IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2022] NZEnvC 105

IN THE MATTER	of the Resource Management Act 1991
AND	of appeals under clause 14 of the First Schedule of the Act
BETWEEN	MERIDIAN ENERGY LIMITED
	(ENV-2021-CHC-91)
	DIRECTOR-GENERAL OF CONSERVATION
	(ENV-2021-CHC-92)
	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED
	(ENV-2021-CHC-93)
	ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED
	(ENV-2021-CHC-94)
	Appellants
AND	MACKENZIE DISTRICT COUNCIL
	Respondent

Court: Environment Judge JJM Hassan
Environment Commissioner C J Wilkinson

Hearing: In Chambers at Christchurch

MDC – PC18 SCOPE – INTERIM DECISION

Last case event: 9 June 2022
Date of Decision: 17 June 2022
Date of Issue: 17 June 2022

INTERIM DECISION OF THE ENVIRONMENT COURT

A: The relief in Meridian Energy Limited's appeal is allowed in part insofar as it is found that clause c) of the PC18 definition of "significant indigenous vegetation and significant habitats of indigenous fauna", associated Figure 1 and those aspects of other PC18 provisions that incorporate or apply those provisions are beyond scope and inappropriate.

B: No determination of the most appropriate provisions or directions for the amendment of PC18 is made at this time, these matters being reserved for later determination.

C: Directions are made for parties to confer and Mackenzie District Council to report seeking related case management directions, including for expert conferencing and any further facilitated mediation.

D: Costs are reserved.

REASONS

Introduction

[1] There are a number of appeals in relation to Plan Change 18 to the proposed Mackenzie District Plan ('PC18'). This decision concerns a set of provisions ('Disputed Provisions') included in the decision version of PC18 ('DV-PC18') that is the subject of an appeal by Meridian Energy Limited ('Meridian') (and other appeals).

[2] Part of the appeal relief sought by Meridian is deletion of the Disputed Provisions (which we set out shortly). It submits that there was no jurisdiction to include them in DV-PC18 and they are inappropriate. It is those aspects of Meridian's appeal that this decision addresses.

[3] Following engagement with the parties, directions were made for this decision to be made on the papers.[1]

[4] For the reasons set out, we find that the Disputed Provisions cannot stand. To that extent, this finds in favour of Meridian's relief. However, as there are consequential matters to consider, this decision leaves aside the final determination of that relief (and of course the relief sought in other appeals). As it is now appropriate for these matters to be traversed in expert conferencing, directions are made to that end.

The Disputed Provisions

[5] The Disputed Provisions comprise:[2]

(a) clause c) (emphasis **added**) of the following new definition included in DV-PC18 as follows:

> Significant indigenous vegetation and significant habitats of indigenous fauna: means areas of indigenous vegetation or habitats of indigenous fauna which:

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1 The directions were made by Minute dated 21 October 2021. By joint memorandum dated 16 May 2022, and in subsequent exchanges, parties invited the court to consider whether an AVL hearing could be appropriate. By Minute dated 9 June 2022, the court signalled that it remained satisfied that the 'on the papers' approach remained suitable but that the Registrar would further enquire of parties as to their preferences. Ultimately, only Meridian preferred this approach if it would assist the court.

2 Meridian memorandum dated 11 October 2021, at [2], submissions for Meridian dated 15 December 2021, at [5].

a) meet the criteria listed in the Canterbury Regional Policy Statement's Policy 9.3.1 and Appendix 3; or

b) are listed in Appendix I as a Site of Natural Significance; and

c) includes any areas that do not comprise improved pasture within the glacial derived or alluvial (depositional) outwash and moraine gravel ecosystems of the Mackenzie Basin as shown on Figure 1.

(b) the associated Figure 1 (a copy of which is included as Annexure 1 to this decision for ease of reference); and

(c) some related provisions included in DV-PC18 in reliance on that definition and Figure 1.

[6] Collectively, the Disputed Provisions would render a relatively large area of the Mackenzie Basin (shown in Figure 1) the subject of regulatory controls for the protection of so-termed 'significant indigenous vegetation and significant habitats of indigenous fauna'. In terms of the interests of the parties, that includes:

(a) operating easement land set aside by the Crown for the Waitaki Power Scheme[3] ('WPS') including power generation assets of Meridian and Genesis Energy Limited ('Genesis'); and

(b) several operational farm holdings whose owners present a joint position on the scope issue ('The Farming Stations').[4]

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3 The most nationally significant renewable energy facility in New Zealand.

4 Submissions for The Farming Stations, dated 21 January 2022. The Farming Stations are The Wolds Station Limited, Mt Gerald Station Limited, Balmoral Station (Tekapo) Limited, Glenrock Station Limited, Classic Properties Limited, Glentanner Station Limited, Sawdon Station Limited, Glenmore Station Limited, Grays Hills Station Limited, Glen Lyon Limited, Anne M Mackay and Simons Pass Station Limited.

Parties' positions as to the scope issue

Meridian and supporting parties

[7] Meridian is supported by Genesis, a s274 party to its appeal having similar interests in Waitaki Power Scheme ('WPS') assets and operations. The Farming Stations also support Meridian, seeking that the Disputed Provisions be removed entirely from PC18 in view of impacts on their farming operations.[5]

MDC

[8] MDC partially supports Meridian's application, namely to the effect that Figure 1 is out of scope and its late introduction in the hearing gives rise to an associated unfairness issue. Counsel, Mr Caldwell, summarises:[6]

> PC18 did not propose mapping. It took a rules based approach to protecting areas of significant indigenous vegetation and significant habitats of indigenous fauna. While mapping is intended to be progressed, this needs to go through a separate process. Mapping was not what PC18 was "all about".

Canterbury Regional Council

[9] Canterbury Regional Council ('CRC') takes a neutral position. Counsel records that, should the court find both the definition and Figure 1 beyond scope, CRC may have a position on any consequential changes.[7]

Director-General of Conservation

[10] The Director-General of Conservation ('DG') submits that the inclusion of a new definition of significant indigenous vegetation and habitat was both 'on' PC18 and within the scope of the DG's submission. However, the DG takes a

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5 Submissions for The Farming Stations, dated 21 January 2022.

6 Submissions for MDC, dated 21 January 2022, at [5.1].

7 Memorandum of counsel for CRC, dated 21 January 2022.

'neutral' position on Meridian's scope issue concerning Figure 1.[8]

Forest and Bird and Environmental Defence Society Inc

[11] Royal Forest and Bird Protection Society of New Zealand Incorporated ('Forest and Bird') and Environmental Defence Society Inc ('EDS') each submits that the Hearing Panel's inclusion of the Disputed Provisions was within scope, arising from submissions and evidence before it.[9]

Evidence

[12] Affidavit evidence was filed as follows:

Meridian witnesses	Catherine Bryant, Meridian Environmental Manager, dated 10 December 2021
	Susan Ruston, resource management and planning expert, two affidavits – dated 10 December 2021 and dated 31 January 2022
MDC witness	Elizabeth White, resource management and planning expert, dated 21 January 2022

[13] In addition, a bundle of MDC statutory documents on PC18 available through MDC's website and a related bundle of RMA planning instruments were compiled by Meridian according to the court's directions.

