

**BEFORE THE HEARINGS PANEL
AT WELLINGTON**

UNDER The Resource Management Act 1991

IN THE MATTER of the Proposed Wellington Natural
Resources Plan

BETWEEN **ROYAL FOREST AND BIRD PROTECTION
SOCIETY OF NEW ZEALAND INCORPORATED**

Submitter

AND **WELLINGTON REGIONAL COUNCIL**

Planning Authority

LEGAL SUBMISSIONS ON BEHALF OF ROYAL FOREST AND BIRD

PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED

13 June 2017

Royal Forest and Bird Protection Society of New Zealand Inc.
PO Box 2516
Christchurch 8140
Solicitor acting: Peter Anderson

MAY IT PLEASE THE HEARINGS COMMISSIONERS

1. Forest & Bird largely supports the Reporting Officer's recommendations on the provisions that are subject to Hearing 1. The key issues relate to:
 - (a) Policy 4, regarding minimisation of effects;
 - (b) Objective O8, regarding water allocation; and
 - (c) Policy 11, regarding in stream water storage.
2. As will be discussed in these submissions, Forest & Bird considers that these provisions should be deleted.
3. Policy P4 applies the concept of minimisation to a range of activities. This concept implies that an activity can proceed and should not be used for activities which may or may not be appropriate. It could properly be properly used in relation to activities that should be controlled. The plan uses minimisation for a range of activities which may or may not be appropriate, including activities which may be contrary to directive policies of higher order documents.
4. Objective O8 provides for development of an allocation framework that "recognises and provides for" social, cultural and economic benefits. The National Policy Statement of Freshwater Management (NPS-FM) provides that the allocation framework that has to give effect to the objectives of the NPS-FM. The allocation framework has a number of compulsory and additional values that need to be considered. Objective O8 does not give effect to this. The benefits referred to in Objective O8 are not consistent with the values NPS-FM.
5. In stream storage usually has significant effects on ecosystems and natural processes, which would be contrary to many objectives and polices of the plan. The plan should not provide support for such an activity.

BACKGROUND

6. Forest & Bird is a national organisation comprising over 70,000 members and supporters in 50 branches throughout New Zealand. The main objective of the Society is to take all reasonable steps within the power of the Society to preserve and protect New Zealand's remaining flora and fauna, and natural features of New Zealand, for the benefit of the public, including future generations.

Forest & Bird submissions

7. The Forest and Bird provides an original submission¹ and further submissions² in general support of the Department of Conservation (DOC)³, Fish & Game,⁴ and in general opposition to DairyNZ and Fonterra⁵ and Federated Farmers.⁶
8. Forest & Bird also lodged further submissions in support of specific submission points by Environmental Defence Society⁷, Queen Elizabeth II National Trust, and in opposition to specific points by Federated Farmers, Ian Benge and Martin Benge,⁸ Waipara Regional Irrigation Trust,⁹ Kiwi Rail Holdings,¹⁰ NZ Transport Agency,¹¹ Porirua City Council,¹² Irrigation New Zealand,¹³ and NZ Pork.¹⁴

¹ S353

² FS43

³ S75

⁴ S308

⁵ S316

⁶ S352

⁷ S110

⁸ S83

⁹ S127

¹⁰ S140

¹¹ S146

¹² S163

¹³ S306

¹⁴ S359

PART B OVERALL POLICY FRAMEWORK

OBJECTIVES O1 AND O4; POLICIES P1, P2, P3, P5 AND P6; METHOD M1

Objective O1

9. Forest and Bird submitted¹⁵ in support of Objective O1, seeking it be retained as notified.
10. Forest and Bird accepts the reasoning provided by the Reporting Officer and agrees with the recommended amendment to Objective 1 changing the word “*coast*” to “*coastal environment*” as this is consistent with the NZCPS. We also accept the amendment to include “air” as appropriate to integrated management.

