

IN THE MATTER OF The Resource Management Act 1991
AND
IN THE MATTER OF appeals under clause 14 of the First
Schedule to the Resource Management Act
1991 concerning proposed One Plan
(Combined Regional Policy Statement and
Regional Plan) for the Manawatu-Wanganui
Region.

BETWEEN **TRUSTPOWER LIMITED**
ENV-2010-WLG-000145

AND **OTHER PARTIES**
Appellants

AND **MANAWATU-WANGANUI (HORIZONS)
REGIONAL COUNCIL**
Respondent

**STATEMENT OF SUPPLEMENTARY EVIDENCE OF ROBERT JOHN SCHOFIELD
ON BEHALF OF MERIDIAN ENERGY LIMITED AND TRUSTPOWER LIMITED
RELATING TO THE PROPOSED ONE PLAN BIODIVERSITY PROVISIONS**

14 March 2012

Introduction

- i. My full name is Robert John Schofield. I have previously prepared a statement of evidence in this proceeding, dated 17 February 2012, and have since been involved with expert conferencing on this topic. I confirm that the further opinion I provide in this supplementary evidence is within my area of expertise and experience.
- ii. I have read, and agree to comply with, the Code of Conduct for Expert Witnesses set out in Schedule 4 of the Environment Court Practice Note 2011.
- iii. I have prepared this supplementary evidence to address matters arising from the expert conferencing which has occurred since my evidence-in-chief was circulated, namely
 - Planners' Conferencing, 27 February 2012; and
 - Ecologists' Conferencing, 30 January 2012.
- iv. In addition to responding to these statements, my supplementary evidence also takes into account the evidence-in-chief of Helen Marr and Spencer Clubb (for the Minister of Conservation) and David le Marquand (for Transpower and Powerco), and the supplementary evidence of Matiu Park (Ecological evidence for TrustPower and Meridian).

1 Scope of Evidence

- 1.1 My supplementary evidence has been produced in response to the outcomes of the expert conferencing undertaken by the parties' ecologists on 30 January 2012 and planners on 27 February 2012, and focuses on the following outstanding issues:
 - (a) Policy 7-2A: regulation of activities affecting indigenous biological diversity;
 - (b) Policy 12-5: Consent decision-making for activities in rare habitats, threatened habitats and at risk habitats;
 - (c) Policy 12-6: Criteria for assessing the significance of, and effects of activities on, an area of habitat; and

- (d) Rule 12-6: Some activities within rare habitats, threatened habitats and at-risk habitats.

1.2 While there was some agreement among the ecologists and planners as to some changes that are recommended to be made to the relevant provisions of the Proposed One Plan, it is important to highlight the continued divergence of expert opinion on the core issues, namely:

- (a) The need to have field investigations to confirm whether any particular habitat that is, prima facie, categorised as an at-risk, rare or threatened habitat under Schedule E is actually significant when ground-truthed;
- (b) The need to have a flexible framework for the use of offsets as a form of mitigation of the effects of activities within at-risk, rare or threatened habitats;
- (c) The inclusion of ecological functioning process as a criterion for determining significance; and
- (d) The activity status for activities within rare or threatened habitats.

2 The Need for Site-Specific Assessments

2.1 Through the Planners' expert conferencing process, I have agreed to several amendments to Policy 7-2A so that, in respect of clauses (a) and (b), it would read:

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

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

- (a) Habitats assessed as rare habitats* and threatened habitats* must be recognised as areas of significant indigenous vegetation and significant habitats of indigenous fauna. ~~unless site*-specific assessments determine otherwise.~~
- (b) At-risk habitats* that are assessed to be significant under Policy 12-6 must be recognised as areas of significant indigenous vegetation and significant habitats of indigenous fauna ~~require site*-specific assessments to determine their ecological significance.~~