Legal principles

[14] Under s86B, RMA, the Disputed Provisions are now in legal effect as part of DV-PC18. That is not able to be overturned unless and until the Meridian appeal is fully determined (unless on an application by MDC for their suspension).

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8 Submissions for the DG, dated 21 January 2022.

9 Submissions for Forest and Bird, dated 21 January 2022, submissions for EDS dated 24 January 2022.

The relevance of first instance jurisdictional scope in the determination of appeals

[15] In determining appeals, we may confirm, amend or cancel a decision to which an appeal relates (s290(2), RMA). We have the same power, duty and discretion in respect of the appealed decision(s) as MDC and its Hearing Panel had in including the Disputed Provisions in DV-PC18 (s290(1)). That is commonly described as our *de novo* role in appeals. It is subject to some riders or qualifications, including:

(a) we must have regard to the appealed decision (and, by extension, the Hearing Panel's report);
(b) after hearing an appeal on a proposed plan (or plan change), the court may, subject to the requirements of s293, potentially make directions for changes to be made to the proposed planning instrument that can extend beyond the scope of relevant appeals.

[16] No issue is taken with what Meridian sought in its first instance primary and further submissions. Its notice of appeal plainly seeks removal of the Disputed Provisions. Our consideration of matters of scope is part of our *de novo* consideration of appeals. Insofar as we find that the Hearing Panel, and by extension MDC, significantly exceeded their jurisdiction in adding the Disputed Provisions to DV-PC18, that weighs powerfully in favour of granting Meridian's relief. That is especially if we find both limbs of *Clearwater*[10] are offended, including as to procedural unfairness.

Scope for what a plan change submission can seek

[17] Counsel address relevant legal principles as to scope and these are now well-

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10 *Clearwater Resort Limited v Christchurch City Council*, HC Christchurch AP34/02, 14 March 2003.

settled, particularly in the consideration of plan changes.

[18] By law, any submission must be "on" the notified plan change for a local authority to be able to consider it (Sch 1, cls 6, 8, 10(1); see *Motor Machinists).*[11] Allowance is given for "matters relating to any consequential alterations necessary to the proposed statement or plan arising from the submissions" and "any other matter relevant to the proposed statement or plan arising from the submissions" (Sch 1, cl 10(2)(b)).

[19] The leading authorities in the consideration of whether a submission is "on" a plan change are *Clearwater* and *Motor Machinists*. In *Clearwater*, the High Court identified that, in order for a submission to be "on" a notified proposed plan change, the submission must:[12]

(a) address the extent to which the plan change would alter the status quo; and
(b) not cause the plan change to be appreciably amended without real opportunity for participation by those potentially affected.

[20] *Motor Machinists* concerned a plan change by Palmerston North City Council to its district plan's two inner city business zones. In an appeal by the Council against a finding of the Environment Court that a submission was "on" the plan change, the High Court applied the *Clearwater* two-limb test. Kós J discussed the underlying rationale for the test. One aspect he noted was the limited procedural and substantive safeguards in Sch 1, RMA (including in terms of the required content of a plan change submission, "a very limited document"). In addition, he discussed the efficiency and cost risks that would arise were the public to be permitted to "enlarge significantly the subject matter and resources to be

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11 *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, Kós J, at [1].

12 *Clearwater,* at [66].

addressed" beyond "the original ambit of the notified proposal".[13]

[21] Kós J described the first limb of *Clearwater* as the dominant one, operating as a "filter" based on "direct connection between the submission made and the degree of notified change proposed to the extant plan". This limb could also be described as requiring that the submission "reasonably be said to fall within the ambit of the plan change".[14] He noted it as involving consideration of:[15]

(a) "the breadth of alteration to the status quo entailed in the proposed plan change"; and
(b) "whether the submission then addresses that alteration".

[22] His Honour observed that this first limb does not exclude altogether the capacity for a submission to seek an extension of zoning in a plan change. Incidental or consequential changes are permissible provided that no substantial s32 analysis would be required to ensure persons likely to be affected are adequately informed of the comparative merits of that change.[16]

[23] Kós J characterised the second limb of *Clearwater* as being militated by unfairness. He described the test as being "whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process". As for the rationale for this limb, he observed that it would not be "robust, sustainable management of natural resources" to "override the reasonable interests of people and communities by a submissional side-wind".[17] Similar observations about the importance of giving real opportunity to

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13 *Motor Machinists*, at [79].
14 *Motor Machinists,* at [81].
15 *Motor Machinists,* at [80].
16 *Motor Machinists,* at [81].
17 *Motor Machinists,* at [82].

participate are made by the High Court in *Mackenzie v Tasman District Council*.[18]

[24] For completeness, there is a helpful discussion of principles in the High Court decision in *Albany North Landowners*[19] concerning the Auckland Unitary Plan. This includes analysis of *Motor Machinists* and other relevant authorities. The important point of distinction, however, is as noted by Whata J. *Albany North Landowners* was concerned with the proposed Auckland Unitary Plan ('PAUP') planning process which is "far removed from the relatively discrete variations or plan changes under examination in *Clearwater, Option 5* and *Motor Machinists"*. His Honour recorded that the "scope for a coherent submission being 'on' the PAUP in the sense used by William Young J [in *Clearwater*] was therefore very wide".[20]

Scope of what a territorial authority can change from a notified plan change

[25] Once a territorial authority notifies a proposed plan change, it must notify a variation if it seeks to substantially change its ambit. Otherwise, any changes cannot substantially extend beyond submissions in terms of their scope. Clauses 16 and 16A, Sch 1 enable minor alterations and variations. Subject to those exceptions, the testing of notified planning instruments under Sch 1 is in terms of what submissions seek in regard to what is notified. Clause 8B and 8C Sch 1, RMA require a hearing into submissions on a proposed plan change, except where no person seeks to be heard (in which case, the local authority must consider submissions). Clause 10 Sch 1 requires a local authority to give "a decision on the provisions and matters raised in submissions, whether or not a hearing is held".

The issues

[26] The issues can be summarised:

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18 *Mackenzie v Tasman District Council* [2018] NZHC 2304 at [105].

19 *Albany North Landowners v Auckland Council* [2017] NZHC 138.

20 *Albany North Landowners* at [129]. We have not discussed *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1. In that case, Ronald Young J applied *Clearwater*.

(a) what breadth of alteration did NV-PC18 intend to the pre-existing District Plan?

