

**BEFORE THE COMMISSIONERS APPOINTED ON BEHALF
OF THE OTAGO REGIONAL COUNCIL**

UNDER	the Resource Management Act 1991 (the Act or RMA)
IN THE MATTER	of an original submission on the Proposed Regional Policy Statement for Otago 2021 (PRPS)
BETWEEN	OTAGO WATER RESOURCE USER GROUP Submitter OS00235 and FS00235 FEDERATED FARMERS NZ INC Submitter OS00239 and FS00239 DAIRY NZ Submitter FS00601
AND	OTAGO REGIONAL COUNCIL Local Authority

SUPPLEMENTARY SUBMISSIONS OF COUNSEL REGARDING NPSIB



GALLOWAY COOK ALLAN LAWYERS

Bridget Irving / Phil Page
bridget.irving@gallowaycookallan.co.nz
phil.page@gallowaycookallan.co.nz

P O Box 143
Dunedin 9054
Ph: (03) 477 7312
Fax: (03) 477 5564

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1. Minute 15¹ of the non-freshwater hearings panel directed that submitters respond to the implications of the NPSIB for non-freshwater issues by 15 September 2023. This deadline was then amended to 19 September 2023 in Minute 19.²
2. These supplementary legal submissions respond to those directions.

IMPLICATIONS OF THE NPSIB

3. In response to Minute 15 of the non-freshwater hearings panel, evidence was lodged by Kelvin Lloyd and Andrew MacLennan on behalf of ORC regarding the implications of the NPSIB. These submissions respond to that supplementary evidence
4. Further to that it is unclear whether ORC intended Ms Felicity Boyd's evidence³ on the implications of the NPSIB on the freshwater planning instrument to also be available to the non-freshwater panel, given it addressed provisions allocated to the non-freshwater part. For the avoidance of doubt these submissions respond to relevant points raised in that supplementary evidence, where they dealt with provisions in the non-freshwater party. In particular, the definition of 'natural wetland'.

Objective of the NPSIB

5. At paragraph 140 of his evidence, Mr MacLennan states that:

140 The NPSIB aims to protect, maintain, and restore indigenous biodiversity...

6. We think that this characterisation is somewhat misleading. The '2.1 Objective' clause of the NPSIB is divided into two subclauses, with the first explaining that the objective is to maintain indigenous biodiversity across Aotearoa New Zealand so that there is at least no overall loss in indigenous biodiversity. The second subclause then provides four methodologies to achieve this maintenance. The words 'protecting and restoring' only appear in one of the four.

¹ Dated 21 July 2023.

² Dated 13 September 2023.

³ Evidence of Felicity Ann Boyd. FPI – Implications of the NPSIB. 11 August 2023.

7. We submit that in only identifying one of the four methodologies to achieve maintenance of indigenous biodiversity, Mr MacLennan has given more weight to the 'protect and restore' directions. This is at the expense of:
 - (a) recognising the mana of tangata whenua as kaitiaki of indigenous biodiversity; and
 - (b) recognising people and communities, including landowners, as stewards of indigenous biodiversity; and
 - (c) providing for the social, economic, and cultural wellbeing of people and communities now and in the future.
8. Even the protect and restore direction itself is subject to the qualifier 'as necessary'.
9. This is important because this mischaracterisation leads into recommendations around SNAs and their place in the proposed regional policy statement. In not properly framing the objective, Mr MacLennan has diminished the importance of people⁴ and their role in relation to indigenous biodiversity and recognition of their need to be able to provide for their social, economic and cultural wellbeing.
10. This theme is consistent with the concerns raised by the submitters throughout the pRPS process.

No net loss in NPSFM vs net gain in the NPSIB

11. In Mr MacLennan's evidence,⁵ he adopts a passage from Ms Felicity Boyd's supplementary evidence on the implications of the NPSIB for the freshwater planning instrument to support the argument that two EMHs are required within the pORPS:

The key differences between the NPSIB and the NPSFM are:

103.1 The definitions require aquatic offsetting to achieve no net loss and preferably a net gain whereas biodiversity offsetting must achieve a net gain;

⁴ The lack of recognition of people and communities was touched on in written and oral submissions of Emma Crutchley when she appeared in the freshwater hearings on Monday 4 September 2023.

⁵ Evidence of Andrew MacLennan. Implications of the NPSIB. 8 September 2023, at [91]-[92].

103.2 The principles for offsetting reflect the different outcomes sought from aquatic and biodiversity offsetting (above); and

103.3 In the principles for compensation, the NPSIB version has an additional criterion for the use of financial contributions, which makes it more stringent than the NPSFM version.

