
FOURTH BRIEF OF SUPPLEMENTARY EVIDENCE OF FELICITY ANN BOYD LF (NPSFM AMENDMENTS)

Qualifications and Experience

- 1 My qualifications and experience are set out in paragraphs 13 to 15 of my section 42A report titled *Chapter 9: LF – Land and Freshwater* and dated 4 May 2022.

Code of Conduct

- 2 I have read and agree to comply with the Environment Court’s Code of Conduct for Expert Witnesses, contained in the Environment Court Practice Note 2023. I have complied with the Code in preparing my evidence. Other than where I state that I am relying on the advice of another person, I confirm that the issues addressed in this statement of evidence are within my area of expertise. I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express.

Scope of Evidence

- 3 This supplementary statement of evidence addresses the implications of the December 2022 amendments to the National Policy Statement for Freshwater Management 2020 (NPSFM) on the Proposed Otago Regional Policy Statement 2021 (pORPS), including to recommendations made previously through s42A report(s) and/or supplementary evidence.
- 4 The relevant s42A report is Chapter 9: LF – Land and Freshwater, dated 2 May 2022. This statement of evidence is in addition to three previous supplementary statements of evidence for LF – Land and Freshwater.¹
- 5 In this statement, I discuss and recommend amendments to the following provisions in the pORPS:

- 5.1 The definitions of “natural wetland” and “degraded”;

¹ Brief of Supplementary Evidence of Felicity Ann Boyd. LF – Land and Freshwater dated 11 October 2022; Brief of Second Supplementary Evidence of Felicity Ann Boyd. LF – Land and Freshwater (Highly Productive Land) dated 21 October 2022; Brief of Third Supplementary Evidence of Felicity Ann Boyd. LF – Land and Freshwater (LF-WAI-P3) dated 21 October 2022.

- 5.2 LF-FW-P13; and
- 5.3 LF-FW-P13A.
- 6 In the sections below, and in relation to each matter above, I have:
- 6.1 Outlined the relevant amendment(s) to the NPSFM;
- 6.2 Explained the impacts on pORPS provisions;
- 6.3 Recommended amendments or revisions to previous amendments;
- 6.4 Set out and explained any proposed amendments to the relevant pORPS provisions;
- 6.5 Identified the scope relied upon to make these amendments;
- 6.6 Evaluated the amendment or replacement in accordance with section 32AA of the RMA (where applicable).
- 7 Where I have recommended additional amendments to provisions, my recommendations are shown in addition to my previous recommendations. The key below sets out how these different recommendations are shown.

Key to proposed amendments

Appearance	Explanation
Black text	Text as notified.
Black text with <u>underlining</u> or strikethrough	Amendments recommended in section 42A report.
Red text with <u>underlining</u> or strikethrough	Amendments recommended in first statement of supplementary evidence.
Brown text with <u>underlining</u> or strikethrough	Amendments recommended in second statement of supplementary evidence.
Green text with <u>underlining</u> or strikethrough	Additional amendments recommended this fourth statement of supplementary evidence.

- 8 In the same way as the original section 42A report recommendations, the scope for all proposed amendments is included as a footnote in the amended provisions.

Background to the NPSFM amendments

- 9 Following gazettal of the NPSFM and NESF, issues were raised by councils and sector groups about the application of the NESF, the way natural

wetlands were defined, and the lack of consenting pathways for some activities. In response, the following occurred:

- 9.1 In September 2021, the Ministry for the Environment (MfE) published a discussion document called *Managing our wetlands*² outlining potential options for changes to wetland provisions in the NPSFM and NESF;
 - 9.2 Submissions on the discussion document were received between 1 September and 27 October 2021;
 - 9.3 In May 2022, MfE published a report called *Report, recommendations and summary of submissions*³ on the proposed changes and the consultation;
 - 9.4 Also in May 2022, MfE released an exposure draft⁴ of potential amendments along with a document setting out the policy rationale for those amendments⁵ and received written feedback on these until 10 July 2022.
- 10 On 8 December 2022, a suite of amendments was made to the NPSFM, the NESF and the Resource Management (Stock Exclusion) Regulations 2020. The amendments to the NPSFM have been incorporated into the NPSFM and came into effect on 5 January 2023.⁶

Council's obligation to implement the amendments

- 11 Clause 4.1 of the NPSFM sets out the timing for giving effect to the NPSFM, and states:
- (1) *Every local authority must give effect to this National Policy Statement as soon as reasonably practicable.*
 - (2) *Local authorities must publicly notify any changes to their regional policy statements, regional plans, and district plans that are necessary to give effect to this National Policy Statement as required under the Act.*

² Available from <https://environment.govt.nz/assets/publications/managing-our-wetlands-discussion-document.pdf>

³ Available from <https://environment.govt.nz/assets/publications/essential-freshwater-amendments-report-recommendations-summary-submissions-may2022.pdf>

⁴ Available from https://consult.environment.govt.nz/freshwater/npsfm-and-nesf-exposure-draft/user_uploads/exposure-draft-changes-to-rm-nesf-regulations-2020.pdf

⁵ Available from <https://environment.govt.nz/assets/publications/managing-our-wetlands-policy-rationale-exposure-draft-amendments-31May2022.pdf>

⁶ The 2022 version of the NPSFM is available from <https://environment.govt.nz/publications/national-policy-statement-for-freshwater-management-2020-amended-december-2022/>

- 12 The amendments to the NPSFM do not contain any compulsory direction that must be included in a regional policy statement without being subject to a Schedule 1 process.
- 13 In accordance with section 62(3) of the Resource Management Act 1991 (RMA), a regional policy statement must give effect to a national policy statement. I understand that because the amendments to the NPSFM have been introduced 'mid-process', the extent to which the pORPS can give effect to the amendments is confined by the scope of the submissions lodged that seek changes to the pORPS provisions.
- 14 Some of the NPSFM amendments affect provisions in the Freshwater Planning Instrument (FPI) part of the pORPS. Those provisions are not before this hearing panel, however I have discussed them in this statement in order to ensure that the chapter as a whole is considered when recommending any amendments.

Overview of the amendments

- 15 The amendments to the NPSFM broadly address:
 - 15.1 The management of wetlands;
 - 15.2 The addition of principles for aquatic offsetting (new Appendix 6) and aquatic compensation (new Appendix 7);
 - 15.3 Clarifying that limits on the volume and/or rate of water are both a type of "take limit" as defined by the NPSFM;
 - 15.4 Amendments to the NPSFM provisions for attributes affected by nutrients, including minor and technical changes to the measurement and monitoring of some attributes set out in Appendix 2A; and
 - 15.5 Amendments seeking to improve the clarity of policies, reduce the complexity of drafting, and correct errors.
- 16 Matters 15.1 and 15.2 are the most relevant for the pORPS because they amend the direction in the NPSFM applying to the management of wetlands and rivers, both of which are also managed by the provisions of the pORPS. The remaining amendments primarily affect the implementation of the

National Objectives Framework in regional plans and are not directly relevant to the pORPS.