Objective O4

11. Forest and Bird submitted¹⁶ support in part to Objective O04 seeking the replacement of “recognised” with “safeguarded”. DOC made a similar submission.
12. The grounds for this submission are that safeguarding better reflects the higher order documents that the plan has to give effect to, in particular:
 - (a) the NPS-FM, particularly Objectives 1A and 1B which set out to safeguard, ‘*the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of fresh water*’.
 - (b) the Regional Policy Statement for the Wellington region (RPS), particularly Objective 12, which provides for the safeguarding the life-supporting capacity of water bodies.

¹⁵ S353/009, S353/010, S353/011

¹⁶ S353/012

13. The Reporting Officer recommends accepting in part Forest and Bird's submission, to allow for additional changes addressing other submission. The recommended changes are:

The intrinsic values of ~~aquatic~~ fresh water and marine ecosystems are recognised and the life-supporting capacity of water and aquatic ecosystems are safeguarded ~~are recognised~~.

14. Forest & Bird supports this recommendation, as it gives effect to the high order documents, set out above and also on the grounds that it better reflects section 5(2)(b) of the RMA.

Policy P1 – Ki uta ki tai and integrated catchment management

15. The Reporting Officer has discussed Policy P1 in the context of Objective O1. Forest and Bird is a further submitter in support of DOC who sought to retain P1 as notified. We accept the Reporting Officers recommended amendments.

Policy P2 – Cross-boundary issues

16. Forest and Bird opposes Federated Farmers submission¹⁷ to amend Policy P2. We agree with the Reporting Officer's recommendation to reject this submission.

Policy P3 – Precautionary approach

17. Forest & Bird submitted in support of Policy P3 and sought its retention.¹⁸
18. Forest & Bird opposes DairyNZ¹⁹ to amend Policy P3 such that it applies solely to the coastal environment.

¹⁷ s352/110

¹⁸ s353/52

¹⁹ s316/042

19. Forest & Bird also opposes Federated Farmers²⁰ request replacing Policy P3 with a policy about balancing values. We agree with the Reporting Officer's recommendation to reject these submissions.

20. We accept the Reporting Officer's recommendation to limit the policy to where there is both an absence of information and the potential for significant adverse effects. This is the proper application of the precautionary approach, and should not be limited to the coastal environment.

Policies P5 (review of existing consents) and P6 (synchronised expiry and review dates)

21. Forest & Bird submitted in support of Policies P5 and P6 and sought they be retained.

22. The Reporting Officer has accepted these submissions in part, retaining P5 as notified and recommends an amendment to P6²¹ to change "integrated solution" to "integrated approach".

23. Forest & Bird accepts that this amendment provides for consistency with plan terminology.

OBJECTIVES O3, O11, O14, O15 AND O16 AND O4; POLICIES P17, P19 AND P20; METHODS M2, M25 AND M26

24. Forest and Bird submitted²² in support of Objective O3, seeking it be retained as notified, and outcome also recommended by the reporting officer.

OBJECTIVE O5 (VALUES OF WATER)

25. Forest & Bird seeks that Objective O5 be retained as notified.

²⁰ s352/111

²¹ s42A paragraph 182

²² S353/010,

26. Forest & Bird opposes submissions that seek additions to the objective and suggestions of balancing those additions with the matters recognised in the objective as notified. For example, Federated Farmers seeks to provide an *‘appropriate balance across values and uses in a catchment’*. HortNZ seek a similar addition.
27. These submissions should not be accepted. The matters referred to Objective O5 have a foundation in either the RMA and/or the higher order planning documents. For example the reference to safeguarding aquatic ecosystem health is founded both in section 5 and the objectives of the NPS-FM, including Objectives A1 and B1 and Objective 12 of the RPS.
28. It would not be appropriate to add an obligation to balance these matters with unidentified values and uses, which are unlikely to have the same level of recognition in law or the higher order documents. It does not give effect to the NPS-FM or the RPS.
29. The Reporting Officer, correctly it is submitted, notes that values that should be taken into account in decision making will be included in other objectives and policies that will need to be considered.²³
30. The matters referred to in Objective O5 are appropriate and should be retained, without addition. Forest & Bird supports the Reporting Officer’s recommendation.

