

**Before the Hearing Panel
at Wellington**

UNDER the Resource Management Act 1991 (RMA)

IN THE MATTER OF Proposed Natural Resources Plan for the Wellington
Region (Hearing Stream 3)

**LEGAL SUBMISSIONS ON BEHALF OF WELLINGTON FISH AND GAME
COUNCIL:
HEARING STREAM 3**

Dated: 13 September 2017

Counsel instructed

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Introduction

1. The Wellington Fish and Game Council ("Fish and Game") is a statutory body under the Conservation Act 1987. Its functions include representing the interests of anglers and hunters and advocating for the Council's interests, including in relation to habitats.¹
2. Mr Peter Wilson is a representative of the Wellington Fish and Game Council and will provide further information on the interests of Fish and Game.

PART 1: NATURAL FORM AND FUNCTION

3. It is trite that "natural" does not necessarily equate to "pristine".² Natural character does not need to be nationally outstanding to be relevant under section 6(a).³
4. The following expert witnesses will give evidence for Fish and Game in relation to the Natural Form and Function topic:
 - 4.1. Professor Death, geomorphology and freshwater ecology; and
 - 4.2. Ms Cooper, planning.
5. The amendments Fish and Game are seeking on the 'Natural Form and Function' provisions are set out in Ms Cooper's Appendices 1 and 2.
6. Fish and Game seeks a definition of Natural Character be provided in the plan. I submit this would be efficient and effective - as distinct from a person needing to have recourse to caselaw, or trying to determine whether (or which) national policy statement applied. Ms Cooper's definition is based on Fish and Game's original submission and would ensure consistency with Policy 13(2) NZCPS, the NPS-FM and Policy 3 of the RPS.
7. This would assist with:
 - 7.1. "*Recognising and providing for*" natural character:
 - 7.2. Identifying what is "*inappropriate subdivision, use and development*".

¹ Section 26Q Conservation Act 1987.

² *Harrison v Tasman District Council* [1994] NZRMA 193, *Eyres Eco-Park Ltd v Rodney District Council* EnvC A147/2004 at [78].

³ *Man o War Station v Auckland Council* [2017] NZCA 24, [2017] NZRMA 121 (Court of Appeal).

8. It is also consistent with the direction of the Supreme Court in *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, where the Court said that the interpretation of what is *inappropriate* must relate back to the backdrop of what is sought to be protected or preserved.⁴ Identifying those elements provides certainty for those wishing to undertake projects that may affect natural character.
9. Professor Death's Habitat Quality Index would also assist in this regard (if it is inserted to Table 3.4 of the pNRP). This is to be further discussed at a later hearing stream. For the purposes of *this* hearing Professor Death's evidence is relevant to the following issues:
 - 9.1. Natural processes are part and parcel of natural character. Therefore, the same management level should apply to each.⁵
 - 9.2. Fish and Game seeks a new method be included in the pNRP (as Method 10a) requiring *inter alia* state of the environment (SOE) monitoring as to how the natural character provisions of the pNRP are being met, including by reference to the HQI.
10. If the HQI is to be adopted it would enable categorisation of the extent to which natural elements, patterns and processes have, or would be, modified. The degree of natural character is highest where there is least modification to natural elements, patterns and processes. As Professor Death is here today I invite the Panel to ask any questions on the HQI Index matter, which will be the subject of further planning evidence at the relevant time.

PART 2: WATER QUANTITY

11. Fish and Game relies on the planning evidence of Mr Philip Percy for this topic. These legal submissions cover:
 - NPS-FM 2014 and the setting of interim limits;
 - Section 14(3)(b) takes;
 - Common catchment expiry dates and reviews: phasing out over-allocation (Policies P5 and P6);
 - The phrase 'necessary, reasonable and efficient'; and
 - Integrated management.

⁴ At [105].

⁵ Ms Cooper [47] – [59].

