

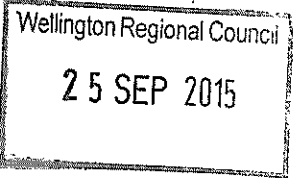
Proposed Natural Resources Plan:

Submitter:

Environmental Defense Society
Incorporated

Submitter Number:

S110



SUBMISSION ON THE PROPOSED WELLINGTON NATURAL RESOURCES PLAN 2015

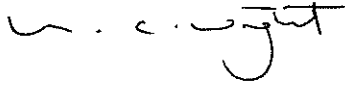
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SUBMISSION

- A. This is a submission on the proposed Wellington Natural Resources Plan (PNRP).
- B. The Environmental Defence Society (EDS) could not gain an advantage in trade competition through this submission.
- C. EDS wishes to be heard in support of this submission.
- D. If others present a similar case EDS will consider presenting a joint case at hearing.
- E. EDS is a not-for-profit, non-government national environmental organisation. EDS was established in 1971 with the objective of bringing together the disciplines of law, science and planning in order to promote better environmental outcomes in resource management. EDS has been active in assessing the effectiveness of the RMA and planning documents in addressing key environmental issues include landscape protection, coastal management and water quality.
- F. This submission focuses on PNRP's biodiversity focused provisions. We thank the Council for the opportunity it provided to give feedback on these provisions during the development of the PNRP.
- G. High level comments and responses to the specific provisions of the PNRP that this submission addresses are set out in **Annexure 1**. EDS incorporates that annexure into this submission and relies on the points made in it.
- H. EDS seeks the following relief:
 - (a) The relief in **Annexure 1** or alternative relief/wordings which respond to the issues raised; and
 - (d) Such other relief as is considered necessary to address the concerns set out in this submission.

- I. EDS thanks the Council for the opportunity to submit on the PNRP.



Madeleine Cochrane Wright – 25 September 2015

Annexure 1

GENERAL SUBMISSIONS

Required approach to plan-making: *Environmental Defence Society v The New Zealand King Salmon Company Limited*

1. The recent Supreme Court decision *Environmental Defence Society v The New Zealand King Salmon Company Limited*¹ (*EDS v King Salmon*) requires a new approach to be taken to plan-making. The focus is on the operative decision-making provisions; in the case of regional plans sections 66 and 67 of the Resource Management Act 1991 (RMA). Section 67(3) RMA requires regional plans to give effect to the New Zealand Coastal Policy Statement 2010 (NZCPS) and any relevant national policy statement. Where the NZCPS or a national policy statement is relevant a regional plan must give effect to it and there is no need to refer back to Part 2 RMA absent invalidity, incomplete coverage or uncertainty of meaning.²
2. The Supreme Court also clarified a range of other matters including: the meaning of the word “avoid” (as used in Section 5(2)(c) RMA and provisions of the NZCPS and the National Policy Statement Freshwater Management 2014 (NPSFM)) is “not allow” or “prevent the occurrence of”³ and the meaning of the word “inappropriate” depends on its context and in sections 6(a) and (b) should be interpreted against the backdrop of what is sought to be protected or preserved.⁴ Policies which make use of the word “avoid” are firmly worded directives and constitute environmental bottom lines to which lower order planning documents must give effect.
3. The High Court has recently confirmed that the Supreme Court’s findings in *EDS v King Salmon* are applicable to the NPSFM.⁵

SPECIFIC SUBMISSIONS

Biodiversity

General response

4. New Zealand’s biodiversity is in a state of crisis and continuing to decline and the Wellington region is no exception⁶. The Wellington Regional Policy Statement (RPS) identifies that around 70 per cent of the indigenous forest and more than 90 per cent of the wetlands that existed in 1840 have been cleared for agriculture and urban development, with most remaining areas modified or degraded in some way⁷. Both the persistence of biodiversity and ecosystem function must be protected as the Wellington region grows and diversifies.
5. There is clear legislative direction as to the nature and level of protection required:
 - (a) The PNRP must be prepared in accordance with the Council’s functions⁸ relevantly:
 - i. The control of the use of land for the purpose of the maintenance and enhancement of ecosystems of water bodies⁹; and

¹ *EDS v King Salmon* [2014] NZSC 41.

² *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139 relying on *EDS v King Salmon*, at [90].

³ *EDS v King Salmon*, at [96].

⁴ *EDS v King Salmon*, at [100], [101] and [105].

⁵ *Hawkes Bay and Eastern Fish and Game Councils v Hawkes Bay Regional Council* [2014] NZHC 3191 at [169] to [172].

⁶ See Brown et al, *Vanishing Nature: Facing New Zealand’s biodiversity crisis*, Environmental Defence Society & NZ Law Foundation, Auckland, 2015.

