

**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

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**LEGAL SUBMISSIONS ON BEHALF OF ROYAL FOREST AND BIRD**

**PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED**

**13 September 2017**

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## **MAY IT PLEASE THE HEARINGS COMMISSIONERS**

1. Forest & Bird's generally supports the provisions relating to natural form and function. There are some areas where improvements could be made but these are primarily improvements in drafting.
2. In relation to water allocation, the intent of the provisions is supported but there are some more significant issues where Forest & Bird considers that changes are needed to ensure that the provisions given effect to the higher order documents, particularly the National Policy Statement on Freshwater Management (NPSFM) and the Wellington Regional Policy Statement. Key issues relate to:
  - (a) Objective 52 only referring to efficient allocation of water;
  - (b) taking of water below minimum flows; and
  - (c) the provisions regarding transfers.
3. These are dealt with in turn.

## **NATURAL FORM AND FUNCTION**

### **Objective O17 and Policies P24 and P25**

4. The section 42A report recommended that:
  - (a) Objective O17 be amended to make it clear that it applies to the margins of wetlands; and
  - (b) Forest & Bird's submission that references to coastal marine area be replaced with coastal environment is rejected.
5. Forest & Bird agrees with these recommendations.

### **Objective O19 and Policy P26**

6. Forest & Bird's submission expressed concern with:
  - (a) Objective O19, seeking that natural processes be safeguarded; and

(b) Policy P26, particularly the use of the word minimise.

7. The section 42A report has suggested a number of amendments to Objective O19 such that it provides:

Natural processes, including natural elements, patterns and ecological processes continue to occur, and the integrity and functioning of natural processes and forms are retained.

8. Forest & Bird seeks that the reference to “retained” be replaced with “safeguarded”. Otherwise, the section 42A recommendation is accepted.

9. The section 42A report proposes two options with respect to Policy P26:

(a) that it be retained as notified; or

(b) a number of amendments be made to provide greater guidance:

Policy P26: Use and development will be managed to minimise effects on the integrity and functioning of natural processes, by

(a) considering alternative locations and methods for undertaking the activity that would have less adverse effects, and

(b) locating away from areas identified in Schedule A (outstanding water bodies), Schedule C (mana whenua), Schedule E (historic heritage), Schedule F (indigenous biodiversity), and

(c) timing the activity, or the adverse effects of the activity, to avoid times when adverse effects may be more severe, or times when receiving environments are more sensitive to adverse effects, and

(d) using good management practices, and

(e) designing the activity so that the effects of the scale or footprint of the activity is as small as practicable.

10. Forest & Bird favours the latter option and considers that the suggested additional wording proposed provides helpful guidance. This is subject to the following comments:

- (a) minimise should be replaced with avoid, remedy or mitigate, which fits better with the avoidance of significant sites; and
- (b) the reference to avoiding significant sites in proposed Policy P26(b) is particularly supported.

**Objective O32 and Policies P48 and P49**

11. Objective O32 and Policy P48 provide for the protection of outstanding natural features and landscapes.
12. Forest & Bird's submission, sought the retention of these policies as notified. This is on the basis that this is necessary to give effect to:
  - (a) Section 6(b) of the RMA;
  - (b) Policy 13 and 15 of the NZCPS;
  - (c) Objective 17 and Policies 25, 26 and 50 of the RPS.
13. Nothing in the other submissions has led Forest & Bird to change this submission and it is consistent with officer recommendation in the section 42A report.
14. Forest & Bird is particularly opposed to the suggestion by other submitters that reference to inappropriate subdivision use and development should be included. Forest & Bird opposes this on the basis that it does not give effect to the NZCS or RPS.

**Objective O36, Policy P50, and Schedule J**

15. These provisions deal with the protection of outstanding natural features and landscapes, particularly which includes significant geological sites.
16. Forest & Bird supports these provisions on the basis that they effect to the RMA, NZCPS and the RPS, which deal with the protection of outstanding natural features and landscapes, which includes significant geological sites.

**Objective O37 and Policy P51**

17. Forest & Bird supported the provisions in the notified plan that protect surf breaks. The key issue that arises from the section 42A report is whether Policy P51 should contain further guidance about how adverse effects should be minimised. Suggested amended wording is:

Policy P51: Use and development in and adjacent to the significant surf breaks identified in Schedule K (surf breaks) shall be managed by minimising the adverse effects on:

- (a) natural processes, currents, seabed morphology and swell corridors that contribute to significant surf breaks, and
- (b) access to significant surf breaks within the coastal marine area, on a permanent or ongoing basis.
- (c) consideration of alternative locations and methods for undertaking the activity that would have less adverse effects, and
- (d) timing the activity, or the adverse effects of the activity, to avoid times when adverse effects may be more severe, or times when receiving environments are more sensitive to adverse effects, and
- (e) using good management practices for reducing the adverse effects of the use and development.