- 17 For completeness, I note that there have been no changes to the fundamental concept of Te Mana o Te Wai as set out in Part 1.3, including the 6 principles and the hierarchy of obligations. Further, the objective and Policies (as set out in Part 2 of the NPSFM) remain the same, aside from a minor amendment to Policy 5.⁷
- 18 I then address the substantive amendments that are relevant to the pORPS, and recommended changes to the pORPS in more detail under the following headings:
 - 18.1 Wetlands in the coastal environment and the definition of “natural inland wetland”;
 - 18.2 Consenting pathway (natural inland wetlands)
 - 18.3 Principles of aquatic offsetting and compensation
 - 18.4 Definition of ‘degraded’
 - 18.5 Definition of ‘limit on resource use’
 - 18.6 Transparent decision making

Wetlands in the coastal environment and the definition of “natural inland wetland”

Background

- 19 Management of coastal areas is complex, partly due to the number of jurisdictional boundaries involved and the way various planning documents apply within or across these boundaries. The following jurisdictional boundaries are established in the RMA and national policy statements:
 - 19.1 Coastal marine area (CMA): The CMA is defined in section 2 of the RMA. The seaward boundary of the CMA is the outer limit of the territorial sea (i.e. 12 nautical miles). The landward boundary is

⁷ The new Policy 5 states (additions underlined): “Freshwater is managed (including through a National Objectives Framework) to ensure that the health and well-being of degraded water bodies and freshwater ecosystems is improved, and the health and well-being of all other water bodies and freshwater ecosystems is maintained and (if communities choose) improved.”

either to mean high water springs or, where mean high water springs crosses a river, a point that is the lesser of (a) one kilometre upstream from the mouth of the river or (b) a point upstream calculated by multiplying the width of the river mouth by five. The Regional Plan: Water for Otago (Water Plan) and Regional Plan: Coast for Otago (Coast Plan) include maps showing where these non-MWHS boundaries are in relation to some, specified rivers. This boundary is important for determining the jurisdiction of regional coastal plans and the specific requirements that apply to those types of plans.⁸

19.2 Coastal environment: The coastal environment is a broader area than the CMA. It has the same seaward extent as the CMA but its landward boundary is further inland. Policy 1 of the NZCPS includes a list of matters that must be recognised as being included in the coastal environment. This list includes the coastal marine area but also, for example, areas where coastal processes or influences are significant and areas at risk from coastal hazards.

19.3 All other land and waters inland from the landward extent of the coastal environment.

20 The diagram below shows, broadly, the difference between the coastal marine area and the coastal environment as well as the application of the NZCPS.

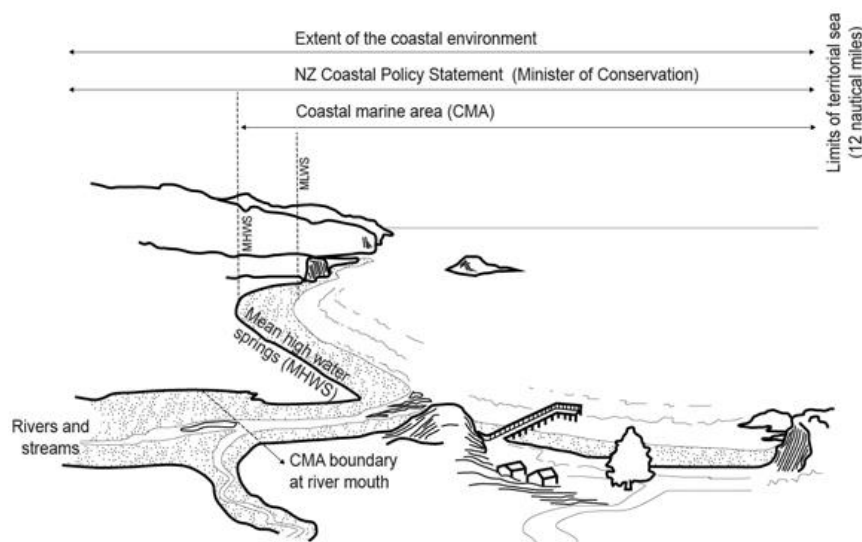


Figure 1: Coastal boundaries (retrieved from Chapter B8, Auckland Unitary Plan)

⁸ See section 64(2), RMA, which requires that “there shall at all times be, for all the coastal marine area of a region, 1 or more regional coastal plans prepared in the manner set out in Schedule 1.” Clause (2) goes on to clarify that a regional coastal plan may form part of a regional plan where it is considered appropriate to promote the integrated management of a coastal marine area and any related part of the coastal environment.

- 21 These jurisdictional boundaries affect the application of planning documents, including national policy statements. I have summarised the scope of the key planning documents for this statement of evidence in the table below.

Document	Inland	Coastal environment	CMA
pORPS	✓	✓	✓
NZCPS	x	✓	✓
NPSFM	✓	✓	x
NESF	✓	✓	x

- 22 Wetlands are common along the coast, especially around river mouths. They do not neatly follow the jurisdictional boundaries set out in the RMA and other planning documents. This makes their management complex – while a wetland may be physically ‘one’ water body, parts may be subject to different planning frameworks depending on where the jurisdictional boundaries lie.
- 23 To illustrate this point, I have included in **Appendix 1** some examples of wetlands in Otago where the physical extent of the wetland spans the landward extent of the coastal marine area and/or it is unclear where that landward boundary is (and therefore it is unclear whether a wetland is in the CMA or not).
- 24 I have set out this background, and the examples above, as context for the rest of my evidence on wetlands which concerns, primarily, how the pORPS should manage natural wetlands.

NPSFM amendments

- 25 The 2020 version of the NPSFM included a definition of “natural wetland” and a definition of “natural inland wetland”. I have set out the wording of these in **Appendix 2**. In summary, “natural wetlands” were a broad category of wetland covering all natural wetlands regardless of where they were located, whereas “natural inland wetlands” were only those natural wetlands located inland from the landward extent of the CMA. Natural inland wetlands were therefore a subset of natural wetlands. I am unsure how it was intended that wetlands spanning the landward boundary of the CMA would be classified using these definitions.

- 26 In the 2022 amendments, the definitions of “natural wetland” and “natural inland wetland” have been amalgamated into a new definition of “natural inland wetland”⁹ which applies only to natural wetlands outside the CMA. Accordingly, the definition of “natural wetland” has been deleted. In all places throughout the NPSFM where “natural wetland” was used, “natural inland wetland” is now used. This means some direction that previously applied to all natural wetlands now only applies to natural inland wetlands (i.e. those inland from the landward extent of the CMA).
- 27 I have included both the old (2020) and new (2022) versions of the definitions in full in **Appendix 2**. In addition to the change regarding the CMA, other changes are:
- 27.1 “natural inland wetlands” now also exclude wetlands that have developed in or around a deliberately constructed water body, since the construction of the water body; and
- 27.2 the previous exclusion relating to improved pasture has been replaced with a more comprehensive exclusion addressing these areas but not allowing their exclusion where they are the habitat of a threatened species.
- 28 The NESF has been similarly amended by the insertion of a new definition of “natural inland wetland” that cross-refers to the NPSFM definition. This amendment means that the wetland provisions in the NESF no longer apply to wetlands in the coastal marine area.¹⁰ In summary, the amendments mean that:
- 28.1 wetlands in the coastal marine area are subject to the NZCPS only;
- 28.2 wetlands in the coastal environment are subject to the NZCPS, NPSFM, and NESF; and
- 28.3 wetlands inland of the coastal environment are subject to the NPSFM and NESF only.

Impacts on pORPS provisions

⁹ NPSFM, clause 3.21(1).

¹⁰ While there was previously some uncertainty as to the scope of the application of the NESF to wetlands in the coastal marine area, in *Minister of Conservation v Mangawhai Harbour Restoration Society* [2021] NZHC 3113 the High Court held that the NESF applied to wetlands in the coastal marine area.

