

BEFORE THE FRESHWATER HEARING PANEL

AT DUNEDIN

KI ŌTEPOTI

UNDER

the Resource Management Act 1991

AND

IN THE MATTER

of the Freshwater Planning Instrument part of the
proposed Otago Regional Policy Statement 2021

Submission on behalf of the Director-General of Conservation

Dated 5 September 2023

Department of Conservation Te Papa Atawhai

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May it please the Panel:

1. The following matters are submitted on behalf of the Director-General of Conservation *Tumuaki Ahurei* ('the Director-General') in relation to the freshwater planning instrument (FPI) parts of the proposed Otago Regional Policy Statement ('pORPS'):
2. The Director-General is a submitter on the pORPS and has also appeared before the pORPS non-Freshwater Hearing Panel.¹
3. The Director-General acknowledges that the pORPS was developed through a collaborative process between the Otago Regional Council ('the Council') and Kāi Tahu and acknowledges Kāi Tahu as tangata whenua of the Otago Region.
4. The Department of Conservation has functions which include;
 - a. Preserving as far as practicable all indigenous freshwater fisheries and protecting recreational freshwater fisheries and freshwater fish habitats; and
 - b. Advocating for the conservation of natural and historic resources generally.²
5. These functions inform the Director-General's advocacy generally as well as her submission on the FPI parts of the pORPS.
6. The following witnesses will appear and give evidence to support the submissions of the Director-General:
 - a. Dr Nicholas Dunn
 - b. Dr Marine Richarson
 - c. Bruce McKinlay
 - d. Murray Brass
7. Mr Brass, Mr McKinlay, and Dr Richarson submitted evidence for the non-freshwater pORPS hearing, and that evidence is also before the Panel in accordance with the Director-General's memorandum dated 28 June 2023.

¹ Submission FPI044 dated 5 December 2022 and FSFPI044 dated 3 February, and Submission 00137 dated 3 September in respect of non-freshwater matters.

² Conservation Act sections 6(ab) and (b)

8. I will address the statutory framework and key national policy, before turning to the Director-General's key issues:
 - a. Interconnectedness
 - b. Indigenous freshwater fish
 - c. Wetlands
 - d. Timeframes

Statutory framework

9. The Director-General supports the Council's opening legal submissions at paragraphs 2 - 6.6 regarding the scope of the FPI.³
10. The Director-General supports the Council's submissions at paragraphs 24 - 65 in respect of the statutory framework and the role of a regional policy statement.
11. A regional policy statement provides an overview of the resource management issues of a region, and policies and methods to achieve integrated management of the natural and physical resources of the region.⁴ This is an opportunity to identify key issues and to adopt ambitious and high-level thinking.
12. The Council has the ability to adopt more stringent measures than required by the National Policy Statement for Freshwater Management in light of the particular circumstances of a region.⁵
13. The Otago Region is a diverse landscape, with unique ecosystems, including wetlands and habitat for indigenous freshwater fish.⁶ The decline in quality of habitat, and loss of habitat for threatened species, is an important part of the circumstances of this particular region.

National Policy Statement for Freshwater Management

14. Te Mana o Te Wai is the fundamental concept of the National Policy Statement for Freshwater Management (NPSFM).⁷ This framework prioritises the health and well-being of water bodies and freshwater ecosystems, and this priority is reflected in the objective of the NPSFM (2.1(1)). This is a water-centric approach. Te Mana o Te Wai is relevant to all freshwater management and not

³ Opening submissions for ORC, S J Anderson, 28 August 2023

⁴ Resource Management Act 1991 section 59

⁵ National Policy Statement for Freshwater Management (NPSFM), cl 3.1(2)

⁶ Non-FPI EIC Bruce McKinlay at para 24

⁷ NPSFM, cl 1.3.

just to the specific aspects of freshwater management referred to in the NPSFM.⁸

15. Every regional council must give effect to Te Mana o Te Wai.
16. The NPSFM requires the recognition of the interconnectedness of the whole environment, ki uta ki tai, recognising interaction between freshwater, land, water bodies, and ecosystems.⁹ Freshwater is to be managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis.¹⁰ Policy 9 NPSFM requires that the habitat of indigenous freshwater species is protected.