18. Similar to above, Forest & Bird considers:

- (a) the reference to minimising should be replaced with avoid remedy or mitigate; and
- (b) the additional guidance should be included on the basis that this provides useful guidance to the protection of surf breaks.

## **WATER ALLOCATION**

19. Forest & Bird's concerns about water allocation relate to:

- (a) Objective 52 only dealing with efficient allocation; and
- (b) provisions that allow for the take of water below minimum flows, particularly Policies P111 and P115; and

- (c) the failure to accept Forest & Bird's submission that 50% of water transferred should be surrendered in over allocated catchments.

#### **Objective 52**

- 20. Forest & Bird's submission expressed concerned that the objective relating to water allocation was solely concerned with efficient allocation of water and failed to address any of the other issues that arise from the allocation of water, particularly the adverse effects on ecological values.
- 21. The section 42A report recommended not accepting this submission. Key points are that the section 42A report:
  - (a) considered that the matters raised by Forest & Bird were already addressed in Policy P107;<sup>1</sup> and
  - (b) instead recommended all the sub-paragraphs be deleted.
- 22. Forest & Bird does not support this recommendation. The resulting objective simply provides that "the efficiency of allocation and use of water is improved and maximised through time" is so broad as to be almost meaningless.
- 23. The key paragraph of the section 42A report is:

543. Does the objective provide targets that policies seek to achieve and outcomes that can be monitored? Yes, Policies P118: Reasonable and efficient use, P116: Reallocating water, P117: Supplementary allocation amounts at flows above the median flow, P118: Reasonable and efficient use, Policy P119: Unused water, Policy P120: Taking water for storage, and P128: Transferring water permits, all aim to implement Objective O52.
- 24. The key criticism of the section 42A report is that, after answering yes to the question of whether the objectives provides targets for the policies to meet,

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<sup>1</sup> Para 561.

the section 42A report recommends deleting all references to the things in the objective that provide the targets that the policies seek to achieve.

545. Is the objective a process objective? Yes, the objective sets out matters that any reasonable person would consider when allocating water. However, I agree with the assessment of the proposed Plan objectives undertaken by Willis (2017) and consider the sub clauses of Objective O52 to be more policy focused than outcome based. I consider the sub-clauses in Objective O52 are already contained within Policies P116, P117, P118, P119, P120 and P128 and through the provisions of Schedule Q. I therefore recommend deleting the subclauses from Objective O52 as follows:

The efficiency of allocation and use of water is improved and maximised through time, ~~including by means of:~~

~~(a) efficient infrastructure, and~~

~~(b) good management practice, including irrigation, domestic municipal and industry practices, and~~

~~(c) maximising reuse, recovery and recycling of water and contaminants, and~~

~~(d) enabling water to be transferred between users, and~~

~~(e) enabling water storage outside river beds.~~

25. In my submission, the objective needs to address the matters which are provided for in the policies, even if it does so in broad terms. The argument that because matters are dealt within policies they do not need to be considered in objectives is flawed. The section 32 analysis requires an assessment of the extent to which the policies achieve the objectives. Section 32 provides:

**32 Requirements for preparing and publishing evaluation reports**

(1) An evaluation report required under this Act must—

(a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and

(b) 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; and**

(iii) summarising the reasons for deciding on the provisions; and

(c) contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.

26. Under s 32 matters cascade from the objectives into the policies and on through to the methods. If there is nothing in the objectives then it makes it difficult for those matters to be included in policy, as there is nothing to suggest that the policy needs to include a specific matter in order to achieve the objective.

27. The section 42A report recommended that Forest & Bird's submission was rejected as the matter was already addressed in relation to Policy P107.

S61. I consider the relief sought by S353 is provided for by Policy P107 and I do not recommend deleting and replacing Objective O52.

28. It is submitted this approach is flawed as there is nothing in the objectives that Policy P107 has to achieve. The matters in Policy P107 do not cascade through the plan as anticipated by section 32.

29. The outcome sought by Forest & Bird is very similar to that sought by Fish & Game. Mr Percy recommended deleting Objective 52 and replacing it with a new Objective 52A.

