

**BEFORE THE HEARING COMMISSIONERS**

**IN THE MATTER** of the Resource Management Act 1991

**AND** of Proposed Plan Change 4 to the partly  
**IN THE MATTER** operative Canterbury Land and Water  
Regional Plan

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**MEMORANDUM OF COUNSEL ON BEHALF OF THE ROYAL FOREST AND BIRD  
PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED**

**PLAN CHANGE 4 TO THE CANTERBURY LAND AND WATER REGIONAL PLAN**

**21 MARCH 2016**

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## MAY IT PLEASE THE COMMISSIONERS

### Introduction

1. Forest & Bird lodged a submission and further submission on Plan Change 4 ('PC4') to the Canterbury Land and Water Regional Plan ('LWRP'). It attended the hearing on 3 March 2016, and presented legal submissions and an appendix (Appendix 1) to those submissions, detailing the changes sought. Those changes were principally to the provisions regarding inanga habitat, and those regarding the management of activities in riparian margins.
2. Commissioner Sheppard expressed a concern that the changes dealt with in legal submissions and set out in Appendix 1 may not have been within the scope of F&B's submission, in that they were not identical to the changes sought in Forest & Bird's submission. Commissioner Sheppard recommended that Forest & Bird file a memorandum setting out the jurisdictional basis for the changes it sought.
3. In Forest & Bird's submission, it cannot be the case that submitters in a Schedule 1 process have to limit themselves to identical amendments to those sought in the original or further submission. Subsequent to lodging a submission, several factors will influence the position that a submitter finally advocates for at a hearing. Consideration of advice from relevant experts, consideration of the submissions of other parties, as well as the Council's recommendations in the s42A report, will inform a submitter's final position. This means that what a submitter advocates for at a hearing may not identically replicate provisions sought in its submission. That is both desirable and appropriate.
4. A requirement that the relief sought at hearing be identical to that sought in a submission effectively would mean that a fully detailed case needs to be developed prior to the submission process. This has a number of perverse consequences, including:
  - a. A limited time frame to determine matters of concern, engage experts and receive their opinion for the submission – this has effects on natural justice principles and unfairly disadvantages those with less resources;
  - b. expert opinion is developed in a vacuum without the context of Council s42A reports; and
  - c. there is no ability to respond to other evidence or Council s42A reports, and to amend a submitter's position accordingly.

5. Commissioner Sheppard suggested that the onus was on Forest & Bird to prove it had scope to advocate for the changes it sought at the hearing, and that they were therefore changes that the Panel could recommend to the Council; further that the Panel could not even consider the merits of Forest & Bird's proposed changes before it was satisfied that these were changes it could lawfully recommend.
6. Setting aside whether Forest & Bird agrees with that analysis, it is submitted that the changes sought at the hearing are changes that the Council can lawfully make.
7. This memorandum sets out the relevant law to this issue. The attached 'Annotated Appendix 1' sets out the changes sought by Forest & Bird at the hearing, and the relevant submission point(s) relied on. It also notes the relevant paragraphs in the legal submissions presented at the hearing which dealt in detail with the changes sought in Appendix 1.

### **The Law**

8. The Commissioners have jurisdiction to make any changes to the notified version of PC4 where those changes were 'on' PC4 and fairly and reasonably within the scope of submissions. While the issues are related, different approaches have been developed to assessing whether relief sought is:
  - a. "on a variation" and
  - b. fairly and reasonably within the scope of submissions.
9. The concern that the Commissioners raised at the recent hearing related to whether the changes sought by Forest & Bird were within the scope of submissions.
10. The leading authority on the question of whether a submission is "on a variation" is *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, which endorses earlier High Court authority that the question of whether a submission is on a variation requires analysis of whether:
  - a. the submission addresses the change to the status quo advanced by the proposed plan change; and
  - b. there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.
11. In Counsel's submission, this aspect of scope does not arise in terms of the refined relief sought by Forest & Bird at the hearing. As discussed in the legal submissions, and referred to again in the attached Annotated Appendix 1, a small number of original submission

points potentially would have had implications for provisions outside the ambit of PC4. This is one of the reasons that Forest & Bird refined the relief sought at the hearing. Given the refinements made in the relief advocated for at the hearing, this aspect of jurisdiction does not arise. The changes sought relate squarely to the proposed changes in the status quo that PC4 advances.

12. The question of whether relief sought is fairly and reasonably within the scope of the submission was considered by the High Court in *General Distributors v Waipa District Council* (2008) 15 ELRNZ 59, which held:
  - a. jurisdiction is limited by the terms of the proposed change and the content of submissions filed;<sup>1</sup>
  - b. the whole relief package detailed in submissions must be considered when determining whether or not the relief sought is reasonably and fairly raised in the submissions;<sup>2</sup>
13. In terms of determining whether relief sought is fairly and reasonably within the scope of submissions the Courts have repeated on many occasions that this “*should be approached in a realistic workable fashion rather than from the perspective of legal nicety.*”<sup>3</sup>
14. In the 2014 decision of *Otorohanga District Council v Environmental Defence Society Inc*<sup>4</sup>, the Environment Court noted:

[12] ... In the leading case of Countdown Properties (Northlands) Ltd v Dunedin City Council [1994] NZRMA 145 a full court of the High Court considered a number of issues arising out of the plan change process under the Act, including the decision-making process in relation to submissions. **The High Court confirmed that the paramount test is whether or not the amendments are ones which are raised by and within the ambit of what is reasonably and fairly raised in submissions on the plan change. It acknowledged that this will usually be a question of degree to be judged by the terms of the proposed change and the content of the submissions.**
15. *Campbell v Christchurch City Council*<sup>5</sup> also considered *Countdown Properties* with respect to the Council’s ability to make consequential changes not sought in any submissions. The

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<sup>1</sup> Paragraph [64]

<sup>2</sup> Paragraph [60]

<sup>3</sup> See for example *Royal Forest & Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 at 413, cited at paragraph [59] *General Distributors*, and at paragraph [17] of *Environmental Defence Society v Otorohanga District Council* [2014] NZEnvC 70.

