

**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 Natural
Resources Plan for the Wellington Region

Legal submissions for the Royal Forest & Bird Protection Society Inc

Hearing Stream 1

17 October 2024



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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 submissions and further submission on Proposed Plan Change 1 (**PC1**) to the Natural Resources Plan for the Wellington Region.
2. These submissions address the points of different between New Rule R151A supported by the Section 42A Hearing Report for Beds of Lakes and Rivers and the changes sought by Forest & Bird, and the reasons why Forest & Bird's relief should be preferred.¹

Statutory and planning framework

3. Counsel agrees with the legal submissions for Greater Wellington on:²
 - a. the framework for regional plan making;
 - b. progressing PC1 in light of signalled changes to national direction.
4. Key statutory imperatives relevant to the matters of concern to Forest & Bird in Hearing Stream 1 are below:
 - a. While the purpose of the RMA in section 5 is well-known, it is reiterated that in amending the regional plan, the Regional Council must provide for future generations, safeguard life-supporting capacity, and manage adverse effects.
 - b. Pursuant to section 6(a) of the RMA, the Council must, in achieving the purpose of the Act, recognise and provide for 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.
 - c. Pursuant to section 6(c) of the RMA, the Council must, in achieving the purpose of the Act, recognise and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna as matters of national importance.

¹ Many of Forest & Bird's concerns relate to matter to be addressed in later Hearing Streams. It is noted that the topic of target attribute states for natural form and character is proposed to be dealt with in Hearing Stream 2 and Forest & Bird supports shifting the topic until then

² Legal submissions on behalf of Greater Wellington Regional Council – Hearing Stream 1, dated 3 October 2024 at [21]-[27]

Issue 5: Ongoing diversion of a river (permitted)

New Rule R151A

5. The s42A Report recommends R151A remain as follows:

FW Rule R151A: Ongoing diversion of a river – permitted activity

The diversion of a river as a result of:

- (a) an existing permanent diversion, that is not associated with existing structures, that was lawfully established by way of a resource consent as at the date of this rule becoming operative on (insert date), or
- (b) a permanent diversion, that is not associated with existing structures, that has been lawfully established by way of a resource consent after the operative date of this rule,

is a permitted activity subject to the following conditions:

- (c) the permanent diversion has been in place for at least 10 years, and
- (d) all of the conditions of the resource consent to lawfully establish the diversion have been complied with.

Note

Diversion of water in association with existing structures is subject to permitted activity rule R122 (Maintenance, repair, replacement, **upgrade** or use of existing structures (excluding the Barrage Gates) – permitted activity).

6. Forest & Bird opposes permitted status for this activity and remains unconvinced that New Rule R151A gives effects to the NPSFM and meets the statutory imperatives outlined above.
7. Forest & Bird considers that full Discretionary Activity status is appropriate as it provides Council the ability to decline or at least impose conditions in order to:
- a. Address unanticipated adverse environmental effects;
 - b. Respond to changing preferences of tangata whenua and the community; and
 - c. Enable consideration of all relevant matters including those that may become apparent over time as a consequence of ongoing scientific research or new environmental phenomena including the impacts of climate change.
8. Forest & Bird says that full Discretionary Activity status is essential if the Plan is to sustain the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations per s 5(2)(a) RMA and to recognise and provide for s 6 RMA matters.
9. The fact that permanent diversions are already authorised by a consent does not mean that they should be renewed without an enquiry into the advantages of

restoring the river to its former state and whether the diversion continues to achieve sustainable management.

New Rule R151A will not best implement the objectives of the Natural Resources Plan for the Wellington Region