Issue 7 – Policy P4 (Minimising adverse effects)

31. Forest & Bird submitted in opposition to Policy P4 and sought its deletion as well as replacement of all references to “minimise” and

²³ paragraph 528, s42A Officers Report Overall policy framework of the proposed Plan – Part B

“minimisation” in the plan with appropriate language consistent with the RMA. The Reporting Officer recommended to rejecting this submission.²⁴

32. Forest & Bird’s concern with the use of the word minimisation is that it implies that an activity can go ahead if the adverse effects are “minimised”. The Reporting Officer’s notes that cost, time and trouble are relevant considerations to an assessment of whether an effect has been minimised. In response it is submitted that:

- (a) people have different views on the necessary level of cost, time and trouble;
- (b) there is no guidance on when “cost, time and trouble” will not provide an appropriate level of minimisation and the activity should be avoided;
- (c) minimise is not the same as avoid, remedy or mitigate; and
- (d) adverse effects that have been minimised, may still be significant, either in isolation or cumulatively.

33. The latter is a critical concern for Forest & Bird.

34. The Reporting Officer concludes that minimise is consistent with avoid remedy or mitigate and it only is used for activities which are generally appropriate or reasonably necessary.

572. I consider that the word minimise as defined in proposed Policy P4 requires a reduction of effects to a specific level and is therefore consistent with the RMA’s purpose and principle to promote the sustainable management of natural and physical resources, while avoiding, remedying or mitigating adverse effects. I also consider that there is clear direction in the NZCPS, NPS-FM and RPS for the

²⁴ This recommendation only relates to P4 and in relation to other provisions will be considered in the relevant s42A officer reports.

proposed Plan to use policies that minimise adverse effects for certain activities. In the proposed Plan, minimise is used for activities that are generally appropriate or reasonably necessary, and where the effects are known and can be managed. Proposed Policy P4 provides certainty to plan users as to what minimise means and how it should be applied when referred to throughout the policies of the proposed Plan. Therefore, I recommend not deleting the word minimise from the proposed Plan (including from Policy P4).

35. Forest & Bird does not agree with this. As noted above, minimise does not equate to avoid, remedy or mitigate. Minimise does not involve avoidance, except in the limited situations set out in Policy P4, primary in relation to significant sites. There are other situations where avoid should be an available option.

36. The plan uses minimise for activities that are “*generally appropriate or reasonably necessary*”. It is submitted that this sets the test too low. Given the implication that activities can proceed if effects are minimised, the situation is similar to controlled activity status. Minimisation should only be used in relation to activities that are appropriate.

37. The references that the Reporting Officer makes to provisions in the higher order documents requiring minimisation²⁵ relate to situations where the activity is appropriate, in that they:

(a) relate to specific situations whether the activity that is required to minimise the effects is appropriate, for example:

(i) Policy 23 of the NZCPS relates to effects within the zone of reasonable mixing; and

(ii) Policy 27 relates to protecting existing developments.

²⁵ paragraph 568

Both these scenarios are predicated on the basis that the activity can proceed (discharge or protection of existing development); or

(b) include reference to avoidance, Policy A3 of the NPS-FM refers to prevent or minimise (a restatement of avoid, remedy or mitigate).

38. Forest & Bird does not agree with the Reporting Officer that Policy P4 requires effects be reduced to a specific level. The Reporting Officer earlier acknowledges that whether effects are minimised is a case by case analysis and includes assessment of "time, cost and trouble". This is inconsistent with the argument that the effects are reduced to a specific level.

39. There are a number of other situations where the plan uses minimise inappropriately.

(a) Policy P31 relates to aquatic ecosystems health and mahinga kai, including in the coastal environment and includes many references to minimise. Similarly, Policy P36 provides for the minimisation of effects on indigenous bird habitat, including in the coastal environment. The references to minimise do not give effect to Policy 11 of the NZCPS, which provides for the avoidance of adverse effects on certain indigenous biodiversity.

(b) Section 4.8 relates to effects of discharges on water quality. Minimising effects of discharges on water quality is not appropriate. "Minimised" effects of discharges on water quality, may still cumulatively have significant adverse effects. This is not consistent with other provisions of the plan which provide for the imposition of limits and the maintenance of ecological health.

