

**SUBMISSION ON PROPOSED WEST COAST REGIONAL POLICY STATEMENT OF ENVIRONMENTAL
DEFENCE SOCIETY**

SUBMITTER DETAILS:

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FORMAL SUBMISSION

- A. This is a submission on the proposed West Coast Regional Policy Statement (“PRPS”).
- B. EDS could not gain an advantage in trade competition through this submission.
 - 1. EDS’s submission is as follows:
 - (a) EDS is a not-for-profit, non-government national environmental organisation. EDS was established in 1971 with the objective of bringing together the disciplines of law, science and planning in order to promote better environmental outcomes in resource management matters. EDS has been active in assessing the effectiveness of the RMA and planning documents in addressing key environmental issues including landscape protection, coastal management and water quality.
 - (b) Overall EDS seeks that the West Coast Regional Council (“Council”) withdraws the PRPS in order for it to be redrafted and then reworked accordingly and re-notified in a form that meets the requirements of the RMA.

(c) EDS considers that the PRPS is fundamentally flawed, that it fails to meet the requirements of the RMA for a regional policy statement and requires extensive revision. It is not the purpose of the submission process or the role of submitters to provide revisions of this scale. EDS considers that unless it is withdrawn and wholly revisited the PRPS:

- (i) Will fail to promote the sustainable management of resources;
- (ii) Will be inconsistent with the resource management principles addressed in Part 2 of the Resource Management Act 1991 (“RMA”);
- (iii) Will fail to give effect, and be contrary, to the New Zealand Coastal Policy Statement 2010 (“NZCPS”);
- (iv) Will fail to give effect and be contrary to the National Policy Statement Freshwater Manage 2014 (“NPSFM”);
- (v) Will variously be inappropriate, unnecessary and contrary to sound resource management practice;
- (vi) Will not comply with the requirements of s32 RMA; and
- (vii) Will enable the generation of significant adverse effects that warrant being addressed through RPS provisions.

2. The high-level, underlying concerns and the specific provisions of the PRPS that this submission addresses are set out in **Annexure 1**. Without detracting from the generality of the above, EDS incorporates into this submission and relies on the points made in that annexure.

3. EDS seeks the following relief from Council:

- (a) That the PRPS be withdrawn; and/or

- (b) That the PRPS be amended so as to promote the sustainable management of natural and physical resources in the region, to comply with the RMA, and to give effect to the relevant national policy statements;
 - (c) The relief specified in **Annexure 1**; and
 - (d) Such other relief as is considered necessary as appropriate to address the concerns set out in this submission.
4. EDS wishes to be heard in support of this submission.
5. If others make a similar submission, EDS will consider preparing a joint case with them at the hearing.

CONTENTS – ANNEXURE 1

- 1. Underlying concerns: policy approach of the PRPS.
- 2. Specific sections:
 - (a) Resilient and sustainable communities/Use and development of resource
 - (b) Regionally significant infrastructure
 - (c) Biodiversity and landscape
 - (d) Land and water
 - (e) Coastal environment

ANNEXURE 1

POLICY APPROACH OF PRPS

Summary Policy Approach

1. The overarching policy approach of the PRPS is one of minimal intervention premised on the importance and enabling of economic development and business opportunities.
2. The PRPS has been developed using 5 principles: people, economy and environmental, effectiveness, adaptable management and affordability. These focus on business opportunities, long term economic success, “managing and investing” in the environment and significant reduction in environmental regulation.¹
3. The PRPS identifies 8 “significant resource management issues” for the region. These issues are underpinned by a clear direction that the RMA must be implemented in such a way to ensure it is not detrimental to economic growth and the creation of employment in the region.²
4. This economic focus permeates the entirety of the PRPS. Specific examples are provided under the chapter headings below.

