

BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH
I MUA I TE KOOTI TAIAO

ENV-2020-CHC-

IN THE MATTER

of an appeal under
Clause 14 of the First
Schedule of the Resource
Management Act 1991

BETWEEN

**Minister of
Conservation**
Appellant

AND

**Marlborough District
Council**
Respondent

**NOTICE OF APPEAL BY THE MINISTER OF
CONSERVATION**

Dated: 6 May 2020

Department of Conservation
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**Notice of appeal to Environment Court against decision on the Proposed
Marlborough Environment Plan**

Clause 14(1) of Schedule 1, Resource Management Act 1991 (the Act)

To: The Registrar
Environment Court
CHRISTCHURCH

1. I, the Minister of Conservation, appeal against parts of a decision of the Marlborough District Council (the Council) on the following plan:
 - 1.1. Proposed Marlborough Environment Plan.
2. The proposed Marlborough Environment Plan (the Plan) is the proposed regional policy statement, regional plan, district plan, and coastal plan for the Marlborough District.
3. I made a submission on the Plan.
4. I am not a trade competitor for the purposes of section 308D of the Resource Management Act 1991 (the Act).
5. I received notice of the decision on 21 February 2020.
6. The decision was made by the Council.
7. The parts of the decision that I am appealing are the parts of the Council's decision regarding:

Volume 1 – Policy – Chapter 08 – Indigenous Biodiversity

- 7.1. Policy 8.1.1 - Identification of sites, areas and habitats with significant biodiversity value
- 7.2. Policy 8.3.6 - Biodiversity Offsetting

Volume 2 – Rules – Chapter 2 – General Rules

- 7.3. Rule 2.9.1 – Alteration, repair or maintenance of an existing structure in the bed of a lake or river

Volume 3

- 7.4. Appendix 3 - Biodiversity Criteria for Significance
- 7.5. Appendix 2 - Coastal Natural Character Schedules of Values and Natural Character overlay maps

Volume 4

- 7.6. Ecologically Significant Marine Sites overlay maps

8. The reasons for the appeal are set out in the third column of Table 1 appended to this Notice of Appeal under the heading “Reasons”.
9. The parts of the decision appealed:
 - 9.1 do not promote the sustainable management of natural and physical resources as required by Part 2 of the Act.
 - 9.2 do not implement the Council’s functions under s 30 and s 31 of the Act and/or
 - 9.3 do not represent best resource management practice.
10. I seek the following relief:
 - 10.1. The relief specified in fourth column of Table 1 appended to this Notice of Appeal under the heading “Relief sought”; and
 - 10.2. such further orders, alternative relief, consequential amendments or other amendments as are considered appropriate or necessary to address the concerns set out in this Notice of Appeal.



Natasha Hayward

Director, Planning, Permissions and Land
Department of Conservation

Acting pursuant to delegated authority on behalf of the Minister of Conservation¹

6 May 2020

Address for service of appellant:

Minister of Conservation

Planning Shared Services

Department of Conservation

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Attachments

A copy of my submission has been forwarded to the Environment Court with this notice of appeal. If any party served with this notice requires a copy of the submission to be served on them, please contact the appellant at the address for service given above and provide an email address so that this document can be forwarded electronically.

Advice to recipients of copy of notice

How to become a party to proceedings

You may be a party to the appeal if you made a submission or a further submission on the matter of this appeal.

To become a party to the appeal, you must,—

- within 20 working days after the period for lodging a notice of appeal ends, lodge a notice of your wish to be a party to the proceedings (in [form 33](#)) with the Environment Court and serve copies of your notice on the relevant local authority and the appellant; and

Your right to be a party to the proceedings in the court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

¹ A copy of the Instrument of Delegation will be provided on request and may be inspected at the Director-General's office at Conservation House (*Whare Kaupapa Atawhai*, 18-32 Manners Street, Wellington 6011) when Covid 19 restrictions allow.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing requirements (see form 38).

Advice

If you have any questions about this notice, contact the Environment Court in Auckland, Wellington, or Christchurch.

Table 1: Decisions of the Marlborough District Council on the Plan which are appealed by the Minister of Conservation

