

Appendix E. Extracts from legal advice provided by Buddle Finlay relevant to the NPS-IB

Clause 3.8(6) of the National Policy Statement on Indigenous Biodiversity (NPS-IB)

Question from officers

The hearings panel asked officers to provide an assessment of PC49 and the Variation against the NPS-IB. The legal advice we are seeking specifically relates to whether clause 3.8 (6) of the NPS-IB has been triggered by PC49 and the Variation.

The NPS-IB came into force on 4 August 2023, and Clause 3.8 (6) of the NPS-IB states that:

“If a territorial authority becomes aware (as a result of a resource consent or any other means) that an area may be an area of significant indigenous vegetation or significant habitat of indigenous fauna that qualifies as an SNA, the territorial authority must:

Conduct an assessment of the area in accordance with subclause (2) as soon as practicable; and if a new SNA is identified as a result, include it in the next appropriate plan or plan change notified by the territorial authority.”

Whilst Council identified potential SNAs in 2021, this work was at its very early stages. Our view is that clause 3.8(6) of the NPS-IB has not been triggered for PC49, this is because:

- PC49 was notified on 11 August 2021, prior to the NPS-IB coming into force on 4 August 2023;
- no SNAs were identified in that plan change;
- the draft SNA's identified by Council do not form part of a current plan or plan change and have not been assessed against subclause (2) of the NPS-IB in accordance with Clause 3.8 (6)(a); and
- given the three points above, PC49 would not be the 'next appropriate plan change' to give effect to the clause 3.8 (6) of the NPS-IB.

In your legal opinion, is our view on PC49 not triggering Clause 3.8 (6) correct?

Response from Buddle Finlay

We agree with your view that clause 3.8(6) of the NPS-IB is not triggered by PC49 and we set our reasoning below. UHCC is required by section 75 of the RMA to 'give effect' to, among other things, national policy statements in its District Plan. This obligation applies even where a new NPS takes effect after a plan or plan change is notified, as is the case in respect of the NPS-IB and PC49. However, the manner in which UHCC is required to 'give effect' to an NPS depends on the wording of the NPS and any implementation and transitional provisions in an NPS are important in this regard.

In the case of the NPS-IB, there are specific timing requirements on territorial authorities in Part 4 of the NPS-IB in respect of when they must implement aspects of the NPS-IB. In general, this must be done "as soon as reasonably practicable" , but specifically within five years after commencement for planning provisions for SNAs and for information requirements for resource consent applications,³ and within eight years for other provisions.⁴ Clause 3.8(6) requires that, if a territorial authority becomes aware that an area "may be an area of significant indigenous vegetation or significant habitat of indigenous fauna that qualifies as an SNA", the territorial authority must conduct an assessment of the area "as soon as practicable" and, if a new SNA is

identified as a result, include it in "the next appropriate plan or plan change notified by the territorial authority."

We understand that UHCC has become aware of areas that may be areas of significant indigenous vegetation or significant habitat of indigenous fauna that qualify as SNAs. UHCC is obliged to undertake an assessment of those areas in accordance with Clause 3.8(6) 'as soon as reasonably practicable'. However, the obligation to include a newly identified SNA in a plan comes after that assessment has taken place and an SNA has been identified. We understand that is not yet the case in respect of the potential SNAs identified by UHCC. Accordingly, UHCC is not yet obliged by the NPS-IB to include the potential SNAs in a plan change.

In any event, the obligation relates to the "next appropriate plan or plan change notified... (emphasis added)". In our view, the clear intention of this wording is that the obligation does not apply to a proposed plan or plan change notified prior to the NPS-IB coming into force. As you note, PC49 was notified prior to the NPS-IB coming into force, and therefore could not be the 'next plan change notified'.

For these reasons, in our view it is not necessary to consider the 'appropriateness' of PC49 in terms of clause 3.8(6). However, if this was a relevant consideration, the fact that the draft SNAs identified by UHCC did not form part of the plan change as notified would make it inappropriate for these to be introduced at a later stage. To do so would be 'out of scope' of the plan change in that there would be a real risk that persons potentially affected by the proposed SNAs would have been denied an effective opportunity to participate in the decision-making process. As such, a variation would be required to introduce proposed SNAs into PC49. Plainly, this is not something that is required by the NPS-IB.