Response

5. EDS considers that the uninhibited focus on economic growth and development means the PRPS in its current form does not comply with the requirements of the RPS. This conclusion has been reached for the following reasons:
 - (a) It is inconsistent with the purpose of the RMA. The function of the PRPS is to achieve the purpose of the RMA in the context of the West Coast region.³ In order to achieve this, the PRPS must be prepared in accordance with (inter alia) Part 2 RMA.⁴ Although economic considerations are relevant to sustainable management they are not one benefit to be enjoyed at the cost of adverse effects, on the environment.⁵ In the recent

¹ Part A Introduction and Background, Chapter 1, [1.2], pg 1-2

² Part C, Chapter 3, Table 2, page 11

³ s59 RMA

⁴ s61 RMA

⁵ NZ Rail Ltd v Marlborough District Council [1994] NZRMA 70 (HC)

decision **Environmental Defence Society Inc v New Zealand King Salmon Company Limited**⁶ (“King Salmon”) the Supreme Court highlighted that environmental protection **must** be observed in the course of, and at the same time as, managed development and use.⁷ It was reiterated throughout the decision that environmental protection is a core element of sustainable management.⁸ Any exercise of statutory function or power and discretionary judgment **must** promote the statutory purpose. That purpose includes environmental protection. This is not a choice available to Council. These are not qualifications or exemptions.⁹ The PRPS is brazenly unenvironmental. It promotes “sustainable development”.¹⁰ It seeks to ensure that the implementation of the RMA does not detriment economic growth,¹¹ it places the benefits to be derived from the use and development of outstanding areas over and above the protection of these areas.¹² The PRPS expressly requires Regional and District Plans to recognise and reflect the vision and targets of the West Coast Economic Development Plan 2014-2030. The gravamen of the PRPS suggests this should come over and above the purpose of the RMA. This is incorrect and contrary to Part 2 RMA. EDS considers that the content and structure of the PRPS is wholly inadequate to give effect to RMA’s purpose of sustainable management.

- (b) The PRPS fails to recognise and provide for Section 6 RMA matters of national importance. Apart from a discreet reference in Chapter 7 Coastal, the PRPS does not address or provide for natural character. Further provisions relating to ONLS, ONFS and biodiversity are inadequate and fail to implement s6 RMA and the NZCPS. In King Salmon, the Supreme Court found that the matters set out in s6 RMA fall naturally with the concept of sustainable management in the New Zealand context.¹³ As a result, failure to recognise and provide for s6 matters of natural importance fails to achieve the purpose of the RMA. These are not matters the Council can choose whether to implement. They are mandatory considerations which are at the heart of sustainment.

⁶ Environmental Defence Society Inc v New Zealand King Salmon Company Ltd [2014] NZSL 38

⁷ King Salmon [24]

⁸ King Salmon [24], [28]

⁹ RFB v Manawatu-Weymouth A86/96 part reported [1995] NZRMA 2[i]

¹⁰ Part C, chapter 4, policy 5.

¹¹ Part C, chapter 3, table 2,

¹² Part C, chapter 2, page 25.

¹³ King Salmon [26]

- (c) The PRPS misinterprets and misapplies the finding in King Salmon. The PRPS advocates that an “overall broad judgment approach” should be used in all instances.¹⁴ This is incorrect. The Supreme Court found that where policy documents use, clear, directive language those policies equate to “environmental bottom lines” which must be adhered to. Only if the language leaves room for flexibility should an overall judgment approach be applied. The PRPS is required to “give effect” to those documents superior to it in the hierarchy of planning documents. This includes NZCPS and other NPS’s such as NPSRM 14. Although a policy in an NPS or NZCPS cannot be a “rule” within the RMA definition, it may nevertheless have the effect of what in general speech would be a rule.¹⁵ These rules constitute environmental bottom lines. The Council is not at liberty to implement provisions inconsistent with these.¹⁶ Currently the RPS fails to implement the environmental bottom lines in NZCPS and NZSFM, and in fact, contains objectives and policies, and advocates a decision making approach, which contradicts them.
- (d) There is a clear anti-regulatory sentiment resonant in the PRPS. Regulation is seen to be wholly inconsistent with economic development. Although EDS supports efficient plan making and decision making processes in principle there is a fine line between achieving temporal efficiency and compromising the quality of decision making for the sake of speed and economic efficiency. EDS considers that in minimising regulation at all costs the PRPS has compromised its ability to ensure quality decision making and environmental protection are achieved.
- (e) The PRPS exhibits a clear inclination to avoid regulation at RPS level, and leave this responsibility to lower order planning documents.¹⁷ The PRPS is “the heart of resource management” in the region.¹⁸ It sets the strategic direction for lower order policy documents which must give effect to it. It is imperative that the PRPS sets the region on the right trajectory, and itself gives effect to the environmental bottom lines in the NZCPS, NPSFM and Part 2.
- (f) s61 RMA requires the PRPS to be prepared in accordance with the functions afforded to the Council under s30 RMA. EDS contends that the PRPS fails to implement these functions for the following reasons (but not linked to):

