

BEFORE THE HEARINGS PANELS

IN THE MATTER OF

Proposed Change 1 to the Wellington
Regional Policy Statement, Hearing
Stream 1

**LEGAL SUBMISSIONS ON BEHALF OF THE ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED**

13 June 2023

Introduction

1. The Royal Forest and Bird Protection Society of New Zealand Incorporated (Forest & Bird) made a submission on Proposed Change 1 to the Wellington Regional Policy Statement.¹
2. That submission raised the issue of the correct allocation of plan provisions to the freshwater planning process, versus the standard Schedule 1 RMA process. These submissions address that point.

Allocation of several provisions to the freshwater planning process

3. Forest & Bird submits there is no jurisdiction under the RMA for many provisions currently marked with a freshwater symbol to undergo the freshwater planning process.
4. Forest & Bird considers that GWRC has not correctly applied the High Court decision *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Incorporated* [2022] NZHC 1777 (*ORC v Forest & Bird*) when identifying provisions to include in the freshwater planning process. In *ORC v Forest & Bird*, the High Court made the following observations as to what qualifies as a “freshwater planning instrument” (emphasis added):

[191] The words “relates to freshwater” must be interpreted having regard to the purpose for which s 80A was enacted. **That purpose was to address the decline in freshwater quality in New Zealand.**

[192] Section 80A(3) drives the interpretation of s 80A. Because of this, parts of a regional policy statement will qualify to be part of a freshwater planning instrument pursuant to either s 80A if they **directly relate to the maintenance or enhancement of the quality or quantity of freshwater.**

5. The High Court found that the jurisdiction of the freshwater planning process is narrower than what is encapsulated under the NPSFM, and is not concerned with coastal water:

[200] The National Freshwater Policy is concerned with the quality of freshwater and the effects on the receiving environment of freshwater on a whole of catchment basis. This does not mean that any part of a regional policy statement concerned with the catchment for or receiving environment from freshwater will relate to freshwater for the purpose of s 80A. It will be only to the extent parts of the proposed regional statement **regulate activities in the catchment or receiving environment, because of their effect on the quality or quantity of freshwater**, that policies or objectives for the catchment or receiving environment will relate to freshwater for the purposes of s 80A.

...

¹ Submitter number 165.

[202] In accordance with s 80A(2)(b), there may potentially be other ways in which provisions in the proposed regional policy statement can qualify to be part of a freshwater planning instrument. For that to be so, the ORC will have to be satisfy itself that those parts relate directly to matters that will impact on the quality and quantity of freshwater, including groundwater, lakes, rivers and wetlands. **The ORC will also have to satisfy itself that the parts are not concerned with sea water** or are part of a proposed regional coastal plan or a change or variation to that plan.

6. The decision by GWRC to include certain provisions beyond the scope of what qualifies as “freshwater planning instrument” appears based on the following:²

‘Freshwater’ is defined in the RMA as, ‘all water except coastal water and geothermal water’. ‘Freshwater quality and quantity’ is not defined in the Decision but has been considered by Council to encompass freshwater ecosystem health, including habitat, aquatic life and ecological processes. It is a measure of, and intrinsically connected to, freshwater quality. Therefore, in the following analysis and justification any matters directly impacting freshwater ecosystem health are directly impacting the quality and quantity of freshwater. The reasons for this approach include:

- Te Mana o Te Wai, the fundamental concept for freshwater management in the NPS-FM 2020, prioritises the health and well-being of water bodies and freshwater ecosystems. Freshwater ecosystem health is central in the objective and policies of the NPS-FM.
- Water quality and quantity are two of five biophysical components contributing to freshwater ecosystem health, as outlined in Appendix 1A of the NPS-FM. The others are habitat, aquatic life and ecological processes, which each have relevant attributes under the National Objectives Framework. The NPS-FM is therefore clearly about more than just water quality and quantity, and to separate them from other components of freshwater ecosystem health would not be giving effect to the NPS-FM.
- Freshwater hearings panels must collectively have knowledge and expertise in relation to ‘freshwater quality, quantity, and ecology’ under Section 59(6)(b) of Schedule 1 of the RMA. This explicitly states that the FPP includes other matters relating to freshwater ecosystem health beyond water quality and quantity.

7. This does not accord with the following elements of High Court’s decision in *ORC v Forest & Bird*:

[193] In accordance with s 80A(2), parts of the proposed regional statement may relate to freshwater management in the manner required to be part of a freshwater planning instrument either through the way those parts give effect

² GWRC Section 32 Report, Appendix E – Parts of RPS Change 1 subject to the Freshwater Planning Process at page 387.

to the National Freshwater Policy or through otherwise relating to freshwater. **Parts that give effect to the National Freshwater Policy will only qualify if they are giving effect to those parts of the National Freshwater Policy that directly relate to the maintenance or enhancement of freshwater quality or quantity.**

...