(b) did any submission(s) give scope to allow the Hearing Panel to include the Disputed Provisions in NV-PC18? In particular, did any submission(s):

(i) ask for the Disputed Provisions or similar?

(ii) address the extent to which NV-PC18 would alter the pre-existing District Plan? In particular, was there a direct connection between any submission and the Disputed Provisions?

(c) was the inclusion in DV-PC18 of the Disputed Provisions an appreciable amendment to NV-PC18 without there having been real opportunity for participation by those potentially affected?

Legal submissions as to scope

[27] As we largely find in favour of Meridian and the supporting parties' positions, we do not need to traverse their submissions in any detail.

MDC and CRC

[28] Mr Caldwell notes that NV-PC18 was not promulgated on the basis that significant indigenous vegetation and habitats of fauna would be identified or mapped.[21]

[29] Counsel for CRC points out that nor is it a required as a method for giving effect to the CRPS.[22]

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21 Submissions for MDC, dated 21 January 2022, at [2.17].

22 CRC memorandum, dated 21 January 2022, at [3].

Forest and Bird and EDS

[30] Forest and Bird submits that the Hearing Panel had scope for including the Disputed Provisions in the DV-PC18. That is notwithstanding there was no specific direct submission on the inclusion of Figure 1 within a definition of significant indigenous vegetation. Mr Jennings submits that the Panel's inclusion of Figure 1 in the definition arose from submissions and evidence. He referred to Forest and Bird and others as having sought a definition and mapping of significant indigenous vegetation and significant habitats of indigenous fauna.[23]

[31] EDS makes a similar submission. Mr Enright and Ms Woodhouse argue that EDS's NV-PC18 submission was unambiguous in requesting that significant indigenous vegetation and habitats within the Mackenzie Basin be "recognised" and identified by being mapped. They say it was therefore clear that the inclusion of a map identifying the remaining, undeveloped corridor of indigenous biodiversity value (and which, by virtue, included land utilised for the WPS) was intended. Counsel refer to EDS's submission point on mapping/sites of natural significance in further submissions, including the further submissions of Meridian and Maryburn Station Ltd.[24]

The ambit of change to the Plan intended by NV-PC18

The pre-existing District Plan regime

[32] The pre-existing District Plan was summarised in the so-termed 's42A report'[25] to the Hearing Panel as follows:[26]

> 18. The current MDP became operative in 2004. It contains provisions relating

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23 Submissions for Forest and Bird dated 20 January 2022, at [16].

24 Submissions for EDS, dated 24 January 2022, at [5].

25 This is a report on submissions and issues prepared under s42A, RMA. The author was Ms White, an experienced planning consultant, and witness for MDC in this matter.

26 Bundle, s42A report, at [18]-[21].

to indigenous biodiversity in the Rural Section (Section 7). Section 7 is split into two parts, one containing an issue, objective and policy framework and the other a set of rules. Within the objectives and policies part, there is one overarching objective (Rural Objective 1) that pertains to indigenous ecosystems, vegetation and habitat and three related policies (Rural Policies 1A, 1B and 1C). There are also other policies, for example those pertaining to pastoral intensification and agricultural conversion, that include reference to indigenous vegetation, but are more focussed on landscape values.

19. The MDP also currently identifies, in Appendix I, Sites of Natural Significance (SONS). These are described as areas considered to be significant in terms of s6(c), as well as geological and geomorphic sites considered to be outstanding natural features in terms of s6(b) and areas adjoining or encompassing lakes, streams, rivers and wetlands considered to contribute to the natural character and functioning of these water bodies in terms of s6(a). There are currently a range of provisions that apply to SONS, including, but not limited to indigenous vegetation clearance rules.

20. As explained further by Mr Harding, the SONS listed in the MDP were identified in the 1990s and appear to be based on desk top analysis only. In his view, they are inadequate and incomplete. In terms of the s6(c) areas, I also note that the identification of these was undertaken prior to the Canterbury Regional Policy Statement 2013 (CRPS). About 30% of the Appendix 1 SONS have been reviewed, and assessed against the CRPS criteria, as part of an ongoing review programme. However, this review has not been formalised through amendments to Appendix 1 of the MDP.

21. The current rule framework (Rule 12) generally provides for clearance of indigenous vegetation up to a specified threshold as a permitted activity. The threshold varies depending on either the location of the clearance or the type of vegetation being cleared. There are also exemptions to these. These are set out in the table below … .

Directions given by the Canterbury Regional Policy Statement 2013

[33] District Plans are required to give effect to regional policy statements

(s75(3)(c), RMA). The CRPS includes various policies in response to s6(c), RMA as to recognising and providing for (as a matter of national importance):

> The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.

[34] In particular CRPS Obj 9.2.3 and Policy 9.3.1 provide as follows:

> **9.2.3 Protection of significant indigenous vegetation and habitats**
>
> Areas of significant indigenous vegetation and significant habitats of indigenous fauna are identified and their values and ecosystem functions protected.
>
> **9.3.1 Protecting significant natural areas**
>
> 1. Significance, with respect to ecosystems and indigenous biodiversity, will be determined by assessing areas and habitats against the following matters:
>
>   a. Representativeness
>
>   b. Rarity or distinctive features
>
>   c. Diversity and pattern
>
>   d. Ecological context
>
>   The assessment of each matter will be made using the criteria listed in Appendix 3.
>
> 2. Areas or habitats are considered to be significant if they meet one or more of the criteria in Appendix 3.
>
> 3. Areas identified as significant will be protected to ensure no net loss of indigenous biodiversity or indigenous biodiversity values as a result of land use activities.

[35] The related explanation to Obj 9.2.3 records:

> One of the major impediments to their protection is the limited information available for their identification and requirements for protection. Many areas are already protected but there are other areas of significant vegetation and habitats that remain at risk.

[36] The CRPS does not require that district plans comprehensively and completely identify (whether by mapping or otherwise) all areas of significant indigenous vegetation and significant habitats of indigenous fauna and their values. Rather, it envisages an incremental response that allows for the gathering of information on the basis of case-by-case assessments. For instance:

(a) the explanatory text for CRPS Policy 9.3.1 includes:

> While areas of significant indigenous vegetation and significant habitats of indigenous fauna are often identified in plans, it is difficult to ensure that all significant sites are included, because of issues with access and ecosystem information. The methods therefore seek that as a minimum, territorial authorities will include indigenous vegetation clearance rules that act as a trigger threshold for significance to be determined on a case by case basis.

(b) related CRPS 9.4 Anticipated Environmental Results states:

> 1. There are more areas of significant indigenous vegetation and significant habitats of indigenous fauna that are identified and protected.