- 2.2 The key change is the deletion of the end clause of Policy 7-2A (a) and (b) in regard to site specific assessment, and the use of the word “assessment” (rather than determined) at the start of (a) and (b). My agreement was based on the need to ensure that sites have to be assessed to be rare, threatened or at risk habitat, rather than simply relying on the broad categories provided in Schedule E. As Mr Park states in his evidence-in-chief, Schedule E has been prepared primarily on predictive and spatially-based satellite imagery, combined with other scientific research. Mr Park has agreed that this approach for defining habitats of significance for the purpose of managing indigenous biodiversity is an appropriate one in the absence of a comprehensive regional on-the-ground survey and investigations, but that specific sites or habitats are likely to need to be investigated and ground truthed to verify their significance.
- 2.3 My agreement to this change is predicated on the need to clarify elsewhere that field investigations are an essential part of the process of assessing whether a particular habitat that may be affected by a proposed activity is actually significant. While the word “assessed” infers that there is an assessment process, in my opinion, in itself, it does not provide sufficient guidance to Plan users and decision-makers that field investigations by a qualified ecologist are likely to be required to confirm the categorisation of a habitat and its ecological significance.
- 2.4 In my opinion, the best place for such clarification would be in Schedule E itself, in the introductory part of the Schedule which outlines the process and the need to use a qualified ecologist: possible wording is provided in Appendix 1 to my evidence.

3 The Use of Offsetting

- 3.1 During the Planners’ conferencing on 27 February 2012, a number of changes to Policy 12-5 were discussed, based on the evidence-in-chief of the Planner for the Department of Conservation and Fish and Game, who sought to have best practice on offsetting embedded into the One Plan. The changes that were discussed, but on which there was not full agreement, would amend Policy 12-5 so that, in respect of clauses (b) and

(c), it would read (highlighting indicates those amendments where there was not full agreement):

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

- ...(b) Consent must generally not be granted for ~~vegetation clearance*~~, ~~land disturbance*~~, ~~forestry*~~ or ~~cultivation*~~ and certain other resource use activities in a *rare habitat**, *threatened habitat**, or *at-risk habitat** assessed to be an area of significant indigenous vegetation or a significant habitat of indigenous fauna, unless:
- (i) any more than minor adverse *effects*[^] on that habitat's representativeness, rarity and distinctiveness, or ecological context assessed under Policy 12-6 are avoided, ~~as far as reasonably practicable, or otherwise remedied or mitigated, or~~
 - (ii) Where any more than minor adverse *effects*[^] which cannot reasonably be avoided, they are remedied or mitigated within the area of habitat affected by the activity are offset to result in a net indigenous *biological diversity*[^] gain.
 - (iii) Where any more than minor adverse effects cannot reasonably be avoided, remedied or mitigated within the area of habitat affected by the activity, and/or where it will result in a greater net indigenous biological diversity gain than under (b)(ii), they are offset outside of the area of habitat affected, provided there is a net indigenous biological diversity gain.
- (c) Consent ~~must generally~~ may be granted for ~~vegetation clearance*~~, ~~land disturbance*~~, ~~forestry*~~ or ~~cultivation*~~ and certain other resource use activities in an *at-risk habitat** assessed not to be an area of significant indigenous vegetation or a significant habitat of indigenous fauna when:
- (i) there will be no significant adverse *effects*[^] on that habitat's representativeness, rarity and distinctiveness, or ecological context as assessed in accordance with Policy 12-6, or
 - (ii) any significant adverse *effects*[^] are avoided, ~~as far as reasonably practicable, or otherwise remedied or mitigated, or~~
 - (iii) Where any significant adverse *effects*[^] which cannot reasonably be avoided, they are remedied or mitigated within the area of habitat affected by the activity, are offset to result in a net indigenous *biological diversity*[^] gain.
 - (iv) Where significant adverse effects cannot reasonably be avoided, remedied or mitigated within the area of habitat affected by the activity, and/or where it will result in a greater net indigenous biological diversity gain than under (c)(iii), they are offset outside of the area of habitat affected, provided there is a net indigenous biological diversity gain.