<sup>4</sup> [2014] NZEnvC 70

<sup>5</sup> [2002] NZRMA 352 (EnvC) at [20].

Court considered that consequential changes not sought in submissions could be made where they flowed downwards from any amendment sought in the submissions as a whole.

16. In the hearings for Variation 1 to the LWRP, legal submissions were made to the Commissioners by Mr. Maw for the Council. Mr. Maw traversed the relevant case law and concluded that:

70. Applying these principles to Variation 1, it is submitted that while changes to Variation 1 cannot go beyond what was specifically raised in submissions, the fact that a submission does not seek in precise terms the changes sought is not fatal.

71. In considering the third group of submissions (those that addressed cases presented at the hearing of submissions) the Environment Court in Foodstuffs (Otago Southland) Properties Limited v Dunedin City Council found that the respondent council did not exceed its authority by making the amendments in group 3. **That is, that amendments to a planning document may still be able to be made, even where the submission has not requested the change in precise terms provided that the changes are ones which are raised by and within the ambit of what is reasonably and fairly raised in submissions and approached in a realistic workable fashion rather than from the perspective of a legal nicety.**

17. Forest & Bird agrees with this analysis.
18. As noted above, the attached Annotated Appendix 1, read in conjunction with the legal submissions, make it clear that the relief sought at the hearing was fairly and reasonably raised in the original submission lodged by Forest & Bird. As such there is no issue as to scope.



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**Erika Toleman**

**Counsel for the Royal Forest and Bird Protection Society of New Zealand Inc**

**21 March 2016**

**Annotated Appendix 1 to Forest & Bird legal submissions for PC4 on the Canterbury LWRP.**

**21 March 2016**

**APPENDIX 1: FOREST AND BIRD REWRITE OF PLAN CHANGE 4 PROVISIONS**

**Note: where a provision proposed to be amended as part of Plan Change 4 is not included in this Appendix, Forest & Bird either did not make a submission on that provision, or has not presented evidence on the changes sought in its submission. In the latter instance, Forest & Bird relies on its primary submission. Where changes are sought to only discrete parts of rules, only that part which is sought to be changed is listed.**

Amendment sought

**Section 2.9 Definitions**

The amendment to the definition of Inanga Spawning Habitat, dealt with in legal submissions at paragraphs 6-22, was omitted from this Appendix in error. Forest & Bird sought the following amendment at the hearing:

Inanga Spawning Habitat : means that part of the beds and banks of a lake, river, artificial watercourse, coastal lagoon or wetland that ~~is between mean high water springs and mean low water neaps and~~ is within ~~an the~~ area identified as 'Inanga Spawning Habitat' on the Planning Maps.

Forest & Bird also suggested the following addition, if the Panel thought necessary:

**'and for the purposes of the LWRP, is outside of the CMA'.**

Source of scope

Page 2, original submission

Section 2.9 - Definitions: Inanga Spawning Habitat	Support in part	PC 4 treats Inanga Spawning Sites and Inanga Spawning Habitat differently. A definition for both terms should be included in section 2.9.	Retain, and also include definition for Inanga Spawning Sites
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As explained in the legal submissions at paragraphs 6-22, the amendment sought at the hearing is simply to clarify what was intended for the inanga provisions by Council. It does not represent a change in the intended application of the definition, but removes the potential ambiguity from the definition.

Amendment sought

**Earthworks** means the excavation of, and/or filling with topsoil, subsoil, sediments, rock and/or other underlying materials on which the soil is formed. Earthworks include, but are not limited to, the construction and maintenance of roads, tracks, firebreaks and landings, and ground shaping (recontouring), root raking and blading.

Earthworks excludes:

- a. cultivation of the soil **for the establishment** of crops or pasture, **except where the cultivation is in the beds or margins of waterbodies on production land established prior to 5 September 2015.**

*Dealt with in legal submissions at paragraphs 101-112.*

Source of scope

Pgs 4 and 5 original submission:

<p>Section 2.9 Definitions: Earthworks</p>	<p>Support in part.</p>	<p>Part (a) of the definition is too broad, and needs to be reworded so as to not allow wide scale earthworks that may have adverse effects on biodiversity. While F&amp;B supports the apparent intent of the change to mean that any new cultivation of the soil will not be exempted, we are concerned that the drafting is not precise enough to actually achieve that apparent intent.</p> <p>Cultivation on ‘production land’ has effects on water quality, and can frequently result in the loss of terrestrial native vegetation and habitat within that land. The definition ignores the fact that land used for production may still retain very high natural values – it assumes that any land in production will be exclusively e.g. exotic pasture, or a field of cabbages.</p> <p>The same issues arise for the amendments to the vegetation clearance definition. While land may be ‘production land’, the scale and effects of the earthworks may be of a very different scale than has occurred before on that land. It is inappropriate to exempt cultivation in those circumstances.</p> <p>If production land is going to remain in this and the vegetation clearance definitions it will need its own definition.</p>	<p>Amend (a) so that effects of cultivation on water quality and biodiversity are addressed.</p> <p>If production land is going to remain in the earthworks definition it will need its own definition.</p>
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Amendment sought

**Vegetation clearance** means removal of vegetation by physical, mechanical, chemical or other means but excludes:

- a. cultivation or harvesting for the establishment of crops or pasture, **except where the cultivation is in the beds or margins of waterbodies on production land established prior to 5 September 2015.**

