

# EclA and the Resource Management Act

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## Introduction

This note considers some issues around the Resource Management Act and the role of ecological impact assessment. Despite EclA being a well-established input to both local planning processes and the consideration of proposals requiring resource consents, it is perhaps surprising that there remain several areas of uncertainty about the approach which should be adopted in any particular situation.

Decisions at both local authority and Environment Court levels have tended to focus on the specific facts involved rather than assessment approaches or techniques. Because of that, for some questions which I consider to be fundamental, it is difficult to discern clear principles, guidance or direction that can be applied consistently.

This note identifies what I consider to be two major areas of uncertainty about EclA as described in the EIANZ Guidelines [\[1\]](#): use of the terms “significance” and “value”, and lack of guidance about “protection”. I suggest that the EIANZ’s Ecological Impact Assessment guidelines 2nd edition (2018) provide an excellent start, but that there is still more work to do. While the 1st edition (2015) guidelines have been implicitly accepted in a few decisions, it appears that consideration of the usefulness and applicability of the guidelines has not been the subject of explicit consideration by a council, board of inquiry or court.

I suggest there is merit in taking a similar approach to the Institute of Landscape Architects, which involves further engagement internally within the profession and externally with the Environment Court about the Court’s expectations of EclA, and the areas of uncertainty and whether greater clarity could and should be provided.

## The scope of impact assessment

In general terms, the requirements of an impact assessment are well known. A resource consent application (and by implication subsequent expert evidence) must include “*an assessment of the activity’s effects on the environment, as required by Schedule 4*”.[\[2\]](#) Schedule 4 is the main element of statutory guidance. The schedule lists a range of matters that must be included, [\[3\]](#) which must be in “such detail as corresponds with the scale and significance of the effects that the activity may have on the environment”.[\[4\]](#) Third party challenges to the adequacy of an AEE are difficult given the general requirements for assessment of effects set out in Schedule 4. An inadequate impact assessment does not of itself invalidate an application and can be ‘cured’ by subsequent information through the

process. The ultimate question is whether the decision maker has enough information from whatever source including their own investigations, to perform their functions properly.

The Environment Court has commented on the information requirements of an AEE as follows:

***Good resource management practice requires that sufficient particulars are given with an application to enable those who might wish to make submissions on it to be able to assess the effects on the environment and on their own interests of the proposed activity. Advisors to consent authorities and would-be submitters should not themselves have to engage in detailed investigations to enable them to assess the effects. It is an applicant's responsibility to provide all the details and information about the proposal that are necessary to enable that to be done. The proposal and the supporting plans and other material deposited for public scrutiny at the consent authority's office should contain sufficient detail for those assessments to be made*** [\[5\]](#)

### **Distinguishing between significance and value**

The 2018 EclA guidelines distinguish between “significance assessment” and “impact assessment”. They state:

***Significant Natural Areas (SNAs) are sites which have been identified by survey, or by desktop analysis and remote sensing, and are considered to be ‘significant’ under section 6(c) of the RMA based on interpretation of a set of criteria developed for that purpose... In EclA the term “significant” should be reserved for use in the context of section 6(c) assessments. It is not used in the determination of ecological value or importance.***[\[6\]](#)

The guidance notes that a significance assessment is carried out primarily to assist planners in their interpretation of district or regional plan provisions and is less relevant to the assessment of ecological impacts and the determination of appropriate mitigation which rely instead on an assessment of ecological value, resilience, sensitivity, and ecological processes and functions. The guidance states:

***Significant / not significant is a binary condition – there are no degrees of significance. But the ecological value or importance of an area is a continuum, ranging from (for example) none to very high.***[\[7\]](#)

While I agree that the distinction is important, in my experience the two issues are closely interrelated, and often overlap. In most cases, an applicant will be required to make an assessment, as part of the description of the existing environment,[\[8\]](#) of whether there are any ‘areas of significant indigenous vegetation’ or ‘significant habitats of indigenous fauna’ which may be affected by the proposal (the ‘significance assessment’). This is necessary whether or not the district or regional plan identifies or lists significant areas or habitats in some way, and whether or not the relevant planning instrument provides specific provisions about how significant areas or habitats are to be managed. Many district plans provide criteria for assessing “significance” even if there is no list, but there remains no national approach to ensure consistency and efficiency of the planning processes[\[9\]](#).