¹⁴ See for example pg 12, pg 26

¹⁵ King Salmon [116]

¹⁶ King Salmon [118]

¹⁷ See for example Chapter 8, Policy 1 and Chapter 9, Policy 1

¹⁸ North Shore City Council v Auckland Regional Council [1994] NZRMA s21

- i. Failure to include provisions providing for environmental protection and implement environmental bottom lines will mean the Council is missing a crucial consideration necessary for it to achieve integrated management of the regions resources.
- ii. The provision in Chapter 7 and the reliance on land swaps and Department of Conservation (“DOC”) land to protect biodiversity is inadequate to fill the Council’s function to maintain indigenous biodiversity. There is a complete failure to provide objectives and policies to achieve this maintenance of biodiversity in 16% of region not controlled by DOC. The fact that 82% of land is DOC land does not exempt the regional Council from protecting the biodiversity present in the balance of the region.

(g) Further reasons are provided in the more specific comments below.

RESPONSE TO SPECIFIC CHAPTERS

Chapter 4 - Resilient and Sustainable Communities/Chapter 5 – Use and Development of Resources

6. The background section to “Resilient and Sustainable Communities” clearly reflects the primacy afforded to economic considerations. It refers to the West Coast Economic Development Plan 2014-2030, with no similar or equivalent statement addressing environmental effects and protection. It suggests that economic development is the sole contributor to resilience and sustainability. There is no reference or understanding of the role of eco-systems in a sustainable future. This is compounded by a reliance upon sunset industries including mining and intensive dairy farming. The focus on these industries is exceedingly short-sighted particularly given international commitments to reducing greenhouse gas emissions. The third focal point of the chapter is tourism. The lax approach to environmental protection is likely to substantially detract from this goal – with regional and national implications.
7. We consider that the objectives and policies and issues all require revision to reflect the purpose of the Act, the RPS and the statutory role of Council.

8. The anti-regulation sentiment of the PRPS is most acutely demonstrated in Chapters 4 and 5. There is a clear direction in several sections that regulation should not detriment economic development. For example, Issue 3 sets up implementation of the RMA as counter to economic growth, and therefore favouring a minimalist regulatory regime. This is exemplified by the direction to regional and district plans in Policy 2, including that regulation should be “simple” (2(c)) and that compliance should be minimised (2(e)). These two examples of several in Chapter 4 alone demonstrate a lack of focus on environmental protection.
9. EDS considers that Chapter 5 places an unjustifiable emphasis on social, economic and cultural well being, and ignores legislative direction that these elements of sustainable management must be provided for at the same time as achieving environmental protection (section 5(2)).
10. For example, environmental protection is not mentioned in either objective. Further, in Policy 2 protection is only afforded to natural and physical **resources** that are important to the economy, rather than the wider environment. Another example lies in the fact that the “reverse sustainability” provisions in Policy 2a focus entirely on economic activities rather than environmental elements such as outstanding landscapes (and rivers and streams).

Relief Sought

11. The following relief is sought:
 - (a) That Chapters 4 and 5 are revised in their entirety and provisions included which reflect the purpose of the RMA, the purpose of an RPS and the statutory role of Council, and which comply with the requirements of the RMA.

Chapter 6 - Regionally Significant Infrastructure

12. EDS supports the provision for regionally significant infrastructure to meet the needs of future generations. In particular, Policy 2 which emphasises importance of the development of renewable energy generation.