*Dealt with in legal submissions at paragraphs 117 (which refers back to paragraphs 101-112, dealing with the same issue for the earthworks definition).*

Source of scope

Pages 5 and 6 of original submission:

<p>Section 2.9 Definitions: Vegetation clearance</p>	<p>Support in part, oppose in part.</p>	<p>As in the earthworks definition, part (a) of the definition is too broad, and needs to be reworded so as to not allow vegetation clearance that may have adverse effects on biodiversity. Currently the definition would allow cultivation or harvesting of vegetation that is on land that has been established as production land by September 2015, regardless of whether the effects are of a different scale and/or nature as has occurred before on that land. For example, the vegetation clearance involved in turning dry short tussocklands used to run sheep, into exotic pasture for instance would likely be exempted under this definition, as the land is already 'production land'.</p> <p>Cultivation and harvesting on 'production land' has effects on water quality, and can frequently result in the loss of terrestrial native vegetation and habitat within that land. The definition ignores the fact that land used for production may still retain very high natural values (although it is an improvement on the earthworks definition, as it refers to 'crops or pasture').</p> <p>Further, 'production land' is not defined – most of Canterbury has been used for production of some sort or other. It needs to be defined if it is retained in the exemption.</p> <p>Oppose (b) – this exemption is far too broad and fails to recognise the adverse effects of clearance for structures and utilities.</p> <p>Support (f) and (g).</p> <p>This definition should include vegetation alteration and disturbance, as this can have significant adverse effects, even where it is not complete 'removal'. The rules (e.g.5.163) envisage that such disturbance will be managed. This definition is too narrow.</p>	<p>Amend (a): so that effects on biodiversity are addressed.</p> <p>Delete (b), retain (f) and (g).</p> <p>Include vegetation alteration and disturbance in this definition.</p> <p>If production land is going to remain in the vegetation clearance definition it will need its own definition.</p>
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Amendment sought

b. clearance for the establishment or maintenance of utilities or structures, **except where the clearance is within inanga spawning habitat, or the bed of the Clarence, Waiau, Hurunui, Waimakariri, Rakaia, Rangitata or Waitaki rivers.**

*Dealt with in legal submissions at paragraphs 118-125.*

Source of scope

Pages 5 and 6, original submission (as set out above). Forest & Bird sought the complete removal of exemption (b), given the adverse effects that earthworks for utilities and structures can cause. If accepted, that submission potentially would have had implications for several rules managing earthworks, some of which were not at issue in PC4.

The above amendment limits the submission point to only those matters at issue in PC4, and which are of most concern to Forest & Bird. That is, rather than seeking that no earthworks for structures and utilities should be exempted from any earthworks rules in the Plan, the above amendment would mean that:

- earthworks for structures and utilities will continue to be exempted from the rules where they are not within inanga habitat or the beds of relevant braided rivers, but
- earthworks for utilities and structures within inanga habitat or braided riverbeds will not be exempted from the relevant rules.

The amendment sought in Appendix 1 therefore has more limited effect than the original submission point.

Amendments sought

f. clearance by, or on behalf of, the Canterbury Regional Council for the purposes of maintaining the flood-carrying capacity of a river; or

g. exotic vegetation clearance by the Department of Conservation or Land Information New Zealand for the maintenance of public access.

Source of scope

Pages 5 and 6, original submission.

Simply supported exemptions as proposed.

Amendment sought

**Section 3 Objectives**

3.14 ~~Outstanding fresh water bodies~~ High naturalness waterbodies and hāpua and their margins are maintained in a healthy state or are improved where degraded.

Source of scope

Page 14 original submission

Objective 3.14	Support in part	Query effect of change in practice. F&B opposes any limiting of the application of this objective to fewer waterbodies. If that is the result of this change then F&B opposes the change.	If change lessens the coverage of this objective, delete it.
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*Not dealt with in legal submissions, as no further change sought at hearing.*

Amendment sought

**Section 4 Policies**

**4.31**

Damage to the bed or banks of water bodies, sedimentation and disturbance of the waterbody, direct discharge of contaminants, and degradation of aquatic ecosystems and inanga and salmon spawning habitat is avoided by:

- (a) Excluding intensively farmed stock from lakes, rivers and wetlands; and
- (b) Excluding stock from swimming freshwater bathing sites listed in Schedule 6, inanga and salmon spawning sites listed in Schedule 17, and other sensitive water body areas and the waterbody bed and banks closely adjacent to ~~upstream of~~ these areas; and
- (ba) excluding stock from inanga spawning habitat during the period of 1 January to 1 June inclusive; and
- (c) Limiting access to wetlands, and the banks or beds of lakes and rivers to stock species that prefer to avoid water and at stocking rates that avoid evident damage.

*Dealt with in legal submissions at paragraphs 56-59 and 62-63.*

Source of scope

Page 2 original submission

Section 4 –Policies: 4.31	Support in part	Policy 4.3.1(b) has been amended so that it now applies to the waterbody bed and banks “closely adjacent to”, rather than “closely upstream” of various sensitive areas. While including ‘adjacent to’ is helpful, the removal of the ‘upstream component may lessen the impact of the policy.	4.3.1(b) should read: “...and the waterbody bed and banks closely adjacent to and upstream of these areas;”
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Forest & Bird supported the proposed change in its submission, but sought a change regarding ‘closely upstream’. This part of the submission point was not pursued at the hearing.

Therefore the remaining part of the submission supported the proposed change. The only further change sought in Appendix 1 was to delete inanga from clause (b). As explained in legal submissions, Forest & Bird received expert advice that it would be more appropriate to regulate activities in inanga ‘habitat’ only, rather than both ‘habitat’ and ‘sites’. This amendment reflects that position.