29 The pORPS uses the term “natural wetland” as it was previously defined by the NPSFM 2020. That definition read:

means a wetland (as defined in the Act) that is not:

(a) a wetland constructed by artificial means (unless it was constructed to offset impacts on, or restore, an existing or former natural wetland); or

(b) a geothermal wetland; or

(c) any area of improved pasture that, at the commencement date, is dominated by (that is more than 50% of) exotic pasture species and is subject to temporary rain-derived water pooling

30 As noted, this definition applied to all natural wetlands, whether in or outside the CMA. The provisions in the pORPS which use the term “natural wetland” therefore also apply to all natural wetlands in and outside the CMA.

31 The definition of “natural wetland” is a non-FPI provision. However, the provisions that use this definition are contained in both the non-FPI and the FPI parts of the pORPS (see below). It is therefore important that panel members are aware of the implications for both processes when considering this definition. For that reason, I have discussed both FPI and non-FPI provisions below. Any references to FPI provisions are shaded blue.

32 The use of the term “natural wetland” in the pORPS is largely restricted to the LF chapter, with one reference in the EIT-INF chapter.

Non-FPI provisions	FPI provisions
LF-FW-P8	LF-FW-O9
LF-FW-P13A	LF-FW-P9
EIT-INF-P13	LF-FW-P10
	LF-FW-M6
	LF-FW-E3

33 In terms of policy logic, LF-FW-O9 sets out the primary objective for natural wetlands and policies LF-FW-P8, LF-FW-P9 and LF-FW-P10 set out how natural wetlands are to be identified, protected, and restored (respectively). In response to submissions on LF-FW-P13 (which relates to the natural

character of rivers and lakes), I have recommended including a new policy LF-FW-P13A setting out the effects management hierarchy to be followed for both natural wetlands and rivers, in accordance with the NPSFM. That policy therefore links provisions in the FPI and non-FPI processes.

- 34 Objective LF-FW-O9 and Policies LF-FW-P8, LF-FW-P9 and LF-FW-P10 use the term “natural wetland” as defined above, meaning that those provisions apply to all natural wetland, including those in the CMA. This was a deliberate policy choice, recognising that coastal wetlands commonly span these jurisdictional boundaries and there is a need to manage them in an integrated way.¹¹ This is reflected in the explanation (LF-FW-E3) which states that:¹²

The first two policies reflect the requirements of the NPSFM for identification and protection but apply that direction to all natural wetlands, rather than only inland natural wetlands (those outside the coastal marine area) as the NPSFM directs. This reflects the views of takata whenua and the community that fresh and coastal water, including wetlands, should be managed holistically and in a consistent way. While the NPSFM requires promotion of the restoration of natural inland wetlands, the policies in this section take a stronger stance, requiring improvement where natural wetlands have been degraded or lost. This is because of the importance of restoration to Kāi Tahu and in recognition of the historic loss of wetlands in Otago.

- 35 For the reasons set out above, the term “natural inland wetland” is not defined in the pORPS.¹³ It is used in three places in the pORPS, but none of those instances affect the application of provisions.¹⁴

- 36 I consider there are three options available for the definition of “natural wetland” in response to the NPSFM amendments:

36.1 Retain the definition as it currently appears (i.e. retain the definition in the pORPS that has now been deleted from the NPSFM); or

¹¹ Section 32 Report at [386].

¹² LF-FW-E3 – Explanation.

¹³ “Natural inland wetland” is used in the definition of “loss of values”. The definition of “loss of values” has the same meaning as in clause 3.21(1) of the NPSFM, which refers only to ‘natural inland wetlands’, however in the pORPS it is specifically applied to all natural wetlands.

¹⁴ (1) In the definition of “loss of values”, which has the same meaning as in clause 3.21(1) of the NPSFM and refers only to ‘natural inland wetlands’, however in the pORPS it is specifically applied to all natural wetlands; (2) In LF-FW-E3 to explain the scope of the policies in the LF-FW section; and (3) In the definition of “effects management hierarchy” as notified, however, I have recommended amendments to that definition along with new definitions of “effects management hierarchy (in relation to indigenous biodiversity)” and “effects management hierarchy (in relation to natural wetlands and rivers)” that would remove this reference.

- 36.2 Replace the definition with the new definition of “inland natural wetland” in the NPSFM; or
- 36.3 Amend the definition to align the clauses it has in common with the equivalent clauses in the new NPSFM definition (subject to scope in submissions) but retain its broad scope.
- 37 Retaining the current definition retains the broad scope (i.e. all wetlands in and outside the coastal marine area) but means some clauses in the definition would differ from their equivalent in the NPSFM. For example, the exclusion relating to improved pasture (which is now more helpfully addressed in the NPSFM). This is unhelpful but not fatal – the lower order plans would be left to reconcile the difference between the pORPS and the NPSFM, ensuring that ultimately the NPSFM would be given effect.
- 38 Replacing the current definition of “natural wetland” with the new definition of “natural inland wetland” would narrow the scope of the provisions that use that term to only wetlands outside the coastal marine area. This changes the intended application of the management framework, removing direction that currently applies to wetlands in the coastal marine area. It would not address the overlap between the NPSFM and NZCPS in managing wetlands in the area between the landward extents of the CMA and the coastal environment, but would align the pORPS terminology with the NPSFM and NESF.
- 39 Retaining the broad scope (i.e. to wetlands in the CMA) but amending the definition to align common clauses with the NPSFM would continue the existing application of the policies in the pORPS while resolving any inconsistency between the pORPS and NPSFM definitions. In my view, this would retain the existing policy framework in the pORPS in a way that gives effect to the NPSFM and reduces inefficiencies for users. This would not address the overlap between the NZCPS and the NPSFM for managing wetlands in the area between the landward extents of the CMA and the coastal environment and would expand that overlap to the CMA. In my view, this option is preferable for reasons I have set out below.

Recommended amendments to the definition of “natural wetland”

- 40 I consider that the pORPS should continue to use the term “natural wetland” rather than “natural inland wetland” so that the policy framework in the

pORPS continues to apply to wetlands that are located both within and outside of the CMA. However, amendments will be required to the definition due to its reliance on the cross-reference to the NPSFM definition which no longer exists. I also consider that additional amendments for consistency and clarity should be made, in line with the NPSFM amendments.

- 41 The NPSFM amendments to the definition of “natural inland wetland” remove some uncertainties that were present in the original definition of “natural wetland” in the NPSFM (and the pORPS). I consider that the amendments provide greater clarity as to the scope of the definition and should be carried through to the pORPS.
- 42 Considering the definitions in Appendix 1, in my view 2022 clause (b) is equivalent to 2020 clause (a) and the changes to the wording are minor amendments for clarification. Similarly, I consider that 2022 clauses (e)(i) and (ii) provide clarification of how 2020 (c) applied but does not significantly alter the application of the clause. 2022 clause (c) introduces a new exclusion for wetlands that have developed in or around a deliberately constructed water body. While this is not specifically referenced in the 2020 definition, I consider that these types of wetlands would have been captured by 2020 clauses (a) and/or (c) in most situations.
- 43 The final difference lies in 2022 clause (e)(iii), which means that pasture-based wetlands that are the location of a habitat of a threatened species under clause 3.8 of the NPSFM are not excluded from the definition of a natural inland wetland. There is no equivalent clause in the 2020 definition.
- 44 In its submission on the pORPS, Ballance notes that the definition of “natural wetland” had (at the time) the same meaning as in clause 3.21(1) of the NPSFM and seeks to amend the definition to align with the Ministry for the Environment final version of guidance on the definition of a ‘natural wetland’, once released.¹⁵ Similarly, but less specifically, Forest and Bird seeks that the definition of “effects management hierarchy” (which, in the pORPS, applies to natural wetlands) aligns with the NPSFM.¹⁶ I am advised that these submissions provide scope for the amendments above.
- 45 I recommend that the definition of “natural wetland” be retained in the pORPS, but with amendments to align with equivalent parts of the

¹⁵ 00409.012 Ballance

¹⁶ 00230.005 Forest and Bird

amended definition of “natural inland wetlands” in the NPSFM. For simplicity, I have simply struck out the existing definition and replaced it with a clean version rather than attempt to amend each clause individually.