3.2 In response to these changes, there are a number of points I would like to expand upon.

- 3.3 First, as a matter of best practice, I accept the general approach of seeking to avoid adverse effects on rare or threatened habitats as a first basis, and, if they cannot be reasonably avoided, then the effects should be remedied or mitigated, first by seeking to mitigate the effects within the affected habitat or, less preferably, by offsetting offsite. This approach is also generally accepted by ecologists.
- 3.4 However, for several reasons, I would contend that this approach should not be embedded within the Policy as a fixed ‘cascade of options’, that ultimately requires that there be no net loss, and that an applicant and a decision-maker should have the flexibility to determine the most appropriate extent and form of mitigation, having weighed up all factors, effects, risks, costs and benefits under the framework of the One Plan and, ultimately, the Resource Management Act.
- 3.5 As the Courts have determined, the RMA is not a ‘no effects’ legislation, and Policy 12-5 has to be applied and implemented in conjunction with other policies, including those within the RPS part of the Proposed One Plan, as well as with Part 2 RMA. Accordingly, a decision-maker may determine that some adverse effects may be acceptable and appropriate *without* remediation or mitigation, when considering factors such as the scale and permanence of adverse effects, the effectiveness of mitigation, the ecological functioning of the affected habitat, and the benefits of the proposal. Alternatively, a decision-maker may determine that an applicant’s proposed offsetting offsite is a more effective way of achieving indigenous biodiversity, even though some offsetting mitigation could reasonably be achieved onsite.
- 3.6 Another concern I have with embedding the suggested offset hierarchy into policy is the evolving nature of the science and methodologies involved with offsetting. In his evidence-in-chief, the Senior Policy Analyst for the Department of Conservation, Mr Clubb, asserts that, without a robust demonstration that there will be no net loss, it is very difficult to argue that the positive effects from any offsetting would outweigh the adverse impacts of a proposal on a habitat (re paragraph 26). However, as explained in the supplementary evidence of Mr Park, the methodologies involved with determining both the appropriate extent and form of offsetting and whether

there would be a net gain (or no net loss) are still evolving, with no standardised approaches. For many landowners, the complexities and costs potentially involved with offsetting calculations could be significant and problematic. Ultimately, the process for managing significant habitats should be simple and understandable as many of the activities that could trigger consent could be relatively minor. Accordingly, because of these difficulties, there is a need for a relatively flexible framework.

3.7 Given the position of Mr Clubb for the appellants that “it is very difficult to build an offset that exactly achieves no net loss” (refer paragraph 36), in my opinion, I would prefer that the term ‘net biodiversity gain’ be deleted from Policy 12-5 and instead make reference to the general principle of maintaining indigenous biodiversity.

3.8 For these reasons, I would accept a policy that gave a relatively strong directive on the approach, but that did not fix a particular order so that this policy could be applied as part of the whole suite of relevant policies in the One Plan, and with regard to Part 2 RMA. However, wording of Policy 12-5 as I outlined above, subsequent to the Planners’ conferencing is somewhat convoluted and perhaps ambiguous.

3.9 A simpler approach – and my preference – would be to return to the wording under the Decisions Versions of the Proposed One Plan, with some slight amendments to reflect my comments on the preference:

- (a) To avoid adverse effects if reasonably practicable,
- (b) To recognise biodiversity offsets as a form of mitigation; and.
- (c) To remove reference to the term ‘net indigenous biodiversity gain’ and provide that, when biodiversity offsetting is used, it should maintain indigenous biodiversity.

3.10 I have outlined the wording of such a policy in Appendix 1.

4 Inclusion of ‘Functioning Ecosystem Processes’

4.1 An important part of the process of determining the significance of a habitat for the purposes of managing effects is the concept of “functioning

ecosystem processes” – that is the integrity and the ecological condition of the habitat. This is an important concept to determining the significance of a habitat – some habitats are so degraded that they may function poorly, if at all as an indigenous habitat. One of the principal examples provided by Mr Park is in regard to the classification of wetlands under Schedule E where former wetlands that have been cleared of vegetation, partially drained and grazed by stock but that remain boggy and that, among the pasture and/or weeds, contain some indigenous plant species such as raupo would be classified as a rare or threatened habitat under Schedule E.