While Forest & Bird did not submit that ‘sites’ should not be managed in the Plan, the Appendix 1 amendment to policy 4.31 actually recommends removing a layer of management (i.e. from sites). It therefore represents a subset of the management approach that was supported in the original submission.

Amendment sought

**4.85A**

Indigenous biodiversity, habitats of indigenous fauna and flora, and the natural character of Canterbury's braided river systems is preserved through:

- (a) preventing encroachment of activities into the beds and margins of lakes and rivers, **wetlands or coastal lagoons;** and
- (b) limiting vegetation clearance within the bed, banks and margins of lakes, rivers, wetlands or coastal lagoons, unless the vegetation clearance is for the purpose of pest management, habitat restoration, flood control purposes, ~~the operation, maintenance or repair of structures or network utilities, or~~ maintenance of public access.

Alternatively, delete the entire exemptions section, starting 'unless the vegetation clearance ...'

*Dealt with in legal submissions at paragraphs 126-141.*

Source of scope

Pages 6 and 7, original submission.

<p>Section 4 – Policies: 4.85A</p>	<p>Support in part</p>	<p>Support the general intention of this policy. However the exemption at the end of (b) is too broad, and suggests that vegetation clearance for the exempted activities doesn't need to be limited at all. Even if the Plan intends to generally allow those activities, there should be controls on vegetation clearance for these activities, so that the disturbance is kept to the minimum possible. Either this exemption section should be deleted, or it should be amended to make clear that these activities also need to be managed so as to limit their adverse effect on biodiversity.</p> <p>It is unclear whether the final section of the policy (starting “unless the vegetation clearance...”) is intended to apply to only (b), or both (a) and (b). The wording of the final section suggests it only applies to (b), however the drafting structure suggests the final section is intended to apply to both (a) and (b). F&amp;B's view is that it should only apply to (b), as no new activities should be allowed to encroach on the beds and margins of waterbodies.</p> <p>It is also not clear why (a) does not include wetlands and coastal lagoons.</p>	<p>Either entirely remove the exemption at the end of (b), or include the words ‘in which case the vegetation clearance will be kept to the minimum necessary’.</p> <p>If the exemption section is to remain, remove the gap between the end of (b) and the start of the final section, so that it reads as one section (b).</p> <p>Include wetlands and coastal lagoons in (a).</p>
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Also, as above, this is consistent with Forest & Bird's earlier submission point arguing that no exemptions should be made in the vegetation clearance definition for clearance for the purposes of structures or utilities.

Amendment sought

**4.86**

~~Earthworks, and structures~~ Activities that occur in the beds or margins of lakes, rivers, wetlands, hāpua, coastal lakes and lagoons are managed or undertaken so that:

- (a) ~~maintain~~ the character and channel characteristics of rivers including the variable channel characteristics of braided rivers are ~~maintained~~ preserved;
- (b) ~~protect~~ sites and areas of significant indigenous biodiversity values or of cultural significance to Ngāi Tahu are protected; and
- (c) ~~do not preclude any~~ existing lawful access to the bed of the lake, river, wetland, hāpua, coastal lake, or lagoon for recreational, customary use, water intakes or supplies or flood control purposes, is not precluded, except where necessary to protect public health and safety.

*Not addressed in legal submissions; simply seeking minor change outlined in original submission.*

Source of scope

Page 14, original submission

Policy 4.86(a)	Support in part	Natural character should be preserved not simply 'maintained': s.6(a).	Replace 'maintained' with 'preserved'.
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Amendment sought

**4.86A**

~~Īnanga spawning sites habitat are is protected through as a first priority, avoiding activities within the beds and margins of lakes, rivers, hāpua, wetlands, coastal lakes and lagoons that may remove or reduce the suitability for spawning, including but not limited to reduction or removal of the area of tidal inundation or vegetation suitable for spawning damage inanga spawning sites, and where these activities cannot be avoided, the use of the best practicable option to minimise all impacts.~~

**4.86B**

~~Within the beds and margins of lakes, rivers, hāpua, wetlands, coastal lakes and lagoons, damage to inanga spawning habitat is minimised by scheduling works to occur outside the inanga spawning period of 1 March to 1 June inclusive where it is practicable to do so, and by extending this period to 1 January to 1 June inclusive, where the works involve vegetation clearance or earthworks, so as to allow sufficient time for regeneration of the habitat.~~

~~This means that activities in the beds and margins of lakes, rivers, hāpua, wetlands, coastal lakes and lagoons must be scheduled outside the Īnanga spawning period of 1 January to 1 June inclusive, so as to allow sufficient time for regeneration of the habitat. Some activities will not be appropriate at any time of the year in Īnanga habitat, given the damage they can cause.~~

Clean version of combined policy:

4.86A

Īnanga spawning habitat is protected through avoiding activities within the beds and margins of lakes, rivers, hāpua, wetlands, coastal lakes and lagoons that may remove or reduce the suitability for spawning, including but not limited to reduction or removal of the area of tidal inundation or vegetation suitable for spawning.

This means that activities in the beds and margins of lakes, rivers, hāpua, wetlands, coastal lakes and lagoons must be scheduled outside the Īnanga spawning period of 1 January to 1 June inclusive, so as to allow sufficient time for regeneration of the habitat. Some activities will not be appropriate at any time of the year in Īnanga habitat, given the damage they can cause.