Appeal point	Provision or decision	Reason(s)	Relief sought
1	Policy 8.1.1 – Identification of sites, areas and habitats with significant biodiversity value	Changes have been sought to Appendix 3 as further set out in Appeal point 3 below. For a site to be considered significant, Policy 8.1.1 provides that one of the first four criteria (further explained in Appendix 3) must rank medium or high.	Amend policy 8.1.1 as appropriate to reflect the amendments made to Appendix 3 – Biodiversity Criteria for Significance.
2	Policy 8.3.6 - Biodiversity Offsetting	<p>8.3.6(b): Many biodiversity values cannot be offset and if they are adversely affected then they will be permanently lost. Limits to offsetting should be expanded to include situations where effects on indigenous biodiversity are unknown or uncertain.</p> <p>8.3.6(c): No net loss needs to be based on evidence that can reasonably prove the proposed offset will result in no net loss. This involves measuring, comparing and balancing the biodiversity at the impact and offset sites. The phrase, ‘...it can be demonstrated that the offset actions will achieve no net loss of biodiversity...’ indicates that some form of biodiversity comparison is required.</p> <p>8.3.6(d): Additionality is a key point in an offset. If an offset is not in addition to what would normally occur, then nothing is gained and, ‘no net loss’ cannot be demonstrated. The second part of the sentence, ‘...and are additional to any remediation or mitigation undertaken in relation to the adverse effects of the activity’ is there to emphasise the difference between offsetting and mitigation/remediation. Often these terms are</p>	<p>Amend policy 8.3.6 as follows:</p> <p><i>“Policy 8.3.6 – Where indigenous biodiversity values will be adversely affected through land use or other activities, a biodiversity offset can be considered to offset significant residual adverse effects. Where a biodiversity offset is proposed, the following criteria will apply:</i></p> <p><i>(a) Residual adverse effects: the offset will only compensate for significant residual adverse effects that cannot otherwise be avoided, remedied or mitigated;</i></p> <p><i>(b) Limits to offsetting: offsetting should will not be applied to justify impacts on vulnerable or irreplaceable biodiversity, <u>or where effects on indigenous biodiversity are unknown or uncertain;</u></i></p> <p><i>(c) No net loss: the residual adverse effects on biodiversity are capable of being offset and will be fully compensated by the offset to ensure it can be demonstrated that the offset actions will achieve no net loss of biodiversity and preferably a net gain;</i></p>

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		<p>confused and mitigation is considered offsetting, when offsetting should occur after mitigation and is separate to, and in addition to, mitigation.</p> <p>8.3.6(e): The last part of the sentence ‘<i>unless an alternative ecosystem or habitat will provide a net gain for indigenous biodiversity in the same area</i>’ could inappropriately allow for a loss of a high value ecosystem in exchange for a larger area of a lower value ecosystem, such as exchanging a mature forest for a larger area of an early stage developing forest. The ‘alternative ecosystem’ also lends itself to an unlike for unlike exchange.</p> <p>8.3.6(h): The period for which the offset outcome lasts is a key concept in an offset. This point could be added onto the end of 8.3.6(g) if it fits better with the format of the plan. For example, 8.3.6(g) could read ‘...ecological outcomes is minimized and the positive ecological outcomes of the offset last at least as long as the impact of the activity, and preferably in perpetuity’</p> <p>Use of the term ‘should’ in policy 8.3.6 introduces an undesirable level of uncertainty. The more specific ‘will’ is more certain, and better achieves the relevant objectives of the Plan.</p>	<p><i>(d) Additionality: actions undertaken as a biodiversity offset are demonstrably additional to what otherwise would occur, and are additional to any remediation or mitigation undertaken in relation to the adverse effects of the activity;</i></p> <p><i>(e) Like for like: offsets should will re-establish or protect the same type of ecosystem, or habitat or species that is adversely affected, unless an alternative ecosystem or habitat will provide a net gain for indigenous biodiversity in the same area</i></p> <p><i>(ef) Proximity: the proposal should be located close to the application site, where when this will achieve the best ecological outcomes;</i></p> <p><i>(fg) Timing: the delay between the loss of biodiversity through development and the gain or maturation of ecological outcomes is minimized;</i></p> <p><i>(h) Long-term context: the positive ecological outcomes of the offset will last at least as long as the impact of the activity, and preferably in perpetuity;</i></p> <p><i>(gI) Any offsetting proposal will include a separate biodiversity offset management plans prepared in accordance with good practice.”</i></p>
3	Rule 2.9.1 - Alteration, repair or maintenance of	The rule, as it relates to existing lawfully established structures in or over the beds of lakes and rivers, does not include the use or operation of existing structures.	Amend Rule 2.9.1 as follows: “Alteration, repair or maintenance, <u>and</u> operation/use of an existing structure, including