NPS-FM 2014 and the setting of interim limits

12. Policy E1 provides a time period for the "*implementation by a regional council*" of policies of the NPS-FM. This does not mean that other provisions of the NPS-FM are not relevant in the interim.
13. In my submissions for Hearing Stream 1, I referred to the decision in *Infinity Investment Group Holdings Limited v Canterbury Regional Council* [2017] NZEnvC 36. This was a decision about the Waitaki Catchment Water Allocation Regional Plan. There the Court concluded:
- "Policy 5 of the NPS-FM 2014 requires us to ensure that environmental outcomes (set in regional plans) will not likely to be exceeded. In fact, the water quality outcomes in the CLWRP are already exceeded so there will be further degradation. Exactly the opposite of Policy B5 will be achieved if we grant consent to Infinity."*
14. In *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* [2017] NZEnvC 37 it was found that the *objectives* of the NPS-FM 2014 are relevant to a consideration of resource consent applications,⁶ even before a regional plan has implemented the NPS-FM. There Counsel for Federated Farmers argued that the Manawatu-Wanganui Regional Council had a programme of work on water quality and that it had until 2025, or 2030, to complete that programme in line with the NPS-FM 2014. It was argued that this meant the NPS-FM was *given effect to* in the Region (i.e. because delays were allowed under the NPS-FM) and on that basis Objectives A1 and A2 did not need to be considered in the interim. This was rejected.
15. Both those cases involved consideration of consent applications. So they involved consideration national planning instruments in the context of the "have regard to" direction under s104.
16. The sections of the Act relevant for the *development of a regional plan* include sections 66(1)(ea) and 67(3).
17. Section 66(1)(ea) of the Act ("*Matters to be considered by regional council*") provides that the a regional plan must be prepared and changed "*in accordance*

⁶ At [105] - [108].

with a national policy statement.⁷ Section 67(3) (*Contents of Regional Plans*) contains the words “give effect to”. In determining what these tests require, and whether the pNRP is “in accordance with”/“gives effect to” the NPS-FM, Policy E1 is relevant. Policy E1 does allow implementation of the “policy” of the NPS-FM in stages. The NPS-FM also provides:

- 17.1. Policies A4 and B7 must be incorporated into regional plans without using the process in Schedule 1; and
- 17.2. the “policy” of the NPS-FM must be implemented *“as promptly as reasonable in the circumstances”*.

18. I submit Mr Percy is correct when he states the provision of Policy E1 to implement the NPS-FM *“as promptly as is reasonable in the circumstances”* should be applied on a policy by policy basis.⁸ It is not acceptable to rely on a resolution of Council as a reason to defer consideration of all provisions of the NPS-FM other than A4 and B7.

19. Some policies in the NPS-FM are cast in such a way that they will need to be implemented through changes to a regional plan (such as in Parts CA, CB and CC). Others are not cast in such a way. Notably, for this hearing, Policy B5:

“By every regional council ensuring that no decision will likely result in future over-allocation – including managing fresh water so that the aggregate of all amounts of fresh water in a freshwater management unit that are authorised to be taken, used, dammed or diverted does not over-allocate the water in the freshwater management unit.”

(Emphasis added)

20. Policy B5 should be applied now to avoid further over-allocation, or the persistence of over-allocation. It should not await the Waitua Committee processes.

21. For these reasons, it is entirely appropriate that the pNRP sets interim limits.

22. But the interim limits have been set only considering ‘part of the picture’.

⁷ Inserted by the 2017 amendments.

⁸ Mr Percy evidence for Hearing 3 at [17].

23. Mr Thompson's 2015 Report⁹ acknowledges that the interim limits do not take account of all the values but only "*maintenance of ecological values and the avoidance of long term decline in water resources.*"

24. A values based approach or framework should be driven through the Plan as notified. As Mr Percy states:¹⁰

"The Plan should provide a clear resource management regime consistent with sustainable management now with the whitua committees recommending any changes to that regime they consider necessary in the future."

