

I MUA NGĀ KAIKŌMIHANA WHAKAWĀ MOTUHAKĒ
TE WHANGANUI-A-TARA

BEFORE THE INDEPENDENT HEARING COMMISSIONERS
AT WELLINGTON

IN THE MATTER

of the Resource Management Act 1991
(RMA)

AND

IN THE MATTER OF

Proposed Change 1 to the Wellington
Regional Policy Statement (RPS)

Legal submissions for the Royal Forest & Bird Protection Society Inc

Hearing Stream 5 (Te Mana o te Wai/Freshwater)

3 November 2023



Royal Forest and Bird Protection Society of New Zealand
Solicitors acting: M Downing
PO Box 631
Wellington
Ph 022 048 1970
m.downing@forestandbird.org.nz

MAY IT PLEASE THE COMMISSIONERS

1. These legal submissions are presented on behalf of the Royal Forest & Bird Protection Society (**Forest & Bird**) in support of its submission and further submission on Proposed Change 1 to the Regional Policy Statement for the Wellington Region as it relates to Freshwater and Te Mana o te Wai.
2. These submissions provide the legal context and basis to support remaining amendments sought by Forest & Bird, where these are left unresolved by the Section 42A Hearing Report.
3. Where there is overlap that supports Forest & Bird's relief, Forest & Bird relies on the evidence of the Director-General of Conservation.¹

Issue 8: Urban development effects on freshwater and the coastal marine area

Policy 14 and Policy FW.3

4. Forest & Bird is concerned with the recommended changes to Policy 14(h)²:
 - a. the narrow reference to "lot boundaries and new roads" as opposed to "urban development" generally;
 - b. including the term "adjacent"; and
 - c. removal of "gully heads."
5. Forest & Bird seeks reinstatement of the notified version of Policy 14(h), with additional reference to "health and wellbeing" and "natural form and flow of the water body" as below:

Require that ~~lot boundaries and new roads are~~ **urban development is** appropriately located ~~and designed~~ to protect and enhance the **health and wellbeing of adjacent gully heads, rivers, lakes, wetlands, springs, riparian margins, and estuaries and other receiving environments, including the natural form and flow of the waterbody;**"

6. Cogent planning reasons for these changes are provided in the evidence of Mr Murray Brass for the Director-General, which Forest & Bird respectfully adopts. Counsel submits the recommended wording is more legally acceptable in terms of giving effect to the NPSFM. In particular, NPSFM clause 3.5(4), which unequivocally requires:

¹ Mr Murray Brass – planning, Dr Nixie Boddy – ecology

² "(h) Require that ~~urban development~~ **lot boundaries and new roads are** is **appropriately** located ~~and designed~~ to protect and enhance **the health and wellbeing of adjacent gully heads, rivers, lakes, wetlands, springs, riparian margins and estuaries including the natural form and flow of the waterbody**"

(4) Every territorial authority must include objectives, policies, and methods in its district plan to promote positive effects, and avoid, remedy, or mitigate adverse effects (including cumulative effects), of urban development on the health and well-being of water bodies, freshwater ecosystems, and receiving environments.

7. NPSFM clause 3.5(4) expressly refers “urban development”.
8. Policy 1 directs freshwater is managed in a way that gives effect to Te Mana o te Wai. It applies to freshwater per se and does not discriminate amongst where the water occurs – be it a gully head or a stream. The reinstatement of the reference to “gully heads” more appropriately implements this directive policy.
9. Forest & Bird is also concerned that a counterpart policy to Policy 14(h) is not contained in Policy FW.3 “Urban development effects on freshwater and ~~the coastal marine area~~ **receiving environments** – district plans.”
10. Similarly, while Forest & Bird supports recommended amendments to Policy 14(n), to “~~consider~~ **promote** the daylighting of streams,” an outstanding issue is that parallel direction is not reflected in Policy FW.3. Again, Forest & Bird also endorses the recommended amendment of Mr Brass to Policy 14(n) to “**promote and enable** the daylighting of streams” as this is more consistent with NPSFM clause 3.5(1) referred above.
11. For the reasons set out below, counsel submits that clauses (h), (m),³ and (n) must also be echoed in Policy FW.3.
12. Territorial authority functions under section 31 of the RMA relevantly include:
 - a. the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district (section 31(1)(a));
 - b. the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of the maintenance of indigenous biological diversity (section 31(1)(b)(iii)).
13. In terms of allocation of responsibilities, the Wellington RPS provides:⁴
 - (c) city and district councils shall be responsible for developing objectives, policies, rules and/or methods in district plans for the control of the use of land for the

³ “require that urban development avoids the loss of extent or values of natural inland wetlands”

⁴ Regional Policy Statement for the Wellington Region, Policy 61(c)

maintenance of indigenous biological diversity. This excludes land within the coastal marine area and the beds of lakes and rivers.