13. Notwithstanding importance of regionally significant infrastructure, EDS considers that it would be appropriate to include:

- (a) Direction to locate such activities outside of sensitive areas wherever possible.
- (b) While Policy 4 recognises the need to protect infrastructure from adverse environmental impacts of encroaching activities, there is no equivalent policy recognising the need to protect sensitive areas from impacts of infrastructure.
- (c) Where regionally significant infrastructure has residual effects, “offsets” are provided for. Policy guidance on what this would allow is entirely absent from the PRPS.
- (d) In Methods, “micro” and “small-scale hydro generation” are directed to be permitted or controlled activities in regional and district plans. Although EDS supports the development of renewable energy, it is inappropriate to provide for activities that may have significant impacts on freshwater eco-systems as permitted or controlled activities. An activity status of permitted or controlled gives Council no ability to restrict these activities which amounts to a failure to give effect to NPSFM (eg Objective A1(a) and A2).

Relief Sought

14. The following relief is sought:

- (a) Provide for protection of sensitive areas through directing regionally significant infrastructure outside those areas whenever possible.
- (b) Provide direction and clarity on offsetting to guide decisions-making.
- (c) Provide for the protection of freshwater eco-systems in the development of renewable energy generation (eg hydro).
- (d) That Chapter 6 is revised in its entirety and provisions included which reflect the purpose of the RMA, the purpose of an RPS and the statutory role of Council, and which comply with the requirements of the RMA.

Chapter 7 - Biodiversity and Landscapes

Issues

15. The issues as identified are inappropriate because the first is simply a restating of a statutory mandate, the second absolves the Council of having to do it and the third implies that it is not necessary anyway because economic development is more important than fulfilling this function.

Biodiversity

Delegation of biodiversity protection to district and regional plans and DOC

16. The overarching policy approach of the PRPS is one of minimal intervention and a strong emphasis on the importance of economic development over management of environmental bottom lines. The PRPS provides minimal guidance on the content and focus for lower tier planning documents.

17. Although the PRPS notes that "*Biodiversity protection under the Resource Management Act (RMA) is not absolute*", the matters outlined in s.6 were confirmed in **King Salmon** to constitute environmental bottom lines. The role of DOC in protecting significant biodiversity and the reliance on district and regional plan rules to affect biodiversity protection is a nonsense when the RPS contains limited support for this core function. Weak objectives and policies in the RPS are likely to have the effect of undermining any rules in lower tier instruments.

Land swaps

18. The RPS fails to give effect to the Regional Council functions related to biodiversity because it relies on an inappropriate method (land swaps) to divide land suitable for development from land that should be protected from development in accordance with the purpose and principles of the RMA. The PRPS presently relies upon land tenure of significant areas and significant habitats of indigenous fauna being changed to include them on public conservation land:

“The long term objective for our region is for all high value land to be in Crown ownership and all low (conservation) value land to be in private ownership, and being used to generate employment and income”.¹⁹

19. This approach is in place of providing for their protection outside of the Crown estate via controls on environmentally damaging activities commonly found in other RPSs. Altering land tenure is a costly, time-consuming and inefficient process, that is unlikely to be either flexible or effective enough to generate good environmental outcomes. Land use pressure is likely to outpace capacity to include significant biodiversity, both in financial resources to acquire the land and in time to undertake gazetting processes. In the interim, significant biodiversity is likely to be lost.

20. The PRPS implies that the Department of Conservation is supportive of this approach in noting:

“The West Coast Regional Council and Department of Conservation share the view that significant habitats and vegetation is best protected when the underlying land is owned by the Department.”

21. The Department of Conservation is not of this view, rendering this policy approach as stated to be somewhat misleading. Land protected by the Crown is also subject to a range of possible impacts under the Conservation Act 1987 and the ongoing impacts of introduced pests and a high burden of management unmet by present operating budgets. Furthermore, protecting land in public conservation land does not address other impacts on biodiversity on private land more efficiently and appropriately managed through policy and plan provisions under the RMA.

Anticipated environmental results

22. The plan lacks direction, strategy and aspirations for improved standards of biodiversity protection in line with other second generation regional policy statements. The lack of vision is best evidenced by the anticipated environmental results of the RPS provisions. The anticipated environmental results, even if achieved, would still not have implemented the functions of either the Council or the RPS.

