

IN THE MATTER OF

Hearing Submissions and Further Submissions on
Proposed Plan Change 1 to the Natural Resources
Plan for the Wellington Region

Freshwater Hearing Panel

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13 December 2024

**Comments on Rule R151A in response to reply and additional comments from Samuel O’Brien
(Response to request for information dated 27 November 2024).**

1. My name is Thomas James Kay. I am the Conservation Advocate – Freshwater at the Royal Forest & Bird Protection Society. I am providing these comments in my capacity as an advocate at Forest & Bird and not as an expert, noting I may provide evidence at subsequent hearings in an expert capacity.
2. Wellington Regional Council provided a response to the Hearing Panel’s request for information (from Minute 3 paragraph 16 and 17 [Rule 151A]) in the “Response to request for information” of Samuel O’Brien dated 27 November 2024.
3. Forest & Bird consider that the information provided is not sufficient to justify giving ongoing diversions a permitted activity status. In light of the uncertainty in information and the extent of adverse effects, a cautious approach would be to assign higher activity status. This would be consistent with the concept of “best information” in the NPS for Freshwater Management whereby “if the information is uncertain, [a local authority] must interpret it in the way that will best give effect to this National Policy Statement.”

Highly Modified Waterbodies

4. Samuel O’Brien’s response includes an example of a stream diversion at Wai-o-hata (Duck Creek) in the suburb of Whitby. This appears to be a relatively recent diversion where remediation works were carried out to maintain the character and habitat of the stream as much as possible (noting that while it may appear this has had minimal impacts on the stream, there is a significant body of evidence illustrating that stream diversions and engineering still have impacts on ecosystem beyond those that might be observable to most people).
5. While allowing the ongoing diversion of streams in situations like this may be appropriate (given the difficulty of letting these streams naturally move within their floodplains again), it is possible

there are other streams or rivers that have been diverted without such remediation requirements. Figure 2 below shows some of the 'Highly Modified Streams' in some of the Wellington region for the purposes of R121 (permitted vegetation clearance). This provides an indication of the length of stream and riverbed across the region that has been modified. While much of this modification is likely to have occurred before the RMA was in effect, some of it may be consented. If this is the case, there is a reasonable question as to whether it should continue indefinitely as a permitted activity.

6. The NRP includes a definition of a 'Highly modified river or stream' for the purposes of Rules R134, R135 and R136. The fact that the NRP notes these types of waterbodies (and maps some of them) indicates that stream diversion is a widespread activity, and its full extent likely unknown. Forest & Bird considers it is inappropriate to simply make ongoing diversion of the consented subsection of these waterbodies, whatever number or length of waterbody that might be, a permitted activity.
7. For these reasons, ongoing diversion should not be a permitted activity. This is especially the case when associated with water takes. Mr O'Brien states that "case law has confirmed that for activities that are seeking to be reconsented, the activities subject to those consents should not form part of the existing environment".¹ I do not understand this to be the correct legal position. Legal counsel has drawn my attention to more recent decisions:
 - a. *Ngāti Rangī Trust v Manawatu-Whanganui Regional* [2016] NZHC 2948, concerning water takes for a hydro-electric scheme, where the High Court observed that "water take permits are not permanent and do not carry existing use rights protections."²
 - b. *Lindis Catchment Group Inc v Otago Regional Council* [2019] NZEnvC 179, where the Court rejected an argument that the scheme of the NPSFM only required assessment against the current situation "especially when there is over allocation of water".³

¹ Paragraph 17 of Mr O'Brien's reply

² At paragraphs 62- 64

³ At paragraph 88: *Given the wording of Objective B1 of the NPSFM requiring that the life-supporting capacity ecosystem processes and indigenous species be safeguarded, we consider that at least in relation to the ecosystems which contain indigenous biodiversity, an assessment needs to be made of any indigenous species' circumstances - its current and former area of occupation and extent of occurrence and analysis of its holding ecosystem's intrinsic values which includes analysis of the ecosystem's "integrity, form, functioning and resilience" all of which appear to have four-dimensional elements (i.e., involve space and time).*