The reason, ultimately, that this is important is that it is a ‘matter of national importance’ that areas and habitats which have been identified as significant are ‘protected’[\[10\]](#). Areas and habitats which are not found to be ‘significant’ do not have the same statutory test as ‘protection’. Rather, the test there is the more general one of promoting sustainable

management and how effects are avoided remedied, mitigated, offset or compensated for.[\[11\]](#) I suggest that an EclA is an important part of determining whether a significant area or habitat can be protected if the activity is consented. (I discuss below the issue of determining what is meant by 'protected').

The guidelines discuss the scope of biological assessments.[\[12\]](#) They state:

***Depending on the size and type of project, the description of the terrestrial and freshwater components of the environment may include:***

- ***A description of the vegetation including species lists and classification of vegetation types. The level of detail provided will vary, but may range from broad narrative description, to formal vegetation classification....***
- ***A more detailed analysis of the areas of various vegetation types may be required, typically presented as tables listing vegetation type, area, and percentage of the Project Site (or subsite) occupied. This should be supported by a vegetation map of the same vegetation types...***

This raises the issue of what is colloquially referred to as the 'clumpers versus splitters debate'. The guidelines recommend as a minimum that the assessment look to the scale of the Ecological District [\[13\]](#) but may also consider a smaller scale (e.g. a unique remnant), and a larger scale (e.g. national movement of migrant species). The guidelines go on to consider 'questions of spatial scale' and 'levels of ecological organisation' and include the following comments:

***Questions relating to spatial scale often arise, especially when dealing with impacts that may be spread over large spatial scales, sometimes in a fragmented manner: what size units of vegetation or habitat should be considered?...***

***Decisions about which ecological features, and at what level of organisation and spatial scale to evaluate them, are influenced by the assessment of effects and mitigation requirements. The values and effects on individual species should not be overlooked or amalgamated or averaged; but where there are likely to be effects of a similar level, requiring similar mitigation actions, these can be addressed together at the community or assemblage level. For example, an area or site (such as a wetland) is likely to contain a variety of habitats, vegetation types, and plant and animal communities and assemblages, having different values. For example, a wetland dominated by introduced rushes and herbs may support a nationally threatened bird species; this would mean that values, effects and impact management of wetland habitat and bird species would require separate assessments.***

***These should be treated separately or grouped according to value, likely seriousness of effects, and mitigation opportunities for components...[\[14\]](#)***

***An overall assessment of the ecological value of a site is determined from the ecological values of species, vegetation types, habitats and ecosystems there. For any given site, it is conventional to assign value at some or all of the following levels of ecological organisation:***

- ***Species (or in some cases sub-species or taxonomically indeterminate taxa)***
- ***Assemblages or communities of plants and/or animals, especially when considering vegetation and soils ('vegetation types')***
- ***Habitats of fauna. Whilst habitat may be determined by vegetation, it also includes abiotic components. Some habitats may contain little or no vegetation***

**(e.g. scree, sand or gravel spits, some freshwaters). Vegetation of low value in itself may provide habitat for high value fauna.**

All of this seems non-controversial, but in situations where the district or regional plan does not comprehensively and exhaustively identify significant areas and habitats (which is the situation in almost all cases) it has become quite common for decision-makers to be faced with conflicting evidence from ecologists. This revolves around what constitutes an ‘area’ of significant vegetation or a ‘significant habitat’ lying within a proposed project footprint or that might be affected by a proposal. For example, applying exactly the same significance assessment criteria to a project area, one ecologist may identify four vegetation types that may be affected by a proposal, and another ecologist identifies 10 vegetation types. Ecologist A (the “clumper”) describes each of the vegetation types as comprising part of larger areas which are significant for the purposes of section 6 RMA. Ecologist B (the “splitter”) describes the 10 vegetation types of parts of much smaller areas of significant vegetation. While the ecologists might see the same ecological values on the ground in the project area, the question of what are the boundaries of “significant” areas remains for the decision-maker.

This is not just a theoretical question. The importance of taking a ‘splitting’ or a ‘clumping’ approach to significance assessment is that it determines what is to be ‘protected’. While I accept that “*The purpose of EclA is to provide information about, and interpretation of, the ecological implications of a project upon all ecological components of a site, irrespective of “significance”*” [15], that significance assessment is critical in determining the physical environment against which effects are to be assessed. Under section 6, each significant area or habitat needs to be protected. In general terms, the greater the number of significant areas or significant habitats there are found to be impacted, the more difficult it will be to satisfy the ‘protection’ test in section 6.