14. Decisions on land use matters can have direct impact on indigenous biodiversity of streams and other freshwater ecosystems.
15. This is recognised by the NPSFM clause 3.5 identified earlier, and the National Policy Statement for Indigenous Biodiversity 2023 (NPSIB).
16. It is trite that wildlife, particularly those that depend on freshwater for a part of their life cycle, do not always abide administrative boundaries. With respect to the NPSIB:
 - a. NPSIB clause 1.3 states that “specified highly mobile fauna” are covered by the NPSIB, whether or not they use areas outside the terrestrial environment (such as the coastal marine area or water bodies) for part of their life cycle.
 - b. NPSIB clause 3.20(3) requires local authorities⁵ to 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.
 - c. Specified highly mobile fauna are listed in Appendix 5 of the NPSIB and includes birds and bats that are either Threatened or At Risk. For each species, the ecosystems within which they occur are listed, being either: coastal/riverine; wetland/riverine; riverine; or forest/open. Species within the first three categories are likely to be relevant to territorial authority functions, particularly when considering the use of land for the maintenance of indigenous biodiversity.
17. The inclusion of equivalent clauses to (h), (m), and (n) in Policy FW.3 ensures consistency with the NPSIB.

Policy 42

18. Policy 42(j) as recommended in the Section 42A Report suffers from the same issues as Policy 14(h) and needs to be augmented to refer to “urban development” for similar reasons.

Issue 9: Earthworks and vegetation disturbance

Policy 15

19. Forest & Bird’s submission sought further amendments to Policy 15 to ensure that it:

⁵ RMA, s 2: “local authority” means a regional council or territorial authority

- a. directs a reduction in sedimentation affecting estuaries and harbours; and
 - b. captures wetlands and rivers, and their margins.
20. Forest & Bird’s concerns have narrowed slightly with acceptance of the first point, but the latter point has not been addressed.
21. Policy 15(b)(iii) must be augmented as follows:
- (iii) Require setbacks from waterbodies, **wetlands, and their margins** for vegetation clearance and earthworks activities;
22. While reference to water bodies will cover important rivers, lakes, and freshwater wetlands, it will not capture river margins or wetlands subject to saline influence. The definition of “waterbody” in the RMA only includes “freshwater or geothermal water in a river, lake, stream, pond, wetland, or aquifer, or any part thereof, that is not located within the coastal marine area.”⁶
23. It is important that these broader habitats do not “slip through the cracks” particularly where the RMA and national policy requires their protection.
24. RMA section 6 directs (emphasis):
- c. the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers **and their margins**, and the protection of them from inappropriate subdivision, use, and development (section 6(a)).
 - d. the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna (section 6(c)).
25. The following NPSFM policies support recognising wider ecosystems:
- Policy 3:** Freshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments.
 - ...
 - Policy 7:** the loss of river extent and values is avoided to the extent practicable.
 - ...
 - Policy 9:** The habitats of indigenous freshwater species are protected.
26. Vegetation clearance and earthworks within these broader habitats may not only result in further sediment and nutrient input into waterways – but may remove habitat entirely. Further, many freshwater species spend a portion of their life cycle

⁶ RMA, s2

in saline environments. Īnanga, for example, spawn on the margins of rivers and estuaries.⁷

27. When considering setback distances from Īnanga spawning sites under the Proposed Regional Plan for Northland, Judge Smith's division of the Environment Court observed:⁸

[117] We agree there needs to be greater certainty around Īnanga spawning areas. This is an issue under the plan and greater certainty is required to make the 10-metre setback efficient in protecting this indigenous fauna.

...

[119] **These issues are also addressed under the NPSFM 2020 and more particularly under the concepts of Te Mana o Te Wai and the more holistic approach now being adopted towards the interrelationships of the various elements of these ecotones.**

[120] We conclude the proposed provisions achieve an appropriate balance between costs and benefits in relation to protections and enabling land use. **In relation to Īnanga spawning sites, lake beds and wetlands, we have concluded that caution should be exercised because of the potential for small events to have significant consequences on the limited areas of these features.**

[121] With the contraction of natural wetlands, introduction of culverts, drainage and the like, as well as the effects of climate change, Īnanga spawning sites are under constant and increasing pressure. Here the emphasis needs to be on a formal protection of the Īnanga spawning areas.

(emphasis)

28. While the Environment Court was tasked with deciding on a narrative definition for "Īnanga spawning sites" pending some later formal identification of such areas, its findings as to the importance of habitats beyond "water bodies" are pertinent.
29. Further, the failure to broaden Policy 15(b)(iii) would be inconsistent with Policy 18(c) which directs "ensuring there is no further loss of extent of natural inland wetlands and coastal wetlands".

Policy 41

30. Policy 41 still suffers from similar issues in that it addresses nutrient input into waterways caused by vegetation clearance but does not address habitat removal

⁷ "Īnanga spawning habitat quality, remediation and management in the Wellington Region" Taylor & Marshall 2016, page 2: "Īnanga whitebait generally migrate into rivers in the spring, but with some runs at other times of the year. Most fish rear over the summer in habitats suitable for each species, but in autumn, schools of adult Īnanga swim downstream into tidally influenced reaches. On the spring tide, they spawn amongst the dense riparian vegetation that becomes inundated by the tidal waters, although this water is often quite fresh."