**Objective O52A – Framework for the take and use of freshwater**

To enable people to take, use, dam or divert freshwater in an efficient way to meet their reasonable social, economic, cultural needs, and for their health and safety, including to provide for:



(a) the health needs of people;

(b) the reasonable needs of livestock for drinking water;

(c) Māori customary use;

while ensuring that the outcomes for the values described in the objectives of this Plan (and set out for each water body in Schedule XX) are met and that any overallocation of water quantity is phased out.<sup>2</sup>

30. Forest & Bird agrees with the section 42A report writer and Mr Percy that the matters in Objective 52(a)-(e) are not appropriate for an objective but are appropriately located in policy.

31. The reference to efficiency in Objective 52A as recommended by Mr Percy provides the basis for the relevant provisions<sup>3</sup> that provide for the efficient use of water.

32. Forest & Bird supports Objective 52A as proposed by Mr Percy and set out above, with an addition relating to avoiding overallocation, which is discussed below.

#### **Phasing out overallocation, including Policy 128**

33. Forest & Bird's submission sought that, in overallocated catchments, 50% of water transferred is surrendered.

34. The situation of concern to Forest & Bird is where a consent for the take of water may not be used or fully used, because the amount in the consent is higher than would be used for the purpose the consent was granted in any event. That is, a consent holder applied for, and the Council granted, consent for more water than was needed for the particular activity for which consent was sought.

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<sup>2</sup> This is arguably not within the scope of the Forest & Bird submission but is within the scope of the Fish & Game submission (page 35), which Forest & Bird supported in its further submission.

<sup>3</sup> Policies P116-P120, P128 and Schedule Q

35. If a portion of water from a consent would never have been used in any event, the transfer of that water will have the effect increasing the amount of water taken. This is not an issue in catchments which are not overallocated. However, if a catchment is overallocated, allowing the transfer of water that would never have been used in any event will result in additional adverse effects.

36. The section 42A report recommends rejecting the Forest & Bird submission.

615. Issue 2.4 of this report describes the allocation framework in the proposed Plan. In the Wellington Region there are a number of fully allocated catchments where the total amount of water allocated by resource consents exceeds the allocation amounts specified in the tables in the whitua chapters. However, this situation is provided for by Policies R.P2, WH.P2 and K.P2 and Rules R.R1, WH.R1 and K.R1.

37. Forest & Bird's submission sought that, in overallocated catchments, there be a reduction of 50% on transfer. The section 42A report recommends rejecting this submission:

616. I consider it would be inconsistent with the approach of the proposed Plan for Policy P128 to refer to over allocated catchments and restrict the amount of water able to be transferred within them.

38. There are two problems with this:

- (a) the way in which overallocation is to be addressed is set out in the objectives, and it needs to be to give effect to the NPSFM, particularly, Policy B6;
- (b) the provisions referred to by the section 42A report do not address this issue.

39. There are two key issues:

- (a) surrender on transfer has been used in other parts of New Zealand as a method of addressing overallocation;
- (b) the objectives and policies fails to address overallocation.

## **Surrender on overallocation used elsewhere**

40. Providing for a reduction in quantity on transferred takes is an important tool for phasing out over-allocation, a requirement of Policy B2 of the NPSFM.

### **Objective B2**

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

41. Policy B3 is also particularly relevant:

### **Policy B3**

By every regional council making or changing regional plans to the extent needed to ensure the plans state criteria by which applications for approval of transfers of water take permits are to be decided, including to improve and maximise the efficient allocation of water.

42. The approach advocated by Forest & Bird has been adopted to help phase out over allocation in Canterbury.
43. Policy 4.71 of the Canterbury Land and Water Regional Plan (CLWRP) provides:

4.71 Enable the transfer of water permits to take or use water, provided:

- (a) the transfer of water is occurring within the same surface water catchment or subcatchment, or the same groundwater zone, as defined in this Plan;
- (b) the same or a lesser amount of water is being taken or used;
- (ba) the transferee's water take is reasonable for their proposed use as determined under the provisions of this Plan including Schedule 10 for irrigation uses;
- (c) the adverse effects of the take and use of water are not more than minor; and
- (d) that in an over-allocated surface water catchment or groundwater zone, a proportion of the allocated water is surrendered and is not re-allocated,

unless there is a method and defined timeframe to phase out over-allocation set out in an applicable sub-region Section of this Plan.

44. This is carried through to Rule 5.133, which provides for transfers of water permits. This is a restricted discretionary activity which includes the following matter of discretion:

7. In a catchment where the surface water and/or groundwater allocation limits set out in Rule 5.123 and Rule 5.128 or Sections 6 to 15 are exceeded, any reduction in the rate or volume of take that may be required to assist with the phasing out of that exceedance.