Natural wetland

~~has the same meaning as in clause 3.21 of the National Policy Statement for Freshwater Management 2020 (as set out in the box below)~~

~~means a wetland (as defined in the Act) that is not:~~

- ~~(a) a wetland constructed by artificial means (unless it was constructed to offset impacts on, or restore, an existing or former natural wetland); or~~
- ~~(b) a geothermal wetland; or~~
- ~~(c) any area of improved pasture that, at the commencement date, is dominated by (that is more than 50% of) exotic pasture species and is subject to temporary rain-derived water pooling~~

means a wetland (as defined in the Act) that is not:

- (a) a deliberately constructed wetland, other than a wetland constructed to offset impacts on, or to restore, an existing or former natural wetland; or
- (b) a wetland that has developed in or around a deliberately constructed water body, since the construction of the water body; or
- (c) a geothermal wetland; or
- (d) a wetland that:
 - (i) is within an area of pasture used for grazing; and
 - (ii) has vegetation cover comprising more than 50% exotic pasture species (as identified in the *National List of Exotic Pasture Species* using the *Pasture Exclusion Assessment Methodology* (see clause 1.8 of the National Policy Statement for Freshwater Management)); unless¹⁷
 - (iii) the wetland is a location of a habitat of a threatened species identified under clause 3.8 of the National Policy Statement for Freshwater Management, in which case the exclusion in (d) does not apply.¹⁸

Overlap between the NPSFM and NZCPS

46 When examining the amendments to the NPSFM above, it became apparent that both the NPSFM and NZCPS apply to natural wetlands in the area between the landward extent of the coastal environment and the landward extent of the CMA. This would be the case even if the pORPS adopted the term “natural inland wetland” because the issue arises in the NPSFM itself.

¹⁷ Clause 16(2), Schedule 1, RMA

¹⁸ 00409.012 Ballance

- 47 There is no direction in the NPSFM about how to apply the direction in the provisions of the NPSFM concurrently with the NZCPS. I have reviewed the background documents prepared to support the amendments to the NPSFM and, from my reading, the consideration afforded to the provisions of the NZCPS is limited to their application in the CMA. I have not found any discussion of its application to the wider coastal environment and how that interacts with the NPSFM.
- 48 My recommendation above expands the existing overlap between the NZCPS and the NPSFM in the area between the landward boundaries of the CMA and coastal environment to encompass all of the CMA. The Regional Plan: Coast for Otago was notified in 1994 and has not yet been subject to a full review or any plan changes specifically to implement the NZPCS.¹⁹ In that context, I consider it is appropriate for the pORPS to provide additional protection for wetlands and to manage all wetlands in a consistent way, noting that the NZCPS provisions will continue to apply to wetlands in the CMA.
- 49 The main issue arising from the overlap between the NZCPS and the NPSFM is how adverse effects on natural wetlands are to be managed when the directive policies in the NZCPS apply. In particular:
- 49.1 Policies 11 (Indigenous biological diversity), 13 (Preservation of natural character), and 15 (Natural features and landscapes) of the NZCPS contain direction to (a) avoid adverse effects and remedy or mitigate other adverse effects and/or (b) avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects.
- 49.2 Clause 3.21 of the NPSFM requires applying the following effects management hierarchy where there is a loss of extent or values of a natural inland wetland (or, in the pORPS, a natural wetland):
- 49.2.1 Adverse effects are avoided where practicable; then
- 49.2.2 Where adverse effects cannot be avoided, they are minimised where practicable; then
- 49.2.3 Where adverse effects cannot be minimised, they are remedied where practicable; then

¹⁹ Other than mandatory Amendment 1 in 2011 to remove references to restricted coastal activities.

49.2.4 Where more than minor adverse effects cannot be avoided, minimised, or remedied, aquatic offsetting is provided where possible; then

49.2.5 If aquatic offsetting of more than minor residual adverse effects is not possible, aquatic compensation is provided; then

49.2.6 If aquatic compensation is not appropriate, the activity itself is avoided.

50 In the absence of any direction on managing this relationship, I understand that it is a question of interpretation as to which provisions apply and which prevail if there is conflict. There will not always be conflict – for example, where Policies 11, 13, and 15 of the NZCPS do not apply.

51 In situations where there is an apparent conflict, the relationship between the instruments must be determined by looking at the words used and the strength of the language in the relevant provisions. Every effort should be made to see if the planning instruments can “work together.” Where there is a direct conflict, the stronger language of the avoidance policies in the NZCPS must prevail. I note that this matter has been traversed in the Supreme Court hearing with respect to Port Otago and a judgement on that case is still outstanding.

52 The pORPS provisions do not explicitly attempt to address this overlap. Consistent with the approach taken across the pORPS of needing to read chapters together, application of the pORPS provisions relies on the approach to interpretation I have outlined above (or, more simply, reading the provisions of the LF and CE chapters alongside one another when addressing the coastal environment). I note that CE-P1(4) as recommended to be amended by Mr Maclennan specifically alerts readers to the need to apply the LF and CE chapters together when managing the coastal environment.

Section 32AA evaluation

53 Most of the amendments I recommend do not alter the scope of the definition, other than clarifying areas excluded from the definition. I do not consider further evaluation under section 32AA is required.

54 The additional amendment I have recommended (to exclude habitats of threatened species from the exclusion for pasture-based wetlands) is consistent with the amendments made to the NPSFM which were subject to a section 32 evaluation. Lower order documents are required to give effect to the NPSFM and I consider there is a reduction in costs for users if the pORPS implements the NPSFM consistently, without the need for additional analysis at the regional and district plan level.

Consenting pathway for activities in natural inland wetlands

NPSFM amendments

55 Clause 3.22 (Natural inland wetlands) of the NPSFM requires every regional council to include a specified policy in its regional plan. The policy directs that the loss of extent of natural inland wetlands is avoided, their values are protected, and their restoration is promoted, except in specified circumstances which are set out in detail.

56 The amendments to the NPSFM introduce additional specified circumstances, creating a new consent pathway for some activities that would result in the loss of extent or values of natural inland wetlands and that were previously prohibited due to the regulations in the NESF.

57 The amendments to the mandatory policy are extensive. I have therefore included it in full as **Appendix 2** and that should be read alongside my evidence. In summary, amendments to the NPSFM introduced the following additions to the list of specified circumstances:

57.1 Wetland maintenance or biosecurity;²⁰

57.2 Construction or upgrade of specified infrastructure, noting that the definition of specified infrastructure has been amended to include water storage infrastructure, specified defence facilities, and ski area infrastructure;²¹

²⁰ NPSFM, clause 3.22(1) – see specified policy (a)(ii); clause 3.21(1) new definitions of “biosecurity” and “wetland maintenance”. The exception for restoration activities was already provided for in the NPSFM prior to the amendments.

²¹ NPSFM, clause 3.22 – see specified policy (b)(i); clause 3.21(1) definitions of “specified infrastructure” and “ski area infrastructure”.