The intended ambit of NV-PC18

[37] Partly in response to the CRPS, MDC notified NV-PC18 as a new stand-alone chapter on indigenous biodiversity. This was to replace the former general vegetation clearance rules in the Rural Zone.[27]

[38] It is common ground that NV-PC18 was not intended as a complete or

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27 Submissions for Meridian, dated 15 December 2021, at [22].

comprehensive response to the CRPS. As the s42A report explained, it was notified in the early stages of a full District Plan review and was intended to form part of the first stage of the review.[28]

[39] Part of the review was a structural reorganisation that did not substantially change the reorganised provisions. The Plan's main indigenous biodiversity provisions were moved from the Rural Zone (Section 7) into a separate section specifically focussed on indigenous biodiversity (Section 19). Provisions that were simply reorganised were notated to signal they were not entirely new provisions. These included the objective and policy suite for indigenous biodiversity and most parts of the Plan's r 12 (i.e. those parts of this rule on vegetation clearance that are specifically limited to indigenous vegetation).[29]

[40] The s42A report explained the ambit of substantive changes that NV-PC18 sought to make to the status quo District Plan.

[41] Leaving aside the bespoke regime it provided for the WPS, these included:

(a) two new objectives (2 and 3), in addition to the existing objective transferred from Section 7 (now proposed Obj 1):
    (i) new Obj 2 as to the management of development activities to ensure the maintenance of indigenous biodiversity, protect and/or enhancement of significant indigenous vegetation and riparian areas;
    (ii) new Obj 3 as to support and encouragement of the integration of land development proposals with comprehensive identification, and protection and/or enhancement of values associated with significant indigenous biodiversity, through the mechanism of Farm Biodiversity Plans.
(b) new Policies 3 – 6, and 8 and 9, in summary to the following effect:

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28 Bundle, s42A report, at [23].

29 Bundle, s42A report, at [24], [26].

(i) to provide for Rural development, including indigenous vegetation clearance and pastoral intensification, to occur in a way or at a rate that provides for no net loss of indigenous biodiversity values in areas identified as significant;

(ii) to ensure that land use activities including indigenous vegetation clearance and pastoral intensification do not adversely affect any ecologically significant wetland;

(iii) to consider a range of mechanisms for achieving protection of significant indigenous vegetation and significant habitats of indigenous fauna, including avoidance, remediation, mitigation or offsetting of adverse effects, and to secure that protection through appropriate instruments including resource consent conditions (if approved);

(iv) to specify criteria for offsetting; and

(v) to provide direction for the role and purpose of Farm Biodiversity Plans as mechanisms for "integrated with comprehensive identification, sustainable management and long-term protection of values associated with significant indigenous vegetation and significant habitats of indigenous fauna" and require comprehensive and expert identification of significant indigenous biodiversity values as part of that Plan, and to ensure that any development proposed under that Plan is integrated with protection for those significant values".

(c) a new rules-based framework to:[30]

(i) classify vegetation clearance in existing sites of natural significance ('SONS') as a non-complying activity;

(ii) govern vegetation clearance for the operation and maintenance of the WPS as a discrete category of activity so that resource consent would only be required for upgrades and refurbishment requiring vegetation clearance; and

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30 Submissions for Meridian, dated 15 December 2021, at [22].

(iii) include a restricted discretionary consenting pathway for the clearance of indigenous vegetation occurring outside the WPS by employing farm biodiversity plans to identify and map areas of "significant indigenous vegetation and significant habitats of indigenous fauna".

[42] As for the farm biodiversity plans regime, the s42A report explained:[31]

> The Farm Biodiversity Plan (FBP) process is intended to provide a consenting pathway for the integration of land development proposals (that involve indigenous vegetation clearance) with management of indigenous biodiversity across a whole property. The FBP would specifically include assessment and identification of indigenous biodiversity values and as such would provide a process for the identification of areas of significance, assessed against the criteria in the CRPS.

[43] As noted, NV-PC18 also introduced a bespoke regime of objectives, policies and rules for the direction for the WPS.

What was and was not in ambit in terms of s6(c), RMA and the CRPS

[44] Importantly, in terms of protecting areas of significant indigenous vegetation and significant habitats of indigenous fauna, the ambit of NV-PC18:

(a) applied to already-mapped SONS; but
(b) did not extend to the mapping of any new areas of significant indigenous vegetation and significant habitats of indigenous fauna.

[45] This was explained in the s42A report as follows:[32]

> 75. As noted earlier, the MDP currently identifies SONS, which are areas referred to in s6(a)(b) and (c) of the RMA. However, in terms of areas to

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31 Bundle, s42A report, at [26].
32 Bundle, s42A report, at [75]-[78].

which s6(c) would apply, not all significant areas within the District are listed as SONS. Mr Harding notes his opinion that much of the undeveloped land on depositional landforms within the Mackenzie Basin has significant ecological values, and notes that the currently identified SONS only includes a small portion of that undeveloped land.

76. The operative rule package generally provides for clearance of indigenous vegetation up to a specified threshold as a permitted activity, with the threshold being related to either the location of the clearance (including within SONS) or the type of vegetation being cleared.

77. Under PC18, Appendix I, which lists the SONS, is retained, but PC18 does not propose to add to the list of SONS, or to continue with managing indigenous vegetation clearance by type/location. Instead, the proposed approach would require resource consent for any clearance of indigenous vegetation (except that specifically identified as a permitted activity), with the consent process used to assess and determine significance of indigenous biodiversity. The FBP process, provided for as a restricted discretionary activity across a farm area, would require an assessment of all areas of indigenous biodiversity, with management of both significant and non-significant areas addressed in the FBP.

78. The proposed PC18 rule package would also allow for clearance of any indigenous vegetation up to 5000m^2 within a site, over a five-year period as a restricted discretionary activity. The matters for discretion would allow for consideration of the significance of the vegetation. Clearance of over 5000m^2 (without a FBP) would be non-complying, regardless of its significance.

[Footnotes omitted]

[46] This ambit was generally summarised in the public notice that called for submissions:[33]

… inserts Section 19 – Indigenous Biodiversity into the District Plan, which

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33 Bundle, Public Notice p 1.

> focuses on managing Indigenous Biodiversity. Several objectives and policies have been transferred from Section 7 – Rural, into this new Section. Revised rules controlling indigenous vegetation clearance are included in the new Section 19, and the existing indigenous vegetation clearance rules in Section 7 – Rural have been deleted.
>
> Proposed Rules 1.1 – 1.3 do not apply indigenous vegetation clearance associated with the Waitaki Power Scheme, which is managed by Rules 2.1 – 2.3, which only apply to the Waitaki Power Scheme.

The Disputed Provisions were outside the intended ambit of NV-PC18

[47] As described in the s42A report to the Hearing Panel, NV-PC18 was the first step in an intended staged response to giving effect to the CRPS.

[48] In fulfilment of its statutory planning authority responsibilities, MDC adjudged how far NV-PC18 would go as a first step in changing its Plan to give effect to the CRPS and respond to s6(c). It did so in accordance with the CRPS's intentions.