45. Plan Change 1 to the CLWRP relates to the overallocated Selwyn te Waihora sub region. Rule 11.4.25 provides for the surrender of 50% of water transferred in certain overallocated catchments.

11.4.25 Restrict the transfer of water permits within the Rakaia-Selwyn and Selwyn- Waimakariri water allocation zones to minimise the cumulative effects on flows in hillfed and spring-fed plains rivers from the use of allocated but unused water, by requiring that:

(a) irrigation scheme shareholders within the Irrigation Scheme Area shown on the planning maps do not transfer their permits to take and use groundwater; and

(b) fifty percent of any transferred water is surrendered except where:

(i) the transferred water is to be used for a community water supply, or

(ii) the transferred water is or will, following transfer, be used for an industrial or trade process and result in a neutral or positive water balance.

46. These provisions were the subject of a strong challenge by submitters. This Hearings Panel, chaired by former Principal Environment Judge Sheppard, rejected this challenge and approved the provisions.

47. It is submitted that a requirement that a portion of water is surrendered on transfer is a lawful and an appropriate method of addressing overallocation.

## **Evaluation of objectives and policies with respect to overallocation**

48. The plan contains no objectives which give effect to Policy B6 of the NPSFM. The section 42A report considers that Policy B6 of the NPSFM is given effect to by Policy P116.

119. Policy B6 requires Council to set a defined timeframe and methods in the plan by which over-allocation must be phased out, to ensure the total amount of water allocated in the freshwater management unit is reduced to the level set to give effect to Policy B1. Given that the allocation levels are still being considered through the whitua process, I consider it is appropriate that the proposed Plan, as yet, does not contain any provisions to phase out overallocation. Policy P116 of the proposed Plan does not allow water that becomes available due to resource consents being surrendered, lapsed, cancelled or not replaced to be reallocated in situations where the consented amount of water exceeds the allocation amounts provided for in the whitua chapters. I therefore consider that Policy B6 is given effect to.

49. There are some obvious problems with this approach.

- (a) There is no objective that addresses Policy B6 of the NPSFM;
- (b) Policy P116 does not include and defined timeframes or methods;
- (c) The provisions of the whitua chapters do not address overallocation.

50. For the same reasons as already discussed, it is submitted that Policy B6 of the NPSFM needs to be given effect to by an objective. The absence of any reference to phasing out overallocation, means that the section 32 analysis of the whitua chapters will not include any obligation to phase out overallocation.

51. The section 42A relies on Policy 116 to give effect to Policy B6 of the NPSFM. Policy B6 requires:

Policy B6

By every regional council setting a defined timeframe and methods in regional plans by which over-allocation must be phased out, including by reviewing

water permits and consents to help ensure the total amount of water allocated in the freshwater management unit is reduced to the level set to give effect to Policy B1.

52. Policy 116 is insufficient as it contains no defined timeframes, so plainly does not give effect to Policy B6.
53. The relevant policies in the whitua chapters similarly do not address overallocation.

Policy WH.P2: Core allocation in the Wellington Harbour and Hutt Valley Whitua

The maximum amount of water available for allocation from rivers (and tributaries) and groundwater in the Te Awa Kairangi/Hutt River, Wainuiomata River catchment and Orongorongo River catchments, at the time an application is made for resource consent to take and use water, shall not exceed whichever is the greater of:

- (a) the total amount allocated by resource consents, or
- (b) the allocation amounts identified in Tables 8.2-8.3 except for the taking and use of water identified in Policy P117 at flows above the median flow.

54. From this evaluation it is clear that the plan does not give effect to Policy B6 of the NPSFM and that reducing the quantity of water on transfer is an appropriate method of phasing out overallocation.

55. The amendments sought by Forest & Bird are the addition to:

- (a) Objective 52A set out above in paragraph 27 above; and
- (b) Policy 128 set out below.

Policy P128: Transfer of resource consents

The temporary or permanent transfer of the whole or part of the amount allocated by a resource consent(s) to take and use water shall be enabled, provided:

- (a) the adverse effects of the take and use of transferred water are the same or less, and

- (b) the transfer occurs within the same catchment management unit, and
- (c) the same or a lesser amount of water is being taken or used, except in overallocated catchments, where 50% of transferred water is to be surrendered, and
- (d) measuring and reporting the use of transferred water is no less than in the parent resource consent, and
- (e) the transferee's water take and use is reasonable and efficient for the intended use, including meeting the reasonable and efficient use criteria identified in Schedule Q (efficient use).