- 57.3 Urban development that contributes to a well-functioning urban environment (as defined in the National Policy Statement on Urban Development);
- 57.4 Quarrying, extraction of minerals (other than coal), and extraction of coal as part of an existing coal mine;
- 57.5 Constructing or operating a new or existing landfill or cleanfill area.
- 58 In order for each of the above activities (aside from wetland maintenance and biosecurity activities) to qualify as 'specified circumstances', additional criteria must be met. For the construction or upgrade of specified infrastructure, quarrying, mineral extraction (other than coal), and coal extraction as part of an existing coal mine:
- 58.1 The activity must be necessary for its purpose (clauses (b)(i), (d)(i), and (e)(i));
- 58.2 The activity will provide significant national or regional benefits (clauses (b)(ii), (d)(ii), and (e)(ii));
- 58.3 There is a functional need for the activity to occur in that location (clauses (b)(iii), (d)(iii), and (e)(iii)); and
- 58.4 The effects of the activity are managed by applying the effects management hierarchy (clauses (b)(iv), (d)(iv), and (e)(iv)).
- 59 The criteria for urban development and landfills or cleanfills are different. For urban development to qualify:
- 59.1 The activity must be necessary for its purpose (clause (c)(i)) and provide significant national, regional, or district benefits (clause (c)(ii));
- 59.2 The activity must occur on land identified for urban development in operative provisions of a regional or district plan (clause (c)(iii));
- 59.3 The activity must not occur on land that is zoned in a district plan as general rural, rural production, or rural lifestyle (clause (c)(iv));
- 59.4 There is no practicable alternative location for the activity within the area of the development or every other practicable location in the

development area would have equal or greater adverse effects on a natural inland wetland (clause (c)(v)); and

59.5 The effects of the activity must be managed by applying the effects management hierarchy.

60 For landfills or cleanfills to qualify:

60.1 The activity must be necessary for its purpose (clause (f)(i));

60.2 The activity must either (clause (f)(ii)):

60.2.1 Provide significant national or regional benefits; or

60.2.2 Be required to support urban development, aggregate extraction, or mineral extraction provided for elsewhere in the policy; or

60.3 There must be either no practicable alternative location in the region, or every other practicable alternative location in the region would have equal or greater adverse effects on a natural inland wetland (clause (f)(iii)); and

60.4 The effects of the activity must be managed by applying the effects management hierarchy (clause (f)(iv)).

61 These amendments are supported by complementary amendments to the NESF that collectively provide a consenting pathway for these activities where the loss of extent or values of a natural inland wetland may occur.

Impacts on pORPS provisions

62 Clause 3.22 of the NPSFM is implemented by Policy LF-FW-P9 of the pORPS, which seeks to protect natural wetlands. This is an FPI provision and is not part of this hearing process. However, for completeness and to assist parties involved in both processes, I intend to recommend amendments to this policy in my section 42A report on the FPI to align with the amended direction in clause 3.22 of the NPSFM and particularly to reflect the new consenting pathways provided. This includes a pathway for

specific mineral extraction activities, which is the subject of my other statement of supplementary evidence.²²

Principles of aquatic offsetting and compensation

NPSFM amendments

63 Clause 3.22(3) (Natural inland wetlands) and Clause 3.24(3) (Rivers) in the NPSFM require avoiding the loss or extent of natural inland wetlands and rivers unless specific exceptions apply. In these cases, the clauses set out direction on the matters to be considered by decision-makers on resource consent applications for these activities, including that adverse effects are to be managed by the effects management hierarchy set out in the NPSFM.²³ Both clauses have been amended as follows:

63.1 if aquatic offsetting or aquatic compensation are applied as part of applying the effects management hierarchy, applicants must comply with principles set out in new Appendices 6 and 7 of the NPSFM (clauses 3.22(3)(a)(ii) and 3.24(3)(a)(ii));²⁴

63.2 there must be measures proposed to ensure that the offsetting or compensation will be maintained and managed to achieve the conservation outcomes (clauses 3.22(3)(a)(iii) and 3.24(3)(a)(iii)); and

63.3 any consent granted is subject to conditions that specify how the requirements above will be achieved (clauses 3.22(3)(b)(iii) and 3.24(3)(b)(ii)).²⁵

64 Appendices 6 and 7 each contain principles that apply to the use of aquatic offsets and aquatic compensation (respectively) for the loss of extent or values of natural inland wetlands and rivers.

Impacts on pORPS provisions

65 Clause 3.22 (Natural inland wetlands) is implemented by policy LF-FW-P9 and clause 3.24 (Rivers) is implemented by policy LF-FW-P13. Both

²² Second brief of supplementary evidence of Felicity Ann Boyd: Introduction and General Themes & LF (Mineral extraction), dated 24 February 2023

²³ "Effects management hierarchy" is defined in clause 3.21(1) of the NPSFM.

²⁴ An applicant must comply with Principles 1 to 6 in Appendices 6 and 7, and must have regard to the remaining principles (as appropriate).

²⁵ NPSFM, clause 3.22(3)(a)(ii)-(iii) and (b)(ii), and clause 3.24(3)(a)(ii)-(iii) and (b)(ii).

provisions rely on the same effects management hierarchy, mirroring the structure of the NPSFM. Although LF-FW-P9 is part of the FPI and LF-FW-P13 is part of this process, I discuss them together in this section given the large degree of commonality between the provisions and the impacts of the amendments to the NPSFM.

- 66 As notified, the effects management hierarchy relied on by LF-FW-P9 and LF-FW-P13 was included as a definition (in the same way as it is included in the NPSFM). In response to submissions, in my section 42A report I recommended deleting this definition and instead including the effects management hierarchy in a new policy, LF-FW-P13A.²⁶ That is consistent with the way other effects management hierarchies in the pORPS have been expressed.
- 67 Clauses 3.22(1) and 3.24(1) of the NPSFM include direction that must be included as a policy, or words to the same effect, in a regional plan. Policies LF-FW-P9(1)-(2) and LF-FW-P13(1)-(2) implement clause 3.22(1) and 3.24(1) respectively, albeit in the regional policy statement rather than the regional plan. Similarly, LF-FW-P9(3) and LF-FW-P13(3) implement clauses 3.22(3) and 3.24(3), which direct that regional plans must be made or changed to ensure that an application that would result in the loss of extent or values of a river is not granted, unless the specified requirements are met in relation to the effects management hierarchy.
- 68 Clauses 3.22(3) and 3.24(3) have been amended to include additional guidance on aquatic offsetting and aquatic compensation which are two steps in the effects management hierarchy set out in clause 3.21(1). These clauses require that when applying aquatic offsetting or aquatic compensation, principles 1-6 of the Appendices must be complied with, and regard had to the remaining principles as appropriate. Clauses 3.22(3)(b) and 3.24(3)(b) also require that any consent granted specifies the methods or measures that will ensure the offsetting or compensation will be maintained and managed to achieve the conservation outcomes.
- 69 Although directly relevant to the effects management hierarchy in the NPSFM, the definition of “effects management hierarchy” was not amended to specifically refer to Appendices 6 and 7. The definitions of “aquatic offsetting” and “aquatic compensation” were not amended either, meaning

²⁶ Chapter 9: LF – Land and freshwater (4 May 2022), para 1126.

that the only place the direction to use the appendices occurs is in clauses 3.22 and 3.24. Policies LF-FW-P9(2) and LF-FW-P13(2) reflect the previous version of these clauses in the NPSFM and do not provide any additional guidance on the use of offsets or compensation.

- 70 In summary, while both the NPSFM and the pORPS set out the same effects management hierarchy, there is now additional, more specific direction in the NPSFM on using two of the steps in that hierarchy that is not in the pORPS.
- 71 Policy LF-FW-P13A sets out the effects management hierarchy in relation to natural wetlands and rivers. LF-FW-P13A largely follows the definition of “effects management hierarchy” contained in clause 3.21 of the NPSFM. This definition has been amended in a very minor way to replace the “and” between each step with “then”, to better reflect that the hierarchy must be applied in order from sub-clause (a) to (f).

