Biodiversity and Heritage Hearing

Volume 1 - Part 5

Chapters 7 and 12 and Schedule E

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5.1 Introduction

This decision of the Regional Council is made by the majority of the Biodiversity and Heritage Hearing Panel (Biodiversity and Heritage Panel or Panel).

Threatened indigenous biological diversity is one of the "big four" issues identified in the POP. In relation to that topic, the decision deals with the indigenous biological diversity provisions of Chapters 7 and 12, relevant terms from the Glossary, and Schedule E. It does not address the general land use provisions of Chapter 12 dealt with in the Land Hearing (Part 4 of this Volume) or the landscape and natural character provisions of Chapter 7 dealt with in the General Hearing (Part 7 of this Volume).

In relation to heritage, the decision deals with the historic heritage provisions of Chapter 7 and addresses the wording of conditions about historic heritage in various provisions in the POP.

This decision comprises:

- Part 1 (Introduction, Comments Forming Part of All Decisions and Conclusion) of this Volume;
- this Part, where, among other things, we set out our evaluation of the submissions and our reasons for accepting or rejecting them;
- Part 5 of Volume 2, which sets out a summary of submissions and further submissions and our decision in respect of each; and
- the relevant provisions in Chapters 7 and 12, the relevant Glossary definitions and Schedule E shown in the marked-up version of the POP in Volume 3 (clean version in Volume 4). While we have addressed the wording of historic heritage conditions generically, the actual conditions to be imposed are determined by each Hearing Panel dealing with the relevant topic.

The Biodiversity and Heritage Panel comprised:

- Joan Allin (Chairperson);
- Jill White;
- Annette Main;
- Michael Plowman; and
- Rob van Voorthuysen.

Che Wilson was initially a member of the Panel but he became unwell. After consultation with both Mr Wilson and the Council, the hearings proceeded in his absence. Commissioner Plowman does not agree with this decision.[1]

The Biodiversity and Heritage hearing was initially scheduled to occur in July and August 2008. Due to logistical reasons, the hearing was rescheduled and was held on 20 and 21 November 2008, 1 and 2 December 2008 and 23 January 2009. Two submitters[2] were heard on 1 July 2008 at a hearing that provided an opportunity for submitters who wished to present all, or part, of their submission or further submission (which we refer to either as separate

[1] A copy of his reasons is available from the Regional Council upon request.
[2] Environment Network Manawatu and Powerco.

terms or as submission) on different topics at one time. The Hearing Panel at that hearing included the members of this Panel.

A minute had been issued on 17 July 2008 encouraging caucusing of experts to narrow the issues. As it transpired, the rescheduling allowed valuable time for caucusing and the issues were considerably narrowed when the hearing started and narrowed further as the hearing progressed. We are grateful to the parties and the experts for the progress that they made in this regard.

5.2 Submissions and Further Submissions Received

The submitters and further submitters on Chapters 7 and the relevant parts of Chapter 12 are listed below. Further submission numbers are those above number 473.

Submission No	Submitter
45	Alexander Bryan Wilfried James
401	Alison Margaret Mildon
521	Allco Wind Energy NZ Ltd
350	Almadale Produce Ltd
447	Angus Gordon
449	B S Young Ltd
237	Bruce & Marilyn Bulloch
225	David John Greenwood
382	David Leonard Hopkins
348	David Young
168	Donald Leslie Siemonek
356	Environment Network Manawatu
386	Environmental Working Party
501	Ernslaw One Ltd
426 and 533	Federated Farmers of New Zealand Inc (Federated Farmers)
33	Fish & Game New Zealand - Auckland / Waikato Region
417 and 491	Fish & Game New Zealand - Wellington Region (Wellington Fish & Game)
224	G M & S M Deadman Partnership
268 and 525	Genesis Power Ltd (Genesis)
313	George & Christina Paton
300	Gordon George Kuggeleijn
534	Gordon Kuggeleijn
369	Grant John Stephens
331	Hancock Forest Management (NZ) Ltd (Hancock Forest Management)
144	Heather Oliver
2	Hoane Titari John Wi
182	Horizons Regional Council
280 and 515	Horowhenua District Council
392	Horowhenua District Growers Association
232	Horowhenua Fruitgrowers Association
357 and 531	Horticulture New Zealand (Horticulture NZ)
142	Ian Edward Roke
371	J M & L C Whitelock & B J & C J Whitelock
366	Jill Strugnell

222 and 474	Johannes Altenburg
355	John Batley
34	John Graham Dobson
317	Kapiti Green Limited
315	Kim Young and Sons Ltd
440	Landlink Ltd
388	Laura M Sivyer
221	Lionel West
433 and 506	Manawatu Branch of NZ Green Party
340 and 507	Manawatu District Council
312	Manawatu Estuary Trust
148	Maraekowhai Whenua Trust, Tawata Whanau Trust, Ngati Tama o Ngati Haua Trust and Titi Tihu Farm Trust
394	Mason Stewart
363 and 522	Meridian Energy Limited (Meridian)
196	Michael John Shepherd
44	Michael Stanwick
444	Middle Districts Farm Forestry Association
359 and 519	Mighty River Power Limited
372 and 492	Minister of Conservation
179	Mountain Carrots NZ Ltd
226	New Zealand Archaeological Association Inc
330 and 502	New Zealand Defence Force (NZDF)
415	New Zealand Fertiliser Manufacturers' Research Association Incorporated
353 and 518	New Zealand Historic Places Trust - Central Region (NZHPT)
419	New Zealand Institute of Forestry
427	Ngā Pae o Rangitikei
180	Ngati Kahungunu Iwi Incorporated (NKII)
227	Noel Olsson
319 and 520	NZ Forest Managers Ltd
241 and 481	Palmerston North City Council (PNCC)
452	Paul & Monica Stichbury
438	Pescini Brothers
305	PF Olsen Limited
143	Philipa Ann Roke
303	Pirie Consultants Ltd, Pacific Farms Ltd, Hoult Contractors Ltd, Keegan Contractors Ltd, Paranui Contractors Ltd, Ryman Healthcare Ltd, M & M Earthmovers Ltd, Titan1 Ltd and O'Hagan Contracting Ltd
272 and 528	Powerco Limited
332	Progress Castlecliff Inc
393	Property Rights in New Zealand Inc
365	Queen Elizabeth II National Trust
346 and 517	Rangitikei District Council
379	Ravensdown Fertiliser Co-operative Limited (Ravensdown)
310	Rayonier NZ Ltd (Rayonier)
442	Robert Leendert Schraders
460	Royal Forest & Bird Protection Society of New Zealand Inc (Forest & Bird)
151 and 495	Ruapehu District Council

246	Ruapehu Federated Farmers of New Zealand Inc (Ruapehu Federated Farmers)
467	Shona Paewai
198	Stuart McNie
396	Sue Stewart
176	Sustainable Whanganui
374 and 490	Taranaki / Whanganui Conservation Board
406 and 488	Taranaki Fish & Game Council
172 and 500	Tararua District Council
395 and 527	Tararua-Aokautere Guardians Inc (TAG)
461	Te Iwi o Ngäti Tükorehe Trust
349	Te Peka Reserve Land Care
445	Tim Matthews
163	Tom & Linda Shannon
468	Tony Paewai
265 and 523	Transpower New Zealand Ltd (Transpower)
358 and 511	TrustPower Limited
152	Visit Ruapehu
291 and 532	Wanganui District Council
446	Wanganui Province of Federated Farmers Inc (Wanganui Federated Farmers)
311	Water and Environmental Care Assn Inc
375	Wellington Conservation Board
294	William Pehi Snr
145	Winston Oliver
347	Woodhaven Gardens Ltd.

5.3 Reports, Evidence and Other Material

In terms of the Council, we received reports and evidence from Helen Marr, a planner and the One Plan Manager; Fleur Maseyk, the Senior Environmental Scientist - Ecology; Alistair Beveridge, the Manager - Biodiversity and Water Quality; Fiona Gordon, a Senior Policy Analyst at the Council and Elizabeth Pishief, Historic Heritage Consultant at Opus International Consultants Ltd. We also received reports and heard from John Maassen, resource management lawyer. End of hearing evidence and material was also received.

We received written reports from Richard Thompson, meeting facilitator, on pre-hearing meetings that had taken place.

In terms of submitters, we heard in person from:

- Michael Moodie (Legal Counsel), Stephen Colson (Planning Manager Mighty River Power), Richard Peterson (an Associate and the Wellington Planning Manager with Harrison Grierson Consultants Ltd), William Shaw (Principal Ecologist and a Director of Wildland Consultants Ltd) for Mighty River Power;
- Maurice Black (Resource Management Consultant) for NKII;
- Nicola Ekdahl (Policy Advisor), Lyn Neeson (President Ruapehu Federated Farmers), Tim Matthews (Vice-president Wanganui Federated Farmers), Gordon McKellar (President Manawatu/Rangitikei Federated Farmers), Andrew Day (President Tararua Federated Farmers) and Brian

Doughty (President Wanganui Federated Farmers) for Federated Farmers, Ruapehu Federated Farmers and Wanganui Federated Farmers;
- Ann Neill (General Manager, Central), Te Kenehi Teira (Kaihautu*)*, Robert McClean (Senior Heritage Policy Adviser) and Rakesh Mistry (Heritage Advisor - Planning) for NZHPT;
- Alanya Limmer (Legal Counsel), Matiu Park (Senior Ecologist and Planner with Boffa Miskell Ltd), Stephen Fuller (Senior Ecologist with Boffa Miskell Ltd) and Catherine Clarke (Planner and Senior Principal with Boffa Miskell Ltd) for Meridian;
- Matiu Park (Senior Ecologist and Planner with Boffa Miskell Ltd), Stephen Fuller (Senior Ecologist with Boffa Miskell Ltd) and Robert Schofield (Senior Principal with Boffa Miskell Ltd) for TrustPower;
- Kit Richards for NZ Forest Managers, NZ Institute of Forestry, PF Olsen, Hancock Forest Management and Rayonier;
- John Whitelock for J M & L C Whitelock and B J & C J Whitelock;
- Tim Matthews;
- Julian Watts (Resource Management Planner), Amy Hawcroft (Ecologist) and Graeme La Cock (Technical Support Officer) for the Minister of Conservation;
- Chris Keenan (Manager - Resource Management and Environment) and Lynette Wharfe (Consultant with The Agribusiness Group) for Horticulture NZ;
- Joan Leckie for Forest & Bird;
- Donald Coles (Chairman) for Property Rights in New Zealand;
- Don and Velma Siemonek;
- Corina Jordan (Resource Officer) for Wellington Fish & Game;
- Rob Owen (Manager Environmental Services with NZDF) and Emily Grace (Resource Management Consultant with Tonkin & Taylor Ltd) for NZDF;
- David Hopkins;
- David Forrest (Planner Principal of Good Earth Matters Consulting Ltd) for the Territorial Authority Collective comprising the Horowhenua, Wanganui, Rangitikei, Ruapehu, Manawatu and Tararua District Councils (TA Collective); and
- David Murphy (Senior Policy Planner) for PNCC.

We also received written evidence or material that was not presented orally at the hearing from:
- David le Marquand (Director of Burton Planning Consultants Ltd) for Transpower;
- Richard Matthews (Partner in Mitchell Partnerships) and Campbell Speedy (Environmental Coordinator - Renewable Energy) for Genesis;
- Stuart Shaw for Te Peka Reserve Land Care;
- Chris Hansen (Senior Planning Consultant with SKM) for Ravensdown;
- Mary O'Callahan (Principal Planner with GHD Ltd) for Meridian; and
- John Dobson.

In response to matters raised, including our Chairperson's Minutes #4 and #7 and the Panel's "Requests Relating to Schedule E and Provisional Determination", we also received additional evidence or material from Geraldine Baumann (NZHPT) providing legal advice from Bell Gully, Jo-Anne Munro (Mighty River Power), Richard Turner (Meridian), Laura Peddie (TrustPower), Sally Strang (on behalf of Hancock Forest Management, NZ

Forest Managers, PF Olsen and Ernslaw One), Nicola Ekdahl, Rob Owen, Amy Hawcroft and Julian Watts.

Because of the overlap with other hearings, in addition to Overall Plan hearing material, we tried to adopt a flexible approach to receiving material presented on behalf of submitters at other hearings. This included:

- supplementary evidence (8 December 2008) of Kit Richards, and evidence (14 July 2008) of Sally Strang on behalf of forestry companies, to the Land hearing;
- page 3 of the evidence of Jill Strugnell to the Land hearing;
- a memorandum dated 16 October 2009 from Andrew Bashford (PNCC) about the cross-over issues between the Water and Biodiversity hearings; and
- material provided to the Water hearing by John Barrow, spokesman for the Ruahine River Care Group. Part of the material provided by Mr Barrow was submission 104 by the Ruahine River Care Group, which was headed "BIO [sic] DIVERSITY SUBMISSION". Mr Barrow expressed concern at the Water hearing that the Group was not given an opportunity to appear at this hearing. We have considered the Group's material. However, we reached the conclusion that the relief sought is appropriately dealt with by the Water hearing as, while the submission is labelled as relating to biodiversity, the relief sought relates to matters dealt with in the Water hearing.

5.4 Evaluation and Reasons

The following sections of this Part set out our evaluation of the submissions and our reasons for accepting or rejecting them. The evidence presented is not summarised in this decision. However, specific matters are referred to as appropriate.

We deal first with Biodiversity and then Heritage. Under each of those topics, we consider legal matters and then the principal issues of contention.

After that, we deal with remaining issues, arranged generally in the order in which they occur in the POP and Volumes 2 and 3. Where we have omitted a heading from the POP or Volume 2, it was because we concluded that no evaluation under that heading was needed.

Where we have dealt with a topic in legal matters or principal issues of contention, we do not repeat the reasoning in the remaining issues.

In some cases, submitters raised the same matter in their submissions on several different parts of the POP chapters. For the sake of brevity, we do not repeat our evaluation of those matters under multiple POP chapter headings. Instead, we generally address the matter when it is first raised.

In addition:

(a) some submissions may be coded under one heading in Volume 2 (or in some cases in a different Part of Volume 2 eg Part 2 Overall Plan Hearing) but the relevant reasoning may be dealt with here under a different heading; and

(b) some matters dealt with under one heading may be relevant to other provisions or have general applicability across the chapter and so may have resulted in changes shown in Volume 3 in various provisions.