¹⁹ P.24

23. For example, AER1 (Maintenance and enhancement of areas with regionally significant indigenous biodiversity values in the West Coast region) refers specifically to “regionally” significant biodiversity. In fact, the Act contains no caveats regarding the scale of significance (see also Friends of Shearer Swamp decision).
24. Secondly, AER4 (Appropriate subdivision, use and development are able to occur, and regulatory processes do not unduly delay appropriate resource use and development taking place) is clearly focussed on environmentally damaging activities not being “held up” by environmental controls. Delays” as a result of complex consenting matters are usually evidence of a careful process being undertaken in respect of a proposed development, including seeking further information on likely impacts and consultation of affected parties. Such lengthier decision-making processes may well generate better outcomes, so the thinking of shorter consenting timeframes and better environmental outcomes is fanciful.

Landscape

25. There are several statutory and policy provisions which apply to the management of landscape and natural character values within the West Coast region, and which the PRPS needs to give effect to. These include:
- (a) Section 6(a) of the RMA which requires *“the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision use and development”*.
 - (b) Section 6(b) of the RMA which requires *“the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development”*.
 - (c) Section 7 of the RMA which refers to *“the maintenance and enhancement of amenity values”*.
 - (d) Policies 13, 14 and 15 of the NZCPS address the preservation of natural character, restoration of natural character and natural features and natural landscapes respectively. These require amongst other things, the avoidance of adverse effects on areas of the coastal environment with outstanding natural character and on outstanding natural features and landscapes. Significant adverse effects need to be avoided on other natural character areas and natural landscapes in the coastal environment.

26. The requirement to “give effect” is a strongly worded directive meaning to implement. The lack of protection afforded to ONC, ONL and ONF areas in the PRPS is inadequate. Critically, it does not give effect to the NZCPS, and fails to implement environmental bottom lines. It is insufficient to ensure their protection from individual or cumulative impacts.
27. In addition to the over arching comments made above, EDS holds the following concerns:
- (a) The PRPS does not map and identify ONLS, ONFS, ONCs or SEAs. Failure to incorporate overlays into the PRPS opens the door for overlay maps to be changed by ad hoc plan changes, undermining strategic direction.
 - (b) Landscapes which contribute to the amenity of the region have not been identified, and there are no objectives or policies to ensure their protection. This means that the maintenance and enhancement of amenity values as required under s7 RMA is unlikely to be achieved.
 - (c) Chapter 7 fails to provide for the protection and preservation of ONCs, ONLs and ONFs as required by Part 2 RMA. Conversely objectives appear to caveat the need for protection as result of their “abundance” in the area, and their ownership being primarily in the hands of the Crown.
 - (d) Chapter 7 fails to give effect to policies 13 and 15 NZCPS and to implement environment bottom lines.²⁰ The NZCPS requires adverse effects on ONC, ONL and ONFs to be avoided in the coastal environment. In light of and protection of these areas being a matter of national importance, EDS considers the requirement to avoid adverse effects should apply to all outstanding areas.
 - (e) The appropriateness of subdivision and development should be assessed against what is sought to be protected. In respect of Use of ONC, ONL and ONCs it is specific characteristics and values which lead to their identification as “outstanding” which require protection. The assessment criteria, in Policy 3 allow for degradation of the “outstanding” qualities of these areas.

²⁰ King Salmon [132]

Relief Sought

28. The following relief is sought:

- (a) That Chapter 7 is revised in its entirety and provisions included which reflect the purpose of the RMA, the purpose of an RPS and the statutory role of Council, and which comply with the requirements of the RMA.

Chapter 8 - Land and Water

29. The wording in this section is noticeably out of date, given that it refers to the National Policy Statement on Freshwater Management 2011, instead of the more recent 2014 version. However, of greatest concern is the relationship between the PRPS and the Regional Land and Water Plan, particularly in that the Council again transfers responsibility for giving effect to the NPSFM to lower tier instruments (as issue discussed earlier). EDS considers that in order to give effect to the NPSFM, Chapter 8 needs to more clearly delineate between addressing water quality and water quantity within environmental limits.

Water Quality

30. As currently worded, the objectives and policies:

- (a) Fail to implement Objectives A1 and A2 of the NPSFM;
- (b) Fail to provide for protection of significant biodiversity, habitats of significant indigenous fauna or the maintenance of life supporting capacity of the environment.

