

**BEFORE THE HEARING COMMISSIONERS**

**UNDER** the Resource Management Act 1991  
**IN THE MATTER** of an application under section 88 of the Act  
**BETWEEN** **JAGGER LTD**  
**Applicant**

**AND** **PORIRUA CITY COUNCIL**  
**Consent Authority**

**AND** **GREATER WELLINGTON REGIONAL COUNCIL**  
**Consent Authority**

**AND** **ROYAL FOREST AND BIRD PROTECTION**  
**SOCIETY OF NEW ZEALAND INCORPORATED**  
**Submitter**

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**SUBMISSIONS FOR THE ROYAL FOREST AND BIRD PROTECTION**

**SOCIETY OF NEW ZEALAND INCORPORATED**

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Royal Forest and Bird Protection Society of New Zealand Inc.  
PO Box 2516  
Christchurch

## **INTRODUCTION**

1. Forest & Bird is New Zealand's largest independent conservation organisation with 70,000 members and supporters and works to preserve our natural heritage and native species. Originally formed in 1923 to protect our native forests and birds, it's role has since grown to include protection of all native species and wild places, on land and in our oceans, lakes and rivers.
2. Forest & Bird has long used the opportunities which the Resource Management Act to submit on the development of district and regional plans as well as on resource consents. The purpose of these submissions is to protect the natural values, particularly significant natural values from development.
3. Forest & Bird is concerned about this application due to the significant ecological values in Duck Creek, which is home to threatened and at risk native fish species. This application poses a serious risk to those values particularly through:
  - a. the removal of 225 m of Duck Creek; and
  - b. the potential impact of discharges including of sediment and stormwater on Duck Creek and the Pauatahanui Tidal Flats.
4. Forest & Bird is not necessarily opposed to the site being subdivided, but considers this can occur without the removal of 225 m of Duck Creek. The issues relating to the diversion of Duck Creek, particularly the offset have not been appropriately considered. In these circumstances, Forest & Bird's considers that the application should be amended to avoid the removal of 225m of Duck Creek. The consent for the diversion and reclamation of Duck Creek should be declined.

### **Duck Creek and the Pauatahanui Tidal Inlet**

5. Duck Creek and the Pauatahanui Tidal Inlet have significant ecological values.
6. Duck Creek is listed on Schedule 1 to the PNRP. The stream and tributaries are habitat for indigenous threatened or at risk fish and habitat for six or more migratory indigenous freshwater fish species.<sup>1</sup>

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<sup>1</sup> The relevant schedule provides:

7. Appendix 3 of the Regional Freshwater Plan records that Duck Creek is home to nationally threatened indigenous fish, Shortjawed Kokopu, Giant Kokopu, and Banded Kokopu

*Appendix 3 Water Bodies with Nationally Threatened Indigenous Fish Recorded in the Catchment and Nationally Threatened Indigenous Aquatic Plants*

*Part A: Water Bodies with Nationally Threatened Indigenous Fish Recorded in the catchment*

- *Duck Creek and its tributaries upstream of the coastal marine area boundary at R26 095 696, as generally shown in figure 3.7. (Species recorded are: Shortjawed Kokopu, Giant Kokopu, and Banded Kokopu)*

8. This is carried through to the Proposed Natural Resources Plan, which includes Duck Creek as a known habitat spawning site.
9. The Pauatahanui Tidal Flats are an outstanding wetland indentified on Schedule A3 of the PNRP for its rarity and representativeness.

**The effects of the activity**

10. Forest & Bird is concerned that these values are not protected as a result of this resource consent application.
11. The particular effects of concern to Forest & Bird are
- the removal of 225 m of Duck Creek; and
  - the potential impact of discharges including of sediment and stormwater on Duck Creek and the Pauatahanui Tidal Flats.

Schedule F1: Rivers and lakes with significant indigenous ecosystems					
River or Lake	Criteria that identify rivers and lakes with significant indigenous ecosystems				Indigenous fish species recorded in catchment (Migratory species are indicated in italics and the conservation status of "At Risk" and "Nationally Vulnerable" species are underlined and in bold, respectively)
	High macroinvertebrate community health	Habitat for indigenous threatened/at risk fish species	Habitat for six or more migratory indigenous fish species	Inanga spawning habitat	
Duck Creek		Stream and all tributaries	Stream and all tributaries	Reach of tidal influence	<i>Banded kokopu, common bully, common smelt, <u>giant kokopu</u>, <u>inanga</u>, <u>koaro</u>, <u>lamprey</u>, <u>lonafin eel</u>, <u>redfin bully</u> and <u>shortfin eel</u></i>

12. It is submitted that the removal of 225 m of Duck Creek is a significant adverse effect.
13. There is also the potential for significant adverse effects on the Pauatahanui Tidal Flats associated with the sediment laden water leaving the site.
14. When considering this application it is necessary to consider these effects in the context of the proposed conditions and the relevant planning documents.