*Dealt with in legal submissions at paragraphs 56-59 and 64-75.*

Source of scope

Pages 2 and 3, original submission

4.86A	Support in part	<p>The use of the phrase ‘as a first priority’ effectively undermines the protection given by the policy.</p> <p>Further, if avoidance cannot be avoided (the policy gives no guidance on what acceptable grounds for not being able to avoid), the ‘best practicable’ option can simply be used. ‘Best practicable option’ is defined in the LWRP, but the definition only relates to emissions of noise and contaminants. The definition does not provide guidance on all the likely disturbance activities that could affect inanga spawning sites.</p>	<p>Amend policy to read:</p> <p>“Inanga spawning sites are protected through avoiding activities within the beds and margins of lakes, rivers, hapua, wetlands, coastal lakes and lagoons that may damage inanga spawning sites.”</p>
4.86B	Support in part	<p>Delete ‘where it is practicable’ as currently written it is meaningless.</p> <p>Support the extension of time for habitat rehabilitation.</p>	<p>Delete ‘where it is practicable’.</p>

The original submission asked for avoidance of activities in inanga spawning sites. As per the habitat based approach, the Appendix 1 amendment removes the focus from sites and restricts it to habitat.

## Section 5 Region-wide Rules

### Amendment sought

#### 5.68

The use and disturbance of the bed (including the banks) of a lake, river or a wetland by stock and any associated discharge to water is a permitted activity, provided the following conditions are met:

3. The use or disturbance of the bed (including the banks) of a lake or river and any associated discharge to water that is not at a permanent stock crossing point does not result in:
- (a) pugging or de-vegetation that exposes bare earth in the bed (including the banks) of a lake or river; or
  - (b) a conspicuous change in colour or clarity of the water, outside the Mixing Zone; or
  - (c) cattle standing in any lake; and

~~(1) lake located outside of the Hill and High Country Area; and~~

~~(2) lake located within a Lake Zone, as shown on the Planning Maps; and~~

~~(3) lake classified as a High Naturalness Waterbody; and~~

*Dealt with in legal submissions at paragraphs 165-170.*

### Source of scope

Page 13 original submission

5.68	Oppose in part	5.68(3) is too limited in its protection of Hill and High Country areas. It is not appropriate for this to be a permitted activity in these areas.	Either amend 5.68(3)(c)(1) to read: "lake located <u>within</u> the Hill and High Country Area"  OR delete the new proposed change to (3)(c) entirely.
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Amendment sought

**5.71**

The use and disturbance of the bed (including the banks) of a lake or river by any farmed cattle, farmed deer or farmed pigs and any associated discharge to water is a prohibited activity in the following areas:

1. In ~~an inanga or~~ salmon spawning site listed in Schedule 17, or undertaken in any inanga spawning habitat during the period 1 January to 1 June inclusive; or

*Dealt with in legal submissions at paragraphs 56-59 and 84-86.*

Source of scope

Page 13, original submission.

5.71	Support		Retain
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As above, the Appendix 1 amendment is a subset of what was originally supported, given that the amendment limits the focus from managing both sites and habitats, to only habitats.

Also consistent with submissions in support of other rules managing adverse effects on inanga habitat, e.g. pg 3 original submission

Section 5 – Rules: 5.136, 5.137, 5.138, 5.139, 5.140, 5.141, 5.148, 5.151, 5.152	Support in part	F&B supports the general approach of these rules to protect both Inanga Spawning Sites and Habitat. However, the extended period (1 Jan - 1 June) should apply to all activities in Inanga Spawning Habitat, given the likely disturbance of that habitat and the need for it to recover before spawning occurs.  Also note that Table 1 – Amendment Categories lists 5.152A as a changed rule in this Category. That appears to be an error; the change has been made to 5.152.	
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Amendments sought

**5.136**

(1) The activity is not undertaken in, on or under the bed of a lake listed as a high naturalness lake in Sections 6 to 15 or in ~~an inanga or~~ salmon spawning site listed in Schedule 17, or undertaken in any inanga spawning habitat during the inanga spawning season of 1 ~~March~~ January to 1 June inclusive;

**5.137**

(4) ~~Other than the maintenance of a structure, outside the spawning season, and the use of a structure~~ The activity is not undertaken in ~~an inanga or~~ salmon spawning site listed in Schedule 17, or undertaken in any inanga spawning habitat during the inanga spawning season of 1 ~~March~~ January to 1 June inclusive;

**5.138**

(2) Other than for the use of ~~flood protection work~~ defences against water the activity is not in, on, or under the bed of any river or lake listed as a high naturalness waterbody in Sections 6 to 15 or within an ~~inanga or~~ salmon spawning site listed in Schedule 17, or undertaken in any inanga spawning habitat during the inanga spawning season of 1 ~~March~~ January to 1 June inclusive.

**5.139**

(4) The maintenance of that part of the structure within the bed of a lake or river is not within an ~~inanga or~~ salmon spawning site listed in Schedule 17, or undertaken in any inanga spawning habitat during the inanga spawning season of 1 ~~March~~ January to 1 June inclusive.

**5.140**

(1) The activity is not undertaken in ~~an inanga or~~ salmon spawning site listed in Schedule 17, or undertaken in any inanga spawning habitat during the inanga spawning season of 1 ~~March~~ January to 1 June inclusive.

**5.140A**

(5) The activity is not undertaken in ~~an inanga or~~ salmon spawning site listed in Schedule 17, or undertaken in any inanga spawning habitat during the inanga spawning season of 1 ~~March~~ January to 1 June inclusive.

**5.141**

(2) The discharge is not undertaken in ~~an inanga or~~ salmon spawning site listed in Schedule 17, or undertaken in any inanga spawning habitat during the inanga spawning season of 1 ~~March~~ January to 1 June inclusive.

**5.148**

(9) The activity is not undertaken in ~~an inanga or~~ salmon spawning site listed in Schedule 17, or in any inanga spawning habitat during the inanga spawning season of 1 March to 1 June inclusive **and any excavated material (including surplus or reject material) is not stockpiled in any inanga spawning habitat between 1 January and 1 June;**

**5.151**

(1) The activity is not undertaken in an ~~inanga or~~ salmon spawning site listed in Schedule 17, or undertaken in any inanga spawning habitat during the inanga spawning season of 1 ~~March~~ January to 1 June inclusive.