Water Quantity

31. As currently worded, the objectives and policies:

- (a) Fail to implement Objective B1-B4 of the NPSFM.
- (b) Fail to provide for protection of significant biodiversity, habitats of significant indigenous fauna or the maintenance of life supporting capacity of the environment.
- (c) The first come, first served approach to water allocation does not adequately manage conflicting resource requirements and the need for environmental protection. The

criteria (a) to (c) do not provide for the avoidance of a water take if it will exceed environmental bottom lines.

Relief Sought

32. The following relief is sought:

- (a) That Chapter 8 is revised in its entirety and provisions included which reflect the purpose of the RMA, the purpose of an RPS and the statutory role of Council, and which comply with the requirements of the RMA, and give effect to the NPSFM.
- (b) Additional criteria are included to provide for the avoidance of water take where it will have deleterious impacts on sensitive freshwater eco-systems.

Chapter 9 - Coastal Environment

33. Section 6(a) of the RMA requires *“the preservation of the natural character (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use and development”*. Section 6(c) of the RMA requires *“the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna”*. Section 6(d) of the RMA requires *“the maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers.”*

34. The NZCPS provides more direction on how these and other provisions are to be implemented within the coastal environment, including how to protect natural character, coastal landscapes and biodiversity, how to effectively manage use and development to avoid cumulative effects; how to protect and enhance public access; how to address sedimentation; and how to manage coastal hazards.

35. The PAUP must *“give effect”* to the requirements of the NZCPS.

36. EDS considers that Chapter 9 fails to implement the RMA, the purpose of a RPS, the NZCPS and statutory role of Council for the following reasons (but not limited to):

- (a) The PRPS limits its consideration to Policies 6, 7, 11, 13, 15, 24 and 27 of the NZCPS. As the guiding strategic document in the region, it is imperative that it addresses all issues

in the coastal space within RMA jurisdiction. This is not at the discretion of Council, but a statutory requirement.

- (b) Chapter 9 advocates a balancing of protection and development. This is incorrect. This approach fails to implement the environmental bottom lines in Policies 11, 13 and 15, and to reflect the hierarchy of protection envisaged in the NZCSP.²¹
- (c) Chapter 9 relies on the “relatively unmodified” and “abundant” coastal environment to justify uninhibited development. This implies little desire to constrain or avoid development on the 16% of the region in private ownership. The statutory requirement to avoid effects on areas such as outstanding landscapes persist irrespective of proportional ownership.
- (d) Again, the PRPS delegates responsibility to lower tier documents. As previously stated, the RPS is the heart of resource management in the region. It is critical that it creates the framework required by the NZCPS (eg see Policy 1).
- (e) Chapter 9 does not adequately anticipate the protection of the coastal environment and the avoidance of adverse effects (see Policy 2(a)). The Supreme Court clarified that in combination Policies 6, 13 and 15 of the NZCPS anticipate that development be appropriate in some areas and will not be appropriate in others. It may be that protection will necessitate complete avoidance.
- (f) Policy 3 of the PRPS does not give effect to Policy 25 NZCPS. Policy 25 requires:
 - a. Avoidance of an increase in risk of social, environmental and economic harm from coastal hazards.
 - b. Avoidance of redevelopment or change inland use to increase this effect.

Providing for new subdivision or coastal development in areas of risk of coastal hazards does not achieve these requirements.

²¹ King Salmon [124]

- (g) EDS supports the 100 year management timeframe for coastal hazard risk, as required by Policy 24 of the NZCPS.
- (h) EDS understands that in some instances, hard protection structures may be necessary. However, Policy 5 gives inappropriate emphasis to hard structures which is contrary to Policy 25(d) of the NZCPS which discourages their use. Policy 5 fails to promote alternatives such as natural defences which have greatly reduced adverse impacts. EDS is concerned that Method 2 relies on the use of consenting processes to manage coastal hazards. This is a poor practice as it is reactive and is contradictory to the 100 year management approach otherwise mentioned.²²

Relief Sought

37. The following relief is sought:

- (a) That Chapter 9 is revised in its entirety and provisions included which reflect the purpose of the RMA, the purpose of an RPS and the statutory role of Council, and which comply with the requirements of the RMA, and which give effect to the NZCPS.

²² The concerns at (f)-(i) above are equally relevant to Chapter 11 Natural Hazards.