

BEFORE THE OTAGO REGIONAL COUNCIL

AT DUNEDIN

KI ŌTEPOTI

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the proposed Otago Regional Policy Statement 2021
(excluding those parts determined to be a Freshwater
Planning Instrument)

**Legal Submissions for the Director-General of Conservation *Tumuaki Ahurei*
Land and Freshwater (LF-FW) Chapter
dated 9th May 2023**

Department of Conservation Te Papa Atawhai

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MAY IT PLEASE THE HEARING PANEL

The following matters are submitted on behalf of the Director-General of Conservation, Tumuaki Ahurei ('Director-General'):

Evidence for the Director-General

1. The following witnesses will appear and give evidence to support the submissions of the Director-General:
 - i. Dr Marine Richarson ('MR') – freshwater ecology
 - ii. Bruce McKinlay ('BM') – terrestrial ecology
 - iii. Murray Brass ('MB') – planning

Legal Framework

2. The legal submissions of the Regional Council on the Land and Freshwater Chapter are endorsed and adopted.¹
3. In order to orient the following submissions, the only additional matters that the Director-General wishes to draw the Hearing Panel's attention to concerns Te Mana o te Wai and judicial pronouncements on the concept. As the NPSFM states, Te Mana o te Wai 'is relevant to all freshwater management and not just to the specific aspects of freshwater management referred to in [the NPSFM]'.²
4. In analysing Te Mana o te Wai in the 2014 NPSFM (as amended in 2017),³ the Environment Court stated:

'[59] As a matter of national significance, the health and wellbeing of water are to be placed at the forefront of discussion and decision-making. Only then can we

¹ Legal Submissions for the Otago Regional Council on the Land and Freshwater Chapter, 2nd May 2023

² NPSFM cl 1.3(2). Hence, these submissions are in scope for the pORPS 2021 (non freshwater parts) hearing.

³ *Aratiatia Livestock Ltd v Southland Regional Council* [2019] NZEnvC 208, [59]-[63]. The NPSFM 2014 (as amended 2017) also included the fundamental concept of Te Mana o te Wai.

provide for hauora by managing natural resources in accordance with ki uta ki tai.
This is our second key understanding...

[62] ... The NPS-FM makes clear that providing for the health and wellbeing of waterbodies is at the forefront of all discussions and decisions about fresh water.
This is our third key understanding.

[63] If we are correct in our understandings, and this approach is indeed threaded through the proposed plan, this is a fundamental shift in perspective around management of this natural resource.'

5. The NPSFM 2020 makes the priorities and hierarchy of priorities that the Environment Court derived from Te Mana o te Wai even clearer.⁴ Freshwater ecosystems are a fundamental component of Te Mana o te Wai, and their health and wellbeing are prioritised within the concept:⁵

There is a hierarchy of obligations in Te Mana o te Wai that prioritises:

- (a) first, the health and well-being of water bodies and freshwater ecosystems
- (b) second, the health needs of people (such as drinking water)
- (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

6. The addition of 'freshwater' to the term 'freshwater ecosystems' removes people and (human) communities from the meaning of ecosystems in this context (note s 2(1) RMA, '[i]n this Act, **unless the context otherwise requires ...**').
7. The importance of this hierarchy is shown by its repetition as the sole objective of the NPSFM in cl 2.1.
8. The NPSFM uses directive language:

'every regional council **must give effect** to Te Mana o te Wai, and in doing so **must: (c) apply the hierarchy of obligations, as set out in clause 1.3(5) ... (iii)** when developing objectives, policies, methods, and criteria for any purpose under subpart 3 relating to natural inland wetlands, rivers, fish passage, primary contact sites, and water allocation' (emphasis added).

⁴ *Re Otago Regional Council* [2021] NZEnvC 164, [32]; see also [30]: 'While expressed differently in earlier iterations of the NPS-FM, the centrality of Te Mana o te Wai to freshwater management is a constant'.

⁵ NPSFM 2020, cl 1.3(5).

9. In *Trustees of Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2022] NZHC 1846, Hinton J explained:

[20] ... the NPS-FM 2020, ... significantly developed the “fundamental concept” of Te Mana o te Wai. **In short, the concept requires local authorities to prioritise the health and well-being of the water body itself before human uses can be provided for.**’ (emphasis added)

ISSUE 1 – LF-FW Policies and Methods

Amend the wording in LF-FW P14, (3) and add new method LF-FW-M8A

10. The Director-General submits that the wording in LF-FW P14 (3) should be amended as follows:

...(3) increase the presence, resilience and abundance of indigenous flora and fauna, including by providing for fish passage within river systems and creating fish barriers to prevent predation incursions from undesirable species where necessary and appropriate.