#### **Regional Planning documents**

15. The applicants legal submissions indicates that the approach to considering planning documents is unchanged after the Supreme Court's decision in *Environmental Defence Society v The New Zealand King Salmon Company Limited*<sup>2</sup> and that the decision is made with respect to Part 2, particularly section 5. This implies that all policies are considered in the round and an overall broad judgment is reached.
16. It is submitted that this oversimplifies the situation. In *King Salmon* the Supreme Court made it abundantly clear that section 5 was not designed to be an operative provision on which decisions were to be made and that the planning documents were the basis for decision making. The Supreme Court said:<sup>3</sup>

*"Section 5 was not intended to be an operative provision, in the sense that it is not a section under which particular planning decisions are made; rather, it sets out the RMA's overall objective. Reflecting the open-textured nature of pt 2, Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in s 5 and the remainder of pt 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though pt 2 remains relevant. It does not follow from the statutory scheme that because pt 2 is open-textured, all or some of the planning documents that sit under it must be interpreted as being open-textured."*

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<sup>2</sup> [2014] NZSC 38

<sup>3</sup> Paragraph 151

17. The Supreme Court explained that planning documents are the substance of the principles and objectives outlined in Part 2 of the Act:

*[30] "As we have said, the RMA envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to s 5, and to pt 2 more generally. **These documents form an integral part of the legislative framework of the RMA and give substance to its purpose by identifying objectives, policies, methods and rules with increasing particularity both as to substantive content and locality.** Three of these documents are of particular importance in this case – the NZCPS, the Marlborough Regional Policy Statement and the Sounds Plan."*

18. This is a general statement as to how the RMA was intended to operate: plans substantiate and give effect to part 2. The Supreme Court set out as follows:

*"[129] When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, "avoid" is a stronger direction than "take account of". That said however, we accept that there may be instances where particular policies in the NZCPS "pull in different directions". But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed."*

19. *King Salmon* applied to a plan change but it is submitted that the same approach applies when considering the policy documents relevant to a resource consent application. Policies that are directive should carry

more weight than those that are general. Simply referring to all policies and reaching an overall broad judgement is inconsistent with *King Salmon*.

20. There are a number of directive policies that relate to significant sites which provide for:
  - a. protection of significant sites; and
  - b. avoidance of adverse effects on significant sites.
21. Forest & Bird had significant concerns about the way in which the section 42A report interpreted some of the key policies. This has been superseded by the Ms Conland's addendum and this has resolved some but not all of these concerns
22. Policy 43 refers to **protecting** significant ecosystems and habitats with significant indigenous biodiversity values.
23. Policy 47 of the Wellington RPS refers to **avoiding** cumulative adverse effects of the incremental loss of significant habitat. Ms Conland correctly notes that the cumulative adverse effects cannot be avoided.
24. Policy 4.1.13 provides:

*To protect the nationally threatened indigenous aquatic plants identified in Part B of Appendix 3 and to protect nationally threatened freshwater fauna, in the water bodies identified in Part A of Appendix 3 by:*

  - *managing water quality so that Policies 5.2.1 to 5.2.7, whichever is (are) relevant, is (are) satisfied; and*
  - *managing the flows and levels of water bodies so that Policies 6.2.1, 6.2.2, 6.2.12, and 6.2.13, whichever is (are) relevant, is (are) satisfied; and*
  - *maintaining migratory and dispersal pathways for fish; and*
  - *avoiding adverse affects on habitats that are important to the life cycle and survival (including spawning areas) of fish and birds; and*
  - *promoting landowner and user know ledge of nationally threatened species, the sites where they are present, and how they can be protected.*

25. Avoid is given a somewhat unusual meaning in the explanation. Avoiding is to be emphasised and only adverse effects that are no more than minor are allowed.