Submitters should therefore carefully read all components of the decision, including this Part and Part 1 of this Volume, the relevant Parts of Volume 2 and the relevant POP provisions in Volume 3 (clean version in Volume 4) to see how their concerns have been dealt with.

General matters that cross all hearing topics, such as the adequacy of consultation in the POP process for all chapters, are dealt with in Part 2 (Overall Plan Hearing) of this Volume. We therefore do not deal with them here.

5.5 Biodiversity

5.5.1 Legal Matters

Chapter 7 forms part of the Regional Policy Statement (RPS) portion of the POP and Chapter 12 forms part of the Regional Plan. Part 1 of this Volume discusses a range of legal matters and refers to provisions relevant to the RPS and the Regional Plan. We do not repeat them here.

The National Policy Statement on Electricity Transmission 2008 is relevant and we have given effect to it. By way of example, we have provided that the maintenance or upgrade of structures or infrastructure is excluded from the definitions of vegetation clearance and land disturbance. In addition, Policy 12-5 provides a cross-reference to the RPS. Chapter 3 of the RPS has a number of relevant provisions. Policy 3-1(a)(ia) provides that the Regional Council and territorial authorities must recognise the National Grid, among other things, as being a physical resource of regional or national importance.

In terms of Part 2 of the RMA, in addition to s 5, ss 6(a), (c), and (e) and 7(a), (aa), (b), (c), (d), (f), (g) and (j) and 8 are relevant. As Ms Limmer noted[3], ss 6(c) and 30(1)(ga) are of particular relevance in the context of the wider considerations of Part 2, including the overarching purpose of the Act.

In contrast to ss 13, 14 and 15, under s 9(2) (post 2009 Amendment Act) of the RMA the use of land can occur as of right unless a rule in a plan states otherwise. So, unless there are rules to constrain land use activities, the use of land can occur as of right.

5.5.1.1 Can the Regional Council include rules controlling land use to maintain indigenous biological diversity?

A legal issue is whether the Regional Council can include rules in its Regional Plan to control land use to maintain indigenous biological diversity.

Ms Marr advised[4] us that the Regional Council, in consultation with the territorial authorities, decided early in the POP process that the Regional

[3] Limmer, Legal Submissions,1 December 2008, paras 11 - 12.
[4] Marr, Planning Evidence and Recommendations Report, June 2008, page 38.

Council should be the lead council agency for maintaining and improving biodiversity in the Region. A number of submitters were of the view that only territorial authorities should be making rules to maintain indigenous biological diversity.

Under the RMA, the Regional Council and territorial authorities have subtly different and overlapping functions.

Section 30 (1)(ga) provides that the Regional Council has functions for:

> the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity.

Section 31(1)(b) provides that territorial authorities have functions for:

> the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of ... the maintenance of indigenous biological diversity.

Section 62(1)(i)(iii) imposes a requirement for the RPS to state the local authority (which includes the Regional Council and territorial authorities) responsible in all or part of the region "for specifying the objectives, policies, and methods for the control of the use of land ... to maintain indigenous biological diversity".

Section 65(1) states that the Regional Council may prepare a regional plan for any function specified in s 30(1)(ga).

So, in provisions referring to "objectives, policies, and methods", the issue is whether "methods" can include rules.

Section 67(1)(d), which was quoted[5] to us, is not relevant as it was deleted by the Resource Management Amendment Act 2005, but s 67(2)(a) "methods, other than rules" seems to provide support for the proposition that rules can be methods. That is because if methods did not include rules, there would be no need to say "other than rules".

Further support that the word "methods" can include rules seems to come from:

(a) ss 32(3)(b) and (4) and 35(2)(b), which refer to "policies, rules, or other methods"; and
(b) s 62(1)(e), which refers to "the methods (excluding rules)".

The logic in relation to (b) is the same as above. In relation to (a), the logic is that by referring to "other methods" after rules, by inference a rule is a method.

As notified, Policy 7-1 in the RPS set out the roles of the Regional Council and territorial authorities. Mr Forrest told[6] us that the approach of the Regional Council being the lead agency for biodiversity was supported in principle but the TA Collective wanted "who does what" to be clarified. Mr Murphy noted[7] that PNCC submitted in support of the Regional Council having the lead agency role for biodiversity in the Region but did not want the Regional

[5] Maassen, Section 42A Report, 13 June 2008, para 22.
[6] Forrest, Statement of Evidence, 10 July 2008, para 8.
[7] Murphy, Statement of Evidence, 11 July 2008, paras 17 and 20.

Council to have the sole responsibility. We deal with the respective roles of the bodies when we discuss Policy 7-1. The relevant point here is that no territorial authority took any issue with the Regional Council having the legal ability to include rules controlling land use to maintain indigenous biological diversity.

As Mr Coles pointed out, there were some errors in sections of the RMA quoted to us, but we do not accept Mr Coles' statement that "maintenance of indigenous biological diversity clearly is the function of the territorial authority not the regional council".[8]

We have concluded that the Regional Council does have the legal ability to include rules controlling land use to maintain indigenous biological diversity.

5.5.2 Principal Issues of Contention

In addition to the legal issue already dealt with, the principal issues of contention were:

(a) Is the general approach in Schedule E the appropriate way to identify relevant areas?
(b) What habitat types should be included in Table E.1 of Schedule E?
(c) What exclusions should there be in Table E.2(b)?
(d) How should forestry be dealt with?
(e) Do all rare habitats, threatened habitats and at-risk habitats come within s 6(c) RMA?
(f) What criteria should be used to determine the significance of, and the effects of activities on, an area of habitat?
(g) What activities should be regulated?
(h) What is the appropriate rule categorisation?
(i) Should there be a separate s 32A RMA analysis?

5.5.2.1 Is the general approach in Schedule E the appropriate way to identify relevant areas?

Ms Maseyk explained[9] the approach in Schedule E, which sets out various habitat types in words. Diversity of habitat types can act as a surrogate to indicate indigenous biodiversity. Protection of a given habitat type will result in protection of the species that live within, and rely on, that habitat type. Conversely, a decline in the extent and diversity of habitat types will consequently result in a decline in indigenous biodiversity. In general terms, the habitat types were largely identified using national spatial datasets and predictive models. She explained that "Alternative methods for identifying uncharacteristic, small and unique habitat types included expert opinion and guidance from the national rare ecosystem project."[10]

There is a hierarchy in Schedule E[11]:

(a) rare habitat types are those that were originally (pre-human) uncommon in the landscape and remain so. Rare habitat types can be individually

[8] Coles, Submission (evidence), undated, page 1.
[9] Maseyk, Section 42A Report, undated, paras 9 - 11.
[10] Ibid, para 11.
[11] Ibid, page 35 Table 6.

small in scale but geographically widespread or individually larger in scale but geographically restricted;

(b) threatened habitat types are those that have been reduced to 20% or less of their former extent. They are considered highly representative of the former biodiversity pattern; and

(c) at-risk habitat types are those that have been reduced to less than 50%[12] of their former extent.

We deal first with a terminology matter. As there was inconsistent terminology in the POP, we have decided that defined terms "rare habitat", "threatened habitat", and "at-risk habitat" should be used. The Glossary definition of those terms links back to Schedule E so that Schedule E is the basis for determining whether or not something is a rare habitat, threatened habitat, or at-risk habitat. For convenience in this decision, when we use the term "Schedule E habitats", we are referring to all three terms.

There were numerous submissions about Schedule E and its use. Some submitters wanted to see the approach to biodiversity changed to focus only on naturally occurring habitats, to be based on Land Environments of New Zealand (LENZ)[13] or Ecological Districts[14], to recognise the geological component of the threatened habitat and not define it on a species by species basis, or to include specific maps of protected habitats.

While there were some statements of support for the overall approach adopted in Schedule E, most submissions opposed Schedule E. To summarise the many views, the concern was that the very broad scope of Schedule E, combined with the policy provisions in Chapters 7 and 12 and the rules in Chapter 12, would lead to a very restrictive, costly management regime.

As notified, Schedule E identified habitat types by words in Tables E.1 to E.3, with one A4 map in Figure E:1 showing the whole region, using Water Management Sub-zones, coloured as red, orange or yellow; that colour-coding linked to some of the habitat types. Ms Maseyk explained that Water Management Sub-zones "have not replaced Ecological Districts when considering significance at the patch scale, and are not part of the evaluation framework. Ecological Districts remain the primary spatial scale at which to assess significance".[15]

A number of pre-hearing meetings were held and, by the time of the hearing, the ecological experts[16] had generally agreed on the content of Schedule E (variously referred to as Version Four or IV), except for some matters of detail, which we deal with later. The recommended changes were to improve the clarity of Schedule E and narrow its scope. We are grateful to the ecological experts for their assistance.

[12] There was inconsistency in the materials as to whether 50% or less or less than 50% is correct (eg compare paragraphs 100 and 108 in Maseyk Section 42A Report, undated). Ms Maseyk confirmed that it should be less than 50%.

[13] Maseyk, Section 42A Report, undated, para 52.

[14] Ibid, various places for material about Ecological Districts.

[15] Maseyk, Section 42A Report, undated, page 47.

[16] Maseyk, Fuller, Hawcroft, La Cock, Park and Shaw.

Ms Maseyk provided Version V in her end of hearing report[17], which incorporated suggestions from experts, submitters and the Hearing Panel. Through our Chairperson's Minute #7, input was sought from submitters who called expert ecological evidence about those changes and input from those submitters and Ms Maseyk was sought on matters raised by the Panel. As the input sought overlapped with planning matters, we received a helpful response from Ms Marr and Ms Maseyk. In terms of responses from submitters, all but one stated that they had no further comments to make. From that, we infer support for, or at least not opposition to, Version V.

In Versions IV and V of Schedule E:

(a) Table E.1 sets out and defines certain habitat types. If the habitat type is not listed in Table E.1, it is not caught by Schedule E. If it is within Table E.1, then in order to be a rare habitat, threatened habitat or at-risk habitat, it must also meet at least one of the criteria in Table E.2(a).
(b) Table E.2(a) sets out additional criteria for specified habitat types, for example size. Even if the habitat is within Tables E.1 and E.2(a), if it comes within at least one of the criteria in Table E.2(b), it is not a rare habitat, threatened habitat or at-risk habitat.
(c) Table E.2(b) essentially sets out exemptions for certain habitat types. If a habitat type is described in Table E.2(b), it is not a rare habitat, threatened habitat or at-risk habitat.

At the hearing, some submitters[18] remained of the view that Schedule E habitats should be shown on maps rather than identified by words in Schedule E. We can easily understand the logic and benefits of having the habitats shown on maps in terms of enabling landowners and others to identify the location of the habitats in an inexpensive and straightforward way.

However, Ms Maseyk said[19] that the Regional Council moved away from lists or maps of known sites for two main reasons:

(a) the inherent errors found associated with site lists compiled from a desk-top exercise; and
(b) the cost (in terms of time and money) required to conduct an in-field assessment for all the patches of remaining indigenous vegetation within the Region.

In her view[20], the Schedule E approach is fair and consistent and importantly provides a mechanism for the implementation of a Region-wide focus despite the present knowledge gaps.

Mr W Shaw[21] (when we refer to Mr Shaw from now on, we are referring to Mr W Shaw) said that the approach used by the Council is new and, as far as he was aware, the first time this approach has been used as the basis for biodiversity provisions in a regional plan. In his opinion, it is a reasonable approach to take in the circumstances, although he noted the need for care.

Ms Hawcroft said that the approach taken is sound and made the point that "The combination of a schedule that identifies habitats as likely to be more or

[17] Maseyk, Response to Supplementary Evidence of Technical Experts for the Biodiversity Hearing, 16 January 2009.
[18] For example, Keenan, Submission (evidence), 2 December 2008, page 7; Federated Farmers, Evidence, 1 December 2008, para 17.
[19] Maseyk, Section 42A Report, undated, para 115.
[20] Ibid, para 116.
[21] Shaw, Statement of Evidence, undated, paras 18 - 19, see also paras 25 - 30.

less significant (rare, threatened, at risk or no-threat) and the requirement for site-specific decisions where habitat is likely to be significant is a practical middle ground between a default vegetation clearance and land disturbance rule (which assumes all habitat is significant) and a schedule of significant sites (which assumes any sites not in the schedule are not important)."[22]

Although each of the ecological experts from whom the Panel heard had some specific issues about Schedule E and its use, all of the ecological experts supported the general approach of Schedule E. Other witnesses[23] also expressed support for the general approach in Schedule E.

Interestingly, both Mr Park and Ms Hawcroft referred to it as being a broad-brush approach, but they had opposite concerns.

Mr Park expressed his "general support for the Schedule E approach as a broad brush tool for assessing areas that are potentially ecologically significant. However, ... Schedule E casts the net very widely as to areas of potential ecological significance ...".[24] He recommended that amendments be made "to address this shortcoming and inconsistency with s 6(c) of the Act".[25]

In contrast, Ms Hawcroft was concerned that "the use of broad-brush models based on generally expected patterns can overlook some important rare and unusual habitats."[26]

We return to the concerns of Mr Park and Ms Hawcroft and others later.

Mr Coles wanted Schedule E to be removed and replaced by a process that defines habitat areas in terms of their geological composition, but there was no expert support for such an approach.

We have concluded that showing the whole region in the manner of Figure E:1 is not helpful. As reference to Water Management Sub-zones is needed for some of the habitat types, a cross-reference to Schedule AA is the solution that we have adopted.

We are mindful of our duties under s 32 of the RMA. Using Schedule E, rather than maps at an appropriate scale to identify habitats, is likely to result in cost implications for some. The first page of Schedule E recommends that a suitably qualified expert be engaged to assist in interpreting and applying Schedule E and it says that such advice could be from a consultant ecologist or the Regional Council staff. In our view, a lay person should not need to go to considerable expense to determine if Schedule E applies, at least in the first instance.