4.2 As a result of the Ecologists’ conferencing on 30 January 2012, the recommended wording for Policy 12-6 was as follows:

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

- (a) An area of *rare habitat**, *threatened habitat** or *at-risk habitat** may be recognised as being an area of significant indigenous vegetation or a significant habitat of indigenous fauna if:
- (i) in terms of representativeness, that habitat:
- (A) comprises indigenous habitat type that is under-represented (20% or less of known or likely former cover), or
 - (B) is an area of indigenous vegetation that is typical of the habitat type in terms of species composition, structure and diversity, or large relative to other areas of the same habitat type in the Ecological District or Ecological Region, with indigenous species composition, structure and diversity typical of the habitat type, and-or has functioning ecosystem processes.
~~has functioning ecosystem processes.~~

4.3 Firstly, I note that the Planners’ conferencing statement included a revised Policy 12-6(a) which resulted in a revised approach to assessing ecological significance of habitats through the addition of the following text “*One or more of the criteria below will contribute to the significance of...*”. This change was agreed to in the absence of input from the Ecologists. However, as outlined in the evidence-in-chief of Mr Park (para 6.10) and as I pointed out in my evidence-in-chief (Paras 2.28 and 2.29) a ‘tick-the-box’ approach to assessing ecological significance is not considered appropriate, as meeting one sub-clause alone, which is inferred by these changes and as discussed by Ms Barton¹, should not be determinative of

¹ Refer para 22(f) page 6 and later para 36 of Ms Clare Barton’s evidence-in-chief on biodiversity.

ecological significance. The supplementary evidence of Mr Park discusses this matter in more detail.

- 4.4 My evidence-in-chief (paragraphs 2.28 and 2.29) also discussed the changes to the ecological assessment criteria in Policy 12-6 suggested by the ecological experts during conferencing. I also recommended some minor amendments to the provisions in Policy 12-6 to require functioning ecosystem processes as a consideration along with other aspects of a site's condition, rather than within a broad-ranging criterion of representativeness, rarity and condition and size.
- 4.5 As set out in the first sentence of Policy 12-6(a), this policy is intended to set out criteria that *may* determine the significance of a rare or threatened habitat. Consistent with the recognised application of ecological assessment criteria, I consider that each of the criteria provide guidance to determining the significance of a potentially rare or threatened habitat. In other words, for rare, threatened or at-risk habitat, it is important that an evaluative judgement is required to confirm the significance of a particular habitat (Mr Park elaborates more on this in his evidence). I do not consider that Policy 12-6 as re-worded following the Ecologists' conferencing would achieve this.
- 4.6 Linked to this matter, in conferencing, there was some confusion among the planners as to how the "functioning ecosystem processes" component of this Policy was now intended to apply –
- (a) If functioning ecosystem processes is a matter that informs habitat representativeness in and of itself then the planners agreed that the wording (using 'or') is appropriate, but
 - (b) If functioning ecosystem processes is linked to the size of the habitat area relative to other areas in the same Ecological District then it was agreed that the provisions should be linked by "and".
- 4.7 Thus there is a need for further clarity as to how the attributes in this Policy with respect to representativeness are intended to apply. In discussion with Mr Park, I have proposed some revised wording for Policy 12-6 in Appendix 1 to my evidence to clarify how I consider this policy should apply. These

amendments would refer to *“indigenous habitat type that is under-represented (20% or less of known or likely former cover for rare or threatened habitats, or 50% or less for at-risk habitats)” and “is an area of indigenous vegetation that is typical of the habitat type in terms of species composition, structure and diversity and has functioning ecosystem processes”*.

- 4.8 My recommended replacement of the “or” in the decisions version with “and” at the end of clause (a)(i)(A) of Policy 12-6 reflects the position of Mr Park that each of these matters requires consideration conjunctively (given that Schedule E has already made habitat type determinations on the percentage of each habitat type remaining in the Region). Activity Status for Activities in Rare or Threatened Habitats
- 4.9 Having read the evidence of the experts for the Minister of Conservation and Wellington Fish and Game, my opinion remains that the most appropriate classification of activities occurring within a rare or threatened habitat is as a discretionary activity, and not a non-complying activity, for the reasons set out in my evidence-in-chief (paragraphs 2.3 to 2.8). In summary, discretionary activity status:
- (a) Recognises that classification of a rare, threatened or at-risk habitat is based on a relatively less precise process under Schedule E – a process that may capture some habitats that have only moderate or low ecological values;
 - (b) Would avoid the bundling of all consents involved with a major project as non-complying;
 - (c) Would require an applicant to undertake a robust assessment of effects on the environment and a careful consideration of the need to avoid, remedy or mitigate any adverse effects on these habitats; and
 - (d) Would still require a consent authority to assess a proposal against the policies of the One Plan, which are directive and demanding.
- 4.10 I would also observe that no evidence has been provided to date to indicate that perverse or poor outcomes are being achieved under the current discretionary activity framework.