12. However, if you interrogate the meanings of 'no net loss and preferably a net gain' as compared with 'net gain', the differences are in name only:

Appendix 6 – Principles for aquatic offsetting ... [NPSFM]

3. **No net loss and preferably a net gain:** This is demonstrated by a like-for-like quantitative loss/gain calculation, and is achieved when the extent or values gained at the offset site (measured by **type, amount and condition**) are equivalent to or exceed those being lost at the impact site.

Appendix 3: Principles for biodiversity offsetting ... [NPSIB]

(3) **Net gain:** This principle reflects a standard of acceptability for demonstrating, and then achieving, a net gain in indigenous biodiversity values. Net gain is demonstrated by a like-for-like quantitative loss/gain calculation of the following, and is achieved when the indigenous biodiversity values at the offset site are equivalent to or exceed those being lost at the impact site:

(a) **types** of indigenous biodiversity, including when indigenous species depend on introduced species for their persistence; and

(b) **amount;** and

(c) **condition** (structure and quality).

13. Although structured slightly differently, the meaning of 'no net loss and preferably a net gain' in the NPSFM is effectively synonymous with the NPSIB's definition of 'net gain'. In that sense it cannot be argued that the definitions are actually different.
14. Because of the synonymous nature of the two definitions means that there is no difference in outcomes between the NPSFM and NPSIB offsetting. So, Ms Boyd's point at 103.2 falls away.

15. Finally, in point 103.3 Ms Boyd notes that in the principles for compensation, the NPSIB version has an additional criterion for the use of financial contributions, which makes it more stringent than the NPSFM version. We assume that this is an error, because the NPSFM compensation provisions also contain a financial contribution criterion:

NPSFM

Appendix 7 – Principles for aquatic compensation ...

10. Financial contribution: A financial contribution is only considered if it directly funds an intended aquatic gain or benefit that complies with the rest of these principles.

NPSIB

Appendix 4: Principles for biodiversity compensation ...

(10) **Financial contributions:** A financial contribution is only considered if:

(a) there is no effective option available for delivering biodiversity gains on the ground; and

(b) it directly funds an intended biodiversity gain or benefit that complies with the rest of these principles.

16. This is important because Mr MacLennan uses Ms Boyd's reasoning (including in paragraph 103) to support a view that the EMH in the NPSIB is more stringent than the EMH in the NPSFM. It is submitted that is not correct.
17. It leads both to argue that the application of the EMH within the ECO chapter should retain a broad scope and apply to all biodiversity (including wetlands and freshwater biodiversity). In effect seeking to apply a more stringent EMH to freshwater matters. It is submitted that the NPS's have deliberately established their own EMH and there is no compelling reason presented in the evidence for departing from those given the differences in the types of habitats that need to be managed. In individual circumstances there will be opportunities to integrate the response across the land and freshwater margin.

New provisions

18. Mr MacLennan recommends an extensive array of additional provisions in response to the NPSIB. The NPSIB is directive in requiring certain matters to be addressed implemented and to that extent the submitters do not object to their inclusion.
19. However, there does not appear to have been any real analysis of their application to Otago context, identification of potential tensions or conflicts and reconciliation of those as required by *Port Otago v Environmental Defence Society & Ors* [2023] NZSC 112. The section 32AA is instructive in that it effectively adopts the section 32 analysis of the NPS⁶. Given that the purpose of an NPS and an RPS are different – i.e. one is to identify matters of national significance⁷ the other is to achieve integrated management of natural and physical resources of the whole Region⁸ the rationale for adopting the provisions in an NPS cannot reliably be imported in support of the same provisions in an RPS. The ambit of an RPS is much broader.
20. This points to the same solution being required as Counsel set out in supplementary submissions dated 15 September 2023 – that being provisions that provide direction about the process required to reconcile these matters through the lower order documents. The provisions recommended on behalf of the farming submitters which take an integrated approach to catchment management would achieve this purpose.

Wetland submissions

Counsel notes that these submissions were delivered in relation Ms Boyd's evidence in the Freshwater Hearing. The submissions are repeated here as the key matter of concern to the Submitters was the proposed amendments to the definition of 'natural wetland' which is a non-freshwater provision. If Ms Boyd's evidence is not being 'imported' into the non-freshwater hearing these submissions can be ignored.

21. We have no substantive quibble with the submissions of Ms Sefton to the freshwater panel regarding the legal obligations and framework this panel has to work with in responding to the newly operative NPSIB.