We were told that the Council currently provides initial assistance free of charge and we wanted to say in Schedule E that the service will continue to be provided free. In response, Ms Maseyk and Ms Marr referred to the LTCCP and annual plan processes and stated "It would be inappropriate for the plan to reflect a council funding decision that may change and which may result in

[22] Hawcroft, Statement of Evidence, 11 July 2008, paras 14 and 19.
[23] For example, Black, Submissions (evidence), 21 November 2008, para 6.
[24] Park, Speaking Notes - Supplementary Evidence, 1 December 2008, para 7.
[25] Ibid.
[26] Hawcroft, Speaking Notes for Evidence, 2 December 2008, para 7.

the One Plan being misleading (or an expensive plan change process being required) as a result."[27]

Our evaluation of the appropriateness of Schedule E is influenced by the assistance that the Regional Council is willing to provide free of charge to those with Schedule E habitats on their property. We have therefore decided to include a statement that the initial assistance with implementing Schedule E is currently provided free of charge. If that changes, the POP will no longer be accurate and a Plan change may be in order.

If there is a Schedule E habitat and the activity requires consent, it is our opinion that at that stage it is reasonable for the cost of carrying out the assessment of ecological effects and related consent costs to be borne by the person seeking to carry out the activity.

In light of the unanimous opinions of the ecological experts and the assistance currently provided by the Council, we have concluded that the general approach of Schedule E is better than all the alternatives and is the appropriate way to identify relevant areas.

5.5.2.2 What habitat types should be included in Table E.1 of Schedule E?

While there was general agreement among the experts about what habitat types should be included in Table E.1 of Schedule E, there was some disagreement.

There was some confusion about the names of the habitat types, but Ms Maseyk explained[28] that the names are labels only and are not intended to be a habitat description. We have changed the relevant heading in Table E.1 to "Habitat Type Label" to emphasise that point and have not shown references to habitat type labels as defined terms in Table E.1.

Because the broad-brush approach had omitted some habitats, Ms Hawcroft referred[29] (in addition to some other habitats that were generally not in dispute) to adding karst landforms; cliffs, scarps and tors; and screes and boulderfields.

Ms Maseyk agreed[30] that they should be included and said that these rare habitat types are present in the Region and their omission from Schedule E was an oversight.

Mr Park did not support the addition of new habitat types that seek to protect bare substrate.[31] He referred to the recommended wording for cliffs, scarps and tors and stated "In effect this category would be protecting substrates because they have the *potential* to be habitat. In my experience, large areas of bare substrate will have little or no ecological or biodiversity values, either in terms of significant indigenous vegetation, or in terms of providing significant

[27] Maseyk and Marr, Response to Chairperson's Minute #7, 7 May 2009, para 65.
[28] Maseyk, Section 42A Report, undated, paras 62 and 167 and page 20 Table 3.
[29] Hawcroft, Supplementary Statement of Evidence, 14 November 2008, paras 4 - 5; Statement of Evidence, 11 July 2008, paras 89 - 96.
[30] Maseyk, Evidence and Supplementary Recommendations, 3 November 2008, page 5.
[31] Park, Supplementary Evidence, 1 December 2008, para 3.2.

habitat for indigenous fauna."[32] He concluded by expressing his opinion that such an approach is not consistent with s 6(c) of the RMA.

Ms Hawcroft disagreed[33] with Mr Park's statement about the lack of ecological value of bare substrate and:

(a) explained that it is unusual to see truly bare substrate in the Region;
(b) noted that there are dynamic habitats where new areas of substrate are created by slip or rockfall and gradually become overgrown and these areas provide important habitat for certain cliff and tallus-dwelling species; and
(c) noted that bare substrate can be essential habitat for fauna, in particular the small-scaled skink, which is endemic to the Region.

Ms Hawcroft said[34] that the additions do not, in her assessment, increase the area classified as significant habitat in the POP because they allow removal of habitat occupied by 24 species elsewhere in the Region from notified Table E.3.

In light of the reasons of Ms Maseyk and Ms Hawcroft as well as the conclusion we have reached about how habitats are to be identified as being significant or not (which we discuss later), we have concluded that the addition of cliffs, scarps and tors; karst systems; and screes and boulderfields as set out in Volume 3 is the correct approach.

As notified, Schedule E included Powelliphanta land snails in Table E.3 with a long list of Water Management Zones or Sub-zones. With the recommended removal of Table E.3, Versions IV and V of Schedule E provided different provisions in Table E.1 about the Powelliphanta land snails and reduced the number of Water Management Sub-zones referred to. Because Powelliphanta land snails are endemic to the Region, "making it the national stronghold of these species"[35], we accept that their inclusion in Table E.1 is appropriate. However, we questioned[36] the reference to treeland in Version V and Ms Maseyk said[37] that treeland should be removed; we accept her reasons for that.

Mr Siemonek[38] expressed his concern that Table E.2(a) refers to an area of any size containing the land snails. In the context of the revised wording of Schedule E, we do not accept that the area could include the whole farm. While we have decided that the wording in Table E.2(a) is suitable and we note Ms Maseyk's comments[39], we have changed the wording in Table E.1 to refer to "containing" rather than "supporting" the Powelliphanta land snails as that wording is consistent with Table E.2(a) wording and it clarifies that the habitat being protected is that which contains the snails.

Mr Siemonek also expressed concern[40] about the addition of some habitats but the ecological experts were in general agreement about the habitats

[32] Ibid, para 3.3.
[33] Hawcroft, Speaking Notes for Evidence, 2 December 2008, paras 10 - 12.
[34] Ibid, para 15.
[35] Hawcroft, Statement of Evidence, 11 July 2008, para 112(a).
[36] Chairperson's Minute #7 - Schedule E, 14 April 2009, page 19.
[37] Maseyk and Marr, Response to Chairperson's Minute #7, 7 May 2009, para 36.
[38] Siemonek, Biodiversity and Heritage (evidence), undated, pages 2 and 4.
[39] Maseyk and Marr, Response to Chairperson's Minute #7, 7 May 2009, paras 37 - 38.
[40] Siemonek, Biodiversity and Heritage (evidence), undated, page 2.

(subject to the issue of identification of significance). As already noted, the inclusion of some habitats in Table E.1 has meant that notified Table E.3 can be deleted and we have done that.

In relation to kanuka forest, Mr Coles objected to its being defined as threatened and he also said that "the 20% threshold is too high".[41] We infer that the 20% threshold that he is referring to is the threshold for threatened habitat. In any event, there was no expert evidence in support of his evidence that the threshold should be 10%. We note the agreed outcome[42] from a pre-hearing meeting attended by a number of submitters (though not Mr Coles) that the definition of kanuka forest be refined to make it clear that it is climax forest and not kanuka regrowth (the latter which would be cut as part of a normal farming scrub clearance cycle). The "kanuka forest or treeland" habitat type in Volume 3 explicitly differentiates kanuka scrub by size.

Manuka scrub is not a habitat type. In response to questions, we were told that it is to be dealt with in a non-regulatory manner and we accept that as the most effective approach.

There were issues raised about riparian margin habitat type.[43] It is important to recall that it only occurs next to Sites of Significance - Aquatic. We accept Ms Maseyk's explanation and reasons[44] and agree that it is appropriate to retain the 20m width of riparian habitat (namely 20m landwards from the top of the adjacent river bank) but limit the habitat definition to "woody vegetation". We have also excluded orchard trees from the definition of treeland. We consider that those changes meet the concerns of Horticulture NZ about the ability to harvest crops within riparian habitat areas.

We note that Mr La Cock had initially sought the inclusion of some habitats in Schedule E, but he and Ms Maseyk have decided that the more effective method is through the non-regulatory provisions of the POP[45] and we agree.

Mr Shaw suggested a number of wording changes to Table E.1 and either the wording or the intent of the wording has generally been included in Table E.1 in Volume 3. Subject to some matters of detail about Table E.1 that we deal with later, we are satisfied that the proper habitat types have been included in Table E.1 in Volume 3.

5.5.2.3 What exclusions should there be in Table E.2(b)?

As already noted, if the habitat meets any of the criteria in Table E.2(b), it is not a rare habitat, threatened habitat, or at-risk habitat for the purposes of the POP. Table E.2(b) therefore provides a way for people to identify habitats that are not caught by new Rule 12-6.

Mr Shaw stated that Table E.2(b) could be improved by exclusions, in "Dunelands and Sand Country", of "Plantation forest on sand" and "Intensively grazed pasture dominated by exotic grasses and other exotic herbaceous

41 Coles, Submission (evidence), undated, last page.
42 Pre-Hearing Report 24, meeting of 7 August, page 2.
43 For example, Horticulture NZ, Submission (evidence), 2 December 2008.
44 Maseyk, Response to Supplementary Evidence of Technical Experts, 16 January 2009, paras 10 - 18.
45 La Cock, Supplementary Statement of Evidence, undated, para 6.

species and lacking a significant indigenous element".[46] He said that this would exclude the intensively developed pastoral and forestry land uses that now occur widely on sand country. In light of the more explicit references to indigenous vegetation in Schedule E, the duneland habitat types including only small, isolated areas[47], the wording difficulties that we perceive in the wording suggested to us, the exclusions in Table E.2(b) in relation to wetlands and the decisions that we have made in relation to forestry, discussed in the next section, we have concluded that the additional exclusion is not needed.

Reference to wetlands in Schedule E was a matter of concern to a number of submitters, including Horticulture NZ, PNCC, energy companies and farmers. Table E.2(b) now excludes a number of different types of wetland habitat so resource consents are not required for activities in those areas. By way of example, there are exemptions for:

(a) certain damp gully heads or paddocks subject to regular ponding; and
(b) areas of wetland habitat specifically designed, installed and maintained for purposes such as stock watering, water storage for fire fighting or irrigation, treatment of animal effluent, wastewater treatment, sediment control, and any hydroelectric power generation scheme.

For the reasons expressed by Ms Maseyk[48], we accept the concerns expressed by Mr Bashford[49] about the water supply lakes in the Turitea Stream. For consistency with definitions already in the POP, we have included an exemption in Table E.2(b) for water storage for the purposes of public water supplies.

In relation to the request to refer to "naturally occurring" rare and threatened habitats in various provisions of the POP, Mr Moodie stated that the recommended changes to Table E.2(b) would address the issue satisfactorily. We agree with that and have included the relevant change in Table E.2(b)(v)(f). Mr Moodie also advised that, in light of the totality of changes in Table E.2, the exclusion of specified artificial lakes is no longer necessary and we agree with that too.

5.5.2.4 How should forestry be dealt with?

There was dispute about what the provisions should be for forestry.

Because forestry is an important solution to the issue of accelerated erosion and the related objectives and policies in the POP, our view is that it is most appropriate for forestry to be encouraged in the Region. We accept Mr Richards' comments that if forestry is to be encouraged, making it a discretionary activity is a perverse outcome.

However, we are also of the view that the Schedule E habitats need appropriate protection from forestry activities.

As noted earlier, we received material in response to the Provisional Determination. The Council officers and forestry submitters (the only

[46] Shaw, Supplementary Statement of Evidence, undated, paras 14 and 41.
[47] Maseyk and Marr, Response to Chairperson's Minute #7, 7 May 2009, para 56.
[48] Maseyk, Section 42A Report for the Water Hearing, November 2009, paras 10 - 12.
[49] Bashford, Memorandum about Cross-over Issues Between Water and Biodiversity Hearings, 16 October 2009, Appendix 1, paras 117 - 119.

submitters to provide input in response to the Panel's invitation) agreed that the Panel's approach of including an exception in Table E.2(b) was not appropriate. We accept that.

The officers and the forestry submitters did not agree on the most appropriate approach to resolve the competing matters. We appreciate and acknowledge the assistance that we have received from them. The approach that we have adopted is a combination of ideas based on the submissions, evidence and the material that we received.

While the officers had recommended that any permitted activity status should be linked to Forestry Stewardship Council (FSC) accreditation[50], we were conscious of the concerns expressed in the evidence to the Land hearing by Mrs Strang[51] and concluded that linking FSC certification to consent status was not the most appropriate way for the rules to be framed.

We have concluded that forestry can be a permitted activity in Rule 12-2, provided certain conditions are complied with.

Condition (b)(iii) precludes any planting or replanting of forestry trees in, or within 5 m of, a Schedule E habitat. Therefore new forestry, or replanting where there is existing forestry, would be a discretionary activity under Rule 12-6. The 5 m buffer provides additional protection for the Schedule E habitats without, in our opinion, causing any particular disadvantage to forestry activities.

Condition (c) provides that if any Schedule E habitat is present within, or within 5 m of an area of forestry, prior to undertaking harvesting an operational plan must be prepared and submitted to the Council and the plan must be complied with.

Operational plan is now defined in the POP as "an operational plan to minimise any potential adverse effects on any *rare habitat**, *threatened habitat** or *at-risk habitat** resulting from *forestry**. The operational plan must be prepared in accordance with Part 3, take into account the Ecological values in Part 2 Section 5, and comply with the Best Environmental Management Practices in Part 1, of the New Zealand Environmental Code of Practice for Plantation Forestry Version 1".

We note the concerns expressed about the Forestry Code of Practice by Ms Maseyk and Ms Marr.[52] However, we also note their statement that "habitat types captured by Schedule E are unlikely to occur within forestry operations"[53], although there may be some exceptions to that.[54] Mr Richards told us about the difficulty of identifying small patches of habitat types within an existing forest, especially in steep hill country (which is where forestry would make its greatest contribution to minimising accelerated erosion) in contrast to identifying a habitat type in an open paddock.

[50] Marr, End of Hearing Statement, 16 January 2009, pages 13 - 14.
[51] Strang, Statement of Evidence to the Land Hearing (on behalf of listed forestry companies), 14 July 2008, para 3.2.
[52] Maseyk and Marr, Memorandum - Response to Issues Raised by Forestry Submitters Relating to Exemptions for Forestry in Schedule E, 20 August 2009.
[53] Ibid.
[54] Maseyk and Marr, Response to the Chairperson's Minute #7, 7 May 2009, pages 15 - 16.

Since a number of Schedule E habitat types are unlikely to occur within forestry operations and in light of the difficulty of identifying smaller patches, we concluded that relying on an operational plan is the most appropriate method for achieving the objectives and policies of the POP, particularly in light of forestry's potential benefits to the Region in relation to accelerated erosion.

If the relevant conditions in Rule 12-2 are not met, forestry in a Schedule E habitat is a discretionary activity under Rule 12-6 (discussed later).