25. In addition to the provisions of the NPS-FM, this is required under the Objectives of the pNRP and under the RPS.

26. In the pNRP, Mr Percy identifies a 'disconnect' between the provisions designed to achieve the objectives, with those objectives.¹¹ Mr Percy considers the *values* that are expressed in the pNRP objectives. He then lists the values that he has identified are relevant to the management of flows and levels of water, and their level of attainment ("provide for", "recognise", "safeguard" etc).¹² As stated at Hearing Stream 1¹³, Fish and Game largely supports the *objectives* of the pNRP, and therefore largely supports the level of attainment of these values.

27. This creates a difficulty because under s 32AA you must:

"examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—

(i) identifying other reasonably practicable options for achieving the objectives; and

(ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives...

(Emphasis added)

⁹ Thompson M 2015 *Minimum flow recommendations for the Wellington Region – Technical report to support the Proposed Natural Resources' Plan* Greater Wellington Regional Council Section 2.6.

¹⁰ At [285].

¹¹ Mr Percy at [18].

¹² At pages 25-26 of his evidence.

¹³ [insert]

28. The implications of this 'disconnect' are presented in stark relief for cultural values. For Fish and Game, ecological values *have* been factored into the allocation regime. But Fish and Game shares the concerns of Rangitāne that there is a lack of a principled approach to guide interim limit setting and to guide the Whaitua process. I submit Mr Percy is correct in that you cannot fill that policy void by relying on the Whaitua Committees introducing measures *via* plan changes.¹⁴
29. In relation to the need to give effect to the RPS, Mr Percy rightly recognises that that 'problem' could have been avoided had the RPS anticipated the current staged approach.
30. Even if one *does* accept the staged approach, it should be acknowledged that the interim flow regime does set limits designed to protect the value of ecosystem health. This particular freshwater objective is not likely to change. It cannot be 'traded off'¹⁵ in the future. Therefore it should be accepted that provisions that allow for the take of water beyond the interim minimum flows would allow an over-allocation of the resource. There can be no assurance that the objectives of the pNRP will be met if allocation limits do not apply to the *total* amount of water including s14(3)(b) takes.
31. I now discuss this point in more detail.

Section 14(3)(b) takes

32. The approach of the pNRP to section 14(3)(b) takes is contrary to Policy B5 of the NPS-FM.¹⁶
33. *Carter Holt Harvey Ltd* [2011] NZEnvC 380 is authority that such takes can be constrained. That is, it is permissible for regional plans to define the point at which a take has, or is likely to have, an adverse effect on the environment and hence fails to be authorised by s14(3)(b). The Court said:¹⁷

¹⁴ M Percy at [74].

¹⁵ Changes made to the National Policy Statement for Freshwater Management 2014 in the 2017 amendments do not alter this position. Objective A4 states "To enable communities to provide for their economic well-being, including productive economic opportunities, in sustainably managing freshwater quality, *within limits*" (emphasis added). "Limits" are the "maximum amount of resource use available, which allows a freshwater objective to be met". The Objectives must be developed after identifying values, including compulsory values, and setting an attribute state at or above the minimum acceptable state where relevant attributes are assigned for a value (NPS-FM Policy CA 2).

¹⁶ Refer Mr Percy evidence at [166] – [170].

¹⁷ At [110] – [113].

[110] For Wairakei Pastoral, Mr Daya-Winterbottom submitted that the constraint imposed on Section 14(3)(b) takes is ultra vires. He submitted that the power to include rules in the Regional Plan in relation to the taking of freshwater is subject to the matters governed by Section 14(3)(b) of the Act. This interpretation, he said, is underpinned by Section 30(4)(f) of the Act which provides, in relation to the regional council's ability to establish rules to allocate water that:

"(4) ...

(f) the rule may allocate water ... as long as the allocation does not affect the activities authorised by section 14(3)(b) to (e)".

