BEFORE THE INDEPENDENT HEARINGS PANEL
AT DUNEDIN / ŌTEPOTI

IN THE MATTER OF	the Resource Management Act 1991
AND	
IN THE MATTER	of submissions and further submissions on the Proposed Otago Regional Policy Statement – Freshwater Planning Instrument
AND	**The Royal Forest & Bird Protection Society Inc** (submitter FPI045)

LEGAL SUBMISSIONS ON BEHALF OF THE ROYAL FOREST AND BIRD PROTECTION SOCIETY INC

6 SEPTEMBER 2023

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MAY IT PLEASE THE PANEL

INTRODUCTION

1. These submissions are presented on behalf of the Royal Forest & Bird Protection Society (Forest & Bird) in support of its submission and further submission on the Proposed Otago Regional Policy Statement 2021: Freshwater Planning Instrument (PORPS – FPI).

2. These legal submissions provide the legal context and basis to support:

   a. retention of certain provisions; and

   b. some remaining amendments to the PORPS sought by Forest & Bird, where these are left unresolved by the Otago Regional Council (ORC or Council) via its s42A Report.

3. Forest & Bird is calling one witness,[1] and also relies on the evidence of the Director-General of Conservation[2] and Kāi Tahu.[3]

LEGAL FRAMEWORK

4. Forest & Bird generally agrees with the legal submissions for the Council[4] but addresses some further considerations required in the RPS-making context and the recent *Port Otago* decision.

Port Otago Limited v Environmental Defence Society

5. Forest & Bird submits the Supreme Court's decision in *Port Otago Limited v Environmental Defence Society*[5] has some relevance in interpreting NPSFM policies but otherwise is of no major moment to the Freshwater Planning Process.

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[1] Ms Maggie Burns – planning.
[2] Mr Murray Brass – planning, Dr Dunn, and Mr Bruce McKinlay – ecology.
[3] Ms Sandra McIntyre – planning.
[4] Opening submissions for the Otago Regional Council dated 28 August 2023, Memorandum for the Otago Regional Council on the implications of the National Policy Statement for Indigenous Biodiversity on freshwater issues dated 11 August 2023.
[5] [2023] NZSC 112.

6. This is because *Port Otago* concerned the "Ports" Policy under the NZCPS versus the "Avoidance" policies under the NZCPS.[6] Essentially, the Court found that the terms "recognise" coupled with "required" referred in NZCPS Policy 9 ("**recognise** that a sustainable national transport system **requires** an efficient national network of safe ports") gives the Ports policy a "directive character":[7]

> [69] Turning to the NZCPS ports policy, we broadly agree with the Environment Court and Miller J that "requires" is a key verb in the policy. We accept that "recognise" is also an operative verb and that the clause begins with it. However, the verb "requires" colours what the decision-maker is being asked to "recognise". In other words, the decision-maker is being directed to recognise that a port network is required. To recognise that something is required is to accept that is mandatory. **So, the directive nature of the ports policy arises from the two verbs taken together.**

7. Further, *Port Otago* applies to the safe and efficient operation of "existing" ports.[8]

8. The NPSFM does not contain a policy of similarly "directive character" for the second and third priorities under the NPSFM.

9. Saliently, *King Salmon* has not been overturned and its methodology to interpreting objectives and policies remain.

10. The Supreme Court in *Port Otago* reiterated its findings in *King Salmon* about the importance of examining the way in which policies are expressed:[9]

> [61] The language in which the policies are expressed will nevertheless be significant, particularly in determining how directive they are intended to be and thus how much or how little flexibility a subordinate decision-maker might have. As this Court said in King Salmon, the various objectives and policies in the NZCPS have been expressed in different ways deliberately. Some give decision-makers more flexibility or are less prescriptive than others. Others are expressed in more specific and directive terms. These differences in expression matter.