*In this policy "avoiding adverse effect s" after the fourth bullet point, means that when "avoiding, remedying, or mitigating adverse effects", as identified in subsection 5(2)(c) of the Act, the emphasis is to be placed on avoiding adverse effects. "Avoiding adverse effects", means that only activities with effects that are no more than minor " ... on habitats that are important to the lifecycle and survival ... " of the fish or bird species identified below will be allowed in the water bodies listed in Appendix 3. Activities can occur in these water bodies but the fish or bird species identified, and their habitats, are to be protected.*

26. It is submitted that this policy only anticipates minor effects on significant sites.
27. It is submitted that the application as it stands does not comply with Policy 4.1.13. The removal of 225 m of Duck Creek is a more than minor effect that should be avoided. The ecosystem or habitat can be avoided as the subdivision can occur without diverting Duck Creek.
28. The policies in the PNRP that are particularly relevant are Policies 39 and 40. These are directive policies that should be given considerable weight. It is submitted that these have not been correctly interpreted by the section 42A report.
29. Policy 39 provides that the adverse effects on outstanding water bodies are **avoided**. Ms Conland correctly refers to this as a requirement to "not allow" or "prevent the occurrence of" but notes that there is an exception for transitory or minor effects.<sup>4</sup>
30. Mr Miller's evidence is not that adverse effects on the Pauatahanui Tidal Flats are avoided. He concludes:<sup>5</sup>

*On the basis of the above assessment, significant sedimentation effects in Pauatahanui Inlet as a result of the Brookside Project are*

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<sup>4</sup> Page 26

<sup>5</sup> 39

*not expected, although sedimentation risks still remain when large events coincide with northerly winds. ...*

31. Ms Conland indicates that such an event would be transitory. The effect would be from sediment deposition. While the event that caused the sediment may be transitory, there is no evidence that the adverse effects from sediment deposition would be transitory or minor.
32. In my submission, the application is not consistent with Policy 39.
33. Policies 40-42 are also relevant.
34. Policy 40 requires that the significant ecosystems, of which Duck Creek is one, are protected and restored. Policy 41 set out how Policy 40 is to be achieved. Significant ecosystem and habitats are to be avoided in the first instance. If the ecosystem or habitat **cannot** be avoided more than minor adverse effects are avoided, remedied, mitigated or offset. Proposals for offsetting are to be assessed against Schedule G. If adverse effects cannot be avoided remedied mitigated or offset, the activity is inappropriate.
35. It is submitted that neither the section 42A nor Ms Conland consider this policy properly. Little or no consideration is given to the requirement to avoid in the habitat in the first instance. The diversion of Duck Creek is not necessary for the site to be subdivided. The ecosystem or habitat can be avoided. The application is inconsistent with Policy 40.
36. Leaving this issue aside, another key question is whether the adverse effects are offset. Ms Conland expresses concerns about the offset.
37. However, neither the section 42A report nor Ms Conland consider Schedule G, which relates to biodiversity offsets. Schedule G is engaged because the applicant is proposing to offset the loss of 225m of Duck Creek with riparian planting. In my submission this is a significant omission. Schedule G provides principles to assess offsets.
38. It is difficult to assess the offset against Schedule G. This is because there is little information on the proposed offset. Appendix 2 has a high level objective of vegetating to the AEE. Appendix 3 does not set out what the offset it is, rather it assumes the type of restoration work that will be undertaken.<sup>6</sup>

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<sup>6</sup> Page 23



39. It is submitted that it is this kind of shortcutting that Appendix G was trying to avoid.
40. When the proposed offset is assessed against Schedule G it is submitted that the offset fails.
- a. Principle 1 relates to the mitigation hierarchy and for reasons set out above it is submitted that this does not adhere to the mitigation hierarchy.
  - b. Principle 2 relates to limits to offsetting. No consideration has been given to whether the values on the site are highly vulnerable or irreplaceable that the effects cannot be offset.
  - c. Principle 3 relates to additionality. With proper conditions, this principle can probably be satisfied.
  - d. Principle 4 relates to landscape context. This may be met but it is not possible to assess it without further information.
  - e. Principle 5 relates to long term outcomes. This may be able to be met but, based on the proposed conditions, it is not currently met. The matters in Principles 5(a)-(d) have not been provided for.
  - f. Principle 6 relates to not net biodiversity loss. There are matters in this policy that have not been considered.
41. The applicant's legal submissions indicate that there is no policy or statutory requirement to achieve no net loss. While this may have been the case at the time Transmission Gully was considered, the PNRP changes the situation. Policy 40 and Schedule G provide for the mitigation hierarchy, with residual adverse effects offset in a way that achieves no net loss. If an offset does not provide no net loss it would not be consistent with Policy 40. The express policy is supported by other policies which