**5.152**

(2) The discharge is not undertaken in an ~~inanga or~~ salmon spawning site listed in Schedule 17, or undertaken in any inanga spawning habitat during the inanga spawning season of 1 ~~March~~ January to 1 June inclusive.

*Dealt with in legal submissions at paragraphs 53-59 and 76-79.*

Source of scope:

Page 3 original submission

Section 5 – Rules:  5.136, 5.137, 5.138, 5.139, 5.140, 5.141, 5.148, 5.151, 5.152	Support in part	F&B supports the general approach of these rules to protect both Inanga Spawning Sites and Habitat. However, the extended period (1 Jan - 1 June) should apply to all activities in Inanga Spawning Habitat, given the likely disturbance of that habitat and the need for it to recover before spawning occurs.  Also note that Table 1 – Amendment Categories lists 5.152A as a changed rule in this Category. That appears to be an error; the change has been made to 5.152.	
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Also on same page:

5.140A	Oppose	The exceptions relating to Inanga Spawning Sites and Habitat should apply to this activity.	Insert Inanga exceptions into this rule.
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Again, the deletion of the reference to sites from the rules represents a subset of the management response that was supported in the original submission.

## Amendments sought

### 5.163

The introduction or planting of any plant, or the removal and disturbance of existing vegetation in, on or under the bed of a lake or river and any associated discharge of sediment or sediment-laden water in circumstances where sediment may enter surface water is a permitted activity, provided the following conditions are met:

~~6. The disturbance, removal, damage or destroying of any plant or vegetation~~ Vegetation clearance in, on, or under the bed of any river or lake listed as a high naturalness waterbody in Sections 6 to 15 is only of:

- (a) non-indigenous species; or
- (b) indigenous species that form the understorey of plantation forest that is being harvested and a minimum 5 m set back from the river or lake is provided upon replanting (if replanting occurs); and

~~7. Except for clearance around utilities or existing structures, removal of a species listed in the Biosecurity NZ Register of Unwanted Organisms or the Canterbury Pest Management Strategy, or clearance for the purposes of maintaining existing fence lines, vehicle tracks, firebreaks, drains, ponds, dams or crossings, the activity~~ Vegetation clearance or disturbance does not occur in an ~~inanga or~~ salmon spawning site listed in Schedule 17, or undertaken in any inanga spawning habitat during the period of 1 January to 1 June inclusive; and

*Dealt with in legal submissions at paragraphs 83 and 113-116.*

### Source of scope

Forest & Bird originally sought that vegetation disturbance (not only clearance) should be managed by the Plan, by way of

- a. the inclusion of 'disturbance' in the vegetation clearance definition, (pages 5 and 6 original submission, already set out above), and also by
- b. retaining 'disturbance' in the introduction to rule 5.163 (page 7, original submission).

The submission asking that vegetation disturbance be included in the definition of vegetation clearance would have had consequences for a number of rules. The effect of the Appendix 1 amendment is to limit the submission that vegetation disturbance should be managed to only those areas that provide inanga habitat.

The Appendix 1 amendment will achieve a more limited result of the amendment sought in the submission, albeit via an amendment to the rules rather than an amendment to the definitions. It is therefore a subset of the original relief sought.

Pages 7 and 8, original submission:

<p>5.163, 5.164, 5.165</p>	<p>Support in part</p>	<p>This rule manages both vegetation removal and disturbance, which is appropriate. However, the vegetation clearance definition only refers to ‘removal’ of vegetation. As per our submission point above, the definition needs to include vegetation alteration and disturbance. Otherwise the Plan will be failing to manage a potentially significant adverse effect.</p> <p>Support change to 5.163(2).</p> <p>5.163(6) is now too narrow, and will only manage the effects of <i>removal</i>. Both the definition (as submitted above) and the rules need to incorporate disturbance and damage to vegetation.</p> <p>5.163 (8) – the rule needs to make clear on what basis those agencies would give the permission.</p> <p>Support intended protection of the rivers listed in 5.163(9), but this condition is far too broad and unworkable for a permitted activity. There is no way that this could be accurately assessed by a plan user, and conversely it would be almost impossible for the Council to monitor and enforce. Taken literally, any vegetation clearance will result in the reduction in at least the area, if not the diversity of existing riverbed vegetation. Support this activity being dealt with as a non-complying rule (as per 5.165).</p> <p>Further, a number of braided rivers, not only alpine rivers, provide habitat for endangered bird species. Their nests are often cryptic and breeding sites may not be obvious. More needs to be done to enhance nesting outcomes, including e.g. lupin removal, and controls on activities in these rivers. If this PC is not going to include provisions to protect braided rivers, the third option mentioned in the s32A report (top of pg 45) should be pursued without delay, and another PC proposed to give effect to it.</p>	<p>Retain words: ‘and disturbance’ in introduction to rule.</p> <p>Retain 5.163(2).</p> <p>Amend (6) to manage both removal and alteration/disturbance.</p> <p>Amend (8) to include detail on basis for and required details of permission.</p> <p>Amend condition (9) to read: “From 5 September 2015, no vegetation clearance takes place in the bed of the Clarence, Waiau, Hurunui, Waimakariri, Rakaia, Rangitata, and the Waitaki rivers.”</p> <p>Include provisions to protect all braided rivers used by endangered bird species.</p>
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Forest & Bird also supported a rule framework that provided appropriate protection for inanga. This submission point needs to be read in conjunction with the submission points discussed above, which highlight the need to regulate disturbance activities. Page 3, original submission:

5.163, 5.167, 5.168, 5.169, 5.170	Support	These rules provide appropriate protection for Inanga.	Retain
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Amendment sought

5.163 (9). From 5 September 2015, **no vegetation clearance takes place and within** in the bed of the Clarence, Waiau, Hurunui, Waimakariri, Rakaia, Rangitata, and the Waitaki rivers **the vegetation clearance does not result in a reduction in the area or diversity of existing riverbed vegetation**

*Dealt with in legal submissions at paragraphs 142-148.*

Source of scope

Page 7 and 8, original submission (set out above).