⁸ *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 77

caused by both activities. Forest & Bird accordingly seeks that the following clause is added:

(x) Avoiding adverse effects on aquatic ecosystem health, indigenous biodiversity in water bodies, coastal water and receiving environments.

31. This relief will ensure the higher order direction referred in 25 above is achieved.

Issue 10: Managing water takes and use

Policy 17

32. Forest & Bird's submission sought that Policy 17(c) be clarified as follows:

(c) the take of water for community **drinking water** supplies

33. Forest & Bird maintains that without this amendment, the terms are vague and could suggest water for third order priorities under the NPSFM Objective (social, economic, and cultural wellbeing) are appropriate.

34. Counsel submits:

- a. The first limb of the NPSFM objective is plainly about the health of water;
- b. the second limb concerns the impact the health of water has on human health. That must include drinking the water, consuming kai harvested from the water, or recreational contact with the water.

35. Policy 17(c), as currently recommended, could also be interpreted as recognising unintended water use activities such household car-washing as falling under the ambit of "health needs of people" when clearly it is not a second order priority.

Issue 11: Protecting and restoring and ecological health of water bodies

Policy 18

36. Forest & Bird is generally supportive of where the Section 42A Report writer has landed in terms of Policy 18.

37. There is, however, an outstanding matter with respect to clause (r). The S42A Report recommends the following, in response to the Director-General's submission:

(r) restoring and maintaining fish passage, where appropriate.

38. Forest & Bird supports the intent behind this recommendation but submits the drafting requires more clarity.

39. Forest & Bird's submission sought the following amendment:

(r) restoring and maintaining indigenous fish passage, except where it is desirable to prevent the passage of some fish species in order to protect indigenous species, their life stages, or their habitats.

40. The wording sought by Forest & Bird provides the requisite clarity, reflective of NPSFM clause 3.26(1):
- (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.”
41. It is also better implements NPSFM Policy 9: “The habitats of indigenous freshwater species are protected”.
42. NPSFM Policy 9 is unqualified. The ability for indigenous species to move freely (without harm from introduced species) within aquatic systems forms part of habitat protection.
43. Counsel submits that the addition of the terms “where appropriate” is open to wider interpretation beyond the ecological rationale behind it,⁹ and is incongruous with higher order direction. It introduces discretion to consider conflicting values, for example, the ability to consider economic factors in determining whether fish passage should be unimpeded or not. This would be a perverse outcome, that does not give effect to the NPSFM.

Policy 40

44. Forest & Bird’s submission sought a clause be added to Policy 40 to alert users to obligations with respect to coastal wetlands, in line with Policy 18 above. This relief was rejected, despite that Policy 18(c) refers to “coastal wetlands”.
45. Forest & Bird submits the reference to coastal wetlands in Policy 18(c) is justified and Policy 40 needs to be consistent with this.
46. The NPSFM applies to all freshwater, and encompasses the receiving environment, which includes coastal wetlands.¹⁰ NPSFM Policy 6 directs that there is no further loss of extent of natural inland wetlands, and does not make reference to coastal wetlands. However, Policy 3 of the NPSFM requires that ‘freshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments.’ The

⁹ Provided in the evidence of Dr Boddy

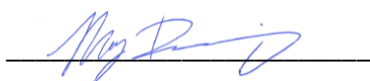
¹⁰ NPSFM Clause 1.5

receiving environment in the NPSFM contains the coastal marine area (including estuaries). In addition, in giving effect to Te Mana o te Wai, councils must adopt an integrated approach - ki uta ki tai (from the mountains to the sea).¹¹ This is elaborated in NPSFM clause 3.5, which requires that local authorities manage freshwater and land use in an integrated way to avoid, remedy, or mitigate adverse effects on water bodies, freshwater ecosystems, and receiving environments.

47. Complementary policies are contained in the New Zealand Coastal Policy Statement (**NZCPS**). The NZCPS directs that the integrity, form, functioning and resilience of the coastal environment is safeguarded, including by maintaining or enhancing natural biological and physical processes.¹² When describing the extent and characteristics of the coastal environment, Policy 1 of the NZCPS includes coastal wetlands. Any regional policy statement must give effect to the NZCPS,¹³ which places a responsibility on the Greater Wellington RPS to safeguard coastal wetlands, through maintenance or enhancement. The term ‘maintain’¹⁴ can be reasonably translated in the context of this policy, as ‘avoid loss’.
48. Therefore, to give effect to both the NZCPS and the NPSFM, the protection that clause (p) of Policy 40 affords to natural inland wetlands, should be extended to capture coastal wetlands.
49. Accordingly, Forest & Bird submits Policy 40(p) be amended to read as follows:

(p) ensuring there is no further loss of extent of natural inland wetlands **and coastal wetlands**, and their values are protected.

Dated this 3rd day of November 2023



M Downing

Counsel for Royal Forest and Bird Protection Society Inc

¹¹ NPSM clause 3.2(2)(e)

¹² NZCPS, Objective 1

¹³ RMA, s 62(3)

¹⁴ Defined in the Merriam-Webster Dictionary as ‘to keep in an existing state (as of repair, efficiency, or validity) : preserve from failure or decline