[206] Parts of a proposed regional statement **cannot be treated as parts of a freshwater planning instrument simply because there is some connection to freshwater through the concepts of Te Mana o te Wai, ki uta ki tai or the integrated management of natural and physical resources.** To hold otherwise would be contrary to Parliament's intention in s 80A and pt 4 of sch 1 to establish a dual planning process where only parts of a regional policy statement directly relating to freshwater would be subject to the freshwater planning process.

8. The High Court noted that this did not mean that Te Mana o te Wai, ki uta ki tai, and integrated management would not be important in either the part 1 schedule 1 or the freshwater planning process:

[208] They will be fundamental to regional councils in the formulation of a proposed regional policy statement and to the Environment Court when it might have to consider issues arising out of a regional policy statement on appeal. To the extent those principles are relevant to matters that are not part of the freshwater planning process, those who consider such principles have not been adequately recognised by a regional council will have full rights of appeal to the Environment Court. That Court is a specialist tribunal, well equipped to recognise the importance of integrated management of natural and physical resources and the fundamental concept of Te Mana o te Wai. Submitters would not have such rights of appeal if the matters they are concerned with are to be subject to the freshwater planning process.

9. Examples of chapters and provisions which do not qualify for the freshwater planning process include, but are not limited to:
 - a. Overarching provisions e.g. Chapter 3
 - b. Climate change provisions e.g. Chapter 3.1A.
 - c. Natural hazard provisions e.g. Objective 20.
 - d. Urban design provisions e.g. Objective 22, Policy 31.
 - e. Provisions concerning wetlands in the coastal marine area (the NPSFM only applies to "natural inland wetlands").³
 - f. General indigenous biodiversity provisions e.g. Chapter 3.6 and Policies 23-24 (discussed further below).

³ See NPSFM 3.21: "natural inland wetlands" means a natural wetland that is not in the coastal marine area." Wetlands in the CMA are within the domain of the NZCPS.

- g. The policies and methods that give effect to the above provisions.
10. While these provisions have some connection to freshwater or the concept of Te Mana o te Wai, the link is tenuous. They do not fall squarely within the jurisdiction of the freshwater planning process as outlined by the High Court (or supported by the policy intent of the freshwater planning process):
- a. They have not been designed to “regulate activities in the catchment or receiving environment, because of their effect on the quality or quantity of freshwater”⁴. The prime examples are the provisions addressing climate change – a phenomenon with indiscriminate effects;
 - b. Some provisions affect or relate directly to seawater which is clearly outside the jurisdiction of the freshwater planning process.
11. Further, many of these provisions require expertise beyond freshwater quality and quantity such as marine biology, coastal systems, climate science, urban planning, terrestrial ecology, and air quality. Including these provisions in the freshwater planning process risks frustrating the expedition of the process for developing a National Objectives Framework. The National Objectives Framework is long overdue, and should not be delayed by matters which have some link to freshwater, but are essentially peripheral i.e. urban development. These provisions are also subject to separate policy direction such as the New Zealand Coastal Policy Statement or the National Policy Statement on Urban Development. They are not only required to be dealt with under the standard Schedule 1 process, but are more appropriately dealt with in this separate arena.

The starting point is the standard part 1 schedule 1 process

12. The High Court made it plain that the default position is that provisions should progress through the part 1 schedule 1 process:

[203] Consistent with the purpose of the Amendment Act and participatory rights under the RMA, in applying s 80A, **the starting point must be that all of the proposed regional statement will be subject to the normal planning process set out in pt 1 of sch 1 of the RMA.** It will be only those parts of the proposed regional statement that directly relate to freshwater management, in the manner just discussed, that can be parts of a freshwater planning instrument and so subject to the freshwater planning process.

(emphasis added)

13. With respect, it almost appears that the GWRC has started from the opposite point: that all potentially relevant provisions should go through the freshwater planning process. 66% of provisions in PC1 have been allocated to the freshwater planning process. These provisions cover a broad range of matters,

⁴ *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Incorporated* [2022] NZHC 1777 at [200].

many of which do not have the direct link to freshwater maintenance that the High Court required.

14. There are two issues with the allocation of provisions to the freshwater planning provisions:
 - a. Many provisions don't relate directly to the maintenance of water quality and quantity; and
 - b. There may be a small number of provisions that deal both with freshwater (in the sense required by s80A) and also other matters.