National Policy Statement for Indigenous Biodiversity (NPSIB)

17. The NPSIB is now in force. As set out in the Director-General's memorandum dated 18 August 2023, there is scope in this hearing to give effect to the NPSIB in the pORPS. The NPSIB reflects best practice in relation to indigenous biodiversity.
18. The objective of the NPSIB is to maintain indigenous biodiversity across Aotearoa New Zealand so that there is no overall loss in indigenous biodiversity after the commencement date of the NPSIB.¹¹ In order to achieve this, indigenous biodiversity should be protected and restored as necessary to achieve the overall maintenance of indigenous biodiversity.¹²
19. The NPSIB provides that a precautionary approach is adopted when considering adverse effects on indigenous biodiversity.¹³ It also requires that the importance of maintaining indigenous biodiversity outside significant natural areas is recognised and provided for.¹⁴ It provides that indigenous biodiversity is managed in an integrated way, within and across administrative boundaries.¹⁵ Local authorities must promote the resilience of indigenous biodiversity to climate change, including by maintaining and promoting the enhancement of connectivity between ecosystems, to enable migrations so that species can continue to find viable niches as the climate changes.¹⁶

⁸ NPSFM cl. 1.3(2)

⁹ NPSFM cl. 3.5.

¹⁰ NPSFM Policy 3

¹¹ NPSIB 2.1(1)(a) – commencement date was 4 August 2023

¹² NPSIB 2.1(b)(iii)

¹³ NPSIB Policy 3

¹⁴ NPSIB Policy 8

¹⁵ NPSIB Policy 9

¹⁶ NPSIB 3.6(1)(c)

20. Nothing in the NPSIB applies to the development, operation, maintenance, or upgrade of renewable electricity generation assets and activities and electricity transmission network assets and activities (REG). The NPSIB is not clear about what requirements must be met as part of a consent application for REG in places with significant biodiversity values.
21. We anticipate clarification on this matter from the Ministry for the Environment and Ministry of Business Innovation and Employment. There has been a consultation on revised versions of the NPSREG and NPSET, which if implemented, could provide greater specificity about how REG is considered in places with significant biodiversity values. The consultation documents currently have no legal weight.
22. Other submitters (e.g. Meridian) have suggested that the scope of the NPSIB provides clues to resolve the planning treatment of REG activities in the pORPS generally.¹⁷
23. Rather than extrapolating too much from uncertainty in the NPSIB, the Director-General submits that the hierarchy of the NPSFM should apply, in terms of effects on indigenous biodiversity in freshwater.
24. Section 6(c) of the RMA continues to apply to significant indigenous biodiversity, as well as the Council's function under section 30(1)(ga) to 'maintain indigenous biodiversity'. Protection of significant indigenous biodiversity, and maintenance of indigenous biodiversity, must still be addressed for REG.

Key issues for the Director-General

Key issue 1: Interconnectedness

25. Integrated management of indigenous biodiversity across freshwater, terrestrial, and coastal marine ecology is an enduring theme from the Director-General's submissions in this process and the non-freshwater process.¹⁸
26. Diadromous fish move between freshwater and sea during their life cycles, transcending catchment boundaries.¹⁹ Mobile species use a network of coastal wetlands and estuaries as part of a wider network of habitats to move around the region. Firm boundaries between freshwater, terrestrial, and coastal

¹⁷ Meridian memorandum concerning implications of the NPSIB dated 18 August 2023 at [3]

¹⁸ FPI044.015, FPI044.024, FPI044.005, FPI044.007

¹⁹ EIC Dr Richarson dated 23 November 2022 at para 67.

domains may be difficult to perceive (e.g. ephemeral wetland boundaries not being sharply delineated), or may change over time (e.g. seasonal variation of wetland).²⁰

27. A region-wide vision in the pORPS recognises the ecological reality of this interconnectedness, with species living their lives without regard for local authority boundaries or catchment boundaries.
28. A single regional long-term vision alone would not be sufficient (according to MfE guidance)²¹, but the drafting in Ms Boyd's opening statement combines overarching region-wide vision with FMU based specificity and is eminently suitable.
29. The Director-General supports the approach of the region-wide objective LF-FW-O1A.

Key issue 2: Indigenous fish and their habitat

30. Otago is an important habitat for a significant proportion of New Zealand's threatened galaxiid species, including Nationally Endangered and Nationally Critical species.²² Some fish species, including kōwaro (Canterbury mudfish, Nationally Critical) are also recognised as taonga fish under the Ngāi Tahu Claims Settlement Act 1998.²³
31. Specifically addressing the protection of non-diadromous galaxiids and their habitat in the pORPS contributes to the NPSFM requirements that the habitat of indigenous freshwater species is protected (NPSFM policy 9), as well as protecting the values of natural inland wetlands (NPSFM Policy 6) and avoiding the loss of river extent and values to the extent practicable (Policy 7).
32. The Director-General supports the inclusion of specific references to non-diadromous galaxiid and Canterbury mudfish populations (and their habitats) in the region-wide vision LF-FW-O1A.²⁴
33. The most recent drafting for this objective refers to 'healthy populations of indigenous species... that are plentiful enough to support mahika kai'.²⁵ The

²⁰ EIC Bruce McKinlay dated 23 June 2023 at paras 38-43.