5.5.2.5 Do all rare habitats, threatened habitats and at-risk habitats come within s 6(c) RMA?

There is an issue as to whether all rare habitats, threatened habitats and at-risk habitats in Schedule E are areas of significant indigenous vegetation and significant habitats of indigenous fauna within s 6(c) of the RMA. The protection of s 6(c) areas is a matter of national importance that is to be recognised and provided for.

So, can it be said that being listed in Table E.1, meeting one of the criteria in Table E.2(a) (for example, being of a certain size) and not meeting any of the criteria in Table E.2(b), means that a habitat automatically comes within s 6(c) of the RMA?

People who were not ecological experts expressed views. For example, Mrs Leckie referred to threatened and at-risk habitats and said that, because "there is so little left, and that is declining, *all* remaining areas of indigenous vegetation and habitats of indigenous species are significant".[55]

Ms Marr stated that Schedule E "identifies the habitats which have been identified as "significant" in terms of s6(c) RMA".[56]

However, Ms Maseyk's Table 8, Criteria for assessing ecological significance[57] identified rare habitats and threatened habitats as ecologically significant, but at-risk habitats as being potentially ecologically significant. So, it seems at least that at-risk habitats cannot be assumed to come within s 6(c). While Ms Maseyk stated that "Schedule E provides a list of habitat types that are considered to be significant (as per Section 6(c) of the RMA)"[58], the statements that followed were not as absolute.[59]

Ms Hawcroft expressed her opinion that sites that came within Tables E.1 and E.2 are "highly likely" to be significant.[60] In response to questions, she said that rare habitats or threatened habitats would be significant.

Both Mr Park and Mr Fuller considered that establishing significance requires a wider range of considerations than provided for in Schedule E. In particular, significance can only properly be established after site-specific evaluation.

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55 Leckie, Submission (evidence), 2 December 2008, page 1.
56 Marr, Introductory Statement and Supplementary Recommendations, 24 October 2008, para 11.
57 Maseyk, Section 42A Report, undated, page 43, also para 118.
58 Maseyk, Evidence and Supplementary Recommendations, 3 November 2008, para 75.
59 Ibid, for example, paras 80, 81, 84 and 85.
60 Hawcroft, Supplementary Statement of Evidence, 14 November 2008, para 15.

Mr Park stated[61] that a site's significance under s 6(c) needs to be determined at the site-specific level. He supported the use of Schedule E as "a tool for identifying *potential* areas of ecological significance under section 6(c) of the Act for rare and threatened habitats and for identifying *important* areas of indigenous biodiversity for at-risk habitats".[62] He gave examples of habitat types that could come within Schedule E, yet may not be significant when using the full suite of assessment criteria.[63] It was Mr Park's opinion that a site's significance under s 6(c) needs to be verified at the site-specific level through field assessment and the use of established ecological assessment criteria.[64]

We have concluded that it cannot be assumed that all rare habitats, threatened habitats and at-risk habitats are automatically s 6(c) RMA areas. Based on all the evidence of the ecological experts, we have decided that we should distinguish between rare habitats and threatened habitats on the one hand and at-risk habitats on the other, at least to some extent. We have concluded that:

(a) rare habitats and threatened habitats should be recognised as s 6(c) areas unless site-specific assessments determine otherwise; but
(b) at-risk habitats need site-specific assessments to determine their ecological significance.

That is reflected in new Policy 7-2A (a) and (b) as well as amended Policy 12-5 in relation to consent decision-making for activities in rare habitats, threatened habitats and at-risk habitats.

In addition, Policy 12-5(a) records, among other things, that resource consent decisions will be made and conditions set on a case-by-case basis having regard to the significance of the area of habitat and the potential adverse effects on that significance.

5.5.2.6 What criteria should be used to determine the significance of, and the effects of activities on, an area of habitat?

In the POP as notified, Table E.4 in Schedule E set out the criteria for assessing the significance of a site in relation to representativeness, rarity and distinctiveness, ecological context and previously assessed sites. The recommended location and wording of the provision varied as the hearing progressed. We understand that there is support for including the provision in Chapter 12, as it relates to resource consent decision-making, but there is some remaining disagreement on aspects of the criteria.

Ms Hawcroft proposed[65] that "type locality" should be included. She explained that this is because type localities are important for taxonomy (the science of classifying animals and plants into species), are useful indicators of the past distributions of species and may lead to the re-discovery of species believed to be extinct. In response to questions, Ms Maseyk explained that type locality is a record of where a plant was found for the first time and therefore its

[61] Park, Speaking Notes - Supplementary Evidence, 1 December 2008, para 23.
[62] Ibid, para 14.
[63] Ibid, para 12 and the references cited there.
[64] Park, Speaking Notes - Supplementary Evidence, 1 December 2008, para 30.
[65] Hawcroft, Statement of Evidence, 11 July 2008, para 134, and Supplementary Statement of Evidence, 14 November 2008, para 7.

location is somewhat random. We have concluded that the type locality does not need to be added in the context of resource consent decision-making criteria.

Mr Park was of the view[66] that important elements were missing from the assessment criteria for ecological significance ie criteria relating to size and shape (affecting the long-term viability of species, communities and ecosystems, and amount of diversity) and inherent ecological viability/long-term sustainability.

Mr Fuller agreed[67] with Mr Park that, in the RMA context, sustainability is an important criterion for assessing a site's significance and the potential effects of an activity on the values that make a site significant. In his opinion, condition and ecological sustainability must be considered as part of assessing the significance of a site and the significance of potential effects.

Other experts did not agree. By way of example, Ms Maseyk said that incorporating inherent viability/sustainability will "potentially place value only on the very best sites remaining within the Region".[68] We agree that protecting only the best sites would not be desirable.

Ms Maseyk stated[69] that the assessment criteria are not intended to determine ecological significance as ecological significance of an area of habitat is determined through application of Schedule E. She said[70] that there are two stages of assessing a site:

(a) the ecological value(s) (or significance) of the site; and
(b) the likely impacts of the proposed activity on the identified values.

She said[71] that the second stage can incorporate consideration of wider issues but those wider factors should not determine significance in the first instance.

Ms Hawcroft said[72] that a habitat's sustainability may usefully be considered when evaluating the potential impact of an activity at a site. Mr Watts told us[73] (as did others) that while the criterion of sustainability has not been consistently agreed upon or applied either in statutory planning documents or in case law, he would not disagree with sustainability being used in the context of determining a consent application.

However, the wording recommended to us at the beginning of the hearing referred to both assessing the value of the habitat and assessing the adverse effects of an activity without these wider second stage factors having been included. There was some confusion at the hearing about what had been intended by the recommended provision. We were provided with very different recommended policy wording in the end of hearing evidence, but that wording is unnecessarily complex.

66 Park, Statement of Evidence, 11 July 2008, para 7.8.
67 Fuller, Supplementary Evidence, 1 December 2008, para 3.2, see also paras 3.3 - 3.9.
68 Maseyk, Evidence and Supplementary Recommendations, 3 November 2008, para 67.
69 Maseyk, Response to Supplementary Evidence of Technical Experts, 16 January 2009, para 20.
70 Maseyk, Evidence and Supplementary Recommendations, 3 November 2008, para 58.
71 Ibid, paras 59 and 65.
72 Hawcroft, Supplementary Statement of Evidence, 14 November 2008, para 9.
73 Watts, Supplementary Statement, 1 December 2008, paras 28 - 29.

Mr Shaw referred to representativeness and noted that alternative definitions tend to refer to large, good quality examples of indigenous vegetation and he recommended that the concept be moved from ecological context to representativeness. Ms Maseyk said that she had no technical objection to his suggestion and that his reasoning was sound.

Mr Schofield provided the general basis of what we consider to be a suitable way forward, although we have not adopted the approach exactly. He referred to using "Schedule E (subject to further revision) to determine sites of potential ecological significance, with any modification managed as a discretionary activity. [The relevant policy] could then be used to determine the level of significance, including the site's ecological viability, which would inform the assessment of effects on the environment, and decision-making."[74]

We have concluded that the most suitable approach is to incorporate, into one policy, the relevant aspects for determining the significance of an area of habitat (in Policy 12-6(a)) and the effects of activities on an area of habitat (Policy 12-6(b)).

The wording of the policy is based on all the evidence and the various wording suggestions provided to us.

Our introductory wording of Policy 12-6 (a) refers to "may" to provide discretion to the decision-maker in relation to significance.

We were concerned that inserting ecological sustainability as a criterion for determining the significance of a habitat could result in protection of only the best habitats. We have therefore not included it in Policy 12-6(a) but have included it in (b). All of the ecological experts seemed to agree that it was a relevant factor when considering the effects of an activity on a habitat.

For representativeness in Policy 12-6(a), we have decided to include reference to the site being large relative to other areas of habitat in the Ecological District or Ecological Region, with indigenous species composition, structure and diversity typical of the habitat type. That is part of what had been a criterion for ecological context, which Mr Shaw said should be moved to representativeness. We have also decided to include the other part of the previous criterion for ecological context, but to link it with both of the other criteria for representativeness to enable consideration of whether the site does have functioning ecosystem processes. We have done this in part because habitat being under-represented has effectively already been addressed by its inclusion in Schedule E and in part because we understand from Mr Fuller's comments[75] that this would enable some evaluation of condition and sustainability.

For rarity and distinctiveness in Policy 12-6(a), we have removed duplication of language and linked all elements to habitat that supports an indigenous species or community to take account of concerns about the potential lack of ecological significance of bare substrate.

[74] Schofield, Supplementary Evidence, 1 December 2008, para 1.45.
[75] Fuller, Supplementary Evidence, 1 December 2008, paras 3.3 and 3.8.

We agree with Ms Maseyk[76] that previously assessed sites or legally protected sites should not be included as assessments can become outdated and legally protected areas can be given legal protection for values other than biodiversity values.

5.5.2.7 What activities should be regulated?

In relation to what activities should be regulated, it is important to recognise that not all biodiversity issues are addressed by rules in the POP and that non-regulatory approaches are also used. It did not seem to be in dispute that there will be s 6(c) RMA areas and areas important for maintaining indigenous biological diversity that are not rare habitats, threatened habitats or at-risk habitats in Schedule E. The intent is for those areas to be addressed by non-regulatory means. Resource use and development activities that are dealt with by non-regulatory means are not restricted by the POP (the relevant district plan may impose controls) and do not need resource consent from the Regional Council. Any restrictions sought to be imposed by non-regulatory means (such as fencing of habitat areas) can only occur with the consent and cooperation of the relevant people, for example landowners.

Ms Maseyk told us[77] about the importance of the non-regulatory approach. A number of submitters also referred to the importance of a non-regulatory approach or told us about steps taken to protect biodiversity on their land[78]. Miss Ekdahl told us that there is nearly 1000 ha of QEII Trust protected land on private land alone, that this is a small minority of the total protection measures individual landowners take, and that landowners should be "encouraged and incentivised".[79] Mr Beveridge's evidence provided information about the Regional Council's non-regulatory programme and the number of bodies and people with whom there are partnering arrangements.

We are conscious that many landowners have been excellent stewards of biodiversity on their land. There is no reason that the provisions in the POP should interfere with that and in our opinion they do not.

Elements of the POP that support the non-regulatory approach include the amended Objective 7-1, Policies 7-4 and 7-5 and many of the methods. We have concluded that (apart from forestry which we have already addressed), to the extent that activities are not regulated by new Rule 12-6 (including the relevant defined terms), the non-regulatory approach is the best way to achieve Objective 7-1 and the policies.

In relation to the regulatory approach, we deal first with s 9(2) (post Amendment Act) RMA land use activities and then with water-related and other activities under ss 13, 14 and 15 of the RMA.

In relation to the regulatory approach for land use activities in Schedule E habitats, Rules 12-7 and 12-8 in the POP as notified regulated vegetation clearance and land disturbance.

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[76] Maseyk, Response to Supplementary Evidence of Technical Experts, 16 January 2009, para 23.
[77] For example, Maseyk Section 42A Report, undated, para 123.
[78] For example, Coles, Hopkins, Neeson and other Federated Farmers witnesses, Siemonek.
[79] Ekdahl, part of Federated Farmers' Evidence, 1 December 2008, para 10.

There were concerns that the rules could unduly restrict forestry, horticulture, farming, infrastructure, renewable energy development and other activities. Mr Siemonek asked[80] us to consider the economic effects on farmers and the community. We have carefully considered what activities should be regulated and the implications of such regulation.

We have already discussed some of the changes that we have made to Schedule E. As already noted, to determine whether a habitat is a rare habitat, threatened habitat or at-risk habitat within Schedule E, Tables E.1, E.2(a) and E.2(b) are all relevant. If the habitat is not a rare habitat, threatened habitat or at-risk habitat within Schedule E, new Rule 12-6 does not restrict any activities within the habitat.

By way of example:

(a) we were told[81] that active duneland, stable duneland and inland duneland include only small, isolated areas;
(b) riparian margin habitat now refers to woody vegetation;
(c) kanuka forest and treeland habitat type is not kanuka scrub;
(d) neither kanuka scrub nor manuka scrub is a habitat type so clearance of either is not restricted, unless it is part of another habitat type;
(e) there are size or other criteria in Table E.2(a), at least one of which must be met for a rare habitat, threatened habitat or at-risk habitat; and
(f) there are exemptions provided in Table E.2(b), for example for wetland habitat types in relation to pasture, stock watering, wastewater treatment, sediment control, hydroelectric power schemes, and water storage for certain purposes.

The Land Hearing Panel, in the Chapter 12 rules dealt with by it (Rules 12-1 to 12-6 in the POP as notified), has distinguished between vegetation clearance, land disturbance, cultivation and forestry. For consistency of approach and because those terms are also suitable for use in new Rule 12-6, we have also incorporated those terms into new Rule 12-6. New Rule 12-6 regulates forestry that cannot meet the relevant conditions in Rule 12-2, vegetation clearance, land disturbance and cultivation in Schedule E habitats. The definitions of those terms have been amended or introduced to be suitable both for use in the rules dealt with by the Land Hearing Panel and by this Panel.