11. The Supreme Court's findings in *Environmental Defence Society v King Salmon*[10] remain instructive in dealing with the interplay between the policy direction contained within National Policy Statements:

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[6] *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [2](a): Policy 11 (indigenous biological biodiversity); Policy 13 (preservation of natural character); Policy 15 (natural features and natural landscapes) and Policy 16 (surf breaks of natural significance).
[7] [2023] NZSC 112 at [71].
[8] [2023] NZSC 112 at [76].
[9] [2023] NZSC 112 at [61].
[10] [2014] NZSC 38.

a. The use of “avoid” in a policy means “not allow” or “prevent the occurrence of”.[11]

b. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.[12]

c. policies “expressed in more directive terms will carry greater weight than those expressed in less directive terms”.[13]

d. A policy may be “stated in such directive terms that the decision-maker has no option but to implement it.”[14]

e. Enabling provisions that provide scope for choice as to how and where a proposal occurs do not prevail over directive policies that require avoidance of adverse effects.[15]

f. Directive policies (particularly NZPCS Polices 13 and 15) represent bottom lines.[16]

12. Accordingly, in giving effect to the NPSFM, it is of course critical to consider the precise wording of the objective or policy in issue. This involves considering whether it formulated in a directive way, or is it formulated in a way that confers wide flexibility in implementation.

The concept of “material harm”

13. ORC’s submissions set out the Supreme Court’s references to *Trans-Tasman Resources v Taranaki-Wanganui Conservation Board*[17], where the Court observed the concept of “material harm” is applicable to the NZCPS avoidance policies.[18]

14. Forest & Bird agrees with ORC that these findings do not have impacts on the FPI.[19]

[11] *Environmental Defence Society v King Salmon* [2014] NZSC 38 at [62].
[12] *Environmental Defence Society v King Salmon* [2014] NZSC 38 at [80].
[13] *Environmental Defence Society v King Salmon* [2014] NZSC 38 at [129].
[14] *Environmental Defence Society v King Salmon* [2014] NZSC 38 at [129].
[15] *Environmental Defence Society v King Salmon* [2014] NZSC 38 at [126]-[131].
[16] *Environmental Defence Society v King Salmon* [2014] NZSC 38 at [132].
[17] [2021] NZSC 127.
[18] Opening submissions for the Otago Regional Council 28 August 2023 at [17]-[18].
[19] Opening submissions for the Otago Regional Council 28 August 2023 at [20].

15. It is important to note the different statutory context the findings in *Trans-Tasman* were made, being under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. The Court was tasked with interpreting part of its purpose as follows:[20]

> in relation to the exclusive economic zone, the continental shelf, and the waters above the continental shelf beyond the outer limits of the exclusive economic zone, to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter.

16. Further, the purpose of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 is not fleshed out in the same way as the RMA in terms of its hierarchy of planning documents such as the NZCPS and NPSFM. Counsel submits that in the RMA context, these documents ultimately guide the suitable approaches as to what may amount to an adverse effect, "material harm", or otherwise.

17. Forest & Bird does not consider this is a significant shift from the concept of minor or transitory effects in *King Salmon."*[21]

18. The Supreme Court recognised that:[22]

    i. The standard was protection from material harm, albeit that **temporary harm can be material.**

    ii. the "concepts of mitigation may serve to meet the "avoid" standard by bringing the level of harm down so that material harm is avoided."

19. Further, the Supreme Court in *Port Otago* concluded that the relevant values and areas are critical in interpreting the avoidance policies: [23]

> the avoidance policies in the NZCPS must be interpreted in light of what is sought to be protected including the relevant values and areas and, when considering any development, whether measures can be put in place to avoid material harm to those values and areas.

20. The requirement to identify the relevant values and areas means that "material harm" cannot be interpreted in a vacuum and must be determined in relation to

[20] Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, section 10(b).
[21] Opening submissions for the Otago Regional Council 28 August 2023 at [19].
[22] *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [65].
[23] *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [68].

the values and areas in question. This is entirely consistent with Supreme Court's findings in *Trans-Tasman* [per Glazebrook J]:[24]

> The standard used by the Court of Appeal, "material harm", seems sensible as a bottom line. If the environment is materially harmed, then it cannot be said to have been protected from pollution. On the other hand, it seems most unlikely that the purpose of s 10(1)(b) was to protect the environment against immaterial harm. **What amounts to "material harm" and the period over which this is measured will be for the decision-maker to determine on the facts of each case. Of course, harm does not have to be permanent to be material. Temporary harm can be material**.