Many provisions are not directly related to the maintenance of freshwater quality and quantity

15. The Otago Regional Council had attempted to progress the entire RPS as a freshwater planning instrument. The GWRC has at least done a provision-by-provision allocation of provisions as between the FPP and the P1S1 process. However, in my submission it has been done incorrectly. While it is true that it is for the GWRC to determine (in the first instance at least) which provisions should be assigned to each process, that assignment must be done in accordance with the High Court's findings and guidance, and s80A. The consequence of getting the allocation wrong is that the findings made under the FPP will be vulnerable to appeal on jurisdictional grounds in the High Court, and those provisions will have to be renotified (discussed further below).
16. As set out above, the allocation in the Section 32 report (App E) appears to have proceeded on a very broad approach to freshwater quantity and quality⁵, which is contrary to the findings of the High Court.
17. While Forest & Bird has some sympathy for the approach taken, in the context of limited participatory rights in the FPP, and of course the clear findings of the High Court, we do not support it.
18. We reiterate the test that the High Court expressed:

It will be only to the extent parts of the proposed regional statement regulate activities in the catchment or receiving environment, because of their effect on the quality or quantity of freshwater, that policies or objectives for the catchment or receiving environment will relate to freshwater for the purposes of s 80A.⁶
19. These submissions go into detail with respect to the indigenous biodiversity provisions, which clearly are not freshwater planning provisions. There are several other provisions that clearly do not meet the freshwater test, for example the climate change provisions. These are dealt with below.

⁵ Section 32 report, Appendix E, paragraph 10.

⁶ [2022] NZHC 177 at [200].

20. In our submission, many of the provisions that have been allocated to the FPP simply do not meet the tests made clear by the High Court. Those provisions will need to be reallocated to the P1S1 process.

Some provisions may also deal with matters other than freshwater

21. The Section 32 report goes on to note that some provisions touch on freshwater quantity and/or quality, but also other matters:

11. Consideration of relationship to freshwater has been undertaken at a provision level without splitting provisions. If a provision contains a matter deemed to impact on freshwater quality or quantity, that whole provision has been included in the freshwater planning instrument even if it also relates to other matters. This is because it can no longer be argued that the provision does not directly relate to freshwater, and regional councils must put freshwater-related provisions through the FPP. Breaking provisions up and putting them through different Schedule 1 processes would lead to unworkable outcomes whereby different parts of provisions could become disconnected.

22. Again, we have some sympathy with that reasoning. However, in our view, that approach is not available to the GWRC.

23. The GWRC is correct that freshwater provisions (or at least ‘parts’) must go through the FPP. But there is an equally mandatory requirement that any parts that are not directly related to freshwater go through the P1S1 process:

(3) A regional council must prepare a freshwater planning instrument in accordance with this subpart and Part 4 of Schedule 1. However, if the council is satisfied that only part of the instrument relates to freshwater, **the council must—**

(a) prepare that part in accordance with this subpart and Part 4 of Schedule 1; and

(b) **prepare the parts that do not relate to freshwater in accordance with Part 1 of Schedule 1 or**, if applicable, subpart 5 of this Part.
(emphasis added)

24. As noted above, freshwater planning provisions may not relate to seawater.⁷ Some provisions that have been allocated to the FPP appear to breach that requirement:

- a. Policy 14 is largely about the effects of activities on freshwater, but it also refers to effects on coastal water.⁸
- b. Policy 40 refers to the management of water quality in the coastal marine area for the health and wellbeing of marine ecosystems.

⁷ [2022] NZHC 1777 at [202].

⁸ E.g. pRPS Policy 14 (c) and (h).

- c. Policy 42 requires regard to be had to effects on both freshwater and the coastal marine area;
 - d. Policy FW.3 similarly requires consideration of effects on the coastal marine area.
25. If there are provisions that genuinely meet the test set out by the HC, that also deal with other matters, then those provisions may need to be withdrawn. They can then be redrafted so as to deal specifically with freshwater and non-freshwater matters. We acknowledge that this will require some work, and likely renotification. However, that will need to be done in order that PC1 can proceed according to the requirements of the Act.