Based on the evidence and our assessment of the benefits of enabling people to undertake certain activities and the potential adverse effects, we have decided that the definitions of vegetation clearance and land disturbance should include a list of exemptions to enable a range of normal farming and other activities to occur without the need for resource consent. The activities include clearance or disturbance by animals including grazing; maintenance or upgrade of existing tracks, structures (including fences), or infrastructure; maintaining shelterbelts; activities undertaken for the purpose of protecting, maintaining or enhancing areas of rare habitat, threatened habitat or at-risk habitat; clearance of vegetation that is fallen or dead and not located within a rare habitat, threatened habitat or at-risk habitat that is forest or scrub (areas where the cover of trees and shrubs in the canopy is more than 80%); certain activities on Conservation land and in the NZDF Waiouru Military Training

[80] Siemonek, Biodiversity and Heritage (evidence), undated, page 1.
[81] Maseyk and Marr, Response to Chairperson's Minute #7, 7 May 2009, para 56.

Area; and clearance of certain pest plants. We explain some of these in more detail below.

Because of the potential adverse effects, we decided that activities to establish a fence line in a Schedule E habitat should not be exempted.

Mr Siemonek[82] referred to high maintenance costs associated with fenced off areas, but there is nothing in the rules that requires fencing. The exemption from the definitions of vegetation clearance and land disturbance for "clearance or disturbance by animals including grazing", was inserted to make it clear that the biodiversity provisions of the POP do not impose fencing requirements to keep animals out of Schedule E habitats. We note that, under the Chapter 13 rules, dairy cattle are to be excluded from some wetlands which will be Schedule E habitats. The rationale for that is discussed in Part 8 (Water Hearing) of this Volume.

In his Overall Plan hearing evidence, Mr Owen explained procedures in place or steps taken to care for the land under NZDF's control, including in relation to biodiversity. In addition, he advised us that NZDF "annually expends in excess of one million dollars maintaining the land and vegetation comprising the Waiouru training area. That expense is necessary to maintain the training value of the land but also achieves very significant biodiversity outcomes. Without our efforts tens of thousands of hectares of "tussockland below the treeline" identified in Schedule E simply would not exist. They would instead be irretrievably infested with *pinus contorta."* [83] Given the success of the non-regulatory approach to date, we have excluded certain activities in the NZDF Waiouru Military Training Area from the definition of vegetation clearance and land disturbance. If the non-regulatory approach should falter, then regulation would be in order.

For similar reasons relating to its care of the land, certain activities on identified Conservation land are also excluded from those definitions.

The submission of Maraekowhai Whenua Trust and others referred to the importance of gathering firewood. In relation to using trees for firewood, only Schedule E habitats are restricted by new Rule 12-6. In addition, the revised definitions of vegetation clearance and land disturbance exclude "clearance of vegetation that is fallen or dead and not located within a *rare habitat*, threatened habitat** or *at-risk habitat** that is *forest** or *scrub** in Schedule E" so, to that extent, there is the ability to remove certain vegetation from a Schedule E habitat.

While some submitters[84] suggested that there should be restrictions in buffer zones around the habitats, the land use focus in Chapter 12 is on vegetation clearance, land disturbance, forestry and cultivation in the habitats although, as already noted, we have decided that any planting or replanting of forestry trees must be 5 m from a Schedule E habitat. The riparian margin habitat type in Schedule E, an area within 20 m landwards from the top of the river bank adjacent to a Site of Significance - Aquatic, is effectively already a buffer zone. Some of the terms used in Schedule E, for example treeland, extend to as low as 20% canopy cover so that, in a way, provides its own buffer zone. No

[82] Siemonek, Biodiversity and Heritage (evidence), undated, page 1.
[83] Owen, letter, 4 December 2008.
[84] For example, Leckie, Submission (evidence), 2 December 2008.

ecological experts recommended a need for land use restrictions in buffer zones around the Schedule E habitats. We have therefore concluded that it is not necessary for the restrictions to extend to buffer zones, except in relation to planting or replanting forestry trees.

We turn now to address water-related and other activities under ss 13, 14 and 15 of the RMA.

Submitters identified links, and potential overlaps and inconsistencies, between the biodiversity provisions and water-related provisions addressed elsewhere in the POP. By way of example, Mr Moodie said that "Mighty River Power has a general concern that the control of water takes, discharge and diversions may be dealt with in multiple places in the Plan, and potentially in inconsistent ways."[85]

In contrast to the other notified rules in Chapter 12 that included certain activities (eg discharges of contaminants) ancillary to the land use, the notified rules dealing with Schedule E habitats listed, as activities in their own right:

(a) "discharges of contaminants into water, or into or onto land" (Rules 12-7(c) and 12-8 (c));
(b) "diversions of water" (Rule 12-7(d)); and
(c) "diversions of water, including for the purpose of wetland drainage" (Rule 12-8(d)).

Other water-related activities were dealt with in Chapters 15 (water takes, uses, diversions, and bores) and 16 (activities in the beds of rivers and lakes, etc).

The Water Hearing Panel asked what the logic was behind dealing with some Schedule E habitat water-related activities in the Chapter 12 rules (discharge of contaminants, diversion of water) but others in the water-related provisions of the POP (eg take or use of water, damming of water and activities in the beds of rivers or lakes). The response was that it is "difficult to comment on why the split was made in the proposed plan, but provided there are appropriate [cross-references] between the chapters it is appropriate to deal with them either separately (with appropriate [cross-references] between chapters) or to combine all the biodiversity restrictions into one rule".[86]

We have concluded that the latter approach is preferable and have therefore combined the land and water-related activities restricted by the POP within Schedule E habitats into new Rule 12-6.

New Rule 12-6 provides exceptions to enable activities permitted under some other rules in the POP to occur without resource consent either where there were existing activities or where the adverse effects of the activities would be no more than minor. In many cases, these activities are ones that are already established, such as existing structures or on-site wastewater discharges.

NZDF sought an exemption for discharges of live ammunition. As already noted, the definitions of vegetation clearance and land disturbance excluded certain NZDF activities, among a range of other activities. In relation to

[85] Moodie, Submissions (legal), 21 November 2008, para 3.17.
[86] Response to Hearing Panel Questions - Water, undated, Q 149, page 23.

discharges of ammunition to land or water, if that is captured by the RMA, it is an issue of general application, affecting not only NZDF but also hunters and others who use live ammunition. If provision is to be included in the POP, we concluded that it should be a provision of general application, not an exemption from a rule for one entity. Any such provision should be preceded by an evaluation by the Council of the potential implications of such a rule and, in the absence of such information, we have not included either a general rule or an exemption for NZDF.

In relation to PNCC's comments about Centennial Lagoon[87], we have concluded that it should be treated in the same manner as any other threatened habitat, for the reasons expressed by Ms Maseyk.[88]

Finally, we have also changed the titles of Chapter 12 to "Land Use Activities and Indigenous Biological Diversity" and Chapter 7 to "Indigenous Biological Diversity, Landscape and Historic Heritage" to more fully encapsulate the activities dealt with in the chapter.

5.5.2.8 What is the appropriate rule categorisation?

As notified, specified activities in at-risk habitats were discretionary activities and those in rare habitats and threatened habitats were non-complying activities. The rules as recommended to us during the hearing became increasingly complicated, in part to deal with the inappropriateness of non-complying activity status for some activities.[89] We decided that such complexity was not needed if we treat all activities as discretionary activities and provide policy guidance to decision-makers.

Mr Schofield noted[90] that, for an activity in a habitat to be classified as a non-complying activity, there should be a high degree of certainty that the habitat is indeed significant under s 6(c) of the Act. He also drew our attention to "bundling" of consents issues and we accept Mr Schofield's analysis[91] of bundling issues.

In light of the innovative approach to identifying Schedule E habitats and their mainly being determined by predictive methods rather than by on-site identification, we agree with Ms Clarke[92] that relevant activities in Schedule E habitats should be discretionary activities, apart from aspects of forestry which we have already discussed, with clear policy direction for resource consent decision-making. Rule 12-6 is the relevant rule and the relevant objectives and policies provide the policy direction.

Mr Siemonek referred[93] to "LAND CONFISCATION BY REGULATION" but the fact that resource consent may be required for some activities in Schedule E habitats does not mean that land is being confiscated.

87 Bashford, Memorandum about Cross-over Issues Between Water and Biodiversity Hearings, 16 October 2009.
88 Maseyk, Section 42A Report for the Water Hearing, November 2009, pages 3 - 5.
89 For example, Marr, Planning Evidence and Recommendations Report, June 2008, page 90.
90 Schofield, Supplementary Evidence, 1 December 2008, para 1.10.
91 Ibid, para 1.12.
92 Clarke, Supplementary Evidence, 1 December 2008, para 5.10.
93 Siemonek, Biodiversity and Heritage (evidence), undated, page 2.

5.5.2.9 Should there be a separate s 32 RMA analysis?

Section 32 Report: One Plan[94] was prepared by Mr Percy for the Regional Council. There were many submissions dealt with in the Overall Plan hearing that criticised the Council's Section 32 Report.

Mr Siemonek[95] stated that a separate s 32 analysis for biodiversity was essential. Commissioner Plowman was of the same view.

In relation to indigenous biological diversity, we concluded that the Section 32 Report: One Plan is superficial. We sought, and obtained[96], additional information about the extent of the Schedule E habitats on private and public land. Our obligations under s 32 of the RMA have permeated our thinking about the issues, our evaluation of the reports and evidence provided to us, and our decision-making about what the provisions of the POP should be. We have discussed some of those already and others are discussed next in Other Issues.

On balance, we have concluded that there is no need for a separate or additional s 32 report for the biodiversity provisions of the POP. We have reached that conclusion based on a number of factors, including:

(a) the significant decline of indigenous biological diversity and s 6(c) RMA areas in the Region and especially in certain parts of the Region;
(b) the fact that the POP takes both non-regulatory and regulatory approaches to maintaining indigenous biological diversity and protecting s 6(c) RMA areas and the changes that we have made in Volume 3 in relation to both;
(c) new Policy 7-2A, including its provision for various activities to be allowed and that the existing use of production land should not be unreasonably restricted;
(d) the unanimous view of the ecological experts that the general approach in Schedule E is appropriate;
(e) the almost unanimous view of the ecological experts about the habitats that should be included in Schedule E;
(f) the deletion of notified Table E.3 (and the entire notified Schedule E), the more focussed wording in Table E.1 (including restricting the riparian margin habitat type definition to woody vegetation) and the provisions in Table E.2(a) and (b);
(g) the inclusion in Schedule E of a statement that the initial expert assistance to landowners regarding the interpretation and application of Schedule E is currently provided free of charge by the Regional Council;
(h) new Objective 12-2 and Policies 12-5A, 12-5 and 12-6, which improve the decision-making policy framework;
(i) the new Rule 12-2 provisions for forestry, with forestry unable to meet the relevant conditions being dealt with under Rule 12-6;
(j) the exceptions from new Rule 12-6 which enable activities permitted in a number of other rules in the POP to occur without the need for a resource consent; and

[94] Percy, Section 32 Report: One Plan, May 2007, with biodiversity issues on pages 99 - 100 and 102 - 108.
[95] Siemonek, Biodiversity and Heritage (evidence), undated, page 1.
[96] Maseyk, Response to Supplementary Evidence of Technical Experts, 16 January 2009, pages 7 - 9 and 12 - 14.

(k) the revised definitions of vegetation clearance and land disturbance which explicitly exclude a number of activities.

5.5.3 Other Issues

5.5.3.1 Biodiversity General

A number of issues raised in Volume 2 under the heading Biodiversity General are dealt with in other parts of this decision.

New Method 7-8 deals with indigenous biodiversity advice and information. Method 7-1 deals with wetlands and, in our view, it is sensible to focus on priority wetlands. We were told[97] that the Regional Council does not have a current programme to re-create wetland out of farmland or to restore duneland, so it would not be appropriate to identify these in the POP.

We have no evidence that the term "indigenous dominance" is suitable for inclusion in the POP.

The POP is not able to deal with some issues raised by submitters for example introduction of pest animals, funding, activities of the Animal Health Board, their use of 1080 and the status of reserves.

5.5.3.2 7.1.1 Scope

Because we are of the view that a brief statement of scope is appropriate in 7.1.1, we decided not to add commentary here about rare or threatened species or state, among other things, that areas of significance or outstanding value do not exist in isolation.

5.5.3.3 7.1.2 Indigenous Biological Diversity

We note Mr James' support for the approach to biodiversity. The riparian margin habitat type in Schedule E provides protection for Sites of Significance - Aquatic but the locations of Sites of Significance - Aquatic and Sites of Significance - Riparian are dealt with in the Water hearing. To improve consistency of terminology in the POP, we have made changes here and elsewhere to refer to indigenous biological diversity or indigenous biodiversity and native fish. In light of our decision about the use of the terms rare habitats, threatened habitats and at-risk habitats, they should not be deleted here and we have included a statement that their meaning is determined in accordance with Schedule E.

We accept Ms Marr's suggestion[98] that the wording reflect the fact that the Region has 3% of remaining wetland habitat, not 2% as stated in the notified POP.

To convey more clearly the areas of habitat loss, we have included a statement that in the lower-lying and coastal areas, typically less than 10% of

[97] Marr, Planning Evidence and Recommendations Report, June 2008, page 17.
[98] Ibid, page 22.

original habitat remains. The Minister of Conservation's other suggested wording change was not pursued at the hearing.

In response to the Federated Farmers submission, we have qualified the loss of riparian margins as being in most areas, rather than the blanket statement of loss in the POP as notified. While there are changing attitudes to riparian management, and landowners and the Regional Council have made efforts to improve riparian margins, Ms Marr told us[99] that most of the length of rivers in the Region do not have riparian vegetation or good riparian management.

5.5.3.4 Issue 7-1

We have changed the order of wording to convey more clearly that it is historical land development practices that have resulted in the loss of biodiversity.

For the reasons expressed by Ms Marr[100], we have not included reference to off-road vehicle activities but note that vehicles in the coastal environment are referred to in Chapter 9 (Coast) Methods 9-1, 9-2 and 9-3.

There was no evidence to support inclusion of sand mining and the other activities referred to; the wording in the issue adequately conveys the message.

5.5.3.5 Objective 7-1

Submissions sought differing relief in relation to Objective 7-1 as notified.

Pre-Hearing Report 26 recorded general agreement that there was merit in a substantially shortened Objective 7-1 and we agree with that. The agreed outcome (which we refer to as "pre-hearing meeting wording") for Objective 7-1 was "Indigenous biodiversity is maintained or enhanced" although there were some outstanding issues.