21. And consistent with this were the Chief Justice's observations:

> [310] The qualification added by the descriptor "material" is important in making sense of the statutory scheme and in terms of how it operates. Whilst s 10(1)(b) applies to every consent application for discharge of a harmful substance, **not every discharge of a harmful substance will cause harm to the environment – material or otherwise. The continental shelf and exclusive economic zone cover a large and varied expanse of seabed. The exclusive economic zone contains a vast volume of ocean water and supports a wide variety of life. Whether harm is material in any one case will require assessment of a multiplicity of factors, such as the volume of the harmful substance discharged into the expanse of the sea, the flora, fauna and natural characteristics of the area of seabed affected, the size of seabed or volume of water affected, and the time for which the damage will last**. There are therefore qualitative, temporal, quantitative and spatial aspects to materiality that have to be weighed.
>
> [311] The assessment of whether the projected harm crosses the threshold of materiality therefore requires a factual inquiry. Consideration must be given to the impact of the discharge upon the marine ecosystem when assessing what is to be adjudged a material level of harm. Consideration must also be given to the impact upon those who depend upon that ecosystem – s 59(2)(a) and (b) require any effects on existing interests of allowing the activity to be taken into account.

22. The Chief Justice took a similar view to Glazebrook and Williams JJ's approach to s 10(b), with one key difference. She did not consider economic benefit considerations were relevant in any circumstances to the assessment of materiality and so could not be taken into account in terms of setting remediation timeframes. Nevertheless, to reach a majority the Chief Justice was adopt the three-step approach formulated by Justices Glazebrook and Williams.

23. In the context of the Freshwater Planning Instrument parts of the PORPS, counsel submits that the findings as to "material harm" are of peripheral relevance. If anything, they serve to reinforce the integral role of bottom lines in environmental management.

[24] [2021] NZSC 127 at [252], agreed by Williams J at [292]-[293].

24. The following NPSFM 2020 policies are directive and in the nature of "bottom lines" per *King Salmon* and *Port Otago*:

    a. Policy 1 "Te Mana o Te Wai is **given effect to**", and
    b. Policy 11"Freshwtaer is allocated and used efficiently, all existing over-allocation is phased out, and future over-allocation is **avoided.**"
    c. Policy 8: "The significant values of outstanding water bodies are **protected.**"
    d. Policy 9: "The habitats of indigenous freshwater species are **protected**."

25. Forest & Bird submits these policies are "stated in such directive terms"[25] and must be implemented.

26. The findings in *Port Otago* do not readily apply to the NPSFM, particularly Policy 11 – one of the most directive policies in the NPSFM. *Port Otago* considered the NZPCS "Avoidance" policies. Following *Port Otago,* the application of the Avoidance policies requires a nuanced assessment, including matters such as whether adverse effects will in fact be minor or transitory or whether adverse effects have been remedied or mitigated to the extent that they are avoided.

27. This can be contrasted with the phrasing in NPSFM Policy 11, that "future over-allocation is avoided." "Over-allocation" is defined as including "where a resource use exceeds a limit."[26] This does not require a nuanced assessment as it is a factual matter to determine. A limit, i.e. minimum flow or take limit, is either breached or it is not. For example, for water takes beyond an allocation limit, the latitude to assess the scale of adverse effects should have already occurred with any defined "exceptions" to the taking of water below minimum flow/levels or in exceedance of an allocation limit (e.g. for community drinking supplies). The wording in NPSFM Policy 11 is clear and does not invite assessment of whether the proposed "over allocation" will create adverse effects. It is assumed to do so.

The Otago context

28. Finally, Forest & Bird submits the context of the Otago Region, including the state of its water bodies, is a relevant and inherent role of an RPS.[27] More stringent

[25] Per *Environmental Defence Society v King Salmon* [2014] NZSC 38 at [129].
[26] NPSFM clause 1.4.
[27] RMA, s 62(1)(a) "the significant resource management issues for the region".

direction than that already contained in the NSPFM may be justified. The NPSFM specifies that it does not:[28]

a. Prevent a local authority adopting more stringent measures than required by the NPS; or

b. Limit a local authority's functions and duties under the Act in relation to freshwater.

