

**BEFORE COMMISSIONERS APPOINTED
BY THE OTAGO REGIONAL COUNCIL**

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the Proposed Otago Regional Policy Statement 2021
(Non-freshwater parts)

AND

IN THE MATTER of the First Schedule to the Act

AND

IN THE MATTER of a submission under clause 6 of the First Schedule

BY **BEEF + LAMB NEW ZEALAND LIMITED and DEER
INDUSTRY NEW ZEALAND**
Submitters

**MEMORANDUM OF COUNSEL FOR BEEF+LAMB NEW ZEALAND LIMITED AND
DEER INDUSTRY NEW ZEALAND**

19 September 2023

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MAY IT PLEASE THE PANEL

1. This memorandum is filed on behalf of Beef+Lamb New Zealand Limited (B+LNZ) and Deer Industry New Zealand (DINZ) in response to the direction by the Panel dated 21 July 2023 for submitters to respond solely to the Otago Regional Council's evidence and submissions on the implications of the NPSIB for non-freshwater issues.
2. B+LNZ and DINZ have reviewed the evidence and memorandum filed by Otago Regional Council on 8 September 2023. Counsel's legal submissions on the NPSIB, presented on behalf of B+LNZ and DINZ at the Freshwater Hearing on 4 September 2023, relate to the implications of the NPSIB for both the freshwater and non-freshwater parts of the PORPS. For completeness we set out these legal submissions on the NPSFM and NPSIB in Appendix A.
3. Further, as outlined at the Freshwater Hearing, counsel has no further submissions to make on the possible implications of the Supreme Court decision of *Port Otago Limited v Environmental Defence Society*.¹ Counsel also confirms it will not be responding to the Memorandum for the Otago Regional Council on resourcing Kāi Tahu,² as directed by the Panel in its Minute dated 24 July 2023.



Dr RJ Somerville KC/ CH Luisetti
Counsel for Beef + Lamb NZ Limited and Deer Industry New Zealand
19 September 2023

¹ [2023] NZSC 112.

² Dated 21 July 2023.

Appendix A

NPSFM and NPSIB

78. Ms Boyd has identified what she considers to be a gap in the policy framework in the NPSFM and the NPSIB that can be addressed by amending the PORPS provisions to provide direction on managing wetlands that may not necessarily be natural inland wetlands as defined in the two NPSs.
79. The issue is whether there is, in fact, a gap in the policy framework or whether the NPSFM and the NPSIB are aligned and can be applied consistently in the PORPS.
80. National policy statements are to be given effect to through lower order planning documents (regional policy statements, regional plans and district plans) of regional and district councils.³ Thus, the ORC must give effect to both the NPSFM and the NPSIB in its preparation of the PORPS.⁴ The phrase ‘give effect to’ means to implement. As the Supreme Court has confirmed, it is a strong directive, creating a firm obligation on the part of those subject to it.⁵
81. In **Re Otago Regional Council**, the Environment Court considered the relationship between different national policy statements in terms of the requirement in s 67(3) of the RMA that a regional plan must give effect to these documents.⁶ The Court said that where there are two national policy statements, they are to be read together and reconciled under lower order planning documents.⁷ We have addressed the relevant principles of statutory interpretation at [71] of our submissions.

³ RMA, ss 55, 62(3), 67(3) and 75(3).

⁴ RMA, s 62(3).

⁵ **Environmental Defence Society Inc. v New Zealand King Salmon Company** [2014] NZSC 38, [2014] NZRMA 195 at [77].

⁶ **Re Otago Regional Council** [2021] NZEnvC 164. The Court was dealing with the National Policy Statement for Freshwater Management 2020, the National Policy Statement for Urban Development 2020 and the National Policy Statement for Renewable Electricity Generation 2011.

⁷ *Ibid*, at [369].

82. In the event of a conflict between the NPSFM and the NPSIB, cl 1.4(3) of the NPSIB makes it clear that the NPSFM prevails over the NPSIB.
83. In addition, it is a well-established principle of construction that Parliament intends to legislate in a way that produces a practicable and sensible result.⁸ In other words, Parliament will not have intended an outcome that is inefficient or unworkable. This principle is important in this case when assessing the efficiency and effectiveness of the policies in terms of s 32(1)(b) of the RMA.
84. The NPSFM and the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NESF) are the primary instruments through which wetlands are managed and protected.
85. The NPSFM's sole objective is set out at cl 2.1. It is implemented through policies, Policy 6 being that 'There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.' Part 3 of the NPSFM contains an implementation process – the Regional Council 'must' undertake certain actions, one of which is to include the policy set out at cl 3.22, which is to provide for and promote the restoration of natural inland wetlands.
86. It is noted that, as part of amendments in 2022, the definition of 'natural wetlands' in the NPSFM was refined and clarified. Prior to the 2022 amendments, the NPSFM used a subset of the RMA wetland definition⁹ to define 'natural wetlands':

Natural wetland 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.

87. The reason for the amendment was because the drafting of the earlier NPSFM was not consistent with the original policy intent that pasture dominated wet areas were to be excluded from the definition. This is made clear in the Regulatory *Impact Statement*:

⁸ **Re Watercare Services Ltd** [2018] NZHC 294 at [64], citing **R v Salmond** [1992] 3 NZLR 8 (CA) at 13.

⁹ The definition of 'wetland' in s 2 of the RMA is: 'permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions.'

*Changes to wetland regulations (inland wetlands).*¹⁰ Page 1 of the *Regulatory Statement* identified the problem in the following way:

The definition of 'natural wetlands' in the National Policy Statement for Freshwater Management 2020 (NPSFM) is unclear and being interpreted inconsistently by councils. This is leading to significant costs and uncertainty for applicants for resource consents.; *and in some instances, more land is being classified and regulated as 'natural wetlands' than was intended, unnecessarily restricting some existing types of land use (primarily farming).*

[Emphasis added]

88. At page 10, the Regulatory Statement stated:

A consistent theme of feedback from various stakeholders is that the 'natural wetland' definition is unclear and is leading to confusion and discrepancies in the application of the NESF.

Part (c) of the definition was intended to exclude highly modified wetland landscapes currently used for pasture, so that these areas can continue to be used for farming. This recognises that applying the regulations within such wetlands and associated buffers (100m of a natural wetland) would be likely to have a prohibitive impact on farming activities in these areas.

One concern raised was that part (c) of the definition is problematic because of its multiple qualifiers; and as a result, it actually captures some modified wetlands dominated by exotic pasture that it was intended to exclude.

89. The 2022 amendment makes it clear that, in line with the original policy intent of the definition, pasture dominated wet areas are excluded from the definition.

90. Since the amendments took effect on 5 January 2023, regional councils 'must' include the updated wetland content set out in cl 3.22(1) of the NPSFM in their regional plans.

91. As directed by the NPSFM, the notified regional policy statement includes LF-FW-P9. Ms Boyd's evidence is, however, that in order to give effect to the NPSIB, a broader class of wetlands needs to be captured and that, therefore, changes need to be made to the definition of 'natural wetlands' and to policy LF-FW-P9 as notified.

¹⁰ It addressed changes to the NPSFM 2020 and the Resource Management (National Environmental Standards for Freshwater) Regulations 2020.

92. We submit that greater weight should be given to the more specific and directly relevant NPSFM in determining the most appropriate provisions relating to natural inland wetlands.