[49] The intended ambit of NV-PC18 included providing a new policy and rules framework including for mapping of SONS. However, it did not seek to define or map areas of significant indigenous vegetation and significant habitats of indigenous fauna. MDC approached its s32 cost/benefit/risk evaluation on a similarly deliberately confined basis, and duly reported on that. It framed its public notice similarly so as to assist the making of informed submissions.

[50] In essence, the Disputed Provisions rendered a very large area of the Mackenzie Basin (as shown in Figure 1) the subject of the updated Plan regulatory controls of land use and development. As noted, that included the strategic WPS power generation assets of Meridian and Genesis and large areas of farm land of The Farming Stations landholders.

[51] As such, we find that the Hearing Panel's inclusion of the Disputed

Provisions went well beyond the ambit of NV-PC18.

The Disputed Provisions did not fairly arise from submissions on NV-PC18

Submissions and further submissions on NV-PC18

[52] No submission sought what the Panel recommended in terms of the Disputed Provisions. As we discuss shortly, the Panel instead drew from expert evidence, particularly as called by Forest and Bird.

[53] In her affidavit, planner Susan Ruston (a witness for Meridian) offers an analysis of the primary and further submissions on NV-PC18 that sought, or related to, a definition of 'significant indigenous vegetation'. We accept the reliability of her evidence on these matters and draw in particular from her summary:[34]

> [47] The following submissions sought or related to a definition of significant indigenous vegetation:
>
> i) Maryburn Station sought council consultation with landowners to identify "*significant indigenous vegetation*";
>
> j) Ms Carol Burke sought that all existing indigenous biodiversity in the Mackenzie Basin be deemed significant;
>
> k) Central South Island Fish and Game supported Policy 1 of PC18 which requires that sites of significant indigenous vegetation or habitat be identified in accordance with the CRPS;
>
> l) Mt Gerald Station and The Wolds Station sought a new definition for "*significant indigenous vegetation"*, with the definition being "*means any indigenous vegetation that meets the criteria set out in Appendix Z*", where Appendix Z "*would read similarly to that [of] appendix 3 to the CRPS but*

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34 S Ruston affidavit sworn 10 December 2021, at [47] and [48]. We have maintained Ms Ruston's subparagraph lettering for ease of reference.

modified to relate specifically to the Mackenzie Basin rather than Canterbury region wide". No content for Appendix Z was offered by the submitters;

m) The Department of Conservation sought a new definition of "*Significant indigenous vegetation or habitat*", with the definition being "*indigenous vegetation or habitat of indigenous fauna which meets the criteria listed in the Canterbury Regional Policy Statement*"; and

n) The Environmental Defence Society Inc (EDS) did not seek the addition of a definition of significant indigenous vegetation and significant habitats of indigenous fauna. Rather EDS sought the addition of a definition of "*Site of Natural Significance*". The definition sought was "*SONS means significant sites of indigenous vegetation and fauna habitat identified in District Plan maps. Not all sites qualify as significant under s6(c) RMA and Policy 9.3.1 RPS in the District have been mapped. Other sites will be identified on a case-by-case basis'*". With this, EDS sought that the "*entire remaining undeveloped corridor*" be identified as a SONS, and identified this area as their Attachment A. The attachment to their submission follows, and differs substantively from Mr Head's Map 2. …

[48] Further submissions relating to a definition of significant indigenous vegetation consisted of the following:

a) EDS supported Ms Burke's submission that all existing remaining indigenous biodiversity in the Mackenzie Basin is significant;

b) Meridian opposed the submissions of the Department of Conservation, Mt Gerald Station and The Wolds Station that sought a definition for significant indigenous vegetation;

c) Mt Gerald Station supported in part the Department of Conservation's submission to define significant indigenous, with the limitation of support relating to reliance on Appendix 3 of the CRPS; and

d) The Department of Conservation opposed The Wolds submission

> that "*Council in consultation with individual landowners should identify "significant indigenous vegetation*"" and considered that significant indigenous biodiversity should be determined by applying the criteria in the CRPS.

[54] Ms Ruston does not refer to the Forest and Bird submission. It addressed PC18's objectives, Policies 1 – 9, and rr 19.1.1, 19.2.2 and 19.3.2 and indicated that PC18 had not done enough in response to s6(c), RMA. It did not, however, seek a definition of 'significant indigenous vegetation'.

[55] The EDS NV-PC18 submission is a focus of some scope arguments. As Ms Ruston fairly summarised, it did not seek a definition of 'significant indigenous vegetation'. It identified a concern that NV-PC18 failed "to identify all SONS" and sought, by way of relief:

> Mapping of all SONS including mapping of the Mackenzie Basin's remaining contiguous/connected areas of biodiversity (and geomorphological and landscape) value as a SONS.

[56] Some attention is drawn to the fact that MDC's statutory Summary of Submissions did not fully upload a map included in EDS's submission that "identified the additional areas of significance in the Mackenzie Basin" (including the WPS).[35] The Summary is an important reference point for those considering making further submissions.[36] However, we are satisfied this error did not give rise to a relevant procedural issue as the Summary nevertheless described what EDS sought as:[37]

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35 Meridian Bundle, EDS submissions on PC18 p 105, submissions for EDS dated 24 January 2022, at [5], [21]-[25].

36 A copy of the map as attached to EDS's submission is in Annexure 2. The map as uploaded on MDC's summary of submissions is in Annexure 3. Submissions for MDC, dated 21 January 2022.

37 Submissions for MDC dated 21 January 2022, at [3.8], Meridian memorandum dated 11 October 2021, at [10], Bundle, PC18 Summary of Submissions pp 366, 368.

> Need to map all SON's, need to recognise overlap between biodiversity, ecological and landscape values, need strong policy showing rules and other parts of the Plan. … Amend and include map of biodiversity/ecological connectivity.

The Panel's findings do not properly address submissions

[57] Submissions on PC18 were heard under delegation for MDC by a panel of experienced independent commissioners.

[58] Their Report to MDC briefly observes that the Panel agrees with submitters that it would improve PC18 if the term "significant indigenous vegetation and significant habitats of indigenous fauna" was defined in the Plan. However, this part of the Panel's Report does not refer to any relief sought in any particular submissions as underpinning their recommendation for the Disputed Provisions.[38]

[59] There is an analysis of how the Panel's recommendations respond to submissions in App A to their Report.[39] This refers to accepting in part the EDS submission. However, as we have noted, this did not seek relief in the nature of the Disputed Provisions.

[60] We do not accept counsel's submission that the EDS map provided sufficient scope for the Disputed Provisions. That map materially differed in purpose and extent from Mr Head's map (and, therefore, Figure 1). For instance, the areas in the Mackenzie Basin in Figure 1 that comprise alluvial outwash gravels and moraines are more extensive than the areas shown on the EDS map. Moreover, the EDS map shows developed areas, whereas Figure 1 does not.