LF-WAI – TE MANA O TE WAI

LF-WAI-P1 - Prioritisation

29. Counsel respectfully adopts the legal submissions for ORC on the hierarchy of obligations under the NPSFM.[29]

30. The rebuttal evidence of Ms Burns sets out why further changes by other parties, seeking to bring the notion of "balancing priorities", are unacceptable,[30] stating that "the priority suggests a systematic approach to relative importance and if all three are prioritised, none are prioritised."[31]

31. Forest & Bird's submission sought that hydroelectricity be included in the third limb of LF-WAI-P1 and continues to seek as such to put the matter beyond doubt in subsequent freshwater planning processes and at the resource consent stage. Clause (3) would accordingly read:

> (3) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future, **such as hydroelectricity generation**.

32. Without these words, there is the risk the argument arises again further down the cascade of planning documents, for example, at regional plan, district plan level and ultimately again at the consenting stage.

[28] NPSFM Clause 3.1.
[29] At [98]-[116].
[30] Ms Burns Rebuttal at [35]-[36].
[31] Ms Burns Rebuttal at [35].

LF-FW-O1A – REGION-WIDE OBJECTIVE FOR FRESHWATER

33. Forest & Bird's submission sought the inclusion of an overarching vision to apply to all FMUs in Otago. Much of the relief sought in this regard has been recommended by way of a new objective LF-FW-O1A.

34. There are however, two outstanding matters from Forest & Bird's perspective which are addressed below.

Outstanding matters from Forest & Bird's perspective

Restoring water bodies

35. Forest & Bird's submission sought an overarching "all of Otago catchment vision" that included, inter alia, "water bodies are protected at, or restored to, a state of good health, well-being and resilience". However, LF-FWO1A lacks any direction to restore water bodies where they are degraded.

36. Including an outcome in this regard is necessary to achieving the NPSFM Objective to prioritise, first, the health and well-being of water bodies and freshwater ecosystems.

Timeframes

37. An outstanding matter is that LF-FW-O1A does not include a timeframe by which freshwater visions are to be achieved by. Forest & Bird sought achievement of all the outcomes set out in Freshwater Visions by no later than 2040 in all Otago catchments (or earlier where this has been specified in FMU specific provisions).

38. Cogent planning reasons are provided in the evidence of Ms McIntyre for Kāi Tahu and not repeated here.[32]

39. Time-bound direction better ensures the NPSFM's objective and policy are effectively achieved. To do otherwise risks frustrating the intent behind NPSFM and the freshwater planning process – both designed to expeditiously address freshwater quality decline. In addressing the intent behind freshwater planning

[32] McIntyre EIC at [62]-[68].

process, the Departmental Report on the Resource Management Amendment Bill records:[33]

> The Government is committed to improving New Zealand's freshwater quality by stopping further degradation and loss, and reversing past damage. Key to achieving the freshwater goals is a new NPS-FM which is expected to be in place by mid-2020. **This needs to be implemented by regional councils in a timely way if it is to be effective.**
>
> As previously noted, recent reporting from councils to the Ministry has shown that the majority of regional councils are unlikely to meet the existing deadline of fully implementing the 2017 NPS-FM by 2025 and are likely to take until 2030 or later the deadline can currently be extended to 2030 in certain circumstances). **The Government's view is that such delays are unacceptable and risk further degradation of rivers, lakes and aquifers.**

40. The evidence of Mr McKinlay for the Director-General of Conservation highlights ecological rationale for timeframes:[34]

> Deferring a response risks passing an irreversible threshold where a new 'undesirable' ecological community dominates or becomes the new normal.
>
> … one matter that I am not sceptical about is that failure to address the population trend issues that threatened species face, (including declining quantity and quality of habitat, inappropriate land use, or other activities) does increase the risk of extinction.

41. Timeframes to achieve Freshwater Visions should be no later than 2040, so that the problem definition of freshwater degradation, spurring the Government's freshwater reforms, is actually addressed.

LF-FW-P7A

42. Forest & Bird seeks references to "within limits" to be reinstated in both the chapeau and clause (1) of LF-FW-P7A. Reasons are set out in the rebuttal evidence of Ms Burns.[35] Ms McIntyre notes the reference to allocating water "to the extent possible within limits" could be encouraging use up to those limits.[36] The concern is acknowledged but Forest & Bird notes that without these limits, the policy could be interpreted as allowing for unlimited extraction for the listed uses. In any event, it is assumed take limits and minimum flows will be set to give effect Part 2 of the

[33] Departmental Report on the Resource Management Amendment Bill (Ministry for the Environment, March 2020) at 86-87.
[34] McKinley EIC at [33]-[34].
[35] Ms Burns Rebuttal at [43]-[47].
[36] Ms McIntrye at [79](a).