Indigenous biodiversity provisions – Chapter 3.6, various policies, methods and definitions

26. A primary concern for Forest & Bird is that the provisions relating to indigenous biodiversity do not remain in the FPP.
27. In our view, none of the provisions should proceed through the FPP – either because the link with the maintenance of freshwater quality and quantity is too indirect, or because the other matters covered in the provisions are required (by s80A(3)(b)) to be decided via the P1S1 process.
28. The PC1 provisions that manage indigenous biodiversity (as set out in RPS Table 6(a)) include:
- a. Indigenous ecosystems: introductory text to chapter 3.6
 - b. Indigenous ecosystems issues: 1 – 3.
 - c. Chapter 3.6: Table 6(a).
 - d. Objectives: 16, 16A, 16B, 16C.
 - e. Regulatory policies: 23, 24, 47.
 - f. Non-regulatory policies: 61, IE.1, IE.2, IE.3, IE.4.
 - g. Methods: 1, 2, 4, 21, 32, 53, IE.1, IE.2, IE.3, IE.4.⁹
29. Allocation policy 61, and method 54 are also relevant (although not noted in Table 6(a)).
30. All of these provisions have been allocated to the FPP.

⁹ We note there are also some provisions in Table 6(a) which appear to be freshwater focussed, we do not take issue with those. Table 6(a) states that e.g. 'Policy FW.7: Water attenuation and retention – non-regulatory' gives effect to Objective 16A: PC1, page 63.

31. Indigenous Ecosystems Anticipated Environmental Results 1-4 have also been allocated to the FPP.¹⁰ Appendix 1A, which is entitled 'Limits to biodiversity offsetting and biodiversity compensation' has also been allocated to the FPP¹¹.
32. PC1 amends or adds several definitions relevant to indigenous biodiversity provisions, which have likewise been allocated to the FPP. These include:
- a. Biodiversity compensation
 - b. Biodiversity offsetting
 - c. Ecological connectivity
 - d. Ecological integrity
 - e. Ecosystem health
 - f. Enhancement (in relation to indigenous biodiversity)
 - g. Naturally uncommon ecosystems
 - h. Nature-based solutions
 - i. Protect (in relation to indigenous biodiversity)
 - j. Resilience (in relation to a natural ecosystem)
 - k. Restoration
 - l. Te Rito o te Harakeke
 - m. Threatened ecosystems or species
 - n. Tree canopy cover.
33. The S32 report assesses the amended objectives (pages 95-102), and the policies and methods to give effect to those objectives (pages 191-200). The later section beings with the following statement:

Intent of this policy package: The aim of this suite of policies and methods is to recognise in RMA planning and decision making that indigenous ecosystems and habitats have values that are broader than just for significant biodiversity, to strengthen the direction to identify and protect significant indigenous biodiversity, to provide greater direction to protect, maintain and restore all indigenous biodiversity in the region, and to better recognise and support the roles of mana whenua / tangata whenua as kaitiaki and landowners as stewards of indigenous biodiversity.

34. The s32 report summarises the policy package being progressed by PC1:¹²

There are five parts to this policy package. These are:

¹⁰ PC1, page 201.

¹¹ PC1, page 206.

¹² Section 32 report, page 191-192.

1. Amendments to policies 23 and 24 to specify a completion date for the identification of sites with significant biodiversity values, directing regional and district councils to have plan provisions in place to protect these sites by June 2025. While this has been a requirement in the RPS since 2013, and the RPS has provided a set of criteria to underpin this work since 1995, less than half of the district plans include schedules of significant sites and plan provisions.

Method 21 is amended to ensure that each territorial authority has a plan for completion in place to meet these timeframes.

2. Policy 24 has also been extended to provide a regional interpretation for the limits to the use of biodiversity offsetting and compensation (one of the principles already required by effects management hierarchies in international and best practice guidance and the principles of offsetting and compensation in the exposure draft NPS-IB). Appendix 1A applies these principles to identify the ecosystems and species where these limits apply in the Wellington Region. For sites with significant biodiversity it also changes the requirement for a 'no net loss' to a '10% net biodiversity gain' for offsetting and a '10% net biodiversity benefit' for compensation.

3. Policy IE.3 and Method IE.3 direct Greater Wellington, in partnership with mana whenua / tangata whenua, to use a systematic conservation planning process to maintain, enhance and restore the region's indigenous ecosystems to a healthy functioning state and to take a collaborative approach, with mana whenua / tangata whenua, landowners and the community, to identify strategic targets and priorities for restoration. Method CC.9 is a new method to provide support and funding to proactively seek to protect, enhance and restore sites with priority values for indigenous ecosystem and/or nature-based solutions.

4. Policies IE.1 and IE.2, and Method IE.1, IE.3, IE.4 (plus Method 32, discussed above) seek to better recognise and provide for Māori values for indigenous biodiversity and recognise and provide for