We agree that (a) to (c) of the objective should be removed as the objective should be wider than Schedule E habitats. Mr Peterson[101] and Ms Clarke[102] opposed (a) to (c) and we accept the validity of their reasons. We also accept the validity of Mr Watts' reasons[103] ie that if Table E.3 as notified is deleted (which it is), the wording of Objective 7-1 as notified (although the Minister had initially supported it) would be too narrow in focussing on the Schedule E habitats. As Mr Shaw said, it "does seem limiting however, that all of these worthwhile initiatives - protection, maintenance, and enhancement - are confined only to 'rare and threatened' and 'at risk' habitats".[104]

In addition, because of the potential for confusion as explained by Mr Shaw[105], reference to "best representative examples" is not appropriate in Objective 7-1 or Policy 7-4(a).

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99 Ibid.
100 Ibid, page 25.
101 Peterson, Supplementary Statement of Evidence, undated, paras 20 - 22.
102 Clarke, Supplementary Evidence, 1 December 2008, paras 3.4 - 3.12.
103 Watts, Supplementary Statement of Evidence, undated, paras 6 - 13.
104 Shaw, Supplementary Statement of Evidence, undated, para 16.
105 Ibid, paras 18 - 24.

We note, however, that the pre-hearing meeting wording does not refer to "protect" or to significant indigenous vegetation or significant habitats of indigenous fauna. We reached the conclusion that this was a deficiency that should be rectified in light of Mr Shaw's comments, the deletion of (a) to (c), Federated Farmers submission[106] and the wording of s 6(c) of the RMA. Mr Watts helpfully referred us to *Port Otago v Dunedin City Council*[107] and said that, based on that case, it is perfectly reasonable to use the term "maintain" in relation to s 6(c) although he did suggest that we consider including an explanation or definition of maintain and perhaps also protect. We reached the conclusion that it is preferable to use the wording of s 6(c).

Mrs Leckie[108] expressed the view that the objective should refer to maintain *and* enhance and we are of the view that our wording accommodates that.

At the hearing, Mighty River Power sought reference to "net" indigenous biological diversity. Mr Peterson told us[109] that including the word "net" would clarify the intent to maintain or enhance overall biodiversity. Mr Watts[110] expressed concerns about "net" biodiversity focussing unduly on the quantifiable aspects of biodiversity rather than maintaining the quality of habitat types. Mr Watts also provided us with a paper written by Mark Christensen[111] which identified a range of issues surrounding offsets. We concluded that it was preferable not to include "net" in Objective 7-1, but to include reference to offsets in Policy 7-2A, with more detailed guidance, including reference to "net" indigenous biological diversity gain, in Policy 12-5.

While s 30(1)(ga) sets out various roles for the Regional Council in relation to "maintaining" indigenous biological diversity, we note the agreement about including "enhanced" in the pre-hearing meeting wording and evidence[112] supporting it. We agree that it is appropriate for the objective to refer to enhancement, but not in exactly the same way as the pre-hearing meeting wording. We concluded that there should be reference to "including enhancement where appropriate" so that it could relate to all parts of the objective. By way of example, while s 6(c) refers to protecting, but not enhancing, areas of significant indigenous vegetation, it seemed to us that it would be possible that protecting significant indigenous vegetation in one place might involve enhancing it in another, particularly in light of the offsets provided for in Policy 12-5.

5.5.3.6 Policy 7-1

For reasons already noted, it is not appropriate to apportion all responsibilities to territorial authorities. As noted earlier, the TA Collective wanted "who does what" to be clarified and PNCC did not want the Regional Council to have the sole responsibility.

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106 Federated Farmers, submission 426-96.
107 Environment Court decision C4/02.
108 Leckie, Submission (evidence), 2 December 2008, page 1.
109 Peterson, Supplementary Statement of Evidence, undated, para 10.
110 Watts, Supplementary Statement, 1 December 2008, para 8; also Supplementary Statement of Evidence, undated, paras 14 - 24.
111 Christensen (April 2007) Biodiversity Offsets - An Overview of Selected Recent Developments: New Zealand - Where to from here?
112 For example, Clarke Supplementary Evidence, 1 December 2008, para 3.13; Black, Submissions (evidence), 21 November 2008, para 9.

We received a memorandum[113] setting out recommended wording as agreed among Mr Forrest, Mr Murphy, Ms Marr and Mr Maassen. We are grateful for their assistance. We have concluded that the wording is suitable, with minor wording changes that we have made to reflect the wording in Objective 7-1.

In terms of the Wellington Conservation Board's submission, while we do not accept that "restoring" needs to be included, we have added reference to enhancement.

5.5.3.7 Policies 7-2 and 7-3 and New Policy 7-2A

At the hearing, the officers recommended deleting Policies 7-2 and 7-3, creating a new policy and, in response to submissions from the TA Collective, moving some aspects of the policies into Chapter 12. Because we have decided that regulated Schedule E activities will all be dealt with as discretionary activities, only one policy is needed. We have therefore deleted Policies 7-2 and 7-3 and created a new Policy 7-2A. We agree that certain matters are better dealt with in Chapter 12 policies, for example detailed criteria relevant to resource consent decision-making, and we discuss them later.

We heard from a number of submitters in relation to these policies. As already noted, Policy 7-2A sets out different approaches to determining the significance of rare habitats and threatened habitats in (a) and at-risk habitats in (b). The rest of Policy 7-2A deals with activities that will need resource consent, minimising potential adverse effects and guidance about certain activities being allowed or not unreasonably restricted.

Mr Moodie identified Mighty River Power's position that there should be a provision identifying the types of activities that would be allowed and the officers agreed that some guidance is appropriate. The policies as notified also provided some guidance on that topic.

New Policy 7-2A provides policy guidance about:

(a) allowing activities for the purpose of pest control or habitat maintenance or enhancement. Those activities are beneficial for the habitats. It is unnecessary to add qualifying words to habitat maintenance and enhancement as sought by the Minister of Conservation, as we concluded that the concept is implicit in the words used;
(b) allowing indigenous biological diversity mitigation offsets in appropriate circumstances which may include the establishment of infrastructure or other physical resources of regional or national importance as identified in Policy 3-1. This is included because offsets can be beneficial in appropriate circumstances and we decided that there should be policy reference to that. The wording here also provides a link with Policy 3-1;
(c) allowing the maintenance and upgrade of existing structures, including infrastructure. The relevant definitions put limits on the extent to which activities can occur to limit adverse effects; and
(d) not unreasonably restricting the existing use of production land. While Schedule E habitats are important, so is the ability of people to carry on with existing uses of production land without being unreasonably

[113] Dated 16 August 2008 but it refers to a meeting on 10 September 2008, so one of the dates would appear to be incorrect.

restricted. The responsibility for, and costs of, protecting Schedule E habitats need to be dealt with equitably.

Reference to "naturally occurring" habitats is not necessary in light of the changes made to Schedule E.

The matter of offsets is dealt with in Policies 7-2A and 12-5.

The policy is now wide enough to cover water takes in a Schedule E habitat. Other water takes are dealt with in Part 8 (Water Hearing) of this Volume.

With respect to "near" and "nearby", nearby is now used only in Policy 7-6 and we concluded that its use there was sufficiently specific in the context of that policy.

We accept the evidence of Mr Peterson[114] and Ms Marr[115] for the reasons that they explained that the RPS should provide guidance on the role of the territorial authorities and we have included this in Policy 7-2A(e), although not exactly as suggested.

5.5.3.8 Policy 7-4

For the reasons explained by Mr Shaw[116], we agree that use of the term "representative" is potentially confusing and should be deleted. Because this policy reflects a non-regulatory approach which may extend to habitats that do not come within Schedule E, we agree with Ms Marr that reference to rare habitats, threatened habitats and at-risk habitats should be removed. It is therefore appropriate to focus the wording in (a) on maintaining or enhancing indigenous biological diversity. We agree it is not only landowners who are relevant, so we have included reference to those with a legal interest in the land and relevant consent holders. We also agree that it should be clarified that the focus is to establish a management plan and incentive programme and that it is voluntary. In the context of a voluntary programme, we have concluded that the 2016 date is reasonable. We were told[117] that this is in line with the available funding and the targets in the current LTCCP. The Council does not have a programme to restore tussock or grassland habitat so referring to one would be misleading. Other details, such as waiving fees, are best addressed in the particular case, rather than in the RPS.

Because the policy is forward-looking and there are many examples of successful non-regulatory methods, it is not appropriate to identify one such as the NZ Forest Accord. Equally, it is not appropriate to identify a particular area that would be included or to set out details about how a management plan might be amended in a voluntary programme. In the context of this policy for a non-regulatory, voluntary programme, we have concluded that it is not necessary to define precisely what is meant by "bush" or to set out detail of where the efforts should be targeted as (a) already refers to the aim "to maintain or enhance indigenous biological diversity".

Employment issues are not for the POP to address.

[114] Peterson, Supplementary Statement of Evidence, undated, paras 27 - 29.
[115] Marr, End of Hearing Statement, 16 January 2009, pages 7 - 8.
[116] Shaw, Supplementary Statement of Evidence, undated, paras 19 - 24.
[117] Marr, Planning Evidence and Recommendations Report, June 2008, page 58.

5.5.3.9 Policy 7-5

In the context of this policy, and as discussed above, it is not appropriate to refer to one example of a successful non-regulatory method, such as the NZ Forest Accord. We acknowledge that a number of landowners are excellent stewards of the land but, from the evidence that we heard, it was apparent that economics, rather than stewardship, is the reason for a number of areas of forest or bush not having been cleared. We agree that "aim to" should be removed as this information should be available, if a person wishes access to it. New Method 7-8, discussed later, is relevant.

5.5.3.10 Policy 7-6

As a consequential change, we have revised the wording of (b) to reflect the functions and powers of the territorial authorities set out in Policy 7-1 but have concluded that the wording of (b) is otherwise sufficient. For the reasons explained by Ms Marr[118], reference to "nearby" is suitable.

5.5.3.11 Chapter 7 Methods General

We have numbered the methods in the POP for ease of reference and have called them methods, rather than projects, for consistency with RMA terminology.

We have not stipulated support for regional parks as they can be included in the methods if that is appropriate. It is not our role to add a method about land purchases for regional parks as such purchases would need to go through the annual plan or LTCCP process to gain funding.

We have included landowners, foresters, relevant consent holders and Federated Farmers in the relevant methods. However, it is not appropriate to include a company or an industry in methods where the interests may be only in a limited number of areas. Ms Marr told[119] us that if a generating company had a known interest, the Council would involve them in the project and that seems sufficient to us.

5.5.3.12 Method 7-1 Wetlands - Biodiversity

Methods in the POP are not the relevant place to raise issues about the Department of Conservation; any issues should be taken up with the Department. In our opinion, enhancement includes restoration.

While Mr Hopkins' evidence[120] queried the number of wetland and bush remnants covered by Methods 7-1 and 7-2, his submission did not seem to have raised that issue. In any event, in response to questions, Ms Marr said that the respective numbers are in the LTCCP.

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[118] Ibid, page 63.
[119] Ibid, page 67.
[120] Hopkins, Submissions (evidence), 25 July 2008, page 3.

5.5.3.13 Method 7-2 Bush Remnants - Biodiversity

All submitters but one support this method. While Mr Stuart Shaw referred to, in his opinion, the very sad state of the Manunui Bush Reserve, we were provided with no evidence in support of deleting this method, so we have retained it.

5.5.3.14 Method 7-4 Inanga Spawning and Native Fishery Sites - Biodiversity

For the reasons expressed by Ms Marr[121], there is no need to include eels in this method.

5.5.3.15 Method 7-5 Biodiversity (Terrestrial and Aquatic) Research, Monitoring and Reporting

Apart from matters already discussed, for the reasons expressed by Ms Marr[122], we are satisfied with this method.

5.5.3.16 Method 7-6 Education in Schools - Biodiversity

We agree with Ms Marr[123] that it is appropriate to include the Youth Environment Forum.

5.5.3.17 Method 7-7 District Planning

We deal here only with the part of Method 7-7 that relates to indigenous biological diversity. We have concluded that there should be an addition that recognises that the Regional Council will seek changes to district plans if necessary to ensure that district plan rules requiring protection of significant indigenous vegetation and the significant habitats of indigenous fauna do not contradict rules on indigenous biodiversity in the POP.

The year 2008 has passed so we have referred to "after this Plan becomes operative".

5.5.3.18 New Method 7-8 Indigenous Biodiversity Advice and Information

In light of the innovative approach to biodiversity protection in the POP, we agree with the outcome in Pre-Hearing Report 26 that an additional method is needed for the Regional Council to provide advice and information.

5.5.3.19 7-6 Anticipated Environmental Results

We deal only with the first two anticipated environmental results (AER).

[121] Marr, Planning Evidence and Recommendations Report, June 2008, page 74.
[122] Ibid, page 76.
[123] Ibid, page 77.

As s 62(1)(g) of the RMA requires the Regional Policy Statement to state the environmental results anticipated from implementation of the policies and methods, it is not possible to delete this section.

In relation to the first AER, it is appropriate to recognise changes to habitats resulting from natural processes or resource consents, and that the habitats could be better in the future than they are now, as all of these are AERs. Because there is no longer reference to "not threatened" habitats, we have changed the AER to refer to the number of at-risk habitats not being increased.

In relation to the second AER, to enable effective and efficient use of information, it is prudent to use habitat condition measures that are consistent with those used by the Department of Conservation, and that should be stated.

5.5.3.20 7-7 Explanations and Principal Reasons

For consistency with the ecological evidence, reference should be to "20% or less" and "less than 50%". There was no expert evidence supporting a change from 30% to 10%.

5.5.3.21 Chapter 12 Overall Biodiversity

The biodiversity provisions already have a basis in the Ecological District and LENZ approach.[124] We have already discussed how the various activities are dealt with in the rules and renewable energy projects will be addressed in that context.

As notified, there was no objective relating to indigenous biological diversity in Chapter 12. In response to the TA Collective seeking additional objectives and policies in the Regional Plan part of the POP, new Objective 12-2 has been included and aspects of some policies have been moved from Chapter 7 to Chapter 12. There was no dispute that it is suitable for there to be a relevant biodiversity objective and associated policies in Chapter 12.

The layout and wording of Chapter 12 now clarifies which provisions relate to which activities.