⁷ RPS section 3.6 Indigenous ecosystems at page 51.

⁸ Section 66(1)(a) RMA.

⁹ Section 30(1)(c)(iia) RMA.

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- ii. The establishment, implementation and review of objectives, policies and methods for maintaining indigenous biological diversity¹⁰.
- (b) The PNRP must be prepared in accordance with Part 2 RMA¹¹ which includes the environmental bottom lines of:
- i. Sustaining the potential of natural and physical resources to meet the reasonable foreseeable needs to future generations¹²;
 - ii. Safeguarding the life supporting capacities of air, water, soil and ecosystems¹³; and
 - iii. Avoiding, remedying or mitigating any adverse effects of activities on the environment¹⁴.

The matters of national importance to which the Council must recognise and provide¹⁵ for, relevantly:

- i. The preservation of natural character of the coastal environment, wetlands, and lakes and rivers and their margins¹⁶; and
- ii. The protection of significant indigenous vegetation and significant habitats of indigenous fauna¹⁷.

The other Part 2 matters to which the Council must have regard, relevantly:

- i. Intrinsic values of ecosystems¹⁸;
- ii. Maintenance and enhancement of the quality of the environment¹⁹; and
- iii. The protection of the habitat of trout and salmon²⁰.

- (c) The PNRP must give effect to the NZCPS and the NPSFM²¹, of particular relevance:
- i. Policy 11 NZCPS which requires avoidance of adverse effects and avoidance of significant adverse effects on specified taxa, vegetation, ecosystems and habitats; and
 - ii. Objectives A1(a), A2, B1 NPSFM.
- (d) The PNRP must give effect to the RPS, section 3.6 Indigenous ecosystems being of particular relevance.

6. In addition, biodiversity contributes to freshwater, natural character, landscape and amenity values.
7. Subject to a few minor amendments EDS supports the relevant provisions in the PNRP. However, at the outset we would like to note our serious concern with the use of a permitted standard attached to stock access to waterways.

Response to specific provisions

Provision	Submission	Support/Oppose	Relief
Section 2.2 Definitions			
Definition:	The definition aligns with international best practise. In	Support	Retain

¹⁰ Section 30(1)(ga) RMA.

¹¹ Section 66(1)(b) RMA.

¹² Section 5(a) RMA.

¹³ Section 5(b) RMA.

¹⁴ Section 5(c) RMA.

¹⁵ Section 6 RMA.

¹⁶ Section 6(a) RMA.

¹⁷ Section 6(c) RMA.

¹⁸ Section 7(d) RMA.

¹⁹ Section 7(f) RMA.

²⁰ Section 7(h) RMA.

²¹ Section 67(3) RMA.

"Biodiversity offsets"	particular it: <ul style="list-style-type: none"> - Identifies that offsetting is applied to residual adverse effects after the mitigation hierarchy has been applied. - Requires a demonstration of no net loss and preferably a net gain. 		
Definition: "Natural wetland"	The NPSFM provides for the protection of the significant values of wetlands as an environmental bottom line (Ob A2). Similarly, the RPS identifies the loss and degradation of these critical ecosystems as a significant issue faced by the Wellington region (section 3.6 Issue 1). Protection provided for wetlands is often met with hostility due to concern that wetted pasture and similar areas will be classified as wetlands and subject to restriction. The definition of 'natural wetland', provided as a supplement to the RMA definition, provides clarity as to exactly what areas are intended to be captured and protected, helping to direct application of the subsequent provisions and to provide clarity and certainty to land owners.	Support	Retain
New Definition: "Mitigation"	The distinction between mitigation and offsetting often causes confusion. ²² Mitigation is the abatement (repair or lessening of) adverse effects of an activity, undertaken in direct response to and at the same location as that activity. In contrast, offsets do not respond to the adverse effects of the specific activity itself, but rather they are considered as positive effects offered by an applicant at an alternative location.	NA	Insert new definition as follows (or suitable equivalent): <i>"Mitigation":</i> <i>Mitigation is the abatement (repair or lessening of) adverse effects of an activity, undertaken in direct response to and at the same location as that activity.</i>
Section 3.6 Objectives – Biodiversity, aquatic ecosystem health and mahinga kai			
O28	Wetlands are unique ecosystems and are under serious threat. It is appropriate that what remains is	Support	Retain