[111] We reject that submission. We accept the submission of counsel for the respondent, Mr Milne, that the provisions are not ultra vires. The authorisation to take pursuant to Section 14(3)(b) is not unlimited. The taking or use must not have, or be likely to have, an adverse effect on the environment. There is no qualifier to "adverse effect" so, on the face of it, any effect which is greater than de minimis would be sufficient to terminate the statutory authorisation. The constraining provisions proposed in Variation 6 do not "affect the activities authorised by s 14(3)(b)". Rather, what they seek to do is define the point at which a take, that would otherwise be authorised under Section 14(3)(b), has, or is likely to have, an adverse effect, and hence fails to gain the statutory authorisation.

[112] Such an interpretation underlays good commonsense policy reasons. Those who would likely be affected by the rule would be people undertaking new dairy conversions since 15 October 2008, or increasing their stock numbers in catchments at or above full allocation. The position of all existing Section 14(3)(b) takes as at 15 October 2008 is protected. Converting a forestry or dry-stock property to a dairy farm is a capital intensive exercise. It is preferable for would be converters to have a clear statement in the Plan of the respondent's position on when Section 14(3)(b) takes have, or will likely have, an adverse effect and hence lose their statutory authorisation, rather than leaving that to the vagaries of possible enforcement action.

[113] Counsel for Wairakei Pastoral also referred to the position at common law and to the right to take and use water for animal needs being preserved by Section 21 of the former Water and Soil Conservation Act 1967. Be that as it

may, the common law has been overridden by the provisions of the RMA which have replaced the 1967 Act with the more restrictive Section 14(3)(b).

(Emphasis added)

34. The two tiered approach suggested by Mr Percy to account for takes that are not accounted for in the pNRP limits should be accepted. Mr Percy's opinion is that a transition period should occur following which takes below minimum flows would be phased out:¹⁸

"While I agree there may be some cost associated with an approach of accounting for and managing all takes to achieve limits, the underlying obligation to achieve that level of management control is prescribed in the higher order documents that the Plan must give effect to."

35. Section 329 should not be relied upon as a planning mechanism. Section 329 applies only to unforeseen water shortages. The operative words of s 329 are virtually identical to those of s 24E Water and Soil Conservation Act 1967.¹⁹ In *Jordan v Marlborough RWB* (1982) 9 NZTPA 129 the Planning Tribunal (Skelton J presiding) said the following in relation to ss 24D and E of the WSCA 1967:²⁰

"...these two sections are intended to cater for unforeseen circumstances. In terms of s.20, it is one of the functions of a Water Board to be knowledgeable about the water supplies in its region. We think it is a wrong approach (although we do not suggest that the respondent has done so in this case), to decide to grant a water right on the basis that if it happens to be wrong in its assessment the Board can always fall back on s.24D or, in an emergency, s.24E."

¹⁸ At [191]

¹⁹ 24E Control of taking and use of water during water shortage

(1) If, in the opinion of the Board, there is at any time a serious temporary shortage of water, the Board may issue or cause to be issued, by such means of communication as it thinks appropriate, an order that the taking or use of any specified natural water or of the natural water in any specified area or in any specified lake, river, stream, drain, or underground source, shall be apportioned, restricted, or [suspended] for such period not exceeding 14 days and to such extent and in such manner as may be specified in the order:

(2) Any order issued under this section may from time to time be amended, revoked, or renewed by the Board by a subsequent order.

(3) Notice of the particulars of any order issued under this section shall, as soon as practicable after its issue, be given to all persons required by the order to apportion, restrict, or [suspend] the taking or use of any natural water, so far as they can be ascertained.

(4) Every order issued under this section shall come into force on its issue and shall continue in force until it expires or is sooner revoked.