²¹ Guidance on the National Objectives Framework of the NPSFM 2022 (amended 2023), dated April 2023 at page 38 "a single regional long-term vision is not allowed"

²² FPI EIC Dr Richardson dated 28 June 2023 at Table 1 (page 7) and para 28, and FPI EIC Dr Dunn dated 28 June 2023 at para 21 and Table 1 (page 10)

²³ Ngāi Tahu Claims Settlement Act 1998, Schedule 98

²⁴ Opening statement of Felicity Boyd dated 28 August 2023 at page 77.

²⁵ Opening statement of Felicity Boyd dated 28 August 2023

Director-General submits that in addition to supporting mahika kai, the objective should recognise the inherent value of species. This can be achieved by having separate clauses within LF-FW-O1A for indigenous species and mahika kai, or with modified wording. Mr Brass will address this in his speaking notes.

34. Mapping the habitats of threatened galaxiids will be a key step in the NOF process to protect these fish.

Key issue 3: Wetlands

35. Otago is the home of a number of wetland complexes, including ephemeral wetlands. The values of ephemeral wetlands are not always recognised by definitions of “wetland” in planning instruments. Even ephemeral wetlands may have important botanical values present, including threatened plant species.²⁶ Non-diadromous galaxiids and mudfish may occupy slow flowing streams associated with wetlands, or wetlands themselves.²⁷
36. ‘Natural wetland’ is not a defined term in legislation. The section 2 RMA definition of ‘wetland’ is an inclusive definition which does not preclude refinements of or extensions to the definition being included in planning instruments.²⁸
37. The term ‘Natural inland wetland’ is defined in the NPSFM and excludes wetlands with more than 50% exotic vegetation cover.²⁹
38. Ms Boyd’s proposed definition for ‘natural wetland’ means that intermittently wet areas, even where they include more than 50% exotic pasture, are protected. This supports the recognition and provision for the section 6(a) RMA matter ‘the preservation of the natural character of... wetlands... and the protection of them from inappropriate subdivision, use, and development’.
39. The Director-General supports the inclusion of references to ephemeral wetlands in the region-wide vision LF-FW-O1A, or equivalent relief arising from an inclusive definition along the lines of ‘natural wetland’ in Ms Boyd’s supplementary evidence addressing the NPSIB.³⁰
40. The Director-General supports the changes to LF-FW-P9 as discussed between Mr Brass, Ms Boyd for the Council, Ms McIntyre and Ms Bartlett for Kāi Tahu,

²⁶ EIC Bruce McKinlay dated 23 June 2023 at paras 39-43

²⁷ EIC Dr Dunn dated 23 June at paras 25-28.

²⁸ Greater Wellington Regional Council v Adams [2022] NZEnvC 25 at para 34

²⁹ NPSFM 3.21

³⁰ EIC Felicity Boyd dated 11 August 2023 regarding implications of the NPSIB at page 30

and Mr Farrell for Fish and Game. The latest version of LF-FW-P9 is set out in the appendix to Fish and Game's legal submissions.³¹

Key issue 4: Clear timeframes

41. Current timeframes for outcomes sought in the Clutha Mata-au Vision are by 2030 for the Upper Lakes rohe, by 2045 in the Dunstan, Roxburgh, and Lower Clutha rohe, and by 2050 in the Manuherekia. The relevant timeframes for the North Otago and Taiari FMUs are 2050, with 2040 for the Dunedin & Coast FMU, and 2030 for the Catlins FMU.
42. Clause 3.3(2)(b) of the NPSFM provides that long-term visions must set goals that are ambitious but reasonable (difficult to achieve but not impossible), and that timeframes for these goals must also be ambitious but reasonable.
43. Mr Brass' planning evidence sets out the unique situation in Otago in respect of deemed permits, and the desirability of this pORPS addressing impacts on biodiversity and the overallocation of water before those deemed permits are replaced.³²
44. Dr Dunn's and Dr Richardson's evidence describes the current state of non-diadromous galaxiid species, and some of the threats they face. Mr McKinlay's evidence sets out the importance of establishing timeframes to respond to ecosystem threats.³³ Mr Brass' evidence concludes that action to address those threats is required in the near term.
45. As Ms Boyd identified in her opening statement at para 30, even in the absence of an RPS review before the end of the lifespan of this pORPS, there will be an opportunity to review the timeframes set before the end of the timeframes for most FMUs (which are between 2040 and 2050), because RPSs must be amended every 10 years. Given that opportunity is available, setting an ambitious direction, and revisiting it once progress is better understood later in time, is an available course of action for this pORPS.
46. In light of the existing risks to threatened species such as non-diadromous galaxiids, as well as the opportunity to review the timeframes before 2040, the Director-General submits that timeframes to achieve Freshwater Visions across the pORPS FMUs should be no later than 2040.

