BEFORE THE HEARING COMMISSIONERS

IN THE MATTER: of the Resource Management Act 1991 (**RMA**)

AND

IN THE MATTER: of Proposed Plan Change 3 Significant Natural Areas to the Rotorua District Plan

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LEGAL SUBMISSIONS ON BEHALF OF DIRECTOR-GENERAL OF CONSERVATION

Submitter number 7

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MAY IT PLEASE THE PANEL

Introduction

1. The Director-General of Conservation (**DGC**) lodged a submission on Proposed Plan Change 3: Significant Natural Areas (**Plan Change 3**) to the Rotorua District Plan (**District Plan**) on 28 August 2019 and a further submission on 7 October 2019. The DGC's submission primarily seeks that all sites that are within the scope of Plan Change 3 and meet the significance criteria as set out in the regional policy statement be mapped and identified as significant natural areas (SNAs) in the District Plan.

2. These legal submissions are presented on behalf of the DGC in relation to Plan Change 3. They will cover the following matters:

   (a) The DGC's interest and approach to Plan Change 3;

   (b) The DGC's concerns with respect to the recommendations in the s 42A planners report; and

   (c) The relief sought by the DGC.

The DGC's interest in Plan Change 3

3. One of the Department of Conservation's (DOC) functions is to advocate for the conservation of natural and historic resources generally (both on and off land or waters managed by DOC).[1]

4. As the administrative head of the DOC, the DGC has all powers as are reasonably necessary and expedient to enable DOC to perform its functions as set out in the Conservation Act 1987.

[1] Section 6(b) of the Conservation Act 1987. Also see Chapter 7 of the Conservation General Policy https://www.doc.govt.nz/globalassets/documents/about-doc/role/policies-and-plans/conservation-general-policy.pdf.

Evidence

5. The DGC will be calling two witnesses to provide expert evidence in relation to Plan Change 3. The witnesses are:

   (a) Mr Paul Barry Cashmore, a Technical Advisor Ecology who will provide evidence relating to the ecological values of the SNAs in Plan Change 3; and

   (b) Mr Thomas Russell Christie, a planner who will provide planning evidence relating to Plan Change 3.

The DGC'S approach to Plan Change 3

6. I submit that the scope of Plan Change 3 is limited to a factual assessment based upon the inherent quality of the sites. If a site meets the significance criteria in the relevant regional policy statement, then it should be identified as a SNA in the SNA maps and associated schedule in the District Plan, irrespective of any planning outcomes that might follow.

7. Any questions relating to the planning and other outcomes that might follow should be dealt with at the next available opportunity for a further plan change that has a broader scope and addresses the objectives, policies, rules or other provisions relating to SNAs.

8. This approach will ensure that:

   (a) The correct legal test under s 6(c) of the RMA is applied; and

   (b) The Waikato Regional Policy Statement (**WRPS**) and the Bay of Plenty Regional Policy Statement (**BoPRPS**) are given effect to.

9. By way of explanation:

(a) *Legal test under s 6(c) of the RMA*

i. In *Man O'War Station Ltd v Auckland Council*[2] Cooper J stated:

> the issue of whether land has attributes sufficient to make it an outstanding landscape within the ambit of s 6(b) of the Act requires **an essentially factual assessment based upon the inherent quality of the landscape itself....**
>
> **The questions of what restrictions apply to land that is identified as an outstanding natural landscape** and what criteria might be applied when assessing whether or not consent should be granted to carry out an activity within an ONL **arise once the ONL has been identified. Those are questions that do not relate to the quality of the landscape** at the time the necessary assessment is made...[3]
>
> **[emphasis added]**

ii. In *Royal Forest and Bird Protection Society of New Zealand Inc v Auckland Council* [4] the High Court held, subject to the scope of the plan change, that the principle in the *Man O'War* case also applies to the identification of an area as a significant ecological area qualifying for protection under s 6(c) of the RMA. In the *Royal Forest and Bird v Auckland Council* case, Wylie J stated:

> [19] **The structure of s 6(b) and (c) is the same.** I agree with the Society and the Council that the same principle must apply to the identification of an area as a significant ecological area qualifying for protection under s 6(c).
>
> **[emphasis added]**

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[2] *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24.
[3] *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24 at paras 61 and 62.
[4] *Royal Forest and Bird Protection Society of New Zealand Inc v Auckland Council* [2017] NZHC 1606.