(c) The reference to minimise in Policy 26 is also inappropriate. Some effects on natural processes would justify consent being declined. Even if the generally appropriate test used by the reporting officer is adopted, it could not be said that effects on natural processes are generally appropriate.

40. Forest & Bird's view is that, when the numerous references to minimise in the plan are considered, Policy P4 is not appropriate.

41. There are two options for dealing with this:

(a) Policy P4 could be retained but the policies which contain references to minimise would have to be redrafted to ensure it only applies to activities which are appropriate; or

(b) Policy P4 and all references to minimisation could be deleted.

42. The Reporting Officer suggested²⁶ that clause (b) means "minimisation" does not apply to scheduled areas. If this is the intention it needs to be more clearly expressed in the policies. The addendum on 22 May achieves this.

43. The Panel addressed Policy P4 in Minute 5. Forest & Bird would be willing to be involved in further discussions on Policy P4 but is unclear on the nature of such discussions. Forest & Bird has not called any planning evidence to date. Forest & Bird does not support a process where only parties that called evidence can engage. As a matter of procedural fairness, other submitter would have to have the opportunity to comment on whatever came out of the further discussions/conferencing.

BENEFICIAL USE AND DEVELOPMENT

OBJECTIVES O2, O6, O7 AND O8, Policies P7, P8, P11, P15 and P16

²⁶ paragraph 554

44. Forest and Bird submitted in support of Objectives O6, O7 but opposed O8. It did not submit on Objective O2.

Objectives O6 and O7

45. Forest & Bird supports the Reporting Officer's recommendation to retain these objectives as notified.

Objective O8 – Taking and using water

46. Forest and Bird submitted in opposition to Objective O8 and sought its deletion. The problem with the objective is that it provides for the creation of an allocation framework in a manner inconsistent with the NPS-FM. The NPS-FM sets specific direction and objectives for Regional Councils for developing the allocation framework. Policy B1 of the NPS-FM provides:

Policy B1

By every regional council making or changing regional plans to the extent needed to ensure the plans establish freshwater objectives in accordance with Policies CA1-CA4 and set environmental flows and/or levels for all freshwater management units in its region (except ponds and naturally ephemeral water bodies) to give effect to the objectives in this national policy statement, having regard to at least the following:

- a) the reasonably foreseeable impacts of climate change;*
- b) the connection between water bodies; and*
- c) the connections between freshwater bodies and coastal water.*

47. The objectives relevant objectives of the NPS-FM provide:

Objective B1

*To safeguard the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of fresh water, in sustainably managing the taking, using, damming, or diverting of fresh water, while providing for economic well-being, including productive economic opportunities.*²⁷

Objective B2

To avoid any further over-allocation of fresh water and phase out existing over-allocation.

Objective B3

To improve and maximise the efficient allocation and efficient use of water.

Objective B4

To protect significant values of wetlands and of outstanding freshwater bodies.

48. The plan has to give effect to the NPS-FM. However, Objective O8 does not give effect to Part B of the NPSFM, which provides detailed provisions relating to the allocation of water. These include consideration of compulsory national values and additional national values.

49. As it currently stands the objectives of the NPS-FM make no reference to social, economic or cultural matters, although reference to economic matters is proposed in the recent "Clean Water" consultation.

50. The way in which the Objective O8 is expressed does not fit well with the national values. Objective O8:

²⁷ The underlining is the proposed change through Clean Water consultation (discussed below)

- (a) refers to benefits, whereas the NPS-FM refers to values;
- (b) makes no reference to ecological outcomes, which are at the heart of Part B of the NPS-FM;
- (c) considers that the social, economic, cultural and environmental benefits should be treated equally, which is inconsistent with the compulsory and additional national values in the NPS-FM.

51. In addition, the reference to environmental benefits makes no sense. The taking of water generally has adverse effects, to a smaller or greater degree. Environmental benefits from taking water are likely to be few and far between. An objective to recognise the environmental benefits associated with taking and use of water is not appropriate, especially if that is to be considered equivalently to community, social and economic benefits. This objective effectively says recognise the benefits, but there is no recognition of the adverse effects from taking water.