³¹ Fish and Game legal submissions dated 30 August at page 41

³² EIC Murray Brass at 45-47

³³ EIC Bruce McKinlay at 26-34

47. The 'ambition' of timeframes shorter than 20 to 25 years is tempered with the 'reasonableness' of opportunity to review. Without aiming to improve in a set time frame, the best case scenario is that things are no worse. Better to aim high and adjust down, than not aim high enough and see no improvement.
48. The Director-General supports those timeframes which are currently set before 2040 (e.g. Catlins and Clutha Mata-au Upper Lakes rohe).

Additional information Regarding the Port Otago SC case

49. The Director-General agrees with the Council's summary of the case *Port Otago Ltd v Environmental Defence Society Incorporated* [2023] NZSC 112.³⁴
50. For the limited purposes of the pORPS freshwater hearing, the decision has minimal impact. The Director-General will file written submissions on this case by 15 September as requested in Minute 9.

Additional information regarding the meaning of 'natural' in respect of LF-FW-01A

51. On the first day of the freshwater hearing, Commissioner Sullivan asked if there was any guidance in legislation or case law about the meaning of the word 'natural'.
52. Although I acknowledge the NZCPS relates to the coastal environment, NZCPS Policy 13 may assist the Panel in understanding the meaning of 'natural character'. NZCPS Policy 13(2) states that natural character may include matters such as
 - a. *Natural elements, processes and patterns*
 - b. *Biophysical, ecological, geological and geomorphological aspects*
 -
 - d. *The natural movement of water and sediment*
 - ...
 - g. *a range of natural character from pristine to modified*
 - h. *experiential attributes, including the sounds and smell [of the sea]; and their context or setting.*

³⁴ Opening submissions for ORC, S J Anderson, 28 August 2023 para 9-14

53. A key point here is that even in modified environments, 'naturalness' and natural character exists to some degree. The word 'natural' indicates a product of nature, and does not necessarily equate with the word 'pristine'.³⁵
54. The Clutha Mata-au FMU vision LF-VM-O2(7A) 'opportunities to restore the natural form and function of water bodies are promoted wherever possible' does not require total restoration of the FMU to a pristine setting by a certain time period, only that opportunities for restoration (including to a better state, not only to a pristine state) are promoted wherever possible.
55. Likewise, the LF-FW-O1A(4) wording that the natural form, function and character of water bodies reflects their natural characteristics and natural behaviours to the greatest extent practicable does not require restoring all land to wetland by a certain timeframe.
56. Rather, these visions set a direction for recognition of the natural behaviours of the FMU, and promoting the restoration of that naturalness. This kind of vision is entirely appropriate in light of the purpose of an RPS.

Additional information in response to a question about sports fish

57. Commissioner Kirikiri asked Fish and Game about the interface of sports fishing regulation and Māori customary non-commercial fishing rights and mahinga kai.
58. Sports fish are those species listed as sports fish in Schedule 1 of the Freshwater Fisheries Regulations 1983 (brown trout, rainbow trout, lake trout, American brook trout, Atlantic salmon, Quinnat salmon, sockeye salmon, perch, tench, and rudd).
59. Sports fish are managed, maintained, and enhanced by Fish and Game Councils according to section s26ZQ of the Conservation Act 1987.
60. While section 26ZH of the Conservation Act 1987 states that nothing in Part 5B affects Māori fishing rights, sports fish management is a Part 5A matter. Courts have held that as trout and salmon are introduced species, introduced pursuant to law, and the taking of them has always been controlled by law, there was never a time when taking trout could have been regarded as an existing and preserved Māori right.³⁶

³⁵ Harrison v Tasman District Council [1994] NZRMA 193 at page 5.

³⁶ *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 at 153-154.

Conclusion

61. The pORPS provides the opportunity to set ambitious long-term visions for the Otago region that will inform future regional policy guidance. Ambition in these visions means that ambition further down the track is not prevented. Place-based specificity and restriction is not precluded in the following NOF process or the LWRP.

62. The Director-General invites the Panel to take a broad-minded and creative approach in considering the pORPS FPI in light of its purpose, the statutory context, and the threats to species and habitats in the Otago region.

R Broad

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