[61] App A also refers to accepting in part a submission by Maryburn Station requesting the identification of "significant indigenous vegetation". However, in a substantive sense, the Panel's recommendation for the Disputed Provisions was contrary to Maryburn Station's requested relief. Rather than asking for a definition

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38 Bundle, Appendix A 12 April.

39 Bundle, Appendix A 12 April.

and associated Figure 1 to be added to NV-PC18, this submitter sought that MDC consult with landowners to identify "significant indigenous vegetation".[40]

[62] Insofar as App A is suggesting that the Panel's recommendation for the Disputed Provisions accepts or accepts in part submissions by Mt Gerard (no.16) and The Wolds (no. 17), we see a similar difficulty. Respectfully, we find Ms Ruston's analysis of these submissions more accurate. It is consistent with what those parties, as part of The Farming Stations group of parties, say, namely that the Disputed Provisions do not fairly and reasonably arise from NV-PC18 or from any submission. As we later discuss, we also accept those parties' submission that "no party was given fair opportunity to consider and address such additions and could not have reasonably foreseen that the additions would form part of" DV-PC18.[41]

[63] The test of scope is not how Forest and Bird puts it. In particular, it is not sufficient that something arose from submissions or evidence in order for this limb of *Clearwater* to be satisfied.

[64] Forest and Bird's submission addressed PC18's objectives, Policies 1 – 9, and rr 19.1.1, 19.2.2 and 19.3.2 and indicated that PC18 had not done enough in response to s6(c), RMA. However, it did not disclose any intention to pursue a definition of "significant indigenous vegetation and significant habitats of indigenous fauna" let alone one that incorporated Mr Head's map. Mr Head's evidence and offered map, rather than being to advance the relief pursued by Forest and Bird's submission, went materially beyond it. The Panel appears to have erred in conflating his opinion with what Forest and Bird in fact pursued in the submission they made on NV-PC18.

[65] The generally-framed relief expressed by Forest and Bird and EDS could not, in any case, be legitimately read to allow for significant expansion of the ambit

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40 Bundle, Appendix A 12 April, p 1437.

41 Submissions for The Farming Stations, dated 21 January 2022, at [15].

of NV-PC18 according to the limbs of the *Clearwater* test.

[66] Nor was it open to the Panel to have read any other submission on such an expansive basis.

[67] Insofar as the Panel purported to attribute their recommendation for the Disputed Provisions to any relief sought in any submission, we find that untenable.

[68] We accept The Farming Stations' characterisation namely that the Disputed Provisions do not fairly and reasonably arise from any submission made on NV-PC18.

The Panel erred in how it drew from submitter representations and expert evidence

[69] The Panel's reasons for recommending the Disputed Provisions predominantly concern the expert evidence that was tendered by submitters. This is in particular in the following extract (the final sentence referring to Figure 1 highlighted for convenience):[42]

> …
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> 49. We note from the evidence of Mr Harding, Dr Susan Walker and Nicholas Head that the Mackenzie Basin is the largest of New Zealand's inter-montane basins and supports extensive montane glacial and fluvio-glacial landforms (moraines and outwash terraces) which support distinct indigenous ecosystems (some of which are nationally threatened), which are not replicated to this extent anywhere else in the country.
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> 50. We also note from the evidence of Dr Walker that the Environment Court has found that the Mackenzie Basin Outstanding Natural Landscape (ONL)

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42 Submissions for MDC, dated 21 January 2022, at [3.1] referring to G Rae, I Boothroyd and R van Voorthuysen *Proposed Plan Change 18 to the Mackenzie District Plan Report and Recommendations of the Hearing Commissioners* (12 April 2021).

is a significant natural area in terms of CRPS Appendix 3 criterion 4. Dr Walker also considered that CRPS Appendix 3 criterion 6 and 8 were met. Dr Walker concluded that the remaining indigenous ecosystems and plant communities of the Mackenzie Basin floor were irreplaceable, and their clearance would cause permanent loss that could not be offset or compensated for.

51. The evidence of Mr Head advised that where not intensively developed, these moraine and outwash ecosystems supported significant ecological values when assessed in accordance with the criteria in the CRPS. He advised that the moraine and outwash ecosystems are classified as originally rare and their extent and variety is not replicated elsewhere in New Zealand. Mr Head considered that those ecosystems were poorly protected and were threatened, and consequently, they were a national priority for protection.

52. We find the evidence of Dr Walker and Mr Head to be persuasive and conclude that the PC18 definition of "significant indigenous vegetation and significant habitats of indigenous fauna" should additionally refer to those moraine and outwash terrace landforms. **To assist with the implementation of that addition to the definition we find that the map showing the extent of naturally rare ecosystems (moraines and inland alluvial outwash gravels) in the Mackenzie Basin (Map 2) in Appendix 5 of Mr Head's evidence should be included in PC18.**

[70] Mr Head is an ecologist and was called by Forest and Bird as an expert witness. He produced Figure 1[43] in support of his opinion to the Panel that the entire mapped area was a RMA, s6(c) resource.[44] He recommended that areas outside of the "improved pasture" areas be treated as having significant ecological values. To that end, he offered the Panel his assessment of the ecological values in the Mackenzie Basin and referred to what is now Figure 1 as depicting the rare glacial derived ecosystem in the Mackenzie Basin. This was the first time Figure 1

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43 Referred to as Map 2 in Appendix 5 in his evidence.

44 Meridian memorandum dated 11 October 2021, at [13]. Figure 1 was included as Map 2 in Appendix 5 to the evidence of Mr Head presented at the hearing on behalf of Forest and Bird.

was introduced in the PC18 process.[45]

[71] We note that Mr Head did not recommend the insertion of a new definition of "significant indigenous vegetation and significant habitats of indigenous fauna" or inclusion of Figure 1 in that definition as a method to identify such areas.[46]

[72] The Panel also heard from another ecologist, Dr Susan Walker. She was called by EDS and gave evidence focussing on an identification and mapping exercise. However, she did not go so far as to recommend the insertion of a new definition of "significant indigenous vegetation and significant habitats of indigenous fauna" or the inclusion of Figure 1 as a method to identify such areas.[47]

[73] In any case, Mr Head's 'Figure 1' (as adopted by the Panel) materially differed in both intent and geographic coverage from the map included as part of the EDS submission.

[74] As noted, those findings in the Report are prefaced by an observation that the Panel agreed with submitters that it would improve PC18 if the term "significant indigenous vegetation and significant habitats of indigenous fauna" was defined in the Plan. We infer from the Panel's reasoning that they may have wrongly assumed that the true scope of relief in a submission can be supplemented by what was presented to them during the hearing, whether as representations or evidence.