NPSFM and accordingly provide for ecosystem health. As long as these limits are **not** breached, then it should make no difference if use goes to the limit.

NATURAL WETLANDS (LF-FW-O9, LF-FW-P9, LF-FW-P10)

43. Forest & Bird is generally supportive of where the S42A Report writer has landed in terms of provisions pertaining to natural wetlands.

44. However, a range of submitters seek amendments that derogate from the NPSFM Objective and Policies, and in some cases, the RMA itself.[37] Some responses to this relief are set out below.

Offsetting and compensation

45. Forest & Bird supports the reference to a more stringent effects management hierarchy in LF-FW-P9:

> **LF-FW-P9 – Protecting *natural wetlands***
> Protect *natural wetlands* by:
> …
>
> (2) for *natural inland wetlands,* implementing clause 3.22(1) to (3) of the NPSFM, except that:
>
> > (a) in the coastal environment, natural wetlands must also be managed in accordance with the NZCPS, and
> >
> > (b) when managing the adverse effects of an activity on *indigenous biodiversity*, the *effects management hierarchy (in relation to biodiversity)* applies instead of the *effects management hierarchy (in relation to natural wetlands and rivers).*

46. However, certain submitters seek a carve out from LF-FW-P9(2)(b) on the basis that the NPSIB does not apply to renewable electricity generation and electricity transmission assets and activities. Forest & Bird opposes this carve-out and submits that the wording recommended is the s42A Hearing Report dated 2 June 2023, to ensure that indigenous biodiversity is considered under the offsetting and compensation criteria in the ecosystems and indigenous biodiversity chapter, is retained.

47. It appears those submitters rely on clause 1.3(3) of the NPSIB:

[37] Rebuttal evidence of Ms Ruston for Meridian at [13]-[15]; Rebuttal evidence of Ms Styles for Manawa Energy at [3.6]-[3.11]; Rebuttal evidence of Ainsley McLeod for Transpower at [5.11].

> Nothing in this National Policy Statement applies to the development, operation, maintenance or upgrade of renewable electricity generation assets and activities and electricity transmission network assets and activities. For the avoidance of doubt, renewable electricity generation assets and activities, and electricity transmission network assets and activities, are not "specified infrastructure" for the purposes of this National Policy Statement.

48. It is important to note also that the NPSFM has no parallel carve-out.

49. Such a clause in the NPSIB is unusual in that it ousts the role of section 6(c) of the Resource Management Act 1991 for two specific sectors where there is no clear statutory basis to do so. It could also have the perverse effect of overriding other parts of Part 2 of the RMA, including ss 6(e)[38] and 8.[39]

50. A replacement NPS for electricity transmission and renewable energy was consulted on earlier this year. Nevertheless, the final content and timing of any replacement is not known. In the meantime, counsel submits the Panel cannot rely on the NPSIB as giving effect to the purposes and principles of the Act.

51. As the Supreme Court in *King Salmon* observed:[40]

> the NZCPS gives substance to pt 2's provision in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with pt 2 and there is no need to refer back to the part when determining a plan change. There are several caveats to this, however, which we will mention shortly…

52. The same cannot be said with respect to the NPSIB (i.e. that it gives substance to part 2 in relation to terrestrial environment) given the glaring gap in its application.

53. In *King Salmon* the Supreme Court makes clear that absent invalidity, incomplete coverage or uncertainty of meaning in the intervening statutory documents, there is usually no need to look at Part 2 of the RMA.[41] These are known as "the caveats" in *King Salmon.* Counsel submits these caveats apply here, as the NPSIB is "incomplete" in its coverage. It is therefore necessary to go to Part 2 of the RMA in this instance.

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[38] The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga

[39] In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[40] *Environmental Defence Society v King Salmon* [2014] NZSC 38 at [85].

[41] *Environmental Defence Society v King Salmon* [2014] NZSC 38 at [90].