4.11 I would also concur with Mr le Marquand's evidence-in-chief, in which he states:

63. *It is worth considering how the POP has otherwise used non-complying activity status. In my opinion the POP has used the non-complying activity status sparingly:*

- *In rule 13-22 (Discharges to land) where it applies to a short and discrete list of pollutants.*
- *In rule 15-6 where a take exceeds the Scheduled cumulative core allocation limit or below the specified minimum flow.*
- *In rules 17-5, 17-18, 17-19, 17-25 and 17-26 for occupation of coastal space, reclamation or disturbance in any Protection Activity Management Area as shown in Schedule H.*

64. *Those activities are discrete, specific, tightly defined and the Protection Activity Management Areas are clearly delineated on maps. There is, in my view, a high degree of certainty that can be applied to whether one is or will be affected by those rules. This is not the case in relation to the biodiversity rules. At this time, in the absence of mapping, the extent of those habitat areas meeting the criteria remains unknown. Even if they were mapped, given that the current policy framework carefully and specifically sets out how they should be identified and then requires avoidance in the first instance before any more than minor effects are remedied or mitigated such that there is a net biodiversity gain, and the fact that the provisions are working, in my opinion there is no reason for there to be a change to the activity status.*

4.12 In respect of Mr le Marquand's evidence, in paragraph 69 he outlines an alternative approach in that any activity in a rare or threatened habitat that is associated with electricity transmission or renewable electricity generation is a discretionary activity. Mr le Marquand's reasoning is that such an activity classification is an appropriate way "to recognise the constraints and national importance issues that apply to [transmission and renewable electricity generation] infrastructure". He also states that this classification "would be a means of clearly giving effect to the NPSET and NPSREG". If the Court is of the view that in general terms a non-complying activity status would be appropriate, I would concur with Mr le Marquand's reasoning for this alternative approach or "carve out" for these activities.

5 Conclusion and Proposed Relief

- 5.1 Taking into account the outcome of the recent conferencing, I do not resile from my conclusions in my evidence-in-chief.
- 5.2 However, I do accept that further clarity could be achieved. In response, I recommend a number of interrelated amendments that could be made to the One Plan to address these concerns:
- (a) To amend Policy 12-5 (b) and (c) to clarify the principles involved with the avoidance, remediation or mitigation of the adverse effects of activities within rare, threatened or at-risk habitat;
 - (b) To amend Policy 12-6(a)(i) by splitting the factors into two separate but conjunctive *attributes* by replacing the word ‘or’ with ‘and’; and
 - (c) To amend Schedule E by referring to the need for a site assessment to confirm or otherwise the significance of a particular rare, threatened or at-risk habitat.
- 5.3 These amendments are outlined in **Appendix 1** attached to my evidence.



Robert Schofield
Director, Boffa Miskell Limited | Environmental Planner
14 March 2012

Appendix 1: Recommended Amendments to the Proposed One Plan

The following outline the suggested amendments to the Proposed One Plan discussed in my evidence (based on the decisions version of the One Plan):