*Amendment sought*

**5.167A**

**The use of land for vegetation disturbance outside the bed of a river or lake or adjacent to a wetland boundary but within:**

- (a) 10 m of the bed of a lake or river or a wetland boundary in Hill and High Country land or land shown as High Soil Erosion Risk on the Planning Maps; or
- (b) 5 m of the bed of a lake or river or a wetland boundary in all other land not shown as High Soil Erosion Risk on the Planning Maps or defined as Hill and High Country on the Planning Maps; and any associated discharge of sediment or sediment-laden water in circumstances where sediment may enter surface water is a permitted activity, provided the following conditions are met:

1. **The vegetation disturbance does not occur in any Inanga spawning habitat.**

*Dealt with in legal submissions at paragraphs 82-83, 113-116.*

*Source of scope*

Same issue as already discussed. Pages 5 and 6 original submission, set out above. Forest & Bird originally sought that vegetation disturbance (not only clearance) should be managed by the Plan, by way of the inclusion of 'disturbance' in the vegetation clearance definition, and also by retaining 'disturbance' in the introduction to rule 5.163 (page 7 and 8 original submission).

The submission asking that vegetation disturbance be included in the definition of vegetation clearance would have had consequences for a number of rules. The effect of the Appendix 1 amendment is to limit the submission that vegetation disturbance should be managed to only those areas that provide inanga habitat.

The reason a new rule has been created for vegetation disturbance to inanga habitat in the margins of waterbodies is that 5.167 (as opposed to 5.163, in the beds of waterbodies) did not already deal with vegetation disturbance (only clearance).

The Appendix 1 amendment will achieve a more limited result of the amendment sought in the submission, albeit via an amendment to the rules rather than an amendment to the definitions. It is therefore a subset of the original relief sought.

### Amendment sought

#### **5.167**

The use of land for vegetation clearance outside the bed of a river or lake or adjacent to a wetland boundary but within:

- (a) 10 m of the bed of a lake or river or a wetland boundary in Hill and High Country land or land shown as High Soil Erosion Risk on the Planning Maps; or
- (b) 5 m of the bed of a lake or river or a wetland boundary in all other land not shown as High Soil Erosion Risk on the Planning Maps or defined as Hill and High Country on the Planning Maps; and any associated discharge of sediment or sediment-laden water in circumstances where sediment may enter surface water is a permitted activity, provided the following conditions are met:

4. The vegetation clearance does not occur adjacent to a salmon ~~or an inanga spawning~~ site listed in Schedule 17, or undertaken in any inanga spawning habitat during the period of 1 January to 1 June inclusive; and

*Dealt with in legal submissions at paragraphs 56-59 and 80-83.*

### Source of scope

Page 3, original submission. Forest & Bird supported rules which provided appropriate protection for inanga. As discussed in the legal submissions, the advice provided to Forest & Bird was that focusing on habitats, rather than on both habitats and sites, was more appropriate. The longer period (year-round) is consistent with what was proposed by Council for inanga sites, and which was supported in the original submission. Changing the focus to habitats is what is needed to appropriately protect inanga habitat.

Amendment sought

5.167 (6). From 5 September 2015, **no vegetation clearance takes place in the riparian margins and within bed** of the Clarence, Waiau, Hurunui, Waimakariri, Rakaia, Rangitata, and the Waitaki rivers. **the vegetation clearance does not result in a reduction in the area or diversity of existing riparian vegetation., unless the earthworks have been authorised by a land use consent granted by the relevant territorial authority and conditions 1 to 5 above are also met.**

*Dealt with in legal submissions at paragraphs 149-154.*

Source of scope

Page 8 original submission

5.167	Oppose in part	<p>5.163(6) (<i>note typo – should read 5.167(6)</i>): Same issue as in 5.163(9). This is not appropriate as a condition for a permitted activity. The activity should be dealt with by a consent requirement. In order to be consistent with the lake and riverbed vegetation clearance rules, this should be a non-complying activity.</p> <p>Also, this condition mentions earthworks as well as vegetation clearance, whereas this rule only relates to vegetation clearance. The references to earthworks should be deleted.</p>	Amend condition (6) to read: “From 5 September 2015, no vegetation clearance takes place in the bed of the Clarence, Waiau, Hurunui, Waimakariri, Rakaia, Rangitata, and the Waitaki rivers.”
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Amendment sought

**5.168**

The use of land for earthworks outside the bed of a river or lake or adjacent to a wetland boundary but within:

(a) 10 m of the bed of a lake or river or a wetland boundary in Hill and High Country land or land shown as High Soil Erosion Risk on the Planning Maps; or

(b) 5 m of the bed of a lake or river or a wetland boundary in all other land not shown as High Soil Erosion Risk on the Planning Maps or defined as Hill and High Country; and any associated discharge of sediment or sediment-laden water in circumstances where sediment may enter surface water is a permitted activity provided the following conditions are met:

3. The activity does not occur adjacent to a significant spawning reach for salmon ~~or an inanga~~ spawning site ~~area~~ listed in Schedule 17; or in any inanga spawning habitat ~~during the period of 1 January to 1 June inclusive~~; and

*Dealt with in legal submissions at paragraphs 56-59 and 80-82.*

Source of scope

Page 3, original submission. Forest & Bird supported rules which provided appropriate protection for inanga. As discussed in the legal submissions, the advice provided to Forest & Bird was that focusing on habitats, rather than on both habitats and sites, was more appropriate. The longer period (year-round) is consistent with what was proposed by Council for inanga sites, and which was supported in the original submission. Changing the focus to habitats is what is needed to appropriately protect inanga habitat.