Recommended amendments and relevant submissions

- 72 I consider the pORPS should give effect to the content of the NPSFM, including the most recent amendments so long as it is within the scope of submissions to do so. Consent applicants will be required to do so, regardless of whether the pORPS is amended, however it would clearly be more helpful and efficient if the pORPS and the NPSFM are consistent.
- 73 In its submission, Forest and Bird seeks that “effects management hierarchy” has the same meaning as in clause 3.21 of the NPSFM, and that other consequential amendments be made to ensure the hierarchy is applied in accordance with the NPSFM.²⁷ I am advised that this provides scope for the amendments I recommend.
- 74 On this basis, I recommend amending Policy LF-FW-P13(2) to mirror the requirements introduced to clause 3.24 of the NPSFM as follows:

- (2) not granting resource consent for activities in (1) unless ~~Otago Regional Council~~ the consent authority²⁸ is satisfied that:
 - (a) the application demonstrates how each step of the ~~effects management hierarchies~~ effects management hierarchy (in relation to

²⁷ 00230.005 Forest and Bird

²⁸ 00137.074 DOC

indigenous biodiversity²⁹ in (1)(b)(i) and the effects management hierarchy (in relation to natural wetlands and rivers) in (1)(b)(ii)³⁰ will be applied to the loss of values or extent of the river, ~~and~~

- (b) any consent is granted subject to conditions that apply the effects management hierarchies hierarchy (in relation to indigenous biodiversity)³¹ in (1)(b)(i) and the effects management hierarchy (in relation to natural wetlands and rivers) in (1)(b)(ii)³² in respect of any loss of values or extent of the river,³³
- (c) if aquatic offsetting or aquatic compensation is applied, the applicant has complied with principles 1 to 6 in Appendix 6 and 7 of the NPSFM, and has had regard to the remaining principles in Appendix 6 and 7 of the NPSFM, as appropriate, and
- (d) if aquatic offsetting or aquatic compensation is applied, any consent granted is subject to conditions that will ensure that the offsetting or compensation will be maintained and managed over time to achieve the conservation outcomes.³⁴

75 I also recommend amending Policy LF-FW-P13A to include “then” at the end of each clause, for consistency with the NPSFM. This simply clarifies how the policy was already designed to be applied and therefore I consider it to be an amendment of minor effect in accordance with clause 16(2) of Schedule 1 of the RMA. My recommended amendments are as

LF-FW-P13A – Effects management hierarchy (in relation to natural wetlands and rivers)³⁵

The effects management hierarchy (in relation to natural wetlands and rivers) referred to in LF-FW-P9 and LF-FW-P13 is the approach to managing adverse effects of activities that requires that:

- (1) adverse effects are avoided where practicable, then³⁶

²⁹ Clause 10(2)(b)(i), Schedule 1, RMA – consequential amendment arising from 00315.014 Aurora Energy, 00235.125 OWRUG, 00511.012 PowerNet, 00320.012 Network Waitaki

³⁰ Clause 10(2)(b)(i), Schedule 1, RMA – consequential amendment arising from 00315.014 Aurora Energy, 00235.125 OWRUG, 00511.012 PowerNet, 00320.012 Network Waitaki

³¹ Clause 10(2)(b)(i), Schedule 1, RMA – consequential amendment arising from 00315.014 Aurora Energy, 00235.125 OWRUG, 00511.012 PowerNet, 00320.012 Network Waitaki

³² Clause 10(2)(b)(i), Schedule 1, RMA – consequential amendment arising from 00315.014 Aurora Energy, 00235.125 OWRUG, 00511.012 PowerNet, 00320.012 Network Waitaki

³³ ³³ Clause 10(2)(b)(i), Schedule 1, RMA – consequential amendment arising from 00119.010 Blackthorn, 00206.031 Trojan, 00411.043 Wayfare

³⁴ 00230.005 Forest and Bird

³⁵ Clause 10(2)(b)(i), Schedule 1, RMA – consequential amendment arising from 00315.014 Aurora Energy, 00235.125 OWRUG, 00511.012 PowerNet, 00320.012 Network Waitaki

³⁶ Clause 16(2), Schedule 1, RMA.

- (2) where adverse effects cannot be avoided, they are minimised where practicable, then
- (3) where adverse effects cannot be minimised, they are remedied where practicable, then
- (4) where more than minor residual adverse effects cannot be avoided, minimised, or remedied, aquatic offsetting is provided where possible, then
- (5) if aquatic offsetting of more than minor residual adverse effects is not possible, aquatic compensation is provided, and then
- (6) if aquatic compensation is not appropriate, the activity itself is avoided.

Section 32AA evaluation

76 The amendments I recommend to LF-FW-P13 reduce inefficiency and costs for users by making the pORPS consistent with the NPSFM. The amended provision gives better effect to the NPSFM which must be implemented by regional councils as soon as reasonably practicable.

77 I consider that the amendments I recommend to LF-FW-P13A are minor amendments of clarification only and as such a section 32AA evaluation is not required.

Definition of “degraded”

NPSFM amendments

78 The NPSFM definition of “degraded” has been amended to include a new reference Appendix 1A – Compulsory values in clause (c). This amendment clarifies what is meant by the reference to values in the definition, removing any potential ambiguity. It does not alter the application of the definition because the compulsory values listed in Appendix 1A were already required to be identified for every FMU.

Impacts on pORPS provisions

79 The pORPS adopts the NPSFM 2020 definition of “degraded”, which reads:

degraded, in relation to an FMU or part of an FMU, means that as a result of something other than a naturally occurring process:

- (a) a site or sites in the FMU or part of the FMU to which a target attribute state applies:

- (i) is below a national bottom line; or
 - (ii) is not achieving or is not likely to achieve a target attribute state; or
- (b) the FMU or part of the FMU is not achieving or is not likely to achieve an environmental flow and level set for it; or
- (c) the FMU or part of the FMU is less able (when compared to 7 September 2017) to provide for any value identified for it under the NOF

80 Its application is limited to the provisions in the LF chapter due to its reliance on the NPSFM and focus on freshwater. It appears in FPI and non-FPI provisions.

Recommended amendments

81 I recommended amending the definition of “degraded” to align with the NPSFM. I consider this is an amendment of minor effect in accordance with clause 16(2) of Schedule 1 of the RMA. The changes I recommend are:

Degraded (in relation to freshwater)³⁷

where it is used in the *LF – Land and freshwater* chapter, has the same meaning as in clause 1.4 of the National Policy Statement for Freshwater Management 2020 (as set out in the box below)

degraded, in relation to an FMU or part of an FMU, means that as a result of something other than a naturally occurring process:

- (a) a site or sites in the FMU or part of the FMU to which a target attribute state applies:
 - (i) is below a national bottom line; or
 - (ii) is not achieving or is not likely to achieve a target attribute state; or
- (b) the FMU or part of the FMU is not achieving or is not likely to achieve an environmental flow and level set for it; or
- (c) the FMU or part of the FMU is less able (when compared to 7 September 2017) to provide for any value described in Appendix 1A or any other value³⁸ identified for it under the NOF

Section 32AA evaluation

82 The amendments I recommend do not alter the scope or application of the definition, therefore I do not consider that further evaluation is required under section 32AA.

³⁷ Clause 16(2), Schedule 1, RMA.

³⁸ Clause 16(2), Schedule 1, RMA.