5.5.3.22 New Objective 12-2 and new Policy 12-5A

The wording of the objective identifies the activities regulated and is otherwise similar to the wording of Objective 7-1. The wording of new Policy 12-5A implements the objective. Because these are both new and specific wording was not suggested by the submitters in their submissions, we consider it prudent to keep this objective and policy aligned with Chapter 7 wording to the extent possible. The reasoning in relation to Objective 7-1 is relevant here.

[124] Maseyk, Section 42A Report, undated, paras 55 and 124 - 129.

5.5.3.23 Policy 12-3

Policy 12-3 has been deleted by the Land Hearing Panel. Policy 12-5 deals with consent decision-making for activities in Schedule E habitats.

5.5.3.24 Policy 12-5

Policies 7-2 and 7-3 as notified set out some guidance relevant to resource consent decision-making, and we have concluded that some of that guidance is better addressed in Chapter 12. We heard from a number of submitters and witnesses about the relevant policy matters, what types of effects should be referred to and other relevant matters. We do not repeat or detail what we were told. Instead, we focus on our reasons for deciding what we did.

Policy 12-5(a) provides that consent applications will be decided on a case-by-case basis, having regard to a number of matters stated in the policy.

In light of our decision about the process for identifying whether Schedule E habitats are significant or not, we decided that it was important to set out policy guidance about when consents should be granted, or not. There is a different presumption based on whether or not the habitats are significant:

(a) in (b), for Schedule E habitats assessed to be an area of significant indigenous vegetation or a significant habitat of indigenous fauna, consents must generally not be granted unless certain factors exist; and
(b) in (c), for those Schedule E habitats that are not significant, consents must generally be granted unless certain factors exist.

In (b)(i), because of the significance of the habitats, we decided that any more than minor adverse effects should be addressed. Those effects are linked to the relevant Policy 12-6 factors and they are to be avoided as far as reasonably practicable, or otherwise remedied or mitigated. We decided that simply referring to avoiding, remedying or mitigating was not appropriate as better guidance should be given about what is expected. In (b)(ii), there is provision for offsets for any more than minor adverse effects that cannot be avoided, remedied or mitigated. It is here that we decided that we should refer to a "net indigenous *biological diversity*^ gain" so that the focus is on both indigenous biological diversity and on a "net" gain in the context of the particular facts. In (d), there is further guidance about assessing the offset, which we discuss below.

In (c), the approach is similar, but because the habitats are not significant, we decided that reference should be made to significant adverse effects rather than those that are more than minor. So, if there are no significant adverse effects, consent should generally be granted. For the same reasons as already expressed, (c)(ii) refers to any significant adverse effects being avoided, as far as reasonably practicable, or otherwise remedied or mitigated. In (c)(iii), there is reference to offsets.

In (d), we have set out matters relevant to offsets. Ms Hawcroft told us that "It is very important, in the case of rare and threatened habitats, that offsets occur in the same habitat type. This is because so little of these habitats remains, and their composition is so distinctive, that any loss is likely to cause

irretrievable loss of biodiversity, which cannot be balanced by gain in another habitat. It is also important that the pattern of indigenous habitat across the landscape is maintained or improved, so any offset should take place in the same locality. The scale at which locality applies will vary depending on the species and habitat concerned."[125] We have not set out a requirement that all of these occur because we decided that this policy as worded now provides guidance on those matters to enable a decision-maker to make the appropriate decision based on all the relevant facts in the particular circumstances of the actual case.

It is not appropriate to exclude certain activities from this policy as the criteria should apply to all activities for which consent is required.

5.5.3.25 Policy 12-6 (Table E.4 as notified)

See section 5.5.2.6**.**

5.5.3.26 Chapter 12 Rules, Rules 12-7 and 12-8 as notified and new Rule 12-6

See section 5.5.2.4, 5.5.2.7 and 5.5.2.8.

The RMA does not provide for a statement that "resource consent applications under this rule will be notified", as sought by NKII.

As already discussed, new Rule 12-6 provides exceptions to enable activities permitted under some other rules in the POP to occur without resource consent. This is either where there were existing activities or where the adverse effects of the activities would be minor. There are also exceptions referring to other rules (eg Rules 13-22 and 16-3) where the other rule is a non-complying activity, as we decided that the other rule should prevail.

We have already discussed issues relating to buffer zones in sections 5.5.2.4 and 5.5.2.7.

5.5.3.27 Glossary

For the reasons expressed by Ms Marr[126], we have concluded that Glossary definitions for ecosystem or terms that are already defined in the RMA are not needed. Reference to riparian margins no longer appears in Chapter 12 rules.

As already noted, the Glossary now includes new or amended definitions of rare habitat, threatened habitat and at-risk habitat and definitions of vegetation clearance and land disturbance have been amended. The Land Hearing Panel inserted definitions of forestry and cultivation and these terms are suitable for Rule 12-6. The Land Hearing Panel also included a definition of woody vegetation which is suitable for use in Schedule E.

As notified, Schedule E used a number of terms (but without using asterisks) that were defined in the main Glossary. Ms Maseyk and Ms Marr,

[125] Hawcroft, Supplementary Statement of Evidence, 14 November 2008, para 11.
[126] Marr, Planning Evidence and Recommendations Report, June 2008, pages 118 - 119.

submitters[127] and a number of experts[128] identified that various terms used in Schedule E should be defined. We agree with that. In our view, all defined terms in the POP should be in the main Glossary.

In addition to rare habitat, threatened habitat and at-risk habitat, defined terms amended or added are abundant, association, boulderfield, broadleaved, canopy, common, continuous, cushionfield, discontinuous, dominant (or dominated), duneland, endemic, fernland, flaxland, forest, grassland, heathland, herbaceous, herbfield, indigenous, lichenfield, mossfield, occasional, operational plan, podocarp, rushland, scattered, scrub, sedgeland, shrub, shrubland, tree, treeland, tussockland. The term "dbh" that was in the Glossary has been deleted as reference to 1.4 m above ground has instead been inserted in the relevant definitions.

We had concerns[129] that the 20% canopy cover threshold for habitats that are currently in the 20% to 80% or 100% range (for example treeland and shrubland) appeared to be too all-encompassing and expressed our preliminary view that a 60% canopy cover would be more appropriate. We asked if material adverse effects would arise for the Region's indigenous biological diversity if the thresholds were increased to 60%. Ms Maseyk and Ms Marr provided further explanation[130] which convinced us that the thresholds should remain as the experts had agreed.

We have set out the documents identified by Mr Shaw[131] in a definition of "New Zealand Threat Classification System and Lists".

We discuss the definition of site later in section 5.6.3.1. In light of the other defined terms in Schedule E, the defined term site is also suitable for the biodiversity provisions.

No expert suggested that manuka or kanuka be defined, but the kanuka forest or treeland habitat type has been revised and clarified to differentiate it from kanuka scrub.

Because the terminology in Schedule E has been improved to refer to indigenous vegetation unless otherwise stated in Schedule E, it is not necessary to exclude trees for horticultural crops or orchard trees from the various defined terms. However, to deal with issues about the riparian margin habitat raised by Horticulture NZ, we have excluded orchard trees from the definition of treeland.

The term forest is used here in the context of indigenous biological diversity and not carbon sequestration, so it is not necessary to use the same definition as the Kyoto Protocol.

Terms defined in the Glossary are identified with an asterisk throughout the POP, except in the Schedule E Habitat Type Label column or where the habitat type label is referred to, to emphasise that those terms are labels only.

[127] For example, Pirie Consultants Ltd and others, submission 303; Horticulture NZ, Submission (evidence), 2 December 2008, pages 4 - 6.
[128] For example, Shaw Supplementary Statement of Evidence, undated, paras 12 - 13 and 36; Park, Supplementary Evidence, 1 December 2008, para 3.6.
[129] Chairperson's Minute #7 - Schedule E, 14 April 2009, page 1.
[130] Maseyk and Marr, Response to Chairperson's Minute #7, 7 May 2009, pages 3 - 7.
[131] Shaw, Supplementary Statement of Evidence, undated, para 29.

In response to questions raised in our Chairperson's Minute #7 about confusion in terminology, Ms Marr and Ms Maseyk suggested[132] that some Schedule E terms (eg wetland, lake) should be shown as RMA terms in some places and not in others. We do not agree with that, except where Schedule E itself identifies that there is a specific definition (eg lakes and lagoons and their margins habitat type) or where Ms Maseyk said that showing the term as defined would result in a nonsensical meaning (wetland species). Otherwise, our evaluation of the material provided to us by the experts was based on words used in the RMA having the same definition as in the RMA. Consequently, terms used that are defined in the RMA are identified by a caret when used in the objectives, policies, rules, Glossary and Schedule E, except where the habitat type label is referred to.

The term "gully" is only used in Schedule E and we have concluded that it can have its ordinary meaning and does not need to be a defined term.

5.5.3.28 Schedule E

We have already dealt with Schedule E in various sections in the principal issues of contention. It is a broad-brush, innovative approach to identifying indigenous biological diversity and Tables E.2(a) and (b) are important to whether a habitat is caught by Schedule E or not. In light of those factors, we have concluded that Schedule E should be a component of the Regional Plan part of the POP as the ability to seek changes to it should be available to any person.

For clarity or consistency, we have made some wording changes. We have revised the introductory wording to clarify the use of Schedule E. Because of confusion about the headings of the table, under the heading Table E.1 we have explained the meaning of the "Habitat Type Label", "Defined As" and "Further Description" columns. We have inserted "treeland" in the Habitat Type Label column where the "Defined As" description refers to treeland. Where the habitat occurs within specified Water Management Sub-zones, we have included them in the "Defined As" column.

Ms Jordan[133] explained the importance of wetlands and expressed concerns about referring to naturally occurring wetlands. Naturally occurring is now used only in Table E.2(a) and has the support of the ecological experts.

Except in notified Table E.3 (which we have deleted), Schedule E in the POP as notified did not include references to external documents. Some versions recommended to us at the hearing did. There were criticisms of some of those external documents and there are issues about incorporating documents into the POP by reference. As all ecological experts agreed that the references were not needed, we have not included them in Volume 3.

Providing financial assistance or purchasing land is a matter for the Regional Council in its LTCCP or annual plan processes.

[132] Maseyk and Marr , Response to Chairperson's Minute #7, 7 May 2009, pages 13 - 14 and 16.
[133] Jordan, Speaking Notes, undated, paras 5 - 11 and 15 - 19.

For all the reasons in this decision, we have concluded that Schedule E as set out in Volume 3 (clean copy in Volume 4) is appropriately worded and the best approach.

5.6 Heritage

We turn now to address the topic of historic heritage.

5.6.1 Legal Matters

In addition to the historic heritage provisions in Chapter 7 in the RPS portion of the POP, conditions about historic heritage in various provisions in the Regional Plan part of the POP (including the Regional Coastal Plan) were drawn together and addressed in this hearing. Part 1 of this Volume discusses a range of legal matters and refers to provisions relevant to the RPS, Regional Plan and Regional Coastal Plan. We do not repeat them here.

Because we have considered not only Chapter 7 but also various conditions in different chapters of the POP, various Part 2 RMA provisions are potentially relevant. In addition to s 5, these are ss 6(a), (b), (e) and (f), 7(a), (aa), (c), (f) and (g) and 8.

While s 6(e) and (f) are of particular relevance, Mr Mistry noted there "is a considerable degree of interrelationships between all the matters listed in section 6 of the RMA".[134] Mr Teira pointed out[135] that Maori heritage is a matter of national significance under s 6(e) and (f). Mr Mistry explained[136] the breadth of historic heritage and said that, as defined under the RMA, historic heritage is both a natural and physical resource.

Mr Maassen told us that the wording of s 6(f) "does not mean that the protection of historic heritage is an end in itself or to be achieved at all costs. A relevant question is whether or not the development or use is inappropriate. The requirements of s.6 inform s.5 but are not in substitution for the overall judgment required by s.5."[137]

When preparing the RPS, Regional Plan and Regional Coastal Plan, the Regional Council must have regard to[138] any relevant entry in the Historic Places Register and we have done that.

Apart from the National Policy Statement on Electricity Transmission 2008, discussed in 5.5.1, there are no national policy statements relevant to this decision.

[134] Mistry, Statement of Evidence, 11 July 2008, para 9.
[135] Teira, Statement (evidence), 11 July 2008, para 14.
[136] Mistry, Statement of Evidence, 11 July 2008, paras 10 - 12.
[137] Maassen, Section 42A Report Concerning Historic Heritage, 13 June 2008, para 7.
[138] Sections 61(2)(a)(iia) and 66(2)(c)(iia).

5.6.1.1 Does the Regional Council have the power to control land use, and to include performance standards in land use rules, to address historic heritage?

A legal issue arose as to whether the Regional Council has the power to control land use, and to include performance standards in land use rules, to address potential effects on historic heritage.

In this hearing, the issue arose in the context of s 9(2) (post Amendment Act) land use activities. In the Water hearing, the same issue arose in relation to s 13 activities on land in the beds of rivers or lakes. Based on legal advice to us, the short answer is "no", except in the coastal marine area.

The relevant RMA provisions are ss 30(1)(a), (b) and (c), 63(1), 65(1), 66(1) and 68(1) (and s 30(1)(d) in relation to the coastal marine area). Section 30(1)(g) is also relevant in relation to beds of rivers and lakes.

Mr Maassen's advice was that "control of the use of land in a regional plan for the purpose of managing historic heritage is outside the jurisdiction of a regional council. It is not a function provided for in s.30(1)(c). I do not consider that the position is different if the rule is primarily aimed at controlling a matter within the jurisdiction of the regional council under s.30(1)(c) but includes a performance standard aimed at addressing the effects of historic heritage... I therefore consider that any performance condition directed at historic heritage would be unlawful."[139]

Advice from Bell Gully to the NZHPT agreed with the conclusion that control of land use activities "excludes the managing of resources for the purpose of historic heritage as this is outside the jurisdiction of the regional council".[140]

5.6.2 Principal Issues of Contention

Except for the issue of contention dealt with next in 5.6.2.1, by the end of the hearing, the principal issues of contention among the submitters had largely been resolved. While we did not always accept the wording of what had been recommended to us, as we explain soon in the context of Other Issues, we greatly appreciate the assistance that has been provided to us.