54. Section 6(c) is “the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna” and is a matter to be recognised and provided for. The wording recommended in s 42A Hearing Report dated 2 June 2023 accords with, and has its legitimate basis in, section 6 of the RMA. It is therefore legally acceptable. As discussed, the NPSIB, an Executive-made document, cannot override the clear operation of s 6 of the Resource Management Act, an Act of Parliament.

55. Any argument that terrestrial biodiversity is addressed in the respective policy statements for electricity transmission and renewables (the National Policy Statement on Electricity Transmission 2008 and the National Policy Statement for Renewable Electricity Transmission 2011) is untenable. Both are respectively s 7(ba)[42] and (j)[43] matters that are to be had “particular regard to” under the Act, as opposed to section 6 matters which are to be “recognised and provided for”.

56. In *Day v Manawatu*,[44] the Environment Court traversed the National Policy Statement-Renewable Energy Transmission and found:

> [2-21] So there is an initial acknowledgement that there may be practical constraints in both establishing new generating infrastructure, and operating, maintaining and upgrading existing infrastructure. And that is followed by a very clear acknowledgement in Policy C2 that there may be adverse environmental effects that cannot be avoided, remedied or mitigated. In that case, the possibility of offsetting is specifically raised. **But there is no affirmation that this sort of infrastructure occupies so special a place in the order of things that it may be established no matter what its effects may be.** In other words, the regime that applies to generation infrastructure is the same regime that applied to other subdivisions, uses or developments, save for the additional factor of the NPS. (Emphasis)

57. The Environment Court also considered the role of the NPS for Electricity Transmission, similarly finding:[45]

> As with the NPSREG, **we do not find the NPSET gives electricity transmission activities so special a place in the order of things that it should override the regime that applies to indigenous biodiversity.**

58. The rebuttal evidence of Ms Burns sets out the planning rationale for the retention of the S42A officer’s recommendation.[46] These are not repeated here, but it is worth reiterating her evidence on the inefficiencies associated with having

[42] “the efficiency of the end use of energy.”
[43] “the benefits to be derived from the use and development of renewable energy.”
[44] [2012] NZEnvC 182 at [2-21].
[45] *Day v Manawatu* [2012] NZEnvC 182 at [3-127].
[46] Ms Burns Rebuttal at [16]-[26].

different effects management policies applying to terrestrial and freshwater environments:[47]

> It is sensible and practical that the same principles would apply to indigenous biodiversity terrestrially and in freshwater. For example, where a project traverses both terrestrial and freshwater environments, the applicant would have to apply separate suites of principles for the same project across those two different areas. This would unnecessarily complex and may not achieve desired outcomes for both the project and habitats.

59. Ms Burns also highlights how many species traverse wetland and terrestrial habitats, making it difficult to ascertain which principles apply to them.[48] Similarly, many natural wetlands will not conform within the category of strictly “freshwater” or “terrestrial”. The example of the Taiari scroll plain is given in the supplementary evidence of Ms McIntyre, who also observes that:[49]

> The nature of wetlands is that they include a transition between dryland and aquatic ecosystems. The close hydrological and ecological interconnections between land and water in wetlands contributes to their rich biodiversity and is part of their mauri. They cannot be managed effectively by assuming a hard boundary between wet and dry or between indigenous and exotic vegetation. Such an approach does not provide for integrated management and carries a risk of incremental degradation through “edge” effects.

60. The ecological rationale, which remains uncontested, is summarised in the supplementary evidence of Ms Boyd.[50]

LF-FW-P10

61. Forest & Bird’s submission sought deletion of “where possible” for wetland restoration, which was at the end of the chapeau of LF-FW-P10. Ms Boyd has recommended that it be replaced with “to the greatest extent practicable”. With respect, this does not advance matters as it can always be argued that something has been done to the greatest extent practicable. In *Tauranga Environmental Protection Society v Transpower* the High Court found that “costs” become a relevant factor when considering “practicability” but that with “possible” it does not.[51] Forest & Bird says that costs will therefore always be relied on to justify leaving natural wetlands unrestored.

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[47] Ms Burns Rebuttal at [24].
[48] Ms Burns Rebuttal at [25].
[49] Ms Mcintyre Supplementary at [11]-[12].
[50] Ms Boyd Supplementary at [108]-[111].
[51] *Tauranga Environmental Protection Society v Transpower* [2021] NZHC 1201 at [148]-[149].