⁶ Supplementary Evidence of Andrew MacLennan at [248].

⁷ Resource Management Act section 45

⁸ Resource Management Act section 59.

22. However, there are numerous issues that arise from Ms Boyd's proposed changes, the genesis of which are legal interpretation matters.
23. I note that Ms Boyd concludes that the PRPS gives effect to the NPSIB.⁹ That is the question that needed addressing. However, the supplementary evidence has gone on to discuss a different matter arising from an alleged gap created by the NPSFM definition of 'natural inland wetlands'.
24. Ms Boyd identifies what she considers a 'gap' in the NPS's created by the NPSFM definition of 'natural inland wetland', which is also relied upon in the NPSIB. Ms Boyd appears to second guess the wisdom of the 2023 amendments to the natural inland wetland definition in the NPSFM. With respect, that is going beyond the brief. In essence, the supplementary evidence is suggesting that the provisions are not implementing the objectives of the NPSIB or NPSFM. Be that as it may, what is required is to give effect to the NPSIB and NPSFM as they are, not how we might wish them to be.
25. At paragraph [69] Ms Boyd discusses the application of NPSIB clause 3.21(2)(d) and expresses concern about how it operates in light of the pasture exclusion in the 'natural inland wetland' definition. She expresses a concern that the objectives of the NPS's cannot be achieved if only 'natural inland wetlands' are managed by the provisions.
26. The provisions of the NPSIB (and NPSFM) need to be interpreted and applied in a manner that achieves their purpose and maintains the integrity and consistency of the documents. The definitions and provisions particularise what is required in order to achieve the objectives with an increasing level of specificity.
27. It is noted that the Government elected not to amend the policies applicable to wetlands when it amended the definition. This must be on the basis that it concluded that the amended definition continued to achieve the desired outcome and implement the objectives and policies to the extent required.
28. The section 32 report in support of the amended definitions noted that the pasture exclusion part of the definition "*is intended to exclude highly modified wetland*

⁹ Supplementary Evidence of Ms Boyd at [77].

*landscapes now utilised for pasture from the regulations, so they can continue to be used for pastoral purposes”.*¹⁰

29. It is submitted that the 50% pasture exclusion is a demarcation between where an area is considered to be worthy of protection. Essentially a threshold where the pendulum swings away from requiring protection and towards other uses. This approach is perhaps a demonstration of how to manage in accordance with the hierarchy of obligations. Therefore, NPSIB Clause 3.21(2)(d) is directed at those wetlands that are sitting just above the 50% threshold, as opposed to those below that threshold.

30. It is worth noting that the amendments to the definition of natural inland wetland were made by the Government as a result of extensive work to address issues that arose with the original definition. Ms Hunter traverses this in her supplementary evidence for Oceana Gold. It is clear that the intent of the changes is that wetlands with more than 50% pasture are not captured by either framework (except where highly mobile fauna areas are identified), and including them is not necessary to give effect to either NPS.

Scope for addressing wetlands in the NPSIB

31. The NPSFM applies to all freshwater (including groundwater) and is applicable to wetlands.¹¹

32. In contrast the NPSIB applies to terrestrial environments excluding land covered by water, water bodies and freshwater ecosystems.¹² Generally, it does not apply to wetlands, though there are exceptions in respect of:¹³

(a) Specified highly mobile fauna;

(b) promoting restoration and increasing indigenous vegetation cover in natural inland wetlands;

(c) Regional biodiversity strategies; and

¹⁰ Ministry for the Environment. 2022. Amendments to the NES-F and NPS-FM: Section 32 report. Wellington: Ministry for the Environment.

¹¹ NPSFM, cl 1.5(1). It mentions 'wetland' 65 times.

¹² NPSIB, cl 1.6, 'terrestrial environment'.

¹³ NPSIB, cl 1.3(2).

(d) SNAs (significant natural areas) containing natural inland wetland.

33. Parts (b) and (d) only apply to **natural inland wetlands**.

34. The only situations where the policy regime may allow for application of the NPSIB to the **natural wetland** definition Ms Boyd has put forward are with respect to highly mobile fauna and regional biodiversity strategies.

35. Regional biodiversity strategies are discussed at cl 3.23 of the NPSIB. Their development requires collaboration with territorial authorities, tangata whenua, communities, and other stakeholders. The NPSIB allows for 10 years for this purpose.¹⁴ This is not that forum.

Specified highly mobile fauna

36. Specified highly mobile fauna are covered by the NPSIB, whether or not they use areas outside the terrestrial environment (such as wetlands) for part of their life cycle.¹⁵

37. Highly mobile fauna areas must be outside an SNA and are identified under clause 3.20 of the NPSIB as an area used intermittently by specified highly mobile fauna.¹⁶

38. Policy 15 of the NPSIB directs that:

Policy 15: Areas outside SNAs that support specified highly mobile fauna are identified and managed to maintain their populations across their natural range, and information and awareness of highly mobile fauna is improved.

39. The areas that support these specified highly mobile faunae must clearly be identified before they are managed to *maintain* populations.

40. Some wetlands areas beyond those that qualify as natural inland wetlands could be identified as highly mobile fauna areas under clause 3.20. However, the NPSIB does not require or anticipate the blanket *protection* of all wetlands for this purpose. In fact, the contrary it appears to have deliberately required a robust identification process.

¹⁴ Clause 4.3.

¹⁵ Clause 1.3(2)(b).

¹⁶ Clause 1.6, '**highly mobile fauna areas**'. Specified highly mobile fauna means the Threatened or At Risk species of highly mobile fauna that are identified in Appendix 2 of the NPSIB.

41. There is no scope in the NPSIB to manage adverse effects of an activity on indigenous biodiversity in the context of a wetland unless the wetland is identified as a specified highly mobile fauna area in accordance with cl 3.20.

42. Ms Boyd recommendations go beyond the intended scope of the NPSIB in seeking to protect broader class of wetlands. For example, at LF-FW-P9:

LF-FW-P9 – Protecting *natural wetlands*

Protect *natural wetlands* by:

(1) preventing activities that will, or are likely to, result in irreversible damage to a *natural wetland*; and

(2) for *natural inland wetlands*, implementing clause 3.22(1) to (3) of the NPSFM, except that:

(4a) in the coastal environment, *natural wetlands* must also be managed in accordance with the NZCPS, and

(2b) when managing the adverse effects of an activity on *indigenous biodiversity*, the *effects management hierarchy (in relation to indigenous biodiversity)* applies instead of the *effects management hierarchy (in relation to natural wetlands and rivers)*.

Identification under clause 3.20

43. Clause 3.20 of the NPSIB discusses the identification of highly mobile fauna areas.

The Clause directs that:

(1) Where information about areas used by specified highly mobile fauna is available, every regional council must record areas outside SNAs that are highly mobile fauna areas, by working together with tangata whenua (in the manner required by clause 3.3), any potentially affected landowners, territorial authorities in its region, and the Department of Conservation.

(2) If it will help manage adverse effects on specified highly mobile fauna, regional councils must include in their regional policy statements (where practicable) a map and description of each highly mobile fauna area in the region.

(3) Local authorities must include objectives, policies, or methods in their policy statements and plans for managing the adverse effects of new subdivision, use, and development on highly mobile fauna areas, in order to maintain viable populations of specified highly mobile fauna across their natural range.

(4) Local authorities must provide information to their communities about:

(a) highly mobile fauna and their habitats; and

(b) best practice techniques for managing adverse effects on any specified highly mobile fauna and their habitats in their regions and districts.

44. Nothing in this regime provides for the 'protection' or 'restoration' of highly mobile fauna areas, nor does it specifically create a carve out for natural wetlands (particularly as opposed to natural inland wetlands). It is merely a regime to manage adverse effects on these areas and maintain viable populations of highly mobile fauna.

45. The approach taken by Ms Boyd constitutes overreach in direct contravention of the deliberate changes to the NPSFM definition of natural inland wetland. If the NPSIB was intended to apply to wetlands generally then it would have said so. On the contrary it explicitly states that it does not apply to water bodies and freshwater ecosystems except for in specific circumstances, and those relate only to natural inland wetlands within SNA's and areas identified for highly mobile fauna.

46. In such circumstances the NPSFM must prevail. In this respect we draw the Panel's attention to clause 2

1.4 Relationship with other national directions and iwi participation legislation

(3) If there is a conflict between the provisions of this National Policy Statement and the National Policy Statement for Freshwater Management 2020 or the Resource Management (National Environmental Standards for Freshwater) Regulations 2020, the latter prevail.


47. The Council must give effect to the provisions of the NPSFM, which only refers to **natural inland wetlands**. The NPSFM approach is summarised succinctly at Policy 6:

Policy 6: There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.

48. The natural consequence of that is that the definitions of 'natural wetland' and the policy regime for their protection that follows must be removed from the PORPS.

49. The national direction is clear and the ORC must give effect to it.

Signed:



Bridget Irving

Counsel for the Submitters

Date: 19 September 2023