Clearly, there needs to be a practical and balanced approach taken, but at what point does the ‘splitting’ become unbalanced so that no longer are areas of vegetation being defined, but rather assemblages of plants? Likewise, at what point does a ‘clumping’ approach become unbalanced so that sensible and practical differences in vegetation types are disregarded, and effects overlooked? How is a decision-maker able to assess these different approaches by different ecologists applying the same significance criteria?

The simple answer is that each ecologist has to justify their approach and the spatial scale they have adopted. In my example above (and in evidence in cases I have been involved in) both ecologists will seek to do that. But on what basis is the decision maker to decide which evidence to prefer? All decision makers will in the end decide which evidence they prefer, but from my reading of the decisions that consider this issue, the conclusions appear very site specific with no general or consistent principles applied.

Of course, every site and every proposal are different, and there will not be a magic, simple, one-size-fits-all approach. But I strongly suspect that we can improve the current situation. Discussions and arguments over this issue consume many hundreds of hours of evidence writing, expert conferencing and decision deliberation and writing. In my view, the 2018 EclA guidelines identify the issue but do not provide any substantive assistance in adopting a consistent or principled approach.

There is some guidance at regional level about what constitutes a significant site. For example, a report to Environment Canterbury [16] provides under the heading “What constitutes a significant site?” it states:

***A significant site should include the significant features, and connecting habitat and key ecological processes that help to maintain the significant features. The significant site would normally include all vegetation/habitat units that contain or constitute significant features, and any intervening or buffering indigenous habitat that helps to connect these units and form a more cohesive or compact site. Mosaics of indigenous vegetation may be included in the significant area because an assemblage of small areas, overall, can comprise a significant area.***

However, at some sites this has raised questions around the definition of “indigenous vegetation” and the extent to which introduced species and habitat types in buffer areas can contribute to the overall ecological significance of a site.

In my view, EclA under the RMA could be improved if there were further consideration of the issue of whether further guidance is possible at a national level on the issue of the scope of biological description, as a basis for assessing impact.

### **The meaning of 'protection'**

A second, and related issue is whether the EclA process can and should explicitly address the issue of whether an identified significant area or habitat is protected if consent is granted to a particular proposal.

Here, there is a range of questions and issues which, in my view, could usefully have greater clarification, notwithstanding the truism that each subject site is ecologically unique and each development proposal is unique. For example, is ‘legal protection’ of a site (eg by way of a covenant or ownership by central or local government) necessary for that site to be protected in terms of section 6 of the RMA? And, even if legal protection is necessary (over and above the legal obligations on a consent holder by way of conditions attached to a consent) is it adequate? That is, given the continuing pest and weed problems in New Zealand, can it be assumed that areas of significant vegetation and significant habitats of indigenous fauna currently within ‘legally protected’ areas but without active and sustained management are currently protected in terms of section 6? Does simply ‘leaving them alone’ (ie preventing development but nothing more) protect them in terms of section 6? Where areas of vegetation and habitats are affected by a development proposal, can protection of those areas or habitats be achieved even if there is net loss of some values? Or is ‘no net loss’ of values required, and if so, how is ‘no net loss’ to be determined, and in what spatial context?

In some situations, the relevant district or regional plan will set out clearly what is required for a significant area or habitat to be protected. At one end of the spectrum, the plan might state that adverse effects on significant areas or habitats generally, or on specifically identified areas, are to be avoided, in effect requiring that the existing values be preserved and that activities which affect those values are prohibited. Following the Supreme Court’s decision in *King Salmon* [17] where a plan requires effects on values to be ‘avoided’ this is likely to mean what it says, so that in those districts where the plan is explicit, if the EclA identifies an adverse effect from a proposed development, that will mean the proposal is contrary to the plan.

However, many district plans have policies which say little more than something like ‘areas of significant vegetation are to be protected’. In these situations, what is the role of an EclA in assisting the decision maker to determine that ultimate question? The guidelines provide for the level of effect to be “*determined by a combination of the magnitude of the effect and the value of the affected ecological component*” [18]. In my view, the guidelines set out a very helpful list of criteria for describing magnitude and level of effect on an ecological

feature (species, vegetation communities, habitats, ecosystems and/or sites) in the form of a number of clear tables [19]. I consider it would be of considerable assistance for witnesses, counsel and decision makers if this were adopted as a standardised approach to all ecological assessment and impact evidence [20].