5.6.2.1 Should there be historic heritage conditions and, if so, what is suitable wording?

As already noted, conditions about historic heritage in the various provisions throughout the POP were drawn together and addressed in this hearing. The particular wording of any condition is ultimately a matter for the relevant Hearing Panel dealing with the topic, but having the conditions addressed in the context of expert advice and evidence about historic heritage was a most helpful approach.

[139] Maassen, Supplementary Legal Report Relating to Historic Heritage, 12 January 2009, para 8.
[140] Bell Gully, letter, 16 March 2009, para 14.

There were issues about various conditions in the POP as notified dealing with historic heritage. We received various evidence and legal submissions about the conditions, and different wording suggestions, during the hearing.[141] We have considered them carefully but do not repeat them here. Instead, we set out our reasons for reaching the conclusions that we did in relation to conditions on matters over which the Regional Council has jurisdiction.

In the POP as notified, the wording of conditions dealing with the accidental discovery or disturbance of an archaeological site, etc was generally:

> In the event of an archaeological site, waahi tapu or koiwi remains being discovered or disturbed while undertaking the activity, the activity shall cease and the Regional Council shall be notified as soon as practicable. The activity shall not be recommenced without the approval of the Regional Council.

It was not clear to us that a person would know if they had encountered "waahi tapu" and since we decided not to include a definition for archaeological site (as discussed in the next section), we decided that there was no particular benefit in using that term. We decided that it would be preferable to refer to an "archaeological artefact or *kōiwi**" and we have included a definition of kōiwi, ie it means human skeletal remains, in the Glossary.

We were of the view that the reason for notifying the Regional Council should be included as "to enable the Council to provide advice regarding the appropriate authorities to be contacted". We anticipate that the Regional Council will tell the person about the NZHPT (so the person can seek any authority that is required), relevant tangata whenua and any other relevant body or person.

There are also conditions in the POP as notified that an activity not be in, or within x metres of:

> any archaeological site, waahi tapu or koiwi remains as identified in any district plan, in the New Zealand Archaeological Association's Site Recording Scheme or by the Historic Places Trust, except where Historic Places Trust approval has been obtained.

We generally accept the recommendation[142] that reference to the term "historic heritage" instead of the terms used in the notified wording is preferable, although in particular circumstances in the POP other references may be appropriate.

Identification in the NZ Archaeological Association's Site Recording Scheme and identification by the NZHPT can change over time. Because of that, and the reasons set out by Mrs Gordon[143], we have concluded that any condition should not refer to them. We note the absence of any reference to a regional plan in the condition as notified and that Mrs Gordon recommended[144] that there should be such a reference. However, we also note the legal limits on the Regional Council except in the coastal marine area.

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[141] Including Gordon, Supplementary Report for the Historic Heritage Hearing, 3 November 2008, para 35; Gordon, End Of Hearing Statement for Historic Heritage, 16 January 2009, pages 16 - 25; Maassen, Supplementary Legal Report Relating to Historic Heritage, 12 January 2009, paras 13 - 19; Bell Gully letter, 16 March 2009, paras 21 - 25.

[142] Gordon, End Of Hearing Statement for Historic Heritage, 16 January 2009, paras 12 and 15.

[143] Ibid, paras 5 - 12.

[144] Ibid, para 12.

There was inconsistency in recommended wording in Mrs Gordon's end of hearing evidence between paragraph 12 that recommended restricting reference to any historic heritage listed in any district or regional plan and paragraph 15 that recommended also including reference to a "Schedule or database, or proposed plan".

No one raised any concern about referring to a district plan, even though it may change over time. However, we concluded that the condition should relate to operative plans that have been through the public submission and appeal process and not extend to proposed district or regional plans. We were also of the view that being in some schedule or database was not sufficient notice for people or sufficiently certain for the condition. While Policy 7-11 does not require historic heritage to be identified in a regional plan, that could occur.

We therefore concluded that reference should be to historic heritage (or an alternative term if something more specific is required) identified in any district plan or regional plan.

5.6.3 Other Issues

5.6.3.1 Chapter 7 General

We have included a number of additions about historic heritage to Chapter 7 and have considered the wording of relevant conditions. It is not clear to us why historic heritage needs to be referred to in each chapter of the POP. In any event, what provisions are added to other chapters is a decision for the relevant Hearing Panel.

Because of the benefits of an integrated RPS and Regional Plan (and Regional Coastal Plan) and the improvements made to the POP, a separate Regional Plan is not necessary for this Region.

We have made better provision for the identification and protection of historic heritage where that is a matter within the jurisdiction of the Regional Council. We have also included reference to the NZHPT's Guide No. 1 Regional Policy Statements in 7.1.4. However, we concluded that it is not appropriate to refer to Guide No. 2 Regional Plans in light of the legal restrictions on the Regional Council's role in relation to historic heritage for land use, which is not recognised in that Guide.

As noted at the end of section 5.5.2.7, we changed the title of Chapter 7 to "Indigenous Biological Diversity, Landscape and Historic Heritage" to more fully encapsulate the activities dealt with in the chapter. Which provisions deal with which topics is clear in the chapter.

In response to submissions, we have included provisions in Chapter 7 to add focus for historic heritage. For example, we have changed Policy 7-10 to provide that the Regional Coastal Plan and district plans must include provisions to protect historic heritage of national significance and added Policy 7-11 and Method 7-9 to deal with historic heritage identification.

For consistency with the RMA, we have used the term historic heritage consistently and identified it in the objectives and policies and in our wording of the conditions as a term defined in the RMA. We decided that such terminology was preferable to the more narrow terminology in the POP as notified. We note Mr McClean's support[145] for the consistent use of the term historic heritage. Because archaeological site is used in the RMA definition of historic heritage without being defined and the definition of archaeological site in the Historic Places Act is very broad, we have not used the Historic Places Act definition for archaeological site for the purposes of the POP.[146]

We were concerned about complexity of historic heritage language that was being referred to or recommended to us including site, place and area with various adjectives. The definition of historic heritage refers to historic sites, structures, places and areas. Mr Maassen recommended[147] using the term "site" and including a definition in the Glossary "Site includes, where in the context it is appropriate, an area or place." Bell Gully[148] agreed with that and we do too. We are grateful to Mr Maassen for his suggestion which we have adopted when wanting to use a generic term. In addition, where possible, we have used the term historic heritage.

In 7.1.1, we have included reference to Chapter 4 - Te Ao Māori and noted that it also contributes to the management of historic heritage, in particular sites of significance to Māori, including wāhi tapu. We have decided that providing a cross-reference to Chapter 4 is the better approach rather than repeating Chapter 4 matters in Chapter 7. We note, too, that Chapter 4 cross-references matters relating to historic heritage in Chapter 7.[149]

5.6.3.2 7.1.1 Scope

Because we are of the view that a brief statement of scope is appropriate in 7.1.1, we decided not to add reference to inappropriate subdivision, etc; it is already referred to in the first sentence of 7.1.4.

5.6.3.3 7.1.4 Historic Heritage

In response to submissions, we have included a range of matters in 7.1.4 relevant to historic heritage:

(a) the meaning of historic heritage as set out in the RMA. We have used that terminology in preference to different terminology suggested by submitters;
(b) a description of aspects of the Region's history and culture;
(c) the NZHPT, its document Sustainable Management of Historic Heritage Guide No. 1, the Historic Places Act and the need for an authority from the NZHPT for certain activities. We decided that 7.1.4 is a suitable location to refer to the Guide but that the detailed wording suggested to us was not needed; and
(d) the NZ Archaeological Association and its Site Recording Scheme.

[145] McClean, Statement of Evidence, 25 July 2008, para 51.
[146] Consistent with the conclusion in Gordon, End Of Hearing Statement for Historic Heritage, 16 January 2009, page 12.
[147] Maassen, Supplementary Legal Report Relating to Historic Heritage, 12 January 2009, paras 20 - 22.
[148] Bell Gully, letter, 16 March 2009, para 9.
[149] Policy 4-4 and Table 4.1(j).

We concluded that 7.1.4 is a suitable location for the advice recommended by Ms Pishief[150] and others about the need for an authority from the NZHPT and agree with Mrs Gordon[151] that this is sufficient.

We have amended the examples in the first paragraph to include matters over which the Regional Council has legal jurisdiction, such as discharges to water as sought in NKII's submission, rather than controlling land use activities. Because the Regional Council does not have tourism responsibilities under the RMA, we have not added that.

Federated Farmers disputed[152] the issue of unknown and undiscovered sites being threatened by demolition by neglect, but we are satisfied by the evidence[153] of Mr McClean that it is a valid issue for historic heritage in the region and worthy of note in the POP.

5.6.3.4 Issue 7-3 Historic Heritage

We have revised the wording to incorporate development as sought by Wellington Conservation Board and have revised the wording to set out the Regional Council's role in relation to the matters over which it has legal jurisdiction, and included reference to discharges to water as sought by NKII.

We agree with Federated Farmers[154] about changing the order to refer to the effects that development and land use can have. But based on the evidence on behalf of the NZHPT, we decided that a stronger statement was needed. The wording of the first sentence is taken directly from the NZHPT's Sustainable Management of Historic Heritage Guide No. 1.[155]

5.6.3.5 Objective 7-3 Historic Heritage

We accept Mrs Gordon's conclusion[156] that the terminology "significantly reduce" in the POP as notified is preferable to alternatives suggested by submitters or officers such as "have an adverse effect on" as the intent is not to afford absolute protection to all historic heritage. We have not referred to inappropriate subdivision, use and development because that simply repeats the RMA. As the RMA definition of historic heritage uses the word "qualities", we have accepted the recommendation to use that instead of the notified word "values".

5.6.3.6 Policy 7-10 Historic Heritage and new Policy 7-11 Historic Heritage Identification

Because Policy 7-10 did little more than express what is already in the RMA (but using some language, eg archaeological values, that is not consistent with the RMA), we took guidance from the Wellington Conservation Board's submission in terms of the suggestion about what regional and district plans should be required to include and also from evidence on behalf of the NZHPT.

[150] Pishief, Section 42A Report Concerning Historic Heritage, undated, para 5(e).
[151] Gordon, End Of Hearing Statement for Historic Heritage, 16 January 2009, para 14.
[152] McKellar, part of Federated Farmers' Evidence, 1 December 2008, para 70.
[153] McClean, Statement of Evidence, 25 July 2008, paras 23 - 28.
[154] McKellar, part of Federated Farmers' Evidence, 1 December 2008, para 71.
[155] Page 10.
[156] Gordon, End Of Hearing Statement for Historic Heritage, 16 January 2009, page 6.

Mr Teira pointed out[157] that, while the NZHPT can register places, protection can only be achieved if the place is an archaeological site defined under the Historic Places Act or the place is protected in a regional or district plan. He told us[158] that it is important that the RPS provide direction for territorial authorities and that few district plans in the Region provide adequate recognition of Māori historic heritage. Mr McClean also referred[159] to the inadequate recognition of the range of historic heritage in the Region and in district plans.

Because of the legal limit on the ability of the Regional Council to impose performance standards in land use rules to protect historic heritage, we concluded that the need to provide guidance to territorial authorities is particularly important. However, we were also conscious of Mr Maassen's helpful identification of relevant functions and his comments about it being risky to provide specific direction on matters relating to historic heritage within the control of territorial authorities in the absence of detailed information.[160]

Mr McClean noted[161] that the NZHPT's guidance promotes policies that recognise places and areas of national significance and said that these would include Category I historic places, wāhi tapu and wāhi tapu areas. However, we heard from Mr Maassen about the process for attaining Category I status under the Historic Places Act and the lack of appeal rights and Mrs Gordon said[162] that it was not clear whether any of the Category I (or Category II) sites listed for the Region is nationally or regionally significant.

Based on all the evidence and legal advice received, we have included amended Policy 7-10 that deals with matters of national significance in district plans and the Regional Coastal Plan and new Policy 7-11 that deals with historic heritage identification.

In Policy 7-10, because we concluded that we could not categorically state that a historic heritage site with Category I status should always be protected as a matter of national importance (a s 6(f) RMA matter), we included Category I historic places as a likely example of such sites. We also refer to wāhi tapu and wāhi tapu areas as other likely examples to help to reinforce the link with Te Ao Māori matters in Chapter 4 of the POP.

New Policy 7-11 requires territorial authorities (for their district) and the Regional Council (for the coastal marine area) to develop and maintain a schedule of known historic heritage and for it to be included in the relevant plan. In relation to the coastal marine area, Policy 9-4 and Method 9-4, which were dealt with in the Coast hearing, are relevant.

Policy 7-11 as recommended to us at different stages of the hearing had a detailed non-exclusive list of various values/qualities. The definition of historic heritage in the RMA already sets out a list of qualities. Reference to the NZHPT's Guide No. 1, which includes detailed information about various values (qualities), has been included in 7.1.4. We therefore decided that the

[157] Teira, Statement (evidence), 11 July 2008, para 9.
[158] Ibid, para 13.
[159] McClean, Statement of Evidence, 25 July 2008, paras 22, 30, 33 - 36.
[160] Maassen, Section 42A Report Concerning Historic Heritage, 13 June 2008, paras 12 - 14.
[161] McClean, Statement of Evidence, 25 July 2008, para 47.
[162] Gordon, End Of Hearing Statement for Historic Heritage, 16 January 2009, page 8.

better approach was to include a simple requirement in (c) that the schedules include a statement of the qualities that contribute to each site.

5.6.3.7 New Method 7-9

To implement Policies 7-10 and 7-11, we included a new method for the proactive identification of historic heritage which is based on wording recommended to us.[163]

5.6.3.8 7.6 Anticipated Environmental Results

As notified, there were no Anticipated Environmental Results (AERs) relating to historic heritage. To provide AERs resulting from Policies 7-10 and 7-11, the new AER states that, by 2017, known historic heritage will be recorded in district plans and the Regional Coastal Plan. The 2017 timeframe is the same as all the other AERs in 7.6.

5.6.3.9 7.7 Explanations and Principal Reasons

As notified, there were no Explanations and Principal Reasons relating to historic heritage, so we have added relevant text.

5.6.3.10 Glossary

Glossary definitions for terms defined in the RMA are not needed.

5.7 Conclusion

See Part 1 of this Volume.

[163] Gordon, Supplementary Report for the Historic Heritage Hearing, 3 November 2008, paras 29 - 30, and End Of Hearing Statement for Historic Heritage, 16 January 2009, pages 8 - 9.