²² For a summary of case law, including this issue see *Biodiversity Offsets – The Latest on the Law* Anderson Lloyd, M Christenson & M Baker-Galloway, October 2013.
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	protected, and at least maintained and preferably restored. This aligns with the environmental bottom lines in the NPSFM and with the RPS. It is notated that the PNRP has defined 'natural wetlands' to help direct protection, and avoid uncertainty in identification and classification.		
Section 3.7 Objectives – Sites with significant values			
O35	The protection of significant indigenous biodiversity is a matter of national importance, and a clear directive that is carried through the hierarchy of planning documents applicable to the PNRP.	Support	Retain
Section 4.4 Policies – Natural form and function			
P22	The PNRP recognises the importance of estuaries. As critical habitat for fish and other sea organisms it is important they are subject to robust protection in policy, especially given their inherent natural sensitivity. P22 is consistent with the avoidance framework in the NZCPS.	Support	Retain
Section 4.5 Policies – Biodiversity, aquatic ecosystem health and mahinga kai			
Section 4.5 generally	<p>Section 4.5 is generally supported (EDS has reservations relating to the interface with water quality and quantity issues).</p> <p>Section 4.5 helpfully identifies and addresses specific ecological elements/areas in order to provide tailored policy responses for these.</p> <p>The mitigation hierarchy is clearly set out, identifying when the use of biodiversity offsetting is available and at what stage off-setting “kicks in”. In particular, EDS supports the requirement that both mitigation and offsetting be subject to principle analysis (see P32, P41 PNRP). This helps to eliminate ad-hoc decision making and to ensure that the mitigation or offset offered will in fact achieve the outcome sought.</p>	Support	Retain (subject to reservations relating to the interface with water quality and quantity issues).

Section 4.6 Policies – Sites with significant values			
P40	<p>The PNRP specifically identifies areas with significant indigenous biodiversity and ecosystem values across the natural landscape. Protection of significant habitat and vegetation is a matter of national importance (s6 RMA). There are clear directives in both the NPSFM and NZCPS that specific significant areas are to be protected, and in specific situations restored. O16 RPS sets out protection and restoration of areas with significant indigenous biodiversity values as a regional goal. It is appropriate that the PNRP also provides for the protection and restoration of significant areas.</p>	Support	Retain
P41	<p>P41 expands on P40, setting out how protection is to be achieved. It applies the mitigation hierarchy, followed by the opportunity to offset residual effects. However, in some instances adverse effects should be avoided. The areas to which the policy applies have been identified specifically because of their significant biodiversity values. As noted above the protection of these values is a matter of national importance (s6 RMA, P24 RPS). The NZCPS provides a clear directive that in the coastal environment there are specific areas, species and habitats upon which adverse effects (and in others where significant adverse effects) are not allowed (P11 NZCPS). The PNRP should reflect this level of protection in its management of ecosystems and habitats with significant indigenous biodiversity values.</p> <p>P41 provides for the use of a precautionary approach to the assessment of adverse effects. Precautionary approach is a tool to be used by decision-makers when faced with a situation with high potential impact and inadequate</p>	Support in part	<p>Amend:</p> <p>Retain first paragraph.</p> <p>Delete second paragraph and insert following replacement:</p> <ol style="list-style-type: none"> a. <i>Avoided in the first instance;</i> b. <i>Where they cannot be avoided, they are remedied;</i> c. <i>Where they cannot be remedied, they are mitigated; and</i> d. <i>Where residual adverse effects remain, that cannot be mitigated they are offset.</i> <p>Amend following paragraph:</p> <p><i>Proposals for mitigation and biodiversity offsets will be assessed against the principles listed in <u>Part A Schedule G</u> and biodiversity offsets <u>will be assessed against the principles in Part B Schedule G.</u> A precautionary approach shall be used when assessing the potential for adverse effects on ecosystems and habitats with significant indigenous biodiversity values.</i></p> <p>Retain final paragraph.</p>

	<p>information. It may result in <i>inter alia</i> the decline of an application, the imposition of stringent conditions, or the adoption of an adaptive management approach. In the realm of biodiversity, in particular significant biological areas, it is appropriate this approach is taken given the paucity of information in many situations and the significant impacts (in the most extreme case extinction) that are a real risk²³.</p> <p>P41 relies on the principles in Schedule G to assess both mitigation and off-setting proposals. EDS agrees with and supports a requirement that both mitigation and offsetting be subject to principled analysis. However, we consider that the principles for each should be separated, requiring much the same test be a clear distinction made based on the underlying goal of each response action. This is addressed in more depth below in response to Schedule G itself.</p>		
P42	<p>Connectedness of ecological corridors and buffers between significant areas are inflammatory activities are important to ensure protection of significant areas and positive outcomes. The cumulative loss of biodiversity is a direct result of incremental applications methodically either removing or degrading small areas. Specifically identifying and requiring decision makers to have particular regard to these points is a strong step towards achieving positive outcomes.</p>	Support	Retain
P43	<p>Restoration management plans provide some flexibility for private individuals and environmental groups to be creative in the protection strategy. However</p>	Support	Retain

²³ P3 NZCPS provides specifically for the precautionary approach in the coastal environment. The RPS also specifically provides for the use of a precautionary approach in this context in P47(f). The most recent case addressed the application of the precautionary approach and in particular the use of adaptive management is *Sustain our Sounds Inc v NZ King Salmon Co Ltd* [2014] NZSC 40; (2014) 17 ELRNZ 520.