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

- (b) Consent must generally not be granted for vegetation clearance*, land disturbance*, forestry* or cultivation* and certain other resource use activities in a rare habitat*, threatened habitat* or at-risk habitat* assessed to be an area of significant indigenous vegetation or significant habitat of indigenous fauna, unless:
- (i) any more than minor adverse effects[^] on that habitat's representativeness, rarity and distinctiveness, or ecological context assessed under Policy 12-6 are avoided as far as reasonably practicable, or otherwise remedied or mitigated;
 - (ii) mitigation may include biodiversity offsetting if it can be demonstrated that offsetting will maintain indigenous biodiversity.
- (c) Consent must generally be granted for vegetation clearance*, land disturbance*, forestry* or cultivation* and certain other resource use activities in an at-risk habitat* assessed not to be an area of significant indigenous vegetation or a significant habitat of indigenous fauna when:
- (i) there will be no significant adverse effects[^] on that habitat's representativeness, rarity and distinctiveness, or ecological context as assessed in accordance with Policy 12-6, or
 - (ii) any significant adverse effects[^] are avoided, as far as reasonably practicable, or otherwise remedied or mitigated, or
 - (iii) any significant adverse effects[^] which cannot reasonably be avoided, remedied or mitigated are offset to result in the maintenance of indigenous biological diversity[^].
- (d) When assessing an offset in accordance with (b)(ii) or (c)(iii), decision-makers must have regard to:
- (i) the desirability of providing for a net gain within the same habitat type,

- (ii) the desirability of providing for a net gain in the same ecologically relevant locality as the affected habitat, and
- (iii) the appropriateness of establishing infrastructure[^] and other physical resources of regional or national importance as identified in Policy 3-1.

In Policy 12-6(a), amend as follows:

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

(a) *An area of rare habitat*, threatened habitat* or at-risk habitat* may be recognised as being an area of significant indigenous vegetation or a significant habitat of indigenous fauna if:*

(i) *in terms of representativeness, that habitat:*

(A) *comprises indigenous habitat type that is under-represented (20% or less of known or likely former cover for rare or threatened habitats, or 50% or less for at-risk habitats), and*

(B) *is an area of indigenous vegetation ~~that is large relative to other areas of habitat in the Ecological District or Ecological Region,~~ that is typical of the habitat type in terms of species composition, structure and diversity ~~with indigenous species composition, structure and diversity typical of the habitat type.~~ and has functioning ecosystem processes.*

~~(C) has functioning ecosystem processes.~~

Or

(ii) *in terms of rarity and distinctiveness, that habitat supports an indigenous species or community that:*

(A) *is classified as threatened (as determined by the New Zealand Threat Classification System and Lists*), or*

(B) *is distinctive to the Region, or*

(C) *is at a natural distributional limit, or*

(D) *has a naturally disjunct distribution that defines a floristic gap, or*

(E) *was originally (ie., prehuman) uncommon within New Zealand, and supports an indigenous species or community of indigenous species.*

or

(iii) *in terms of ecological context, that habitat provides:*

- (A) *connectivity (physical or process connections) between two or more areas of indigenous habitat, or*
 - (B) *an ecological buffer (provides protection) to an adjacent area of indigenous habitat (terrestrial or aquatic) that is ecologically significant, or*
 - (C) *part of an indigenous ecological sequence or connectivity between different habitat types across a gradient (eg., altitudinal or hydrological), or*
 - (D) *important breeding areas, seasonal food sources, or an important component of a migration path for indigenous species, or*
 - (E) *habitat for indigenous species that are dependent on large and contiguous habitats., or*
 - (F) *is an area of indigenous vegetation that is large relative to other areas of habitat in the Ecological District or Ecological Region.*
- (b) *The potential adverse effects[^] of vegetation clearance*, land disturbance*, forestry* or cultivation* on a rare habitat*, threatened habitat* or at-risk habitat* must be determined by the degree to which the proposed activity will diminish any of the above characteristics of the habitat that make it significant, while also having regard to the ecological sustainability of that habitat.*

In the Introduction to Schedule E, amend as follows:

A rare habitat*, threatened habitat* or at-risk habitat* is an area of vegetation or physical substrate which:

- (a) is a habitat type identified in Table E.1 as being “Rare”, “Threatened” or “At-risk” respectively,
- (b) meets at least one of the criteria described in Table E.2(a) for the relevant habitat type, and
- (c) is not excluded by any of the criteria in Table E.2(b),
- (d) has been assessed and confirmed by an suitably qualified expert, who may require to undertake a site specific field investigation, as being a rare habitat*, threatened habitat* or at-risk habitat.