Definition of “limit on resource use”

NPSFM amendments

83 The NPSFM defines the term “limit on resource use”. That definition as been amended as follows:

*means the maximum amount of resource use that is permissible while still achieving a relevant target attribute state **or a nutrient outcome needed to achieve a target attribute state** (see clauses 3.12 and 3.14)*

84 The bolded phrase above is also now defined:

means the instream concentrations and exceedance criteria, or instream loads, for nitrogen and phosphorous, adopted under clause 3.13(4)

85 Clause 3.13 of the NPSFM requires that for any nutrient attribute, and any attribute affected by nutrients, instream concentrations and exceedance criteria, or instream loads, must be set for nitrogen and phosphorus. Clause 3.13(4) specifies that these criteria or loads must be adopted as nutrient outcomes, to achieve target attribute states. On this basis, the nutrient outcomes referenced in the definition of “limit on resource use” form part of the package of NOF requirements to achieve target attribute states, which is the intention of the term in both the original and amended definitions.

Impacts on pORPS provisions

86 In my section 42A report,³⁹ I recommended accepting in part a submission point by the Director-General of Conservation⁴⁰ to refer to “limit on resource use” instead of “environmental limits” in LF-FW-P7. As a consequential amendment, I recommended including the definition of “limit on resource use” from the NPSFM. Given that the original submission point is on a provision that has been re-notified as part of the FPI, I understand that it is no longer a valid submission point and therefore cannot be relied on for making amendments to non-FPI provisions.

87 Accordingly, I rescind my previous recommendation to include the definition of “limits on resource use” in the pORPS. This means there are no impacts on pORPS from the amendments to the NPSFM definition.

Transparent decision-making

³⁹ Chapter 9: LF – Land and freshwater (2 May 2022), paras 974 and 982.

⁴⁰ 00137.072 DOC

- 88 Clause 3.6 (Transparent decision-making) now applies to all decisions made by regional councils in giving effect to NPSFM (rather than just relating to clauses 3.4 – Tangata whenua involvement and 3.15 – Preparing action plans). Accordingly, every regional council must:
- 88.1 record matters considered and all decisions reached;
 - 88.2 specify the reasons for each decision reached; and
 - 88.3 publish the matters considered, decisions reached, and the reasons for each decision, as soon as practicable after the decision is reached, unless publication would be contrary to any other legal obligation.
- 89 This applies in addition to any requirement under the RMA relating to processes for making regional policy statements. However, new clause 3.6(4) states that where these requirements are met by complying with the RMA (e.g., by publishing a s32 report), no additional action is required. I consider that as the pORPS has followed the process set out in Schedule 1 of the RMA, no additional action is required.



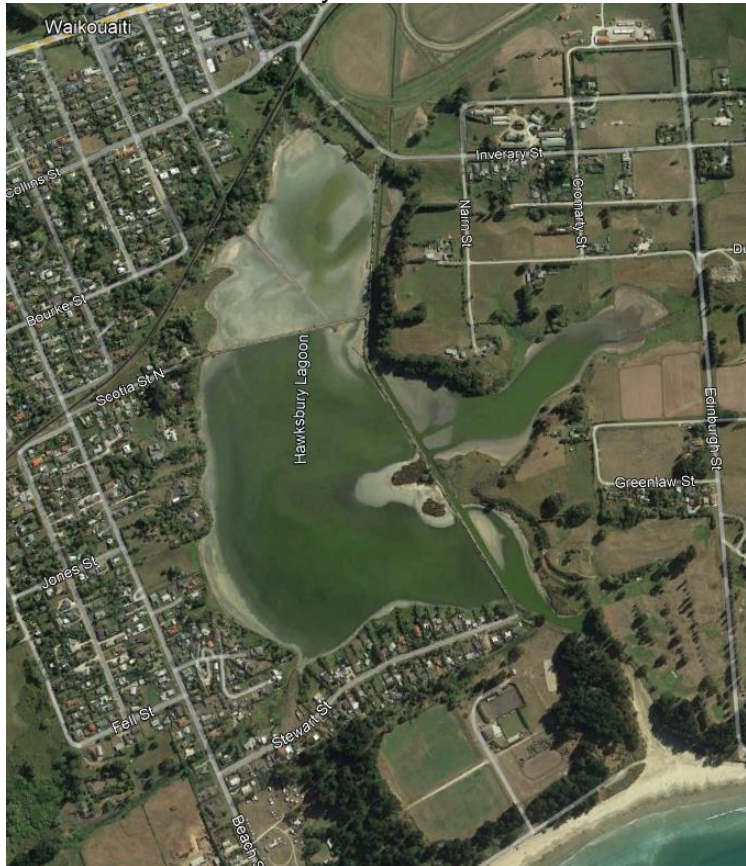
Felicity Ann Boyd

24 February 2023

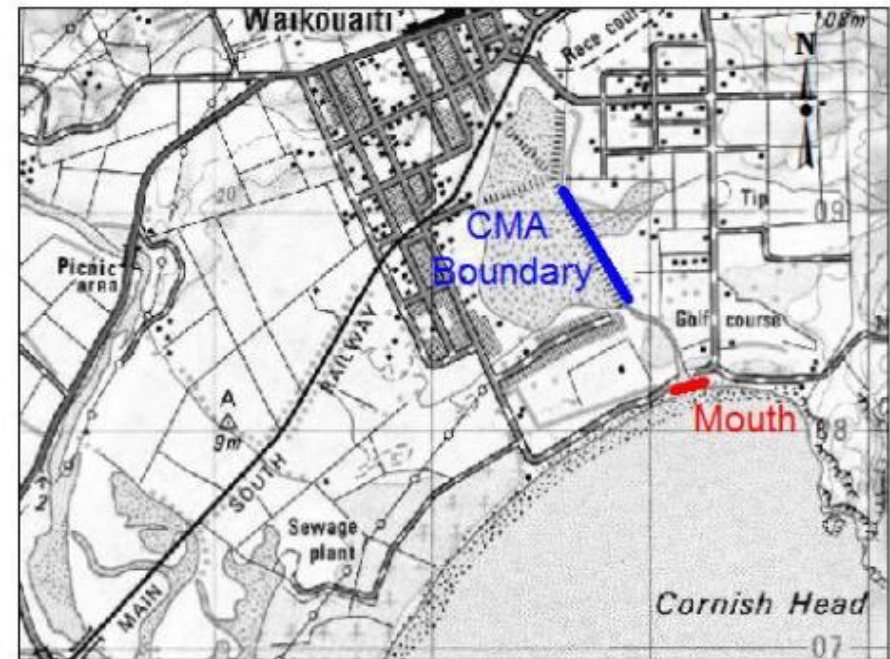
Appendix 1: Examples of wetlands in Otago that cross jurisdictional boundaries

Matainaka (Hawksbury Lagoon)