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	an existing structure in the bed of a lake or river	<p>A large number of existing instream structures present in water bodies in Marlborough will not have been constructed to provide for passage of fish, or over time have become an impediment to the migration or passage of indigenous fish species.</p> <p>Expanding the coverage of this rule to include the use or operation of existing instream structures, in tandem with the new general standard 2.8.1.7 will require fish passage to be provided for at all existing instream structures and will ensure that fish passage is given consideration in determining compliance with the permitted activity rule.</p> <p>It is acknowledged that the Freshwater Fisheries Regulation 1983 (“Regulations”) also has a role in controlling what effects instream structures have on fish passage. But it is considered that making this amendment to the rules of the proposed MEP will compliment the Regulations and also allow for the Council to meet its function under section 30(1)(c)(iia) and is consistent with section 13 of the Act.</p>	<i>any associated temporary damming of water or release of detritus, in, on or over the bed of a lake or river;”</i>
4	Appendix 3 – Biodiversity Criteria for Significance	The Ecological Significance Criteria combined the existing ecological significance criteria in the Wairau Awatere Resource Management Plan (which is mostly criteria for the identification of significance in the terrestrial context) and the marine criteria developed and used in assessing ecologically significant marine sites (ESMS) in the Davidson 2011 report.	<p>That the marine criteria used by Davidson 2011 be retained as a separate set of Ecological Significance Criteria in Appendix 3 for the coastal marine area with corresponding amendment to Policy 8.1.1; and</p> <p>In relation to the Ecological Significance Criteria in Appendix 3 that addresses terrestrial, wetland and freshwater environments:</p>

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		<p>The combining of these criteria raises concerns about:</p> <ul style="list-style-type: none"> a) inconsistency with the marine criteria already used to assess a large number of ESMS in Marlborough. b) inconsistency with the New Zealand Coastal Policy Statement, in particular Policy 11. c) The potential for areas of significant indigenous vegetation or habitats of indigenous fauna in specific environments not being adequately identified. <p>Combining the criteria has created confusion in how the criteria apply in the marine context, with some criteria either irrelevant to the coastal marine area or missing key aspects of the Davidson et al marine criteria. For example:</p> <ul style="list-style-type: none"> a) “Pattern” is not a relevant assessment criteria for the marine environment as most of the significant marine sites are relatively small, so big spatial patterns are not evident; b) “Shape” is largely irrelevant in the marine context, given the fluidity of the medium; c) ”Sustainability” is not a relevant assessment criteria because apart from in estuaries, there is limited scope for “hands-on” management of sites (e.g. fencing, planting and weed/pest control) and controlling harmful activities is the only realistic management approach. 	<ul style="list-style-type: none"> (a) Either delete the Management Criteria or clarify the purpose of the Management Criteria and that they are not relevant to identification of significant ecological areas; (b) ensure the text beneath the criteria is consistent with the text used for ranking the criteria as High, Medium or Low; and (c) Make corresponding amendments to Policy 8.1.1.

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		<p>A further concern is the use of ‘Identification Criteria’ and ‘Management Criteria’. In the application of the criteria in the Plan, through Policy 8.1.1, it is apparent that the ‘Management Criteria’ are intended to have no bearing on determining ecological significance. Accordingly, it is not clear what the purpose of the “Management Criteria” is as it is only the first four ‘Identification Criteria’ that determine whether a site is significant. “Sustainability” is a management outcome, not a criterion for identifying significance.</p> <p>Furthermore, there is often a disconnect between the bullet points (underneath each individual criterion) and the text for high/medium/low which makes the criteria hard to follow and apply.</p>	
5	Appendix 2 – Coastal Natural Character Schedules of Values and Natural Character overlay maps	<p>Two omissions have been identified from the natural character of the coastal environment mapping in Appendix 2:</p> <ol style="list-style-type: none"> a. A portion of the B3 area described in Appendix 2 (page 5) in Cook Strait mapped in the Natural Character overlay as outstanding natural character should be removed as the Council’s expert had recommended at the hearing. b. The H2 area described in Appendix 2 (page 23) as high natural character within the tidal Wairau Lagoon has been omitted from the relevant Appendix 2 map at page 22. 	Amendments to Appendix 2 to ensure the maps and overlays accurately represent the natural character of the Marlborough region as described in the adjacent column.
6	Ecologically Significant Marine Sites overlay	The Ecologically Significant Marine Sites overlay in the planning maps should have been updated in the Council’s decision as sought in submission point	An update be made to the Ecologically Significant Marine Sites overlay in the planning maps in accordance with Davidson, R.J. and Richards,

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		<p>479.278 to update the boundaries of identified sites in accordance with the Davidson, R.J. and Richards, L.A. 2016 report for Marlborough District Council.</p> <p>It is important that the amendments to the sites identified in the above report and the most up to date information available are included in the planning maps to improve the accuracy of the mapped areas and to ensure that the mapped areas and the associated provisions for the protection of these significant sites are robust.</p> <p>The s42A report of Dr Ulrich for the Topic 6 Indigenous Biodiversity hearing considered this submission and recommended the amendments be made. There is no specific consideration of this further in subsequent s42A reply reports and no consideration of this in the decision on Topic 6. The track changed maps from the decision do not make these recommended changes.</p>	<p>L.A. 2016 report for Marlborough District Council, and as detailed in the DOC submission.</p>