[75] In any case, the Panel went well beyond the scope of relief pursued in submissions or able to be pursued in view of the intended ambit of NV-PC18. The evidence the Panel heard may have given them capacity to make non-recommendatory observations as to the importance of the Plan going beyond the ambit of NV-PC18. Conceivably, those observations could have encompassed the

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45 Submissions for Genesis, dated 21 January 2022, at [13]. Bundle, Forest and Bird evidence.

46 Submissions for Genesis, dated 21 January 2022, at [13].

47 Submissions for Genesis, dated 21 January 2022, at [10]-[12].

Panel's impression of Mr Head's Figure 1 (albeit in the limited context in which the Panel received that evidence). Such observations from evidence tendered to a commissioned hearing panel can serve to assist the planning authority, as delegator, in a purely information-gathering sense. However, the Panel did not have jurisdiction as delegate of MDC's statutory submission hearing function, to recommend in effect a material expansion on the ambit of NV-PC18, namely by the introduction of a definition tied to Figure 1 as offered in evidence by Mr Head. Nor did MDC have jurisdiction to have accepted the Panel's recommendation to do so.

Real opportunity for participation by those affected was unfairly denied

[76] For the reasons we have given, the inclusion of the Disputed Provisions in the DV-PC18 was an appreciable amendment to NV-PC18 without real opportunity for participation by those potentially affected.

[77] We accept Ms Bryant's evidence that, had Meridian been aware the Disputed Provisions were 'on the table', it would have presented and prepared for a different case.[48]

[78] The addition of the Disputed Provisions into DV-PC18 on the Hearing Panel's recommendation directly impeded Meridian and other submitters from fairly contesting matters. In Meridian's case, it meant that without due process, the operating easement land set aside by the Crown for the WPS was given RMA, s6(c) status. That was a failure to give effect to the process directions in the CRPS for implementing Policy 9.3.1. Genesis was similarly prejudiced.

[79] Nor did the Panel follow the process specified by the National Policy Statement for Renewable Electricity Generation 2011 ('NPS-REG'). In effect, the NPS-REG requires due scrutiny of the impacts of such plan provisions, in this case including for the WPS and the various farming operations of The Farming

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48 C Bryant affidavit, sworn 10 December 2021, at [28].

Stations.

[80] The prejudicial impacts for The Farming Stations were different, in that they were denied due engagement as the CRPS anticipates. In effect, as Ms White informed the Panel, the blanket determination approach they effectively embarked upon was inappropriate as mapping needs to go through a process that includes the opportunity for landowner input.

[81] It is not an adequate answer to those serious process failings for the Disputed Provisions to be tested through *de novo* appeal processes. One reason for that is that the scope of submissions or further submissions limits the scope of permissible appeal.

[82] Furthermore, the requirement in s290A to have regard to the first instance planning decision reflects the importance of efficacious first instance processes. It is part of MDC's statutory responsibility, as planning authority, to author and notify proposed plan changes. That includes responsibility for deciding on the ambit of what it notifies and undertaking and reporting on its s32 benefit/cost/risk evaluation of its proposal and other options for consideration. It also included a quasi-judicial responsibility for ensuring due public notification of its plan change proposal for submission and fair hearing of submitters, including by its delegates. Appeal rights and *de novo* appeal processes are designed in part to deal with procedural unfairness dimensions of first instance processes. But, as is well established, they do not put the court in any supplementary planning authority capacity. The efficacy of plans and plan-making processes must start with the due exercise by a local authority of its plan change authoring, hearing and decision-making roles.

Matters as to the EDS map

[83] Leaving aside Meridian's submissions, counsel for MDC records that there would be an arguable basis for finding scope to consider the inclusion of EDS's map in the Plan if the court were to determine that a submission seeking the

mapping of SONS was "on" PC18.[49] We make no determination of this matter, as it is not called for as part of what we must determine at this stage concerning the Meridian appeal.

Outcome and directions

[84] That leads us to find that the Disputed Provisions cannot stand. Specifically, that finding favours Meridian's relief to the extent that it finds the following provisions of DV-PC18 beyond permissible scope and hence inappropriate:

(a) clause c) of the definition of 'Significant indigenous vegetation and significant habitats of indigenous fauna";
(b) the associated Figure 1; and
(c) those parts of related provisions insofar as they reference or apply that clause of the definition and/or Figure 1.

[85] Those findings also favour The Farming Stations' case insofar as they seek that the Disputed Provisions should be removed.

[86] Ms Ruston's observation that clause c) of the definition is severable is noted.[50] However, this decision stops short of directing that changes now be made to DV-PC18. Determinations and directions about that would be premature at this stage in that they need to be properly informed by determinations concerning other provisions in issue in the appeals.

[87] In those terms, this decision leaves reserved the extent if any to which it may be appropriate to incorporate a form of mapping in relation to SONS as part

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49 Submissions for MDC, dated 21 January 2022, at [2.21]-[2.23]. Counsel recorded that this would not itself provide scope for the inclusion of Figure 1 in the definition or within the Plan in general.

50 S Ruston affidavit sworn 31 January 2022, at [22],

of determination of the EDS appeal.

[88] The appropriate next step is to make directions to allow for expert conferencing and any requested facilitated mediation to be undertaken. Parties are directed to confer about that and MDC, **by Friday 1 July 2022,** to file a memorandum (preferably a joint memorandum) proposing timetabling directions. Leave is reserved to seek further or amended directions, by memorandum filed following inter-party consultation.

[89] Costs are reserved.