A broader definition for “natural wetlands”

62. Forest & Bird supports the amended definition of “Natural wetland” recommended in Ms Boyd’s supplementary evidenced dated 18 August 2023 so that the pasture exclusions from the NPSFM definition of “natural inland wetlands” are removed. Forest & Bird commends the approach taken by the reporting officer in this regard.

63. Forest & Bird adopts the legal submissions of Kāi Tahu regarding scope to include such changes.[52] It is also noted that the Director-General of Conservation submission seeking recognition of ephemeral wetlands also provides scope to an extent as this was geared towards the similar problem definition in terms of ephemeral wetlands within pasture which do not contain threatened species or otherwise do contain threatened species but have not been identified by the Council under NPSFM clause 3.8.

64. Until comprehensive mapping of “natural inland wetlands” is undertaken, including identifying those that are habitat to a threatened species, there will be a long period where entire wetland habitats are not afforded NPSFM protection and at potential risk of further degradation and/or decline. Ms Boyd’s supplementary evidence highlights the “risk of some of the most vulnerable and/or degraded wetlands may ‘fall through the cracks’ by virtue of either not being mapped or being excluded from being considered a ‘natural inland wetland’ on the basis of the prevalence of exotic pasture species”.[53]

65. The Reporting Officer’s approach accords with NPSFM Policy 1, which directs **freshwater** is managed in a way that gives effect to Te Mana o te Wai. Policy 1 applies to freshwater per se and does not discriminate amongst forms of wetlands, whether they comprise more than 50% exotic pasture species cover or not.

Outstanding issues from Forest & Bird’s perspective

LF-FW-O9 – Natural wetlands

66. Outstanding concerns relate to inclusion of the word “net” in LF-FW-O9(2) (“there is no <u>net</u> decrease, <u>and preferably an increase,</u> in the <u>extent</u> and diversity of indigenous ecosystem types in *natural wetlands*”.

[52] Legal submissions on behalf of Kāi Tahu at [42][48].
[53] Ms Boyd Supplementary at [70].

67. The evidence of Mr Brass for the Director-General is that:[54]

> The 'net' approach would enable perverse outcomes whereby a consent applicant could justify a decrease of extent or diversity arising directly from their actions on the basis that there have been unrelated improvements elsewhere.

68. The reference to "no net decrease" does not appropriately reflect NPSFM Policy 6 which directs: "there is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted." Modifying this policy direction by referring to "no net decrease" fails to implement it, as it gives the false impression that unrelated improvements elsewhere may be appropriate. Offers to "improve" ecosystems elsewhere is not always appropriate or always available under the NPSFM which prescribes "limits" to offsetting.

69. NPSFM Appendix 6, Principle 3 prescribes where offsetting is not appropriate:

> When aquatic offsetting is not appropriate: Aquatic offsets are not appropriate in situations where, in terms of conservation outcomes, the extent or values cannot be offset to achieve no net loss, and preferably a net gain, in the extent and values. **Examples of an offset not being appropriate would include where:**
>
> **(a) residual adverse effects cannot be offset because of the irreplaceability or vulnerability of the indigenous biodiversity affected:**
>
> (b) effects on indigenous biodiversity are uncertain, unknown, or little understood, but potential effects are significantly adverse or irreversible:
>
> (c) there are no technically feasible options by which to secure proposed no net loss and preferably a net gain outcome within an acceptable timeframe.

70. The evidence of Dr Dunn for the Director-General is that "the Otago region houses a suite of highly threatened indigenous non-diadromous galaxiid fishes".[55]

71. Given the vulnerability as demonstrated by the threat status of many of Otago's freshwater species set out in the evidence of Dr Dunn, including the "wetland specialist" Canterbury mudfish (Threatened - Nationally Critical),[56] Forest & Bird submits it is inappropriate to signal at the RPS level an objective directing "no net decrease" of wetlands. "Net" accordingly must be deleted from LF-FW-O9.