10. R151A essentially encourages or enables continuation of an approach to river management for the life of a consent without requiring consideration of, and a response to, the adverse effects that may inevitably flow from changing river geomorphology, interrupting fish passage, and other practices associated with that diversion.
11. R151A will not provide for input arising from change of community aspirations over the life of the existing consents nor the aspirations of future generations.
12. The section 32 report has undertaken a high-level analysis of R151A against key NRP objectives but has not undertaken an assessment against the clear terms of these provisions.
13. Objective 19 of the NRP, by way of example, is that:
 - Objective O19
Biodiversity, aquatic ecosystem health and mahinga kai in fresh water bodies and the coastal marine area are safeguarded such that:
 - (a) water quality, flows, water levels and aquatic and coastal habitats are managed to maintain biodiversity aquatic ecosystem health and mahinga kai, and
 - (b) where an objective in Tables 3.4, 3.5, 3.6, 3.7 or 3.8 is not met, a fresh water body or coastal marine area is meaningfully improved so that the objective is met within a reasonable timeframe, and
 - (c) restoration of aquatic ecosystem health and mahinga kai is encouraged.
14. Objective O19 directs the biodiversity, aquatic ecosystem health and mahinga kai in freshwater bodies and the coastal marine area are safeguarded, and encourages the restoration of aquatic ecosystem health. Counsel submits that R151A is inappropriate when considered against such objectives. As R151A precludes the ability to even consider restoration it is difficult to see how the R151A is the most effective and efficient way of achieving the objectives of the plan.

15. The s 32 report³ does not appear to have assessed the various options against the new objectives contained in PC1 for Whaitua Te Whanganui-a-Tara and Te Awarua-o-Porirua.

NPSFM

16. Pursuant to section 67(3)(c) RMA, the Plan must give effect to the NPSFM.

17. The NPSFM adopts as its “fundamental concept” Te Mana o te Wai which is described as (emphasis):

A concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the **mauri** of the wai. Te mana o te Wai is about **restoring** and preserving the balance between the water, the wider environment, and the community.

18. In that regard, protection of the mauri of a river system and reversal of the effects on it generated by a diversion are consistent with that concept. Those matters require an ability to decline or modify the consent/activity through conditions.

19. NPSFM policies with particular relevance include:

- a. 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.
- b. Policy 5 – Freshwater is managed through a National Objectives Framework to ensure that the health and well-being of degraded water bodies and freshwater ecosystems is improved.
- c. Policy 7 – The loss of river extent and values is avoided to the extent practicable.
- d. Policy 13 – The condition of water bodies and freshwater systems is systematically monitored over time, and action is taken where freshwater is degraded, and to reverse deteriorating trends.

20. The Plan can only “give effect to” the NPSFM in accordance with s 67(3)(a) RMA if the Council has the ability to consider all potential effects of the renewal of consents for diversion schemes and an ability to decline or modify through conditions. That can occur with a full Discretionary Activity status. To do otherwise could deprive Council of an ability to take into account all scientific knowledge regarding existing

³ S32 Report: Part E at 2.11.3

and future adverse effects⁴ and all cultural and social input available at the time consent is sought.

New Rule R151A is uncertain

21. It is unclear as to the scenarios Rule R151A apply to. At the time of preparing these legal submissions, Forest & Bird was unable to obtain the details of the 75 or more existing water permits that would benefit from Rule 151A referred in the s 32 report.⁵ There is a risk if the diversion aspect of takes is permitted it reduces the matters that can be considered for the take aspect, for example, diversion to storage for irrigation and small hydro schemes (such as water races in the Wairarapa). Take and diversion are often inextricably linked and not easy to untangle.

22. The s 32 Report observes that:⁶

Where conditions of the initial diversion consent have not been satisfied, the conditions of the original water permit to divert the water continue to require any adverse effects to be mitigated or remedied. In the event that adverse effects are still occurring, then proposed Rule R151A would not apply, as permitted activity condition (d) would not be met. If the original consent is about to expire and adverse effects are still occurring, then a new application would be required as a discretionary activity under Rule R151.

23. This approach ultimately leaves the consent holder with discretion to determine whether conditions are in fact being met where this should be subject to Council oversight and confirmation. Accordingly, Discretionary Activity status is more appropriate as it would:

- a. remove any uncertainty and potential risk of ongoing environmental harm.
- b. Allow Council to maintain full oversight on the diversions, including whether conditions have been complied with and the appropriateness of the diversion.

Dated this 17th day of October 2024



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⁴ See also NPSFM Clause 1.6(1) "In giving effect to this National Policy Statement, local authorities must use the best information available at the time, which means, if practicable, using complete and scientifically robust data"

⁵ S32 Report: Part E at [50]

⁶ S32 Report: Part E at [49]