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We have assumed that additional mitigation work would occur in the reach upstream and downstream of the constructed channel where significant riparian vegetation is currently lacking. We have therefore used the average SEV scores for Sites 1 and 3 as a basis for the ECR calculation. The average current SEV score for the adjoining natural stream reaches that would be subject to restoration is 0.499. The average potential score for these reaches is 0.720 and considers the presence of residential lots, new roads and associated limitations on the width and extent of riparian planting. We have assumed that restoration work in these areas would comprise bank remedial works at existing areas of erosion and riparian planting and management. The main improvements in stream functionality as a result of this work would be to hydraulic functions, water temperature control, organic matter input, habitat provision functions and riparian vegetation intact.

42. The offset may be able to meet Schedule G, but it currently does not. If the matters in Schedule G were properly considered, many of the issues with the conditions that are discussed below may have been avoided. However as it currently stands critical matters have not been considered.

#### **OFFSETTING**

43. As noted above, Forest & Bird's position is that the consents for the diversion and reclamation of Duck Creek should be declined. Critical to this is the assessment of the offset.
44. It is submitted that a great deal of care needs to be taken when considering the offset in this case. The approach of using a numerical calculation such as that adopted by the applicant is not without controversy. The Environment Court expressed concerns about the approach adopted in this case. *Royal Forest & Bird Protection Society of New Zealand Inc v Buller District Council* involved a significantly more complex and intricate approach than in this case. The Environment Court expressed concern about an overreliance on the modelling approach.

*It is a consent authority whose duties are set by the Resource Management Act, including the duties in a case such as this to assess the strength or otherwise of the evidence about various species, ecosystems and biodiversity, to weigh the individual factors, to assess whether adverse effects must be avoided, remedied or mitigated, and to arrive at an overall broad judgment that serves the purpose of the Act as stated in section 5. The use of a model such as initially put forward in evidence, or the model advanced as technically competing with it, carried the significant danger of purporting to undertake our weighing exercise for us.*

45. The Court preferred to "stick to its knitting":

*[219] The use of the model having been abandoned (rightly in our view), the task for the Court is to consider what would be the various adverse effects likely to result from the mine, to what extent they are proposed to be mitigated, and where no mitigation is possible, how relevant and how significant would be the compensation offered; then to evaluate all these matters in the light of the statutory*

*instruments and the RMA. This has always been the role of consent authorities under the RMA. We think of this as "sticking to the knitting".*

46. These sentiments are similar to those in the Transmission Gully case referred to in the applicants legal submissions.<sup>7</sup>
47. The dangers are equally evident in this case. The ECR analysis undertaken is complex and requires expert advice to properly assess. While appearing to be precise, there is a high degree of subjectivity. This is demonstrated by the fact that the applicant and Council have considered the same information and reached vastly differing conclusions about the amount of offsetting required.
48. While care is required, the explicit calculation of loss and gain is provided by Schedule G of the PNRP. However, it is submitted that there is an overreliance on this calculation at the expense of the other requirement for a proper offset.
49. In this case submitters do not have the benefit of the Council's evaluation of the new information.
50. The section 42A report records that there is significant information regarding the offset outstanding. This is repeated in Ms Conland's evidence.

#### **Legal issues relating to offsetting conditions**

51. The proposed conditions raise two issues:
  - a. specificity, accuracy and clarity of expression; and
  - b. the appropriateness of the approach to the offset.

#### *Specificity, accuracy and clarity of expression*

52. It is almost trite to say that conditions of consent need to be specific, clear and accurate. This was set out in *Wood v Selwyn District Council*<sup>8</sup>

*Shortly thereafter came the judgment of the High Court in *Bitumix Limited-v- Mount Wellington Borough Council* [1979] 2 NZLR 57. This was concerned with noise controls in a district scheme. At page 63*

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<sup>7</sup> Para 13

<sup>8</sup> C35/94

*Davison C.J., having held that there was ample authority in the Town and Country Planning Act 1977 and its regulations, to permit a local body to impose conditions controlling noise, and went on to say:*