Amendment sought

5. From 5 September 2015, ~~no earthworks take place in the riparian margins and within bed~~ of the Clarence, Waiau, Hurunui, Waimakariri, Rakaia, Rangitata, and the Waitaki rivers. ~~the earthworks do not result in a reduction in the area or diversity of existing riparian vegetation, unless the earthworks have been authorised by a land use consent granted by the relevant territorial authority and conditions 1 to 5 above are also met.~~

*Dealt with in legal submissions at paragraphs 155-159.*

Source of scope

Page 9 original submission

5.168	Support in part	<p>5.168(5): Same issue as in 5.163(9). This is not appropriate as a condition for a permitted activity. The activity should be dealt with by a consent requirement. In order to be consistent with the lake and riverbed vegetation clearance rules, this should be a non-complying activity.</p> <p>It is also unclear as to what this condition is trying to achieve. The rule governs earthworks, but this condition is a mix of both vegetation clearance and earthworks.</p> <p>Further, the condition refers to works in the beds of these rivers, whereas this rule only applies to Riparian Areas (rather than the actual beds).</p> <p>Whether land use consent has been issued is not necessarily relevant to the effects of the earthworks on biodiversity in the riparian margins. This should not be an exemption to this condition (or rule).</p>	Amend condition (5) to read: "From 5 September 2015, no earthworks take place in the riparian margins of the Clarence, Waiau, Hurunui, Waimakariri, Rakaia, Rangitata, and the Waitaki rivers."
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Amendment sought

**5.169A**

**Vegetation disturbance outside the bed of a river or lake or adjacent to a wetland boundary but within:**

(a) 10 m of the bed of a lake or river or a wetland boundary in Hill and High Country land and land shown as High Soil Erosion Risk on the Planning Maps; or

(b) 5 m of the bed of a lake or river or a wetland boundary in all other land not shown as High Soil Erosion Risk on the Planning Maps or defined as Hill and High Country and any associated discharge of sediment or sediment-laden water in circumstances where sediment may enter surface water that does not comply with Rule 5.167A is a restricted discretionary activity.

*The exercise of discretion is restricted to the following matters:*

1. For forest harvesting, the harvesting method, location of haulage and log handling areas, access tracks, and sediment control; and
2. The actual and potential adverse environmental effects on soil quality or slope stability; and
3. The actual and potential adverse environmental effects on the quality of water in rivers, lakes or artificial watercourses or, wetlands or the sea; and
4. The actual and potential adverse environmental effects on areas of natural character, outstanding natural features or landscapes, areas of significant indigenous vegetation, indigenous biodiversity and significant habitats of indigenous fauna, mahinga kai areas or sites of importance to Tangata Whenua; and
5. The actual and potential adverse environmental effects on the banks or bed of a waterbody or on its flood carrying capacity; and
6. The actual and potential adverse environmental effects on transport networks, neighbouring properties or structures.

*Dealt with in legal submissions at paragraphs 82-83, 113-116.*

Source of scope

This amendment is part of the changes already discussed above (in relation to rule 5.167A), regarding the regulation of vegetation disturbance (rather than only clearance). It is necessary because there would otherwise be no rule governing vegetation disturbance that did not meet the conditions of proposed rule 5.167A.

Amendment sought

**5.169**

Vegetation clearance and earthworks outside the bed of a river or lake or adjacent to a wetland boundary but within:

- (a) 10 m of the bed of a lake or river or a wetland boundary in Hill and High Country land and land shown as High Soil Erosion Risk on the Planning Maps; or
- (b) 5 m of the bed of a lake or river or a wetland boundary in all other land not shown as High Soil Erosion Risk on the Planning Maps or defined as Hill and High Country and any associated discharge of sediment or sediment-laden water in circumstances where sediment may enter surface water that does not comply with one or more of the conditions in Rules 5.167 or 5.168 is a restricted discretionary activity.

*The exercise of discretion is restricted to the following matters:*

1. For forest harvesting, the harvesting method, location of haulage and log handling areas, access tracks, and sediment control; and
2. The actual and potential adverse environmental effects on soil quality or slope stability; and
3. The actual and potential adverse environmental effects on the quality of water in rivers, lakes or artificial watercourses or, wetlands or the sea; and
4. The actual and potential adverse environmental effects on areas of natural character, outstanding natural features or landscapes, areas of significant indigenous vegetation, indigenous biodiversity and significant habitats of indigenous fauna, mahinga kai areas or sites of importance to Tangata Whenua; and
5. The actual and potential adverse environmental effects on the banks or bed of a waterbody or on its flood carrying capacity; and
6. The actual and potential adverse environmental effects on transport networks, neighbouring properties or structures.

Note that Appendix 1 did not set out a change sought to the above rule. However in the original submission, and in the legal submissions (at paragraph 160), Forest & Bird sought that vegetation clearance and earthworks in the beds and margins of alpine braided rivers should be non-complying.

Page 9, original submission:

5.169	Support in part	As above, vegetation clearance in the beds and margins of the Clarence, Waiau, Hurunui, Waimakariri, Rakaia, Rangitata, and the Waitaki rivers should be non-complying.	Create new rule to provide for non-complying status for vegetation clearance and earthworks in the Clarence, Waiau, Hurunui, Waimakariri, Rakaia, Rangitata, and the Waitaki rivers and their margins.
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