52. This is particularly concerning as the reporting officer states that Objective O8 is the basis on which the allocation framework will be developed:²⁸

The allocation framework is provided for by Objective O8, including other objectives of the proposed Plan (i.e. Objective O52). A full examination of the allocation framework and Objective O52 is in section 42A officer's report: Water allocation.

53. Objective O8 incorporates matters which are not in Part B of the NPSFM and elevates them to equal status to the ecological matters that are at the heart of Part B.

54. The only other objective the reporting officer identifies is Objective 52. This is the only other objective that directly relates to the allocation of

²⁸ Paragraph 136

water. Objective 52 only refers to matters covered by Objective B3 of the NPSFM, but does not relate to any other part of the Part B of the NPSFM.

55. Objective O8 does not give effect to the NPS-FM and should be deleted.

Policy P7 – Recognition of uses of land and water

56. Policy P7 provides for the recognition of certain uses of land and water. Forest and Bird submitted in opposition and sought its deletion. The reference to “recognised” creates uncertainty as it is not clear what recognition involves. The problem is that recognition may allow for activities that would otherwise not be acceptable because they were contrary to higher level policy directives.

57. The inclusion of irrigation in Policy 7 is particularly problematic. The NPS-FM provides for processes which provide for the taking and use of water, subject to the setting of freshwater objectives, targets and limits. In this context, it is unclear how the cultural, social and economic benefits of irrigation are to be recognised.

58. The Reporting Officer rejects submissions seeking that the activities be recognised and provided for.²⁹ This is appropriate as recognising and providing for these matters would put them on an equivalent standing to matters of national importance.

Policy P8

59. Policy P8 identifies a number of activities which are beneficial and generally appropriate. Forest & Bird submitted in part support and opposition to Policy P8, seeking the deletion of clause (h).

60. Forest & Bird agrees with the Reporting Officer that *“These activities are considered to improve or enhance the sites of significance, beds of lakes*

²⁹ paragraph 155

and rivers and the CMA.” Forest & Bird accepts that many of these activities are beneficial and generally appropriate.

61. However, Forest & Bird disagrees with the Reporting Officer’s suggestion³⁰ that the “generality” of Policy P8 which “confers a level of uncertainty” is appropriate in a policy framework is not accepted. In my submission, policy direction must be clear and in this case, when identifying beneficial activities the policy must be clear as to the beneficial aspect or extent of the activity which is appropriate. Uncertain policies lead to in unintended consequences.

P8 clause (d)

62. Forest & Bird support the Minister of Conservation submission³¹ to amend (d) to refer to the removal of animal pests. HortNZ³² has sought an additional clause for the removal of pest species identified in the Regional Pest Management Strategies or material declared as unwanted organisms under the Biosecurity Act 1993. We consider that this wording provides greater certainty and also includes plant pests and would support this wording either address to (d) or as an additional clause.

P8 clause (f)

63. We accept the amendment sort by HortNZ³³ to include management of riparian margins as consistent with Policy P101. Policy P8 should therefore link with Policy P101 which provides additional context for good management of riparian margins. In my submission, more appropriate wording would be:

“(f) the retirement, fencing, planting and management of riparian margins consistent with Policy P101, and”

³⁰ Paragraph 161

³¹ S75/053

³² S307/033

³³ S307/033

P8 clause (h)

64. Forest & Bird does not agree with the Reporting Officers reasons for retaining Clause (h). Section 6(a) provides:

“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:”

65. Policy P8(h) fails to recognise and provide for the matters in section 6(a). The policy provides that a structure that could be having significant adverse effects on the natural character of the coastal environment, wetlands, lakes and rivers or their margins is beneficial and generally appropriate simply because it is there.

66. Just because a structure already exists does not mean ongoing adverse effects should be accepted without further consideration. Policy 8(h) allows for the consenting of existing structures without proper consideration of whether they are appropriate.