*"The real argument in this case is, has the respondent imposed conditions which are enforceable?"*

*The learned Chief Justice went on to set out two tests of enforceability, one being specificity and the other being clarity and accuracy of expression leading to a measure of certainty.*

53. *Bitumix* was also followed in *Ferguson v Far North DC*<sup>9</sup>

*Mr Mathias referred to Bitumix Limited v Mount Wellington Borough Council as requiring that conditions must be sufficiently detailed as to provide certainty. We accept counsel's submission that a condition requires specificity, accuracy and clarity of expression, before it can be enforceable.*

54. The substance of the conditions regarding the offset that attached to the section 42A are through:

- a. Condition 19-25 of WGN0028/33624 which contains a requirement to prepare a Riparian Mitigation Planting Plan, which:
  - i. does not specify the type of mitigation but refers to the landscape plan attached to the AEE; and
  - ii. requires approval by the Manager of Environmental Regulation;
- b. Condition 53-55 of WGN0028/33621 and Condition 46-50 of the WGN0028/33624, which requires a Progress Monitoring Report, which requires compliance with the offset set out in the application.

55. While the riparian mitigation planting provides the offset, there is no reference to the offset in the Riparian Mitigation Planting conditions

56. The reliance on the management plans raises some particular issues. The appropriateness of management plans was considered in *Wood v West Coast Regional Council*,<sup>10</sup> where the Court accepted a submission that the purpose of a management plan is to provide a consent authority and anyone else who might be interested, with information about the way in

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<sup>9</sup> [1999] NZRMA 238.

<sup>10</sup> EnvC Christchurch C127/99, 24 February 1999.

which the consent holder intends to comply with the more specific controls or parameters laid down by the other conditions of a consent. The Court said:<sup>11</sup>

*In the end counsel were agreed on a submission that a management plan can be required to be prepared pursuant to section 108(3) of the Act, but its purpose should be to provide the consent authority and anyone else who might be interested, with information about the way in which the consent holder intends to comply with the more specific controls or parameters laid down by the other conditions of a consent. So, for example, in case of noise, specific noise control limits can be laid down but the way in which these are to be complied with is for the consent holder who can be required to provide a management plan containing information about the method of compliance. However, because technology might change over time the consent holder should have the ability to change the management plan without having to go through the process of seeking a change to the conditions of consent.*

57. The Court also said:<sup>12</sup>

*In New Zealand Rail Ltd v Marlborough District Council (1993) 2 NZRMA 449 this Court took the view that if an applicant was relying on a management plan as a method of avoiding, remedying or mitigating adverse effects, that plan should be formulated so it could be scrutinised by the Court and if accepted, included as part of the conditions of consent. That may still be an appropriate way to proceed in some circumstances. However, in this case it was pointed out that practical difficulties can arise, particularly where a management plan might benefit from future amendments to keep pace with developments in technology.*

*It was generally accepted that it is not appropriate to provide for a management plan on the basis that it is to be approved by a consent authority or some delegated official at a later time, except to the extent that they may be regarded as certifiers in terms of the leading*

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<sup>11</sup> *Wood v West Coast Regional Council* EnvC Christchurch C127/99, 24 February 1999, at 6.

<sup>12</sup> *Wood v West Coast Regional Council* EnvC Christchurch C127/99, 24 February 1999, at 6.

*case on this subject, Turner and Others v Allison and Others [1971] NZLR 833; 4 NZTPA 104 (CA). However, what is or is not a valid certifier condition can itself create considerable difficulties, particularly in regard to a management plan.*

58. The role of the certifier was discussed by the High Court in *Director-General of Conservation v Marlborough District Council*,<sup>13</sup> which considered the validity of a proposed condition that results of a survey “satisfy a consent authority that it is very probable that the site of the marine farm would not be of special significance for Hector's Dolphin”. The High Court held that the question was whether there has been an unauthorised delegation of the judicial function. The question was whether was being asked to be certified was essential to the grant of consent. MacKenzie J held:<sup>14</sup>

*While the question of whether the condition requires the decision-maker to act as certifier or arbitrator will provide a useful test, it does not necessarily provide the only test. **The issue is whether there has been an unauthorised delegation of the judicial function.** Where the judicial function has been delegated in terms which require an adjudication to be made by the delegate, then it will normally be readily apparent that it is a judicial function which has been delegated. But that is not necessarily the only basis upon which a judicial function may have been improperly delegated. It is of the essence of a judicial function that the adjudicator will be required to make findings of fact. If the function of making a finding on facts which are essential to the decision is delegated, then there is a delegation of the judicial function. That may occur in circumstances where the delegate is not explicitly deciding a dispute between the parties. **The role of the delegate as certifier may conceal the fact that what is being delegated is the power to certify a matter which is an essential element of the decision which should be made by the tribunal. It is necessary to examine the real nature of the decision which the delegate is required to make, rather than the***

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<sup>13</sup> [2004] 3 NZLR 127.