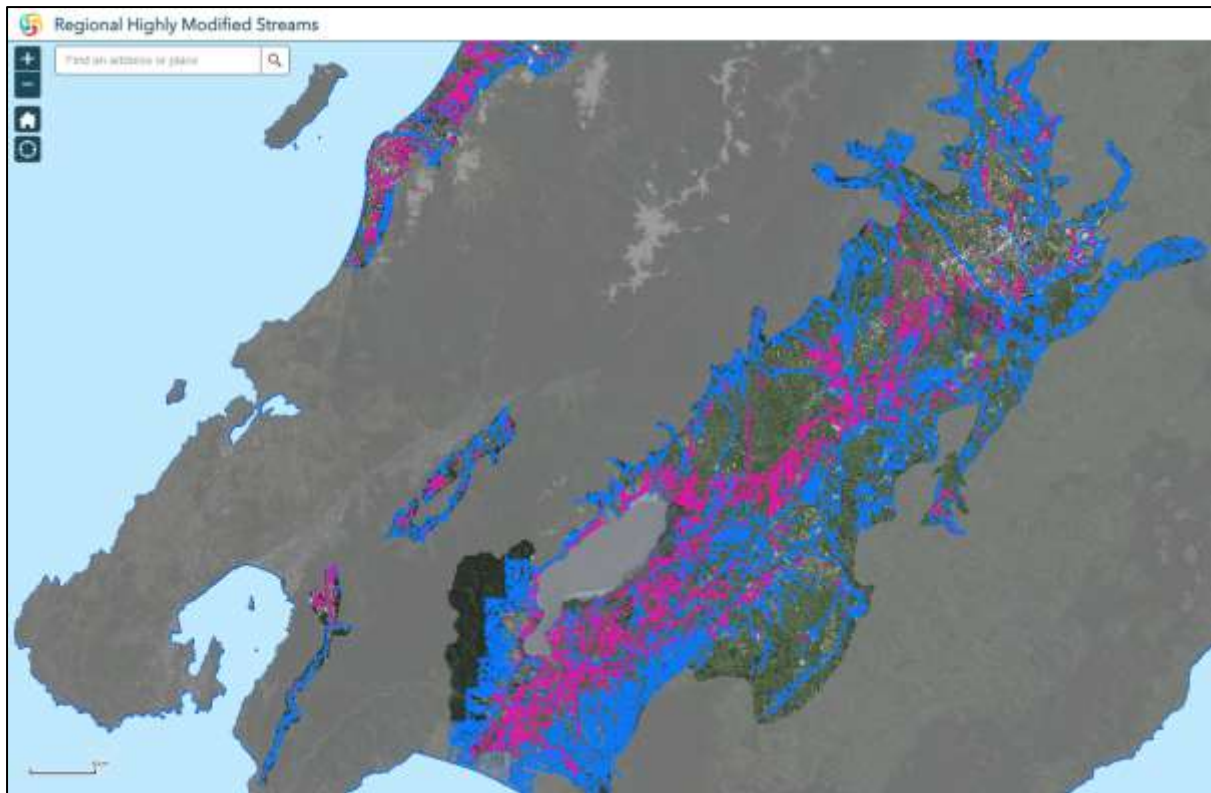


Figure 2: Regional Highly Modified Streams from some of the Wellington Region (note the Hutt River catchment, for example, is largely unmapped). From <https://gwrc.maps.arcgis.com/apps/webappviewer/index.html?id=87a85d0ad2a3493fbecb789eac79773>

8. If the Panel is minded to reclassify Rule 151A as a restricted discretionary rule, Forest & Bird considers the following as appropriate matters of discretion:
 - a. the volume and rate of water taken, used, diverted or discharged and the timing of any take, diversion, or discharge
 - b. the location and course of the diverted section of the river
 - c. any effects on
 - i. river flows,
 - ii. wetland and lake water levels,
 - iii. coastal waters and coastal processes,
 - iv. estuaries,
 - v. aquatic ecosystems,
 - vi. water quality,
 - vii. natural character, including geological, geomorphological and morphological aspects, and the natural movement of water and sediment including hydrological and fluvial processes
 - d. habitat, including the physical form, structure, and extent of the water body, its bed, banks and margins; its riparian vegetation; and its connections to the floodplain and to groundwater

- e. effects, including any seasonal effects, on: the customary use of mahinga kai; taonga species; and the spiritual and cultural values and beliefs of tangata whenua; and
- f. avoidance, mitigation or remediation measures to address adverse effects on the environment,
- g. the collection, recording, monitoring, reporting and provision of information concerning the exercise of consent; and
- h. lapse period, duration of consent and consent review requirements

Water Races

9. Forest & Bird raised concerns at the hearing that water races may be captured by Rule 151A, and therefore PA status is inappropriate as these diversions should not necessarily be permitted in perpetuity (and not without appropriate checks and balances on effects). In seeking further information on this potential issue, we are struggling to understand whether water races are or are not at risk of being captured by this rule.
10. Under the RMA, the definition of a river excludes "any artificial watercourse (including an irrigation canal, water supply race, canal for the supply of water for electricity power generation, and farm drainage canal)".
11. The NRP does not contain a different definition for "river" and so I understand the RMA definition applies. Therefore, the ongoing operation of (and any diversions caused by) water races in the Wellington region would presumably not be captured by rule 151A and would fall under a different rule framework in the plan. This is because Rule 151A applies to ongoing diversion of a "river".
12. If this is the case, Forest & Bird's concerns about water races being captured by this rule may be unfounded (noting these are not the only concerns we raise with the rule and the ongoing diversions of water bodies). It would be useful to clarify the limited coverage of Rule 151A in the plan.
13. However, Forest & Bird notes this has not been noted as a clear exclusion by council officers and the response of Mr O'Brien dated 27 November 2024 does not express this as the clear reason for water races not being captured by Rule 151A. Instead, the rationale is that "Water races typically require an intake structure and would therefore not be captured by new Rule R151A"⁴.
14. Forest & Bird do not understand this to always be the case and remain concerned that water races could be captured by Rule 151A (unless we are correct that they are clearly excluded by their definition). For example, WRC's online 'Wairarapa Water Races' map of races⁵ illustrates the relatively large network of water races in the Wairarapa (see Figure 1). Within this network, there are two types of water race. These are (1) "artificial water race" and (2) "water race that is

⁴ Para. 6 of Mr O'Brien's reply

⁵ Wairarapa Water Races.