iii. The scope of Plan Change 3 is limited to changes to the maps of SNAs and the associated schedule of SNAs in Appendix 2 'Natural Heritage Inventory' of the District Plan. Plan Change 3 does not address the objectives, policies, rules or other provisions relating to SNAs.[5]

iv. I therefore submit that the principle in *Man O'War must* apply to the identification of SNAs in Plan Change 3.

v. In other words, a two-step process is required:

a. **Step One** – the first step involves a factual assessment based on the inherent quality of the sites to identify which sites meet the significance criteria in the regional policy statement – this step is within the scope of Plan Change 3; and

b. **Step Two** – the second step involves the questions regarding the restrictions that will apply to the identified SNAs – this second step is outside the scope of Plan Change 3 as Plan Change 3 does not address the objectives, policies, rules or other provisions relating to SNAs.

(b) *Requirement to give effect to the regional policy statements*

i. Section 75(3)(c) of the RMA states:

> **75 Contents of district plans**
> ...
> (3) A district plan must give effect to –
> ...
> (c) any regional policy statement

[5] Paragraph 1.2 of the s 32 Evaluation Report.

ii. In *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited*[6] the Supreme Court stated that:

> "Give effect to" simply means "implement". On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it. As the Environment Court said in Clevedon Cares Inc v Manukau City Council:
>
> The phrase "give effect to" is a strong direction. This is understandably so for two reasons:
>
> [a] The hierarchy of plans makes it important that objectives and policies at the regional level are given effect to at the district level; and
>
> [b] The Regional Policy Statement, having passed through the [RMA} process, is deemed to give effect to Part 2 matters.

Concerns with the recommendations in the s 42A planners report

10. The s 42A planners report recommends that the exclusion of sites with alternative legal protection remains an appropriate approach.[7]

11. This recommendation relies on a legal opinion attached as Appendix 3 to the s 42A planners report (**Legal Opinion**). The Legal Opinion refers to the Environment Court decision in *Royal Forest and Bird Protection Society of New Zealand v New Plymouth District Council*[8] and it highlights that in the *New Plymouth* case the Court noted that adequate protection of SNAs could be achieved using one or more of a 'palette of other measures'. In the *New Plymouth* case the Court stated:

> We accept that the Council might conceivably meet its duty under ss 6(c) and 31(1)(b)(iii) by means of such other methods".[9]

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[6] *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38 at paragraph 77.
[7] Paragraph 5.57 on page 29 of the s 42A Planners Report.
[8] *Royal Forest and Bird Protection Society of New Zealand v New Plymouth District Council* [2015] NZEnvC 219.
[9] *Royal Forest and Bird Protection Society of New Zealand v New Plymouth District Council* [2015] NZEnvC 219 at para 68.

12. I am concerned that the recommendations in the s 42A planners report: (a) give too much weight to the above statement in the *New Plymouth* case; and (b) do not give effect to the WRPS and the BoBRPS.

13. I note that in the *New Plymouth* case the Court also stated that:

> In our view the fact that the QEII covenant process may provide a better form of protection than rules does not mean that there should not be rules in place to protect vegetation in SNAs from damage or destruction by those who do wish to undertake works within them. We refer to the point made on behalf of the Council that there should be a palette of measures in place. **Any single measure on its own might be insufficient to provide the appropriate level of protection. It is the combination of such measures which is important.**
>
> **[Emphasis added]**

14. The Court also held in the *New Plymouth* case that:

> The protection of SNAs, which the Council was obliged to recognise and provide for, required the application of the full palette of methods identified in the Plan. (para 96)[10]

Conclusion

15. In conclusion, the DGC seeks that all sites that meet the significance criteria as set out in the regional policy statement be mapped and identified as significant natural areas (SNAs) in the District Plan.

16. It is good practice to provide good information in a plan on the values of the district. Granting the relief sought by the DGC will also make the transitioning to the National Policy Statement for Indigenous Biodiversity easier if the national policy statement comes into effect.

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[10] *Royal Forest and Bird Protection Society of New Zealand v New Plymouth District Council* [2015] NZEnvC 219 at para 96.

17. All matters relating to the sites that meet the significance criteria that cannot be dealt with within the scope of Plan Change 3 should be dealt with at the next available opportunity.

DATED this 17th day of February 2020

Michelle Hooper
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