- “(1) A regional policy statement must state—
- (i) the local authority responsible in the whole or any part of the region for specifying the objectives, policies, and methods for the control of the use of land—
 - (i) to avoid or mitigate natural hazards or any group of hazards; and
 - (ii) to prevent or mitigate the adverse effects of the storage, use, disposal, or transportation of hazardous substances; and
 - (iii) to maintain indigenous biological diversity; and ...”

A local authority is defined in the RMA as including both a territorial authority and a regional council. Section 62(1)(i) makes no sense unless regional councils have a function in relation to the control of use of land for the purpose of maintaining indigenous biological diversity.

The extent of TA’s role in controlling land use to maintain indigenous biodiversity in light of POP

- 31. Policy 7-1 in the RPS (Part I, Chapter 7) makes it plain that HRC has the function of controlling land use to maintain indigenous biological diversity.
- 32. Making plain the respective functions of local authorities for maintaining indigenous biological diversity in an RPS is a requirement of section 62(1).
- 33. Territorial authorities in the preparation and review of district plans must give effect to an RPS (section 75(3)). Approving the RPS in its present form will mean that TA’s will (in due course) cease to have land use controls in the district plans for the purpose of maintaining indigenous biological diversity. TA’s that attempted to provide a regime alongside the regime in the regional plan would not be giving effect to the RPS.

What does ‘significant’ mean in section 6(c)?

- 34. Section 6(c) makes it a matter of national importance to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna. Where a matter of national importance arises a person in exercising a function under the Act including deciding the content of an RPS or regional plan must provide for the matter of national importance. The word protection is a significant one and indicates a bias towards avoidance of adverse effects. Protection however, is not to be achieved at all costs except to the extent that that is consistent with the overarching ethic of sustainable management³.

³ *Trio Holdings v. Marlborough District Council* [1997] NZ RMA 97 and *NZ Rail Ltd v. Marlborough District Council* [1994] NZ RMA 70

35. The following passages from the *Royal Forest and Bird Protection Society Inc v. The Central Otago District Council*⁴ are relevant:

"[26] Those exercising functions under the RMA are required to recognise and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna as a matter of national importance: s.6(c). That duty, however, is in the context of "achieving the purpose of this Act". Hence, while one must seek responsibly to recognise and provide for the nationally important matter in question, one must look to achieving the Act's single purpose of sustainable management of natural and physical resources. And in so doing one must look to methods that are necessary and most appropriate under s.32 as it stood before the 2003 amending Act came into force. That is so because these proceedings were lodged in 2000, and under the transitional section of the amending Act (2.112), for the purposes of proceedings such as these, the principal Act applies as though the amendment had not been passed.

[27] In practical terms, the quest for achieving the Act's purpose involves the production of a workable planning framework, duly conceived and analysed in accordance with the RMA's dictates. Central to the process is the need for diligent attention to Part II of the legislation, both in reference to the Act's purpose, and to the principles that inform and assist in relation to that purpose. At the end of the day, key desire is for good environmental outcomes efficiently attained, not overlooking, of course, the enablement of people and communities to provide for their social, economic and cultural wellbeing and their health and safety in the manner contemplated by the assigned definition of "sustainable management".

[28] In various cases cited to us, different panels of this Court have endorsed a variety of methods (depending on the circumstances perceived in particular district) for recognising and providing for significant items falling under s.6(c). Those methods have ranged from reliance upon voluntary mechanisms and incentives on the one hand, to controls in the form of district plan rules of general applications on the other. In general, where voluntary methods are endorsed, we accept Mr Ibbotson's submission that one needs to be satisfied that they will be efficacious in providing the degree of protection needed to reflect the level of importance that the legislation attaches to significant indigenous vegetation and significant habitats of indigenous fauna.

36. The question "what is significant" was discussed in *Minister of Conservation v. Western Bay of Plenty Council*⁵ where at paragraphs 18 and 19 the decision says:

"Importantly, in determining whether an area of indigenous vegetation or a habitat of indigenous fauna is significant for the purpose of paragraph (c) the area or habitat is not required of itself, or in combination with other areas or habitats, to be nationally important. Neither does its importance have to be regional in character or otherwise exceed the bounds of the planning district. Rather, it is a question of identifying and assessing (with the aid of qualified advice and assistance) those areas or habitats that are significant within the district as to require protection.

"Significant" in its context necessarily imports the notion of informed judgment as to those natural resources of the district that need to be protected. In the case of Western Bays, a factor in coming to that judgement is the extent to which the bio-diversity resource of the district has already been diminished."

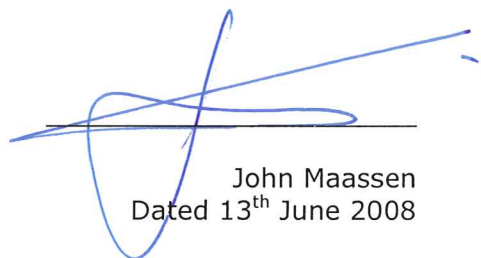
⁴ Decision A128/2004 dated 23 September 2004

⁵ A71/2001

That decision was applied in *Royal Forest and Bird Protection Society Inc v. Central Otago District Council*.

37. In both of the above cases there was consensus amongst ecologists that the following evaluative criteria were relevant to assessing significance recognising that the criteria are not definitive or exhaustive. Quoting again from the *Western Bay of Plenty* decision at paragraph 20:

“(The criteria) comprise: representativeness (concerning the extent or range of genetic and ecological diversity); diversity and pattern (in relation to ecosystems, species and landforms); rarity factors and/or special features; naturalness/intactness; size and shape (affecting the long-term viability of species, communities and ecosystems, and amount of diversity); inherent ecological viability/long-term sustainability; relationship between natural areas and other areas of more modified character (in as much as well buffered areas linked to other natural or semi-natural areas tend to have higher value than unbuffered isolated ones); vulnerability to threat processes” liable to disturb existing equilibrium; and finally, management input required to maintain or enhance an area’s significance (including) nature and scale of input or degree of intervention, and degree of restoration potential.”



John Maassen
Dated 13th June 2008