11. Dr Richarson explains the rationale for this change in her evidence at [131]. Essentially, while fish barriers can play a role in protecting certain fragile communities, they can also cause adverse effects in some circumstances and so careful site-based assessment must be undertaken.

12. This revised wording reflects an appropriate policy approach to the objective contained in clause 3.26(1) NPSFM:

3.26 Fish passage (1) Every regional council must include the following fish passage objective (or words to the same effect) in its regional plan: “The passage of fish is maintained, or is improved, by instream structures, except where it is desirable to prevent the passage of some fish species in order to protect desired fish species, their life stages, or their habitats.”

13. This revised wording is also supported by the s 42A report writer,⁶ (albeit with a slight change in structure, that in turn is acceptable to the Director-General).
14. Further, what will be an ‘undesirable species’ is location specific.
15. The Director-General proposes a new correlative policy entitled ***‘Identifying and managing species interactions between trout and salmon and indigenous species’*** to address decision-making in relation to that issue: LF-FW-M8A (see MB [41] for drafting, and MR [134-140] for the rationale).
16. Proposed policy LF-FW-M8A is an empowering provision. It ensures that decision-makers receive information from the correct knowledge holders and have ‘particular regard’ to their recommendations. Those knowledge holders include the Department of Conservation (DOC) because the Director-General has wide-ranging statutory obligations in relation to all freshwater fisheries,⁷ and, as a corollary, DOC has extensive in-house technical expertise in freshwater fisheries.
17. Proposed policy LF-FW-M8A provides a process to assist the Regional Council in meeting the requirements of clause 3.26(2) and (3)(b) of the NPSFM, i.e.:
- (2) Every regional council must make or change its regional plan to include policies that:
 - (a) **identify the desired fish species**, and their relevant life stages, for which instream structures must provide passage; and
 - (b) **identify the undesirable fish species** whose passage can or should be prevented; and
 - (c) identify rivers and receiving environments where desired fish species have been identified; and
 - (d) identify rivers and receiving environments where fish passage for undesirable fish species is to be impeded in order to manage their adverse effects on fish populations upstream or downstream of any barrier.
 - (3) When developing the policies required by subclause (2) a regional council must:
 - (a) take into account any Freshwater Fisheries Management Plans and Sports Fish and Game Management Plans approved by the Minister of Conservation under the Conservation Act 1987; and

⁶ Opening Statement of Felicity Ann Boyd LF- Land and freshwater’, 27th April 2023, [87].

⁷ ss 6 (ab), 53(3)-(5) Conservation Act 1987. See also cl 3.26(3) NPSFM.

(b) **seek advice from the Department of Conservation and statutory fisheries managers regarding fish habitat and population management.** (Emphasis added)

18. Proposed policy LF-FW-M8A is supported by the s 42A Report writer, albeit with some slight changes (that in turn are supported by the Director-General).⁸

ISSUE 2 – APP1

Amend wording in APP1

19. APP1 should include explicit reference to the New Zealand Threat Classification System (NZTCS) as an appropriate evidential source, as indeed the NPSFM does.⁹

20. APP1 must also ensure that it responds to the Significant Resource Management Issues in the Otago Region, including SRMR-17 **‘Rich and varied *biodiversity* has been lost or degraded due to human activities and the presence of pests and predators’**.

21. As Dr Richardson explains, ‘the Otago Region supports a diverse freshwater fish fauna’ (MR [38]) including ‘32 extant taxa within the region (MR [40]), and ‘many [taxa] have limited distribution around the country, and several are limited to small parts of the Otago Region’ (MR [41]). She further reports that ‘15 [of these species] are currently assessed as ‘Threatened’ and nine are assessed as ‘At Risk’ by the (NZTCS) (MR [44] (Table 1)). Non-diadromous galaxiids in particular ‘face a range of anthropogenic threats stemming from changes in land use, agricultural intensification, water abstraction and the introduction of sports fish’ (MR ([49]-[55])). The loss of habitat, particularly spawning habitat, is ‘a major threat’ (MR [50]).

22. Accordingly, the Director-General submits that the following criteria should be added to List A under ‘Native fish habitat’:

e. The water body is critical to the persistence of a threatened species or to the maintenance of a population with threatened status

⁸ ‘Opening Statement of Felicity Ann Boyd LF- Land and freshwater’, 27th April 2023, [90].

⁹ NPSFM, 1.4, definition of threatened species.

23. Further, the following criteria should be removed from List A under ‘Angling amenity (trout and salmon)’;

~~*b. High number of trout (water body supports the highest trout numbers in the region or the highest trout biomass in the region).*~~

24. Dr Richarson considers this provision incompatible with both the preservation of indigenous freshwater communities *and* good quality recreational fisheries (as ‘high trout densities might lead to stunted growth and absence of large fish’) (MR [129]).