	<p>whether these plans achieve good outcomes in practise depends on the quality of their constituent parts (in particular adequacy of proposed planting, ongoing management and monitoring). This will ultimately come down to the administering council.</p>		
Section 5.4 Rules – Land use			
R97	<p>The intrusion of stock into waterways has significant adverse effects on water quality and on the degradation of ecosystems and habitats in the rural environment. Specifically:</p> <ol style="list-style-type: none"> a. Direct release of pathogens (such as E.coli) from the direct deposition of urine and faeces into waterways. b. Release of sediment from livestock disturbing and carrying soil into the waterway. c. Release of nutrients (nitrogen and phosphorous) the level of which can be released by direct deposition of effluent into or very near water. d. Damage to waterway banks and beds which damages or destroys habitat quality. <p>The permitted standard in R97 is unacceptable because:</p> <ol style="list-style-type: none"> a. Contrary to the environmental bottom lines in s5 RMA. b. Contrary to the environmental bottom lines in OA1 NPSFM. c. Contrary to the requirement upon the Council to be <u>satisfied</u> that none of the effects listed in subclauses (c)-(g) are <u>likely</u> to arise before a discharge of a contaminant is allowed to be a permitted activity. <p>Stock exclusion is a key component of good management practise. Access to waterways should be the exception rather than the rule and should be subject to a resource</p>	Oppose	<p>Amend:</p> <p>Stock exclusion should be a baseline requirement. Exceptions should be considered as part of a resource consent application.</p>

	consent application		
Section 5.5 Rules – Wetlands and beds of lakes and rivers			
R105	Wetlands are in a state of decline nationally. They are extremely important ecosystems and also play a strong role in contaminant filtration. It is appropriate that what remains is not only protected but restored.	Support	Retain
R106	The restoration of wetlands is generally supported. However we are concerned that the type, frequency, density and timing of livestock access to the wetland is provided for as a matter of control (matter 7). The protection of the natural character of wetlands is a s6 RMA matter of national importance. The NPSFM specifically identifies protection of the significant values of wetlands as an environmental bottom line. Given the known adverse effects of stock it is critical that stock are excluded from wetland areas. This is equally the case in restored wetland areas. It would seem counter intuitive to promote and provide for the restoration of wetland areas while simultaneously providing for their degradation.	Support in part	Amend: Delete matter of control 7. Stock should not be allowed in wetland areas.
R107	As previously discussed wetland areas are of critical importance and under pressure. The NPSFM does not restricted protection of the significant values of wetlands to 'outstanding' wetlands or 'significant' wetlands. The significant values of all wetlands are protected. This reflects their severe decline and in EDS's view, indicates that all remaining wetlands are significant. As a result the PNRP should flag that the discharge of contaminants and the removal of vegetation (not carried out under a restoration management plan) is generally unacceptable and therefore be classified as non-complying.	Oppose in part.	Amend: Replace discretionary activity status with non-complying.
R110	See above.	Support	Retain

Schedule G Principles to be applied when proposing and considering mitigation and offsetting in relation to biodiversity

<p>Schedule G generally</p>	<p>EDS supports the requirement that both mitigation and offsetting be subject to principle analysis (see P32, P41 PNRP). This helps to eliminate ad hoc decision making and to ensure that the mitigation or offset- related decision-making has regard to key matters relevant to ecological exchanges and the need for long term outcomes. However, as noted above distinguishing between mitigation and offsets often causes confusion. This confusion is compounded by addressed the two concepts in combination as in Schedule G (for example it is not clear in the schedule that mitigation planting would occur on-site with a goal of lessening the direct adverse effects of the activity, not offsite as is the case with an offset). As a result, EDS considers that a clear distinction needs to be made between the principles relating to mitigation and those to offsets. The principles applicable to each would consist of much the same test with a clear distinction base on the goal of each response action. It is critical that the same principles (no-net-loss aside) apply to mitigation as to offsetting in order to ensure a principled exchange and to avoid the perverse consequences inherent in an unregulated 'anything goes' mitigation-plan pathway.</p>	<p>Support in part</p>	<p>Amend to include a clear distinction between mitigation and offsets based on the goal of each response action, for example, through dividing Schedule G into Part A Mitigation and Part B Biodiversity Offsets, or alternatively, including a new schedule.</p>
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