### **Other Policies**

56. Forest & Bird's submission generally supported the policies. A review of the section 42A report and the Fish & Game submission and evidence has identified some areas where improvements could be made to these policies.<sup>4</sup>

### **Policy 107**

57. Mr Percy recommended some amendments to Policy P107, including the addition of two additional policies P107A and P107B. These amendments are supported.

### **Policies P111 and P115**

58. Forest & Bird is concerned that policies P111 and P115 effectively allow for an overallocation of water quantity. They allow for the taking of water below minimum flows, for certain uses.

59. Forest & Bird considers that these policies cannot stand as they do not give effect to the NPSFM or RPS.

60. In relation to the NPSFM. Policies P111 and P115 do not give effect to Policy B1 and B5 which provide:

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<sup>4</sup> Forest & Bird's further submission supported Fish and Game submission on the policies.

#### 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.

#### 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.

- 61. The section 42A report accepts the provisions do not give effect to Policy B1.<sup>5</sup>
- 62. In terms of water allocation, minimum flows are a critical part of achieving the objectives of the plan in relation to achieving ecological health. An overallocation, contrary to Policy B5 would occur if water could be taken below those minimum flows.
- 63. The NPSFM polices are given effect to by Policies 12, 13 and 17 of the RPS:

Policy 12: Regional plans shall include policies, rules and/or methods that:

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<sup>5</sup> Paragraph 105



(a) require that water quality, flows and water levels, and the aquatic habitat of surface water bodies are to be managed for the purpose of safeguarding aquatic ecosystem health; and

(b) manage water bodies for other purposes identified in regional plans.

Policy 13: Regional plans shall include policies and/or rules that:

(a) establish allocation limits for the total amount of water that can be taken from rivers and lakes, taking into account aquatic ecosystem health; and

(b) establish allocation limits for the total amount of water that can be taken from groundwater, taking into account the aquatic ecosystem health of rivers, lakes and wetlands, and preventing saltwater intrusion.

Policy 17: Regional plans shall include policies, rules and/or methods to ensure the allocation and use of water from any river or groundwater source provides sufficiently for the health needs of people, including:

(a) the taking of water by any statutory authority that has a duty for public water supply under any Act of Parliament;

(b) the taking of water for reticulation into a public water supply network; and

(c) the taking of water for community supplies.

64. Policies P111 and P115 do not give effect to these policies of the RPS as they allow for an overallocation of water quantity.

65. Mr Percy has suggested amendments to Policy 111 and 115<sup>6</sup> to address similar concerns. Forest & Bird supports these amendments.

Policy P117

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<sup>6</sup> Appendix B, page 12

66. Policy P117 relates to supplementary allocation amounts at flows above the median flow. The section 42A report recommends some changes to this policy to provide further guidance on when a supplementary allocation is available. Mr Percy has built on these recommendations, by suggesting some safeguards.

67. Forest & Bird considers that there is merit in both, which result in a comprehensive list of matters to be considered when providing supplementary allocations, while ensuring adverse effects are properly dealt with. We recommend that both the section 42A and Mr Percy's recommendation be adopted.

#### **Policy 121A and 121B**

68. Mr Percy recommended that two new policies be inserted:

- (a) Policy 121A – which relates to avoiding remedying and mitigating adverse effects; and
- (b) Policy 121B – which relates to integrated management.

69. Forest & Bird supports these policies.

#### **Rules**

70. Forest & Bird's submission was generally supportive of the rules. This support is retained, with the only additional change sought by Forest & Bird to Rules 136, 137, 140A, R.R1, K.R1, as set out in Appendix 2 of Mr Percy's evidence. This is consequential change, based on the changes sought to Policy 111.

#### **Conclusion**

71. While Forest & Bird generally supports the natural form and function and water allocation chapters, it considers that some significant changes are needed to the water allocation chapter in order for it to give effect to the NPSFM and RPS, particularly with respect to minimum flows and overallocation.

72. It makes something of a mockery of setting minimum flows if the takes provided by Policy P111 can still be exercised at minimum flows. They are not minimum flows at all.

73. Allowing transfers of water in overallocated catchments also has the potential to increase adverse effects by providing for the use of water that would not otherwise be used or used consistently. An appropriate and accepted way of dealing with this is to require that a portion of the transferred water is surrendered.

Dated 13 September 2017

A handwritten signature in black ink, appearing to read 'P Anderson', with a long vertical stroke extending upwards from the end of the signature.

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