For the court

JJM Hassan
Environment Judge

Annexure 1

Figure 1 as incorporated in DV-PC18 by the hearing panel

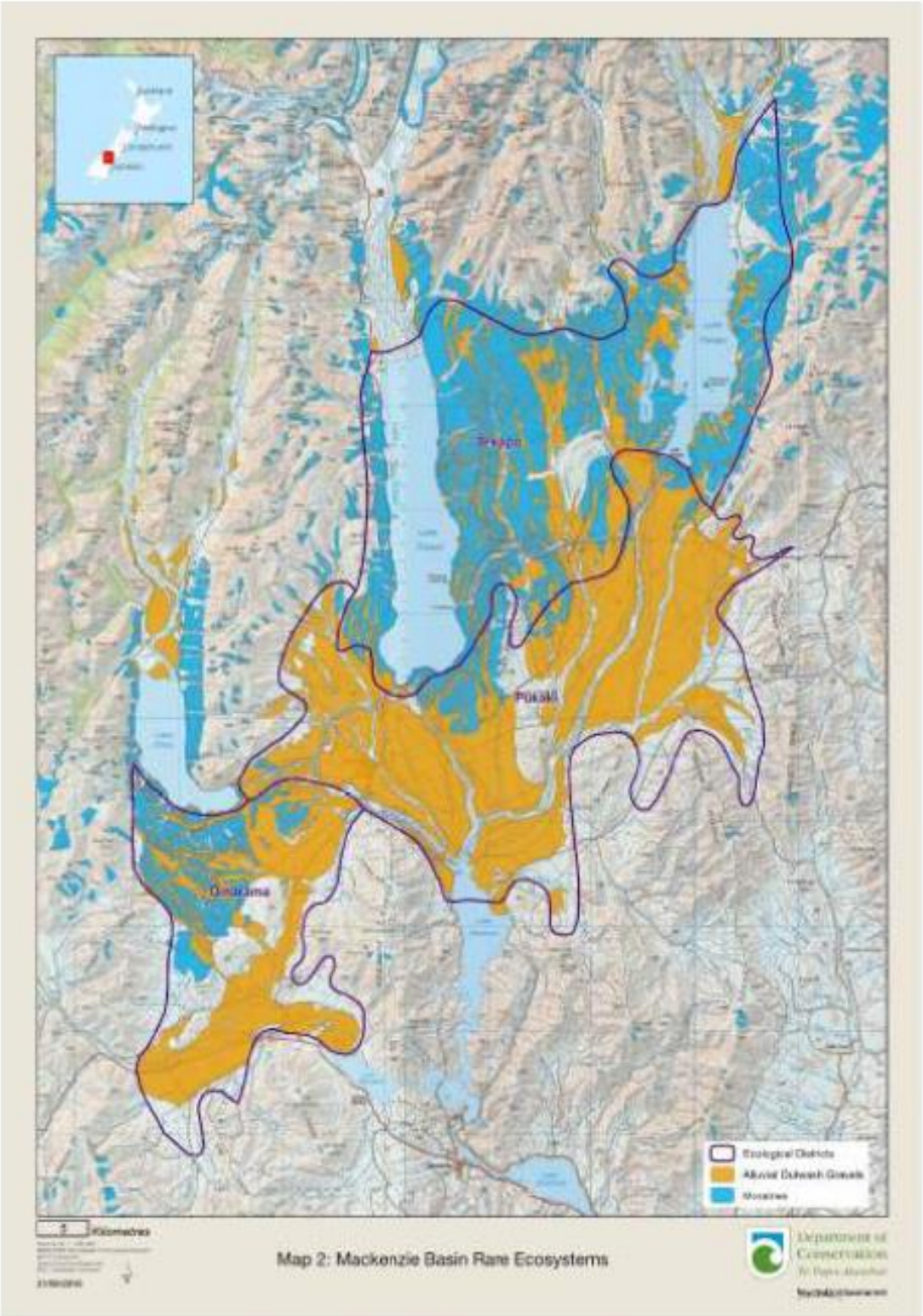
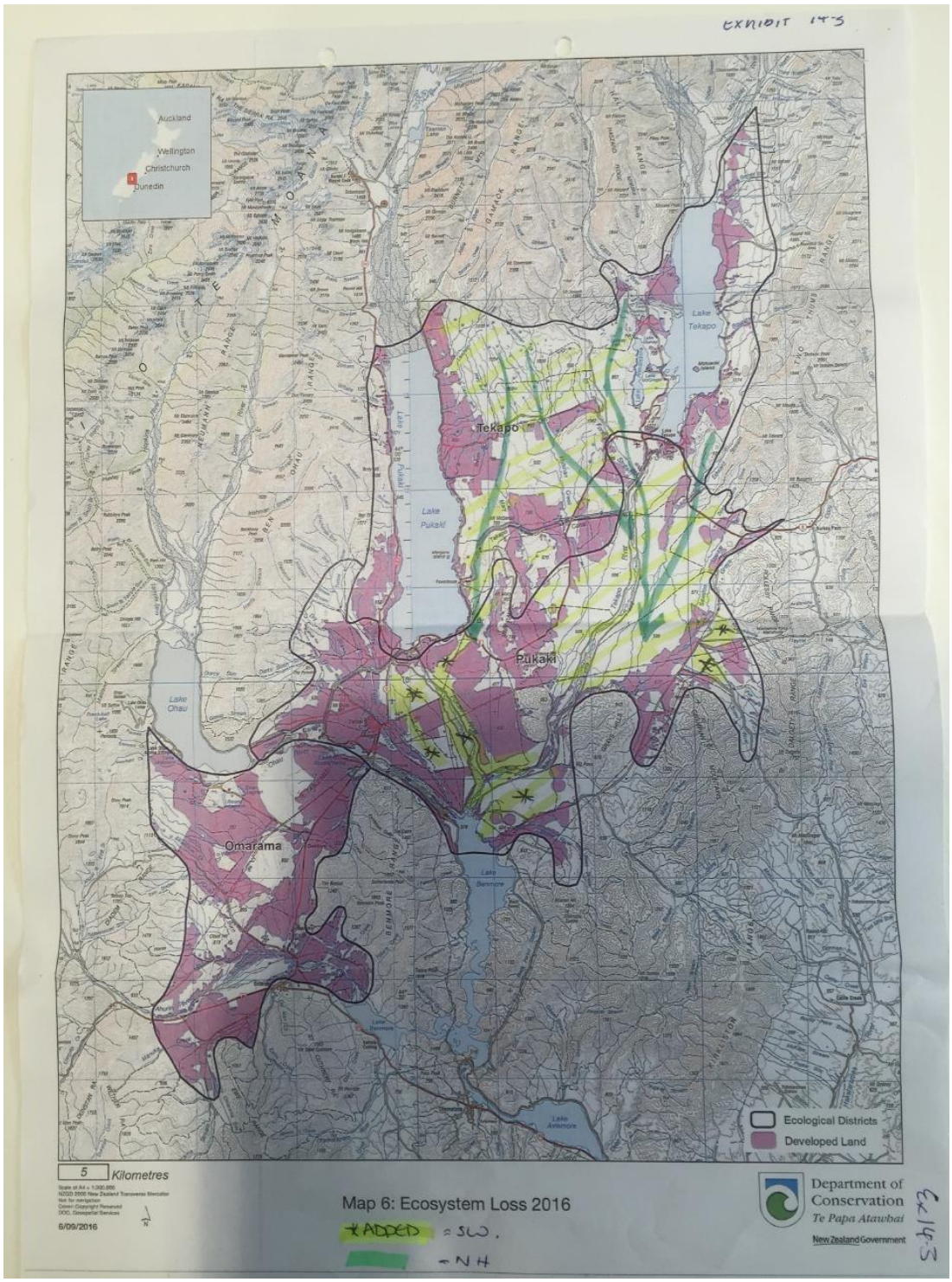


Figure One: Mackenzie Basin alluvial outwash and moraine ecosystems

Annexure 2

The full plan attached to EDS's submission on PC18 dated 9 March 2018 that should have been uploaded to MDC's website



Annexure 3

The plan attached to EDS's submission on PC18 dated 9 March 2018, as uploaded on MDC's website