<sup>14</sup> *Director-General of Conservation v Marlborough District Council* [2004] 3 NZLR 127 at 136.

*form in which the power to make that decision is conferred.*  
*(emphasis added)*

59. This means that, in order for a condition such as that proposed for the offset to be valid here there need to be:
- c. specific requirements contained in the conditions of consent;
  - d. the conditions provide information about how these specific requirements are to be achieved; and
  - e. any approval should not be given unless the person giving approval the plan can be regarded as being a certifier.

**Assessment of the conditions**

60. In my submission the offset conditions fall short of minimum legal requirements. The conditions do not specify what the offset is or that it is required to be undertaken. There is a requirement to do mitigation planting but this is not linked to the offsetting conditions. The offset is somewhat obliquely referred to in the monitoring provision.
61. The deficiencies above mean that the issue of the question as to the appropriate amount of offset is left to the Manager of Environment Regulation. This is an unlawful delegation as the amount of the offset is a matter critical to the grant of consent.
62. If the Commissioners conclude that consent should be granted, then Forest & Bird supports Mr Lowe's suggestions that:
- a. The Commissioners need to determine the appropriate amount of compensation that is required; and
  - b. A requirement for Environmental Compensation Plan (ECP) should be incorporated into the conditions of consent. The conditions should provide specific details on the amount of compensation required including matters such as the location and type of planting required. The manner in which these specific details are to be achieved should be included in the ECP. This would address matters such as timing of planting and the adaptive management response in the event that the offset did not achieve the desired outcomes.
63. The matters in Schedule G also need to be assessed and appropriate steps taken to ensure that the offset complies with the principles.

## **Conclusion**

64. This application includes the removal of 225 m of a significant stream. Without more, this will have significant adverse effects.
65. There are a number of directive objectives and policies including a number that provide for the avoidance of adverse effects on significant indigenous biodiversity.
66. The site can be subdivided without the diversion of Duck Creek. In these circumstances Forest & Bird submits that the application for consent for the diversion and reclamation of Duck Creek has not been made out and consent should be declined.
67. In order to address these effects the Applicant proposes an offset. However, critical questions about the offset remain unanswered.
  - a. Key matters that are critical to the proper development of an offset, including those set out in Schedule G to the PNRP, have not been considered.
  - b. As a result the offset currently falls short of what is required. In any event the proposed conditions do not comply with minimum legal requirements for:
    - i. enforceability;
    - ii. unlawful delegation of judicial function.

Dated 6 April 2016

**Peter Anderson**  
Royal Forest and Bird Protection Society Inc.



**Policy P41: Managing adverse effects on ecosystems and habitats with significant indigenous biodiversity values** 

In order to protect the ecosystems and habitats with significant indigenous biodiversity values identified in Policy P40, in the first instance activities, other than activities carried out in accordance with a **restoration management plan**, shall avoid these ecosystems and habitats.

If the ecosystem or habitat cannot be avoided, the adverse effects of activities shall be managed by:

- (a) avoiding more than minor adverse effects, and
- (b) where more than minor adverse effects cannot be avoided, remedying them, and
- (c) where more than minor adverse effects cannot be remedied, mitigating them, and
- (d) where **residual adverse effects** remain it is appropriate to consider the use of **biodiversity offsets**.

Proposals for mitigation and **biodiversity offsets** will be assessed against the principles listed in Schedule G (biodiversity offsetting). A precautionary approach shall be used when assessing the potential for adverse effects on ecosystems and habitats with significant indigenous biodiversity values.

Where more than minor adverse effects on ecosystems and habitats with significant indigenous biodiversity values identified in Policy P40 cannot be avoided, remedied, mitigated or redressed through **biodiversity offsets**, the activity is inappropriate.

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



This schedule details the principles that should be used to guide the development of mitigation and biodiversity offsetting proposals. These principles will be used when assessing the adequacy of proposals for the design and implementation of mitigation and biodiversity offsetting as part of resource consents issued under this Plan.