72. Further, the Objective LF-FW-O9 broadly applies to "natural wetlands" as opposed to just the narrower subset of "natural inland wetlands". The NZCPS accordingly applies to those natural wetlands that occur in the coastal environment. While the

[54] Mr Brass EIC at [104].
[55] Dr Dunn EIC at [63].
[56] Dr Dunn EIC at [25]-[26].

freshwater planning process is focused on freshwater, the RPS FPI must still give effect to the NZCPS.[57] Policy 11 of the NZCPS is to:

a. avoid adverse effects on items specifically listed in Policy 11(a) – for example "indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists";[58] and

b. avoid significant effects and avoid, remedy, or mitigate other adverse effects on items specifically listed in Policy 11(b), for example, "indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, **coastal wetlands**, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh".[59]

73. The NZCPS makes no express provision for offset and compensation.

74. Depending on the values at play, a natural wetland in the coastal environment may engage NZCPS Policy 11(a) criteria, which represent strict ecological bottom lines, and therefore will not be amenable to offsetting.

75. To provide for "no <u>net</u> decrease", which provides latitude for offsetting of natural wetland extent, particularly in the coastal environment, will not give effect to the clear and unambiguous bottom lines in NZCPS Policy 11.

Ephemeral wetlands

76. Forest & Bird further submitted in support of the Director-General's submission, and supports the reference to ephemeral wetlands in LF-FW-O9 sought by the Director-General. The evidence of Mr Brass is relied on in this regard.[60]

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77. Waka Kotahi and Transpower seek changes that would effectively dilute the clear and unqualified policy direction in the NPSFM pertaining to outstanding water

[57] RMA, s 62(3).
[58] NZCPS Policy 11(a)(i).
[59] NZCPS Policy 11(b)(iii).
[60] Mr Brass EIC at [93]-[97].

bodies. For example, adding the words “while enabling communities to provide for their social, economic, and cultural wellbeing.”

78. The additional changes sought by these parties plainly derogate from the clear and unambiguous direction of NPSFM Policy 9: The habitats of indigenous freshwater species are protected. The rebuttal evidence of Ms Burns further sets out why these additions must be resisted.[61]

79. Ms Craw for Waka Kotahi has stated that in the context of an application for a new bridge over an outstanding waterbody, “you must consider all the relevant sections and provide a balanced response. So in this case, although section 6(c) is also relevant, it does not diminish sections (a) or (b), and they are relevant in relation to different aspects.”[62]

80. With respect, that may be Waka Kotahi’s approach to consent applications, however:

    a. in the RPS-making context the requirement is to give effect to the national policy statement.[63] NPSFM Policy 8 is that “the significant values of outstanding water bodies are protected.” It is unqualified, and introducing the qualifications sought by Waka Kotahi will prevent the RPS from implementing NPSFM Policy 8.

    b. The “balanced response” approach does not reflect the paradigm shift that is Te Mana o Te Wai, which prioritises, first, the health and well-being of water bodies and freshwater systems.

81. In terms of s 6(a) matters, Forest & Bird notes that new clause 2A “include provisions to preserve the natural character of lakes and rivers and their margins from the adverse effects of land use and development and activities on the surface of water” would address this. Forest & Bird is supportive of the new clause 2A as recommended by the s42A officer.

[61] Ms Burns rebuttal at [55]-[60].
[62] Aileen Craw’s speaking notes 30 August 2023.
[63] RMA, s 62(3).

CONCLUSION

82. Forest & Bird's concerns in terms of the PORPS FPI giving effect to the NPSFM (and NZCPS) directives, are narrowing. In some cases, such as with the recommended amendments to the "natural wetland" definition, it has exceeded expectations which Forest & Bird endorses. These instances represent the paradigm shift anticipated by the NPSFM.

83. Forest & Bird, nevertheless, still seeks the following:
    a. An overarching vision (or "outcome") directing that restoration of water bodies is required in LF-FW-O1A.
    b. Timeframes to achieve Freshwater Visions across the FMUs should be no later than 2040.
    c. Reinstatement of references to "limits" in LF-FW-P7A.
    d. That the more stringent effects management hierarchy in the ecosystems and biodiversity chapter apply to both freshwater and terrestrial (with no "carve-outs" for specific sectors).
    e. Reinstatement of "where possible" in LF-FW-P10.
    f. Removal of "net" in LF-FW-O9.
    g. Better recognition of ephemeral wetlands in LF-FW-O9.

Dated this 6th day of September 2023 at Wellington

M Downing
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