Physical extent



CMA boundary



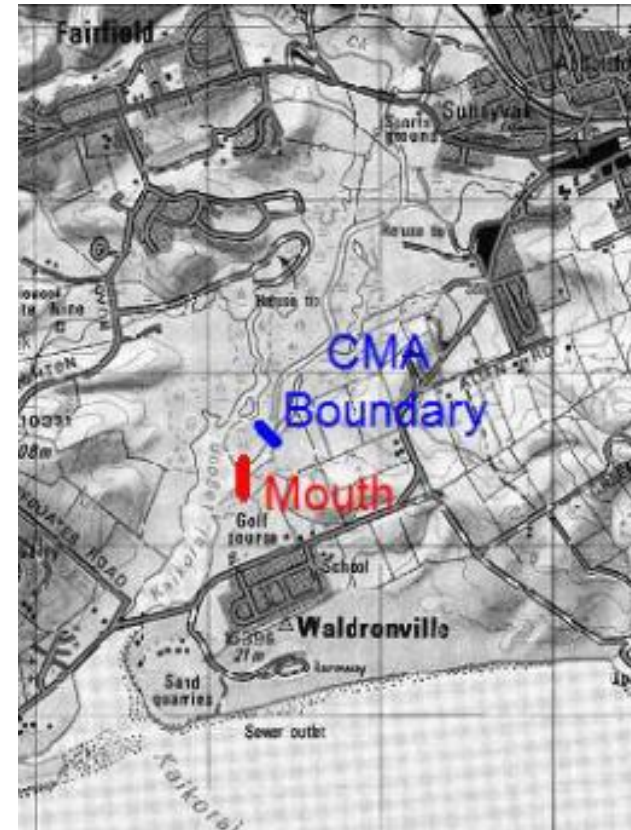
Matainaka (Hawksbury Lagoon) is a shallow fresh-brackish water lagoon and is identified in the Water Plan as a Regionally Significant Wetland. The effect of the CMA boundary means that some parts of the lagoon are in the CMA and others are not. The landward extent of the coastal environment has not been identified so it is unclear whether all of the lagoon is within the coastal environment.

Kaikarae (Kaikorai) Lagoon

Physical extent



CMA boundary



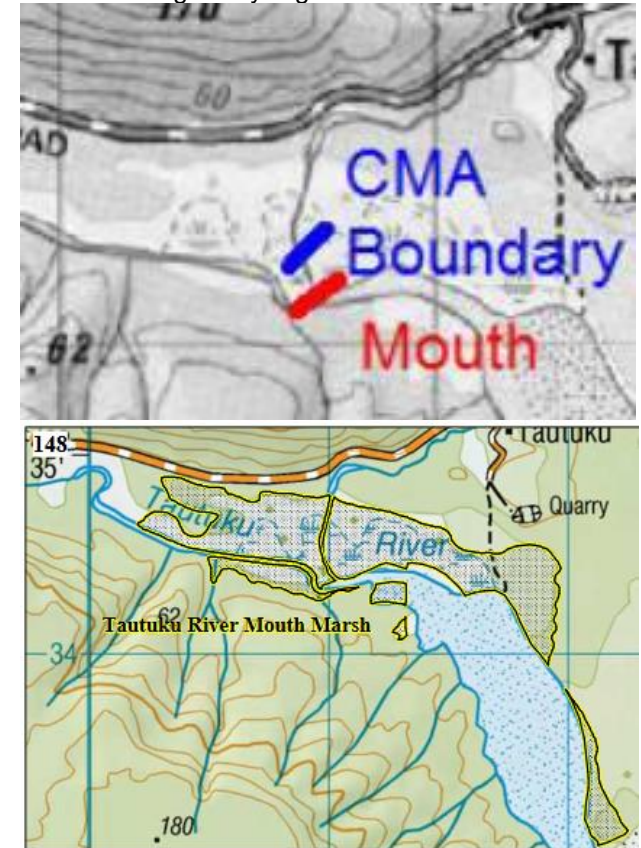
Kaikarae (Kaikorai) Lagoon is a brackish water lagoon with extensive adjacent swamp/marsh areas at the mouth of the Kaikarae (Kaikorai) Stream. The effect of the CMA boundary means that some parts of the lagoon are in the CMA and others are not. The landward extent of the coastal environment has not been identified so it is unclear whether all of the lagoon is within the coastal environment.

Fleming River, Tautuku River, and the Tautuku River Mouth Marsh

Physical extent



CMA and Regionally Significant Wetland boundaries



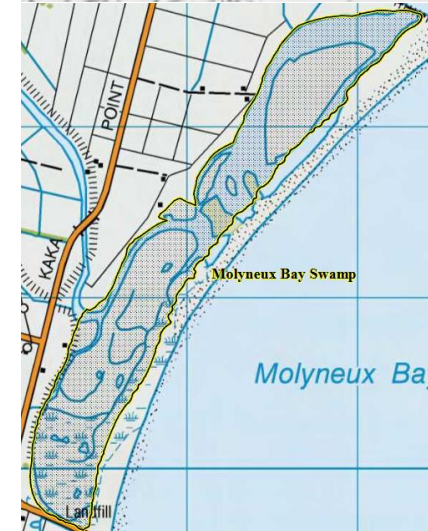
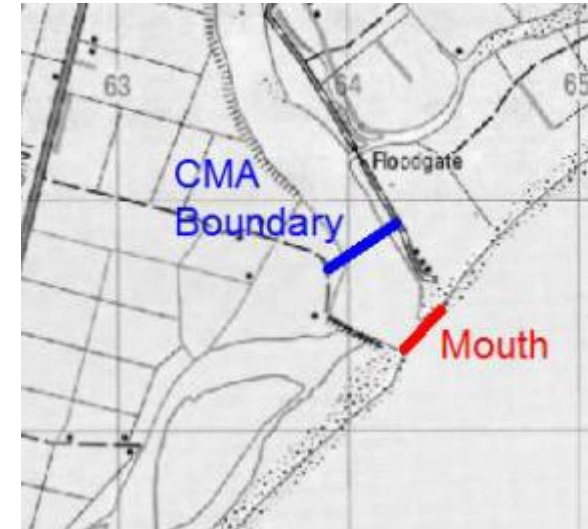
The confluence of the Fleming and Tautuku Rivers occurs some three kilometres inland from the point where the Tautuku River enters the sea. Although the wider area at the confluence is recognised as a wetland, the effect of the CMA boundary means that some parts of the wetland are in the CMA and others are not. The landward extent of the coastal environment has not been identified so it is unclear whether all of the wetland is within the coastal environment.

Puerua River and the Koau branch of the Clutha/Mata-au

Physical extent



CMA and RSW boundaries



The Puerua River has been diverted along the coast to the mouth of the Koau branch of the Clutha/Mata-au. There are no maps in the Water or Coast Plans identifying where the CMA boundary is in relation to the Puerua River, only for the Koau mouth. The entire Molyneux Bay Swamp area is identified as a Regionally Significant Wetland. It is unclear where the CMA boundary is.

Appendix 2: Old vs new definitions of “natural inland wetland”

2020 definitions (adopted in pORPS)	2022 definition
<p>natural wetland means a wetland (as defined in the Act) that is not:</p> <ul style="list-style-type: none"> (a) a wetland constructed by artificial means (unless it was constructed to offset impacts on, or restore, an existing or former natural wetland); or (b) a geothermal wetland; or (c) any area of improved pasture that, at the commencement date, is dominated by (that is more than 50% of) exotic pasture species and is subject to temporary rain-derived water pooling 	<p>natural inland wetland means a wetland (as defined in the Act) that is not:</p> <ul style="list-style-type: none"> (a) in the coastal marine area; or (b) a deliberately constructed wetland, other than a wetland constructed to offset impacts on, or to restore, an existing or former natural inland wetland; or (c) a wetland that has developed in or around a deliberately constructed water body, since the construction of the water body; or (d) a geothermal wetland; or (e) a wetland that: <ul style="list-style-type: none"> (i) is within an area of pasture used for grazing; and (ii) has vegetation cover comprising more than 50% exotic pasture species (as identified in the National List of Exotic Pasture Species using the Pasture Exclusion Assessment Methodology (see clause 1.8)); unless (iii) the wetland is a location of a habitat of a threatened species identified under clause 3.8 of this National Policy Statement, in which case the exclusion in (e) does not apply.
<p>natural inland wetland means a natural wetland that is not in the coastal marine area</p>	