While not preventing other methods being used, the onus should be on an ecologist (and advising counsel) to demonstrate why an alternative approach is justified. But for this to occur, I consider there needs to be a process of consultation and discussion, internally within the ecology profession, with councils and with the Environment Court in particular.

Armed with the results of such a transparent effects assessment, is it appropriate for an ecologist to go on to state his or her opinion about whether or not a significant area or habitat is protected? The guidelines say:

***It is not considered the role of an ecologist to conclude an ecological impact assessment using legal or planning terms. However, the ecologist doing the work should be prepared to answer questions on this topic and assist the planner in coming to a determination about aligning ecological and legal or planning terms.***

It's certainly not the role of an ecologist (or any other expert) to express a view on whether a consent should be granted or declined or whether the 'overall tests of the RMA' are met or not. That is because, in most instances, a decisionmaker must balance a range of different and sometimes conflicting considerations.

However, in my view the most appropriate person to express an opinion on such questions as whether the 'life-supporting capacity of an ecosystem is safeguarded' or 'an area of significant vegetation is protected' is an expert ecologist who has undertaken a significance assessment and a robust and transparent effects assessment. Such an assessment requires more than simply repeating the mantras in the RMA such as 'less than minor' or 'no more than minor'. In my view such an opinion is likely to be of greater assistance than an opinion on the same issue from a planner or submissions from an advocate. But therein, lies the rub.

Similar to the way in which the courts have addressed the 'clumping' versus 'splitting' issue, I can discern no overall consistent approach to the determination of what 'protection' means in the absence of specific and detailed direction in the relevant district or regional plan provisions.

**Can the table of criteria for describing level of effects in the 2018 guidelines [21] be used to assist in the assessment of whether a significant area or habitat is protected?**

**Does 'protection' require 'no net loss' of ecological value (as assessed after considering 'like for like offsets')? Or is it acceptable for a net loss to occur in some situations?**

**Is 'protection' an entirely objective ecological assessment or does it vary depending on what the relevant plan provisions say?**

These are all issues, in my view, which deserve further consideration and discussion. I suggest that the Guidelines would benefit from more guidance on avoid/protect and expanding the discussion of ecological and legal aspects of protection and levels or types of

protection. Some common understanding, at least, of these issues would assist in the effective, consistent and efficient approach to ecological impact assessment.

## REFERENCES & NOTES

[1] Ecological impact Assessment (EcIA). EIANZ Guidelines for use in New Zealand terrestrial and freshwater ecosystems. 1st Ed March 2015; 2nd Ed EIANZ. May 2018

[2] S88(2)(c) RMA

[3] Particularly clauses 6 and 7

[4] Clause 2(3)(c)

[5] Affco NZ Ltd v Far North DC (1994)

[6] Section 4.4.2

[7] Section 5.1.1

[8] Section 4 of the 2018 guidelines

[9] A national approach is recommended in the 2018 report of the Biodiversity Collaborative Group

[10] Section 6(c) RMA

[11] That is not to say such areas and habitats may not be required to be protected in any given situation; but it is not a national imperative that they be protected

[12] Section 4.4.6

[13] Section 4.2 The description should use the Ecological Districts framework to set the spatial context, unless another is more appropriate to the type of environment and likely effects. See also section 5.1.3

[14] Section 5.1.3

[15] Section 4.1 guidelines

[16] Guidelines for the application of ecological significance criteria for indigenous vegetation and habitats of indigenous fauna in Canterbury region. Wildlands report (2013)

[17] Sustain Our Sounds Inc v The New Zealand King Salmon Company Limited & others [2014] NZSC 40

[18] Sections 6.4.2 and 6.4.3

[19] Section 6.4

[20] The use of tables in a way consistent with the 2018 guidelines have been accepted (implicitly and without discussion of and a preference expressed over other approaches) in a range of decisions, including: Transmission Gully (Board of Inquiry) – all ecology disciplines; Mackays to Peka Peka (BOI) – all ecology disciplines; Puhoi to Walkworth (BOI) – marine assessment; East West Connection (BOI) –all ecology disciplines; Shell Oil (EEZ hearing) – marine assessment; Tamarind Taranaki Ltd (EEZ hearing) – marine assessment

[21] Table 10