67. The RMA provides for a limited terms for consents for the construction of structures in rivers lakes, wetlands and the coastal marine area. This can be compared with land use consent which have an unlimited term. This distinction ensures that structures in more sensitive areas remain appropriate. Policy 8(h) is inconsistent with this and should be deleted.

Policy P9

68. Forest and Bird submission is in support of Policy P9 and sought its retention. The Reporting Officer’s recommended making some relatively minor amendments to the policy, which Forest & Bird supports.

Policy P11 – In stream storage

69. Forest and Bird submission is in opposition to Policy P11 and seeks its deletion. As written, Policy P11 does not give effect to the NPS-FM or the RPS.
70. In stream storage has significant adverse effects on aquatic and terrestrial ecosystems. Effects of this nature are inconsistent with objectives and policies in the plan including O4 and O5 of the plan.
71. The NPS-FM and RPS focus on ensuring that development can occur provided ecosystem health is maintained. There is nothing in the either document which supports in stream storage.
72. In addition, it is not clear what “recognising” involves. In stream storage may be appropriate provided it is consistent with Part 2. It appears that recognition would be support activities that would otherwise not be contemplated.
73. For these reasons it is submitted that Policy 11 should be deleted.

Policies P15 and P16

74. These policies provide for existing and new flood protection activities. Forest & Bird does oppose these activities. However, they can have significant adverse effects, which should be avoided remedied or mitigated.
75. Forest & Bird therefore seeks the addition of the words “provided the adverse effects are avoided, remedied or mitigated” to the policies.

REGIONALLY SIGNIFICANT INFRASTRUCTURE - DEFINITIONS, OBJECTIVE O12 AND POLICY P13

Definition of regionally significant infrastructure and related matters

76. A number of submitters have sought additions to “significant infrastructure” either in the definition or to be identified under objectives and policies. For example:

(a) Federated Farmers and others have requested water races and schemes be added.

(b) Hutt City Council and others request roads and landfills be added.

77. The Reporting Officer has considered this and has rejected any changes to the definition.³⁴ Forest and Bird supports the Reporting Officer's recommendation.

78. Forest & Bird supports the Reporting Officer's reasons that the amendments sought would give effect to the RPS.³⁵

79. The definition is consistent with the RPS definition. It is submitted that accepting submissions that extended the definition would not give effect to the RPS.

80. The Reporting Officer also discussed submissions requesting changes to the definition of "upgrade".³⁶ Forest and Bird supports the recommendation to retain the definition as notified. This is important as it has implication to how the term is applied in Policy P13, which Forest and Birds submission supports.

81. The Reporting Officer has discussed submissions seeking additional objectives relating to "regionally significant infrastructure". Forest and Bird also support the Officers recommendation to reject these submissions.

Objective O12 and Policy P12 and P13

82. Forest & Bird supports the Reporting Officer, who concluded that no amendments are necessary to Objective O12. The objective achieves the right balance by recognising things that have a genuine public benefit.

³⁴ under Issue 4 of the s42A report

³⁵ s42A paragraphs 313 – 325

³⁶ Under Issue 4.2, para 289

83. Forest and Bird agrees with DOC's submission and the s42A reporting officer that regionally significant infrastructure does not extend to dairying. Forest and Bird also opposes the amendments sought that Objective O12 "protect the benefits" or "provide for" regionally significant infrastructure. This would be a significant change to the scope of the objective.

84. Similar to Policies P15 and 16 Forest & Bird considers that regionally significant infrastructure and renewable generation activities can have significant adverse effects, which should be avoided remedied or mitigated.

85. Forest & Bird therefore seeks the addition of the words "provided the adverse effects are avoided, remedied or mitigated" to the policies

CONCLUSION

86. The objectives and polices relevant to Stream 1 are generally appropriate. The most significant exceptions are Policy P4, Objective O8 and Policy P11. These provisions do not give effect to higher order documents

Dated 13 June 2017

A handwritten signature in black ink, appearing to read "Peter Anderson". The signature is stylized and written in a cursive-like font.

Peter Anderson
Counsel for Royal Forest and Bird Protection Society NZ Inc.