²⁰ Page 10

Common catchment expiry dates and reviews: phasing out over-allocation (Policies P5 and P6)

36. The pNRP should 'flag' now that, following the Whaitua processes, if over-allocation is found to exist, it will be phased out through reviews of existing consents.
37. Ms Cooper addressed Policies P5 and P6 at Hearing Stream 1.²¹ After that Hearing a track-changed version of the amendments to those policies (and others dealt with at Hearing 1) was submitted.²²
38. Mr Wilson has reconsidered these policies in the context of matters relevant to this Hearing. On this basis, some amendments are requested in the Schedule to Mr Wilson's evidence, consistent with Fish and Game's submission that over-allocation should be phased out.
39. The legal position is that the Act allows the review of consents under s128 or under section 68 of the Act in the following circumstances:
- "(7) Where a regional plan includes a rule relating to maximum or minimum levels or flows or rates of use of water, or minimum standards of water quality or air quality, or ranges of temperature or pressure of geothermal water, the plan may state—*
- (a) Whether the rule shall affect, under section 130, the exercise of existing resource consents for activities which contravene the rule."*
40. This provides an ability to conduct reviews of consents outside the section 128 process (noting the section 128 process relies on times for review being stated within consents).
41. As stated in Mr Percy's evidence, the definition of core allocation in the Ruamahanga catchment should not rely on the amount already allocated under consents (and as such (a) should be deleted from Policy R.P2). It would be expected that, if it is found following that process that the existing allocations do represent a situation of over-allocation, then consent reviews would occur.

²¹ Page 47 of Ms Cooper's evidence for Fish and Game at Hearing Stream 1.

²² Submitted as an attachment to RESPONSE OF LUCY ELIZABETH COOPER ON BEHALF OF WELLINGTON FISH AND GAME COUNCIL to "REVIEW OF THE OBJECTIVES OF THE PROPOSED NATURAL RESOURCES PLAN: A REPORT FOR GREATER WELLINGTON" dated 28 July 2017.

The Whaitua Committees could legitimately consider the *time periods* over which any such over-allocation should be phased out but not whether the phasing out would occur. In any case it is Fish and Game's position that where ecosystem health is 'at stake', the phasing out of over-allocation should not be delayed.

42. The changes to the policies above would appropriately indicate to existing consent holders that their entitlements may not be expected to continue into the future 'no matter what'.

Necessary, reasonable and efficient

43. Fish and Game's submission requests that water use be necessary, reasonable and efficient.²³ This written submission was (and is) based on the nature of water as a finite resource. The principles should be accepted from a policy perspective.
44. From a legal perspective, the concept of efficiency is relevant under the evaluation required under s32AA.
45. There is a link between s32 and section 7(b) of the Act.²⁴ An in-depth discussion of this matter can be found in *Federated Farmers of New Zealand (Inc) MacKenzie Branch v MacKenzie District Council* [2017] NZEnvC 53 (Judge Jackson presiding) where it was said:²⁵

"Section 32 is a procedural provision. It must be applied in accordance with the purpose and principles of Part 2 of the RMA. The principles include the requirement in section 7(b) RMA to have particular regard to the efficient use of the relevant natural and physical resources."

46. The amendments sought in Mr Percy's evidence appropriately reflect the need for efficiency in the use of the water resource. The concept was also rightly reflected in provisions of the pNRP as notified.²⁶

²³ E.g. at 35.14 of the Submission.

²⁴ *Marlborough Ridge Ltd v Marlborough DC* (1997) 3 ELRNZ 483; [1998] NZRMA 73 (EnvC) – considering the former section 32

²⁵ At [458].

²⁶ For example, Policy P118 and Schedule Q.

Integrated Management


47. Mr Percy recommends a new Policy 121B:

Policy 121B: Integrated management of water use, discharges and land use

When making decisions on resource consent applications for taking and using water, the actual and potential effects of any discharges of contaminants associated with the use of water shall be considered and both take, use and discharges shall be managed collectively to avoid, remedy and mitigate adverse effects on the environment and to provide for the values listed in Schedule [X]

48. Mr Percy's evidence suggested consequential amendments would need to be made to rules. As stated by Mr Percy, for Rule R.R1 Restricted Discretionary activity water use and other equivalent rules in the other Whaitua Chapters the "Matters for discretion" should include potential adverse effects (including cumulative) on water quality. This would clarify whether the effects on water quality of different land uses that are enabled by water takes are considered when consenting such takes, and reflects integrated management. Further submissions on Water Quality will be presented at Hearing Stream 4.

DATED this 13th day of September 2017


SJ Ongley