25. These amendments ensure the pORPS better reflects policies 9 and 10, and their hierarchy, in the NPSFM:

Policy 9: The habitats of indigenous freshwater species are protected.

Policy 10: The habitat of trout and salmon is protected, **insofar as this is consistent with Policy 9** (emphasis added).

26. Section 7(h) RMA is adequately met by the other provisions listed in APP1 under ‘Angling amenity (trout and salmon)’.

ISSUE 3 – LF-LS Objectives

Add two new objectives.

27. To a large extent, the submissions made in relation to the objectives in the ECO Chapter are repeated here:¹⁰ that is, objectives have to be sufficiently focused in order to give proper direction to the policies, methods and technical provisions in the RPS (and the immediate policy framework will impact how ecologists approach those technical

¹⁰ Legal Submissions for the Director-General of Conservation on the Ecosystems and Indigenous Biodiversity Chapter, dated 19th April 2023, [14]-[19].

provisions – i.e., APP1, 2, 3, 4).¹¹ Wide, amorphous objectives do not provide adequate direction. Accordingly, it is critical to ensure objectives are sufficiently clear and specific.

28. The Director-General proposes two additional objectives:

- i. *Otago's land environments support healthy habitats for indigenous species and ecosystems.*
- ii. *Land use activities in Otago are managed in a way which recognises and protects terrestrial, freshwater and coastal values which land use activities could affect either directly or indirectly.*

29. The s 42A Report writer suggests that the first proposed objective 'overlap[s] ... somewhat] with those in the ECO Chapter.¹²

30. However, it is not so much a question of objectives 'overlapping' as opposed to *complementing* each other. Complementary objectives help promote integrated management and minimise the problems with structural compartmentalisation in the pORPS. Including these two objectives in the LF Chapter emphasises the importance of considering values *across domains* and in particular –the Director-General would submit– considering the values of indigenous biodiversity across domains.

31. In relation to the second proposed objective, this is a clear expression of *ki uta ki tai* and reflects cl 3.5 of the NPSFM. The 'terrestrial, freshwater, and coastal values' referred to are those expressed in the relevant chapters of the pORPS. The second objective signals that *indirect* effects on freshwater must also be addressed (including consequential and downstream effects), so preventing a singular focus on direct effects. Indirect effects on freshwater (land run-off from agriculture etc), can cause significant habitat degradation

¹¹ See e.g. 'Joint Witness Statement – Ecologists, 31st March 2023', General Matters, 1.

¹² Opening Statement of Felicity Ann Boyd LF- Land and freshwater', 27th April 2023, [105], albeit she states she is 'less opposed' to the inclusion of this first proposed objective.

(MR [49-50]) (as the Whangamarino wetlands disaster in March of this year reminds us).¹³

ISSUE 4 – Pest Management

Insert new pest management policy LF-LS-PX and add a definition for ‘pest’.

32. SRMR-13 notes the ongoing threats of pest species including ‘rabbits ... wallabies ... wilding conifers ... aquatic pests and weeds ... and diseases’. Mr McKinlay’s evidence explains in detail why addressing the adverse effects from wilding pines must be included within a land management context (BM [157-170]). Mr McKinlay also recommends the insertion of explicit policies addressing wider pest-management in the pORPS (BM [171-178]).

33. Regional policy statements that do not contain adequate land control policies for pest management have been successfully challenged.¹⁴

34. Accordingly, the Director-General’s submission recommended inserting a new policy in the LF-LS Chapter to address wilding pine control and pest-management and, further, adding the definition of ‘pest’ from the Biosecurity Act 1993 (BM [178]).

35. However, it is conceded that the Director-General’s current proposed drafting of ‘LF-LS-PX Pest Species’ (MB, [105]) may not accord with the criteria of the *Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017* (NESPF).¹⁵ Mr Brass will give evidence on how the wording of policies for pest and wilding pine management might be amended to ensure compliance with the NESPF (MB, Speaking Notes, 9th May 2023, [6]-[9] and Appendix 1).

¹³ See e.g., Andrea Vance ‘Thousands of birds die at important wetland, from deadly disease caused by pollution’ Radio New Zealand, 19th March 2023, available at <https://www.rnz.co.nz/news/national/486277/thousands-of-birds-die-at-important-wetland-from-deadly-disease-caused-by-pollution>

¹⁴ *Royal Forest and Bird Protection Society of New Zealand v Northland Regional Council* (1998) 4 ELRNZ 200, and see [29] in particular, explaining the complementary relationship between the RMA and the Biosecurity Act 1993.

¹⁵ National Environmental Standards are regulations, s 43 RMA. In accordance with s 62(1) RMA ‘a regional council must prepare and change its regional policy statement in accordance with— ... (e) any regulations.

A handwritten signature in black ink, appearing to read 'Ceri Warnock'.

Ceri Warnock

Counsel Rōia for the Director-General