Your second query in relation to clause 3.8(6) of the NPS-IB relates to the Variation:

Question from officers

We also consider that clause 3.8 (6) has not been triggered by the Variation. The Variation proposes to rezone the Silverstream Spur as Natural Open Space, and an area of significant indigenous vegetation has been identified within the Natural Open Space Zone in the Variation.

The definition of an SNA in the NPS-IB is more relevant than clause 3.8 (6) in this case. The NPS-IB defines a SNA as follows:

"SNA, or significant natural area, means:

any area that, after the commencement date, is notified or included in a district plan as an SNA following an assessment of the area in accordance with Appendix 1;

and

any area that, on the commencement date, is already identified in a policy statement or plan as an area of significant indigenous vegetation or significant habitat of indigenous fauna (regardless of how it is described); in which case it remains as an SNA unless or until a suitably qualified ecologist engaged by the relevant local authority determines that it is not an area of significant indigenous vegetation or significant habitat of indigenous fauna.

In respect of paragraph (b) above, the definition of policy statements and plans in the NPS-IB "includes regional policy statements and proposed regional policy statements, and regional plans, district plans, and proposed plans."

The Variation was notified on the 5 October 2022, and we consider that the natural area for the Silverstream Spur is an identified SNA for the purposes of paragraph (b) of the definition of an SNA in the NPS-IB.

It is acknowledged that clause 3.8 (1) of the NPS-IB states that:

“Every territorial authority must undertake a district-wide assessment of the land in its district to identify areas of significant indigenous vegetation or significant habitat of indigenous fauna that qualify as SNAs.”

However, whilst this has not taken place, Clause 3.8 (5) of the NPS-IB also states that:

“A territorial authority need not comply with subclause (1) in respect of any SNA referred to in paragraph (b) of the definition of SNA, (ie, an area already identified as an SNA at the commencement date) if, within four years after the commencement date, a suitably qualified ecologist engaged by the territorial authority confirms that the methodology originally used to identify the area as an SNA, and its application, is consistent with the assessment approach in Appendix 1.”

By including the natural area in the Variation it is our view that an opportunity to provide submissions on this has been provided. Submissions on the SNA were received. The hearings panel have directed expert ecological conferencing on the Silverstream Spur SNA. The outcome of this expert conferencing could help determine the extent of the natural area and provide an assessment of the Silverstream Spur natural area against the NPS-IB to give effect to clause 3.8 (5).

It is noted therefore that whilst Clause 3.8 (6) is not triggered Clause 3.10 is.

In your legal opinion, is our view that the Variation has not triggered Clause 3.8 (6) correct?

Response from Buddle Finlay

For similar reasons as above, we do not consider clause 3.8(6) is engaged by the Variation. That is, the Variation was notified prior to NPS-IB coming into force and is therefore not the 'next appropriate plan change notified'.

We also agree with your interpretation above that the proposed area of significant indigenous vegetation is an SNA for the purposes of the NPS-IB. That is, it comes under paragraph (b) of the definition of 'SNA' because it is an area of significant indigenous vegetation which, on the commencement date of the NPS-IB was already identified in a plan. As you note, the definition of 'policy statements and plans' includes 'proposed plans', which would include PC49 as varied.

As an SNA which was already identified in a plan, clause 3.8(5) is relevant to the proposed area of significant indigenous vegetation. That is, within four years after the commencement date of the NPS-IB, "a suitably qualified ecologist engaged by the territorial authority [must confirm] that the methodology originally used to identify the area as an SNA, and its application, is consistent with the assessment approach in Appendix 1 [of the NPS-IB]".

Accordingly, UHCC should be satisfied that either this requirement is met, or will be met, by 4 August 2027. Otherwise, the proposed area of significant indigenous vegetation would need to be included in the district-wide assessment required by clause 3.8(1)