Any mitigation or biodiversity offset proposed to manage adverse effects on biodiversity under Policies P32 and P41 should be designed and implemented with regard to any current guidance or direction from central government in relation to mitigation or biodiversity offsets.

The numbering of the principles in this schedule listed below is solely for convenience and should not be interpreted as an indication of relative importance. Principles 1-5 apply to the proposal and consideration of both mitigation and biodiversity offsets relating to adverse effects on biodiversity. Principle 6 applies solely to the proposal and consideration of biodiversity offsets relating to **residual adverse effects** on biodiversity.

### **1. Adherence to the mitigation hierarchy**

The proposed mitigation or biodiversity offset will be assessed in accordance with the mitigation hierarchy set out in Policies P32 and P41. Any proposal for mitigation or biodiversity offset will:

- (a) document the appropriate measures taken to avoid, remedy or mitigate any adverse effects of the activity on biodiversity, and
- (b) demonstrate that the mitigation addresses the adverse effects of the activity, or that the biodiversity offset addresses the residual adverse effects of the activity.

### **2. Limits to what can be mitigated or offset**

Consideration of mitigation or biodiversity offsetting is inappropriate when an activity has the potential to cause adverse effects, or residual adverse effects, on an area:

- (a) where the values of that area are highly vulnerable or irreplaceable, or
- (b) where there is no appropriate site, knowledge, proven methods, expertise or mechanism available to design and implement an adequate mitigation or biodiversity offset.

### **3. Additional conservation outcomes**

Any proposal for mitigation or biodiversity offset will:

- (a) demonstrate that positive effects on biodiversity are additional to what would have occurred without the proposed mitigation or biodiversity offset, and

- (b) incorporate the activities outlined in any associated resource consent/s and would not have occurred without them.

#### 4. Landscape context

Any proposals for mitigation or biodiversity will:

- (a) demonstrate that positive effects are achieved at the site, or where appropriate within the ecological district, and
- (b) complement and contribute to the protection of significant indigenous vegetation, or the habitats of threatened fauna at the local, regional or national level, and
- (c) take into account available information on the full range of biological, social and cultural values of biodiversity and supports an ecosystem-scale approach, and
- (d) take into consideration other likely future developments, such as competing land use pressures, within the landscape.

#### 5. Long-term outcomes

Any proposals for mitigation or biodiversity offset should be based on an adaptive management approach, incorporating monitoring and evaluation, with the objective of securing outcomes that last at least as long as the activity's impacts, and preferably in perpetuity.

The proposed mitigation or biodiversity offset will:

- (a) demonstrate that management arrangements, legal arrangements (e.g. covenants) and financial arrangements (e.g. bonds) are in place that allow the positive effects to endure as long as the adverse effects of the activity, and preferably in perpetuity, and
- (b) be able to be implemented and enforced in line with any resource consent conditions associated with the activity. These conditions should include:
  - i. specific, measurable and time-bound targets, and
  - ii. mechanisms for adaptive management using the results of periodic monitoring and evaluation against identified milestones to determine whether the mitigation or biodiversity offset is on track and how to rectify if necessary
- (c) establish roles and responsibilities for managing, governing, monitoring and enforcing the mitigation or biodiversity offset, and
- (d) undertake methods by which analysis will identify when milestones of the mitigation or biodiversity offset are not achieved, and the causes of non-achievement, and how to revise the mitigation or offset management plan to avoid similar occurrences.

#### 6. No net biodiversity loss

Any proposals for biodiversity offsets will provide measurable positive effects on biodiversity at the site or, where appropriate, within the ecological district, which can reasonably be expected to result in no net loss and preferably a net gain of biodiversity.

No net loss of biodiversity is determined with respect to species composition (e.g. individual species or species groups), habitat structure (e.g. vegetation tiers), ecosystem health (e.g. nutrient cycling rates), and cultural use values (e.g. valued habitats or species).

Any proposals for biodiversity offset will demonstrate that:

- (a) an explicit calculation of loss and gain has been undertaken as the basis for the biodiversity offset design, and should demonstrate the manner in which no net loss or a net gain of biodiversity can be achieved by the biodiversity offset, and
- (b) the biodiversity offset design and implementation should include provisions for addressing sources of uncertainty and risk of failure in delivering the biodiversity offset.