<https://experience.arcgis.com/experience/f7448a0e5db4450a862ad434c1524ed6/>

or used to be a stream”. While the intake points from the respective mainstems of the rivers these networks of races draw water from may be associated with a structure, it is by no means clear that every section of water race mapped (particularly those races that are or “used to be” a stream) are associated with a structure.

15. Forest & Bird consider it inappropriate to classify the ongoing diversions of the streams within these networks as permitted. If the definition of a “river” does not automatically exclude these races from Rule 151A, then a higher activity status (i.e. Restricted Discretionary or Discretionary rule) is even more warranted. If the definition does exclude water races, then it may be useful for this to be clarified in Rule 151A to make it clearer for plan users.

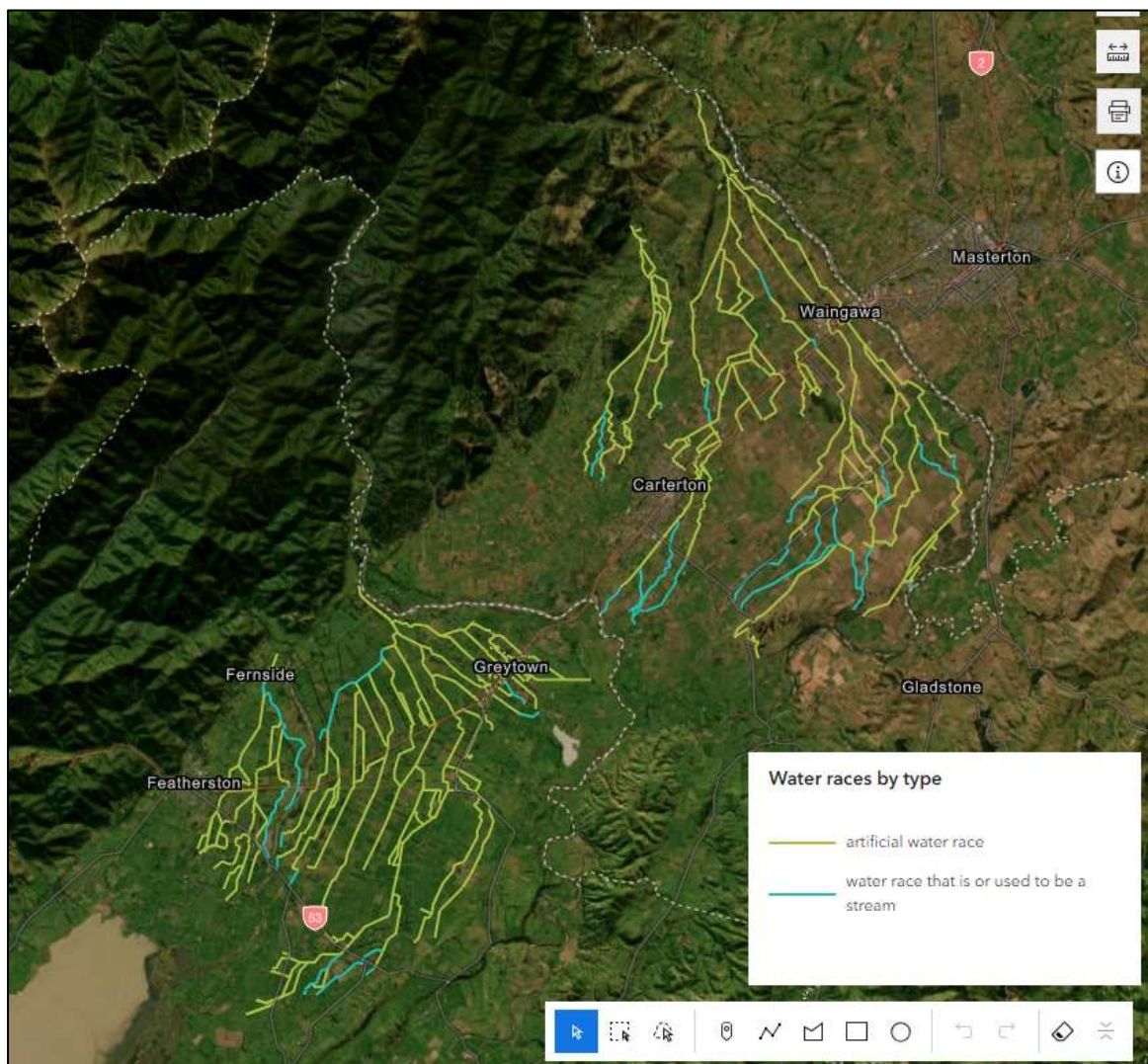


Figure 1: Wairarapa Water Races. From <https://experience.arcgis.com/experience/f7448a0e5db4450a862ad434c1524ed6/>

Ngā mihi,

Tom Kay,
Conservation Advocate – Freshwater