

**BEFORE THE OTAGO REGIONAL COUNCIL**

**IN THE MATTER OF**            **the Resource Management Act 1991**

**AND**

**IN THE MATTER OF**            **Proposed Plan Change 5A (Lindis: Integrated Water  
Management) to the Regional Plan: Water for Otago**

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**Legal Submissions on Behalf of the Director-General of Conservation  
Dated 31 March 2016**

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**Department of Conservation**

South Island RMA Planning

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Counsel: P D Williams

## Introduction

1. The Director-General of Conservation (the Director-General) made a submission to the Otago Regional Council (the Council) on Proposed Plan Change 5A (Lindis: Integrated Water Management) to the Regional Plan: Water for Otago (PC 5A).
2. The Director-General's submission supported PC 5A as notified, and stated he wished to be heard in support of the submission.
3. In support of the Director-General's submission, I am calling evidence from the following witnesses:
  - 3.1 Geoff Deavoll, RMA Planner
  - 3.2 Daniel Jack, Ranger – Services (biodiversity – freshwater)
4. These submissions will cover the following matters:
  - 4.1 The functions and interests of the Department of Conservation (the Department) and the Director-General in the Lindis catchment.
  - 4.2 National Policy Statement for Freshwater Management 2014.
  - 4.3 Proposed National Environmental Standard on Ecological Flows and Water Levels
  - 4.4 Schedule 1AA of the Regional Plan: Water.
  - 4.5 The Director-General's submission.

## Functions and Interests of the Department

5. The functions of the Department of Conservation (the Department) are set out in section 6 of the Conservation Act 1987, and relevantly include the following:

### 6 Functions of Department

The functions of the Department are to administer this Act and the enactments specified in Schedule 1, and, subject to this Act and those enactments and to the directions (if any) of the Minister,—

- (a) to manage for conservation purposes, all land, ..., for the time being held under this Act, ...
- (ab) to preserve so far as is practicable all indigenous freshwater fisheries, and protect recreational freshwater fisheries and freshwater fish habitats:
- (b) to advocate the conservation of natural and historic resources generally

...

6. The Director-General has “... *all powers that are reasonably necessary or expedient to enable the Department to perform its functions*”: section 53(1) Conservation Act 1987. The Director-General also has the specific power to “... *advocate the conservation of aquatic life and freshwater fisheries generally*”: section 53(3)(d) Conservation Act 1987.
7. In the Lindis catchment, the Department administers public conservation land, including fixed marginal strips<sup>1</sup> along much of the river and, adjoining the river, various conservation areas and historic and recreation reserves.
8. The nature of the public conservation land administered by the Department in the Lindis catchment reflects the long history of water use in the area, and the resulting impacts on indigenous freshwater fisheries.
9. As noted in the Section 32 Report, the Lindis also has easy access for recreational activities including swimming and fishing. This is consistent with the conservation purposes for which the marginal strips along the Lindis River are held.<sup>2</sup>
10. The indigenous freshwater fisheries of particular concern to the Director-General are in the tributaries of the Lindis River, rather than in the mainstem. This is further discussed in the evidence of Mr Jack.

#### **National Policy Statement for Freshwater Management 2014 (NPSFM)**

11. Council is required to give effect to the NPSFM: section 67(3) of the Resource Management Act 1991. In my submission, as stated by the Supreme Court in *Environmental Defence Society v New Zealand King Salmon Ltd*<sup>3</sup>, the words “*give effect to*” simply mean to implement the relevant national policy statements, in this case the NPSFM.

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<sup>1</sup> Created by section 58 of the Land Act 1948 and now deemed to be marginal strips held for conservation purposes under the Conservation Act 1987.

<sup>2</sup> Section 24C of the Conservation Act 1987 especially paragraphs (b) and (c).

<sup>3</sup> [2014] NZSC 38, [2014] 1 NZLR 593, (2014) 17 ELRNZ 442

12. As set out in the evidence of Mr Deavoll, PC 5A gives effect to a number of Part B objectives and policies dealing with water quantity.
13. I note that PC 5A will integrate management of fresh water in the Lindis catchment, including surface water from the Lindis River and groundwater from its associated aquifers.
14. In addition to the Part B objectives and policies from the NPSFM, I submit this also gives effect to Objective C1 of the NPSFM as this improves integrated management of fresh water including interactions between fresh water, land and associated ecosystems.

#### **Proposed National Environmental Standard on Ecological Flows and Water Levels (2008) – Proposed NES**

15. Where a National Environmental Standard (NES) is in force, Council must observe the NES, and must enforce it to the extent it is able to under its powers.<sup>4</sup> Council may make rules which are more stringent than the NES where the NES expressly allows for this, however Council may not make a rule which is more lenient than an in-force NES.<sup>5</sup>
16. The Proposed NES was publicly notified for submissions in 2008, with a summary of submissions prepared in 2009. However, the Proposed NES has not progressed and is now on hold, pending other Government decisions on freshwater reform.<sup>6</sup>
17. As the Proposed NES is not in force, it is not binding on Council. However Council may refer to it, as a resource providing relevant information, in considering what decision it wishes to make on PC 5A.

#### **Regional Plan: Water for Otago – Schedule 1AA**

18. I remind the hearing panel of Schedule 1AA of the Regional Plan: Water for Otago which references the threat status of a number of native freshwater

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<sup>4</sup> Section 44A Resource Management Act 1991

<sup>5</sup> Section 43B Resource Management Act 1991

<sup>6</sup> <http://www.mfe.govt.nz/node/19492>

fish resident in the Otago Region. That includes the Clutha flathead galaxiid or '*Galaxias species D*' and states that its threat classification is Nationally Vulnerable.

19. The threat status for freshwater fish given in Schedule 1AA comes from the 2009 assessment of New Zealand's native freshwater fish.<sup>7</sup> Threat classifications are regularly reviewed and, sadly, for most of our freshwater fish their threat classification has worsened, as reflected in the current 2014 conservation status for freshwater fish referred to by Mr Jack in his evidence.<sup>8</sup>
20. Further, as noted by Mr Jack, the undescribed Clutha flathead galaxiid is likely to have two genetically distinct evolutionary significant units. I submit this illustrates the ongoing process of scientific discovery in relation to New Zealand's native freshwater fish species.
21. The taxonomic description of New Zealand's non-migratory freshwater fish is continuing and has resulted in new species being described since Schedule 1AA came into effect.
22. I submit you should note Schedule 1AA is no more than an initial guide to the freshwater fish species resident in Otago. The threat status the Schedule records for each species has subsequently been updated and will be further updated in due course. However, the Otago Region continues to be a "hot spot" for indigenous freshwater fisheries and Council needs to be cognisant of this in any decisions it makes relating to freshwater.

#### **Director-General's submission**

23. The Director-General's submission referred to Policies 7(a) and 7(d) of the Conservation General Policy 2005 which relevantly state:

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<sup>7</sup> Allibone, R.; David, B.; Hitchmough, R.; Jellyman, D.; Ling, N.; Ravenscroft, P.; Waters, J. 2010: Conservation status of New Zealand freshwater fish, 2009. *New Zealand Journal of Marine and Freshwater Research* 44: 271-287.

<sup>8</sup> Conservation status of New Zealand freshwater fish, 2013. Jane M. Goodman, Nicholas R. Dunn, Peter J. Ravenscroft, Richard M. Allibone, Jacques A.T. Boubée, Bruno O. David, Marc Griffiths, Nicholas Ling, Rodney A. Hitchmough and Jeremy R. Rolfe 2014. *New Zealand Threat Classification Series* 7.

## 7 Conservation Beyond Public Conservation Lands and Waters

7 (a) The Department should work cooperatively to develop effective working relationships with people and organisations to protect natural resources, historical and cultural heritage, and public access.

...

7 (d) The Department should undertake statutory advocacy to protect natural resources and historical and cultural heritage outside public conservation lands and waters and for the benefit and enjoyment of the public, including public access, in particular where:

...

ii. indigenous terrestrial or aquatic species or recreational freshwater fisheries are threatened with loss or decline; or

iii. significant marine or freshwater habitats and ecosystems are threatened with loss or decline; or

...

v. activities taking place or proposed in places linked to public conservation lands and waters could have adverse effects on them; or

viii. representativeness of the full range of indigenous habitats and ecosystems can be maintained or improved; or

...

24. In applying these policies, the Department works with other stakeholders, including iwi and regional councils, to promote effective relationships and advocacy to (inter alia) protect natural resources. I submit the Director-General's involvement in the process resulting in PC 5A implements these policies in a meaningful way for the Lindis catchment.
25. In conclusion, the Director-General supports PC 5A as notified, and in particular is supportive of the proposed minimum summer flow which would ensure flow continuity along the entire Lindis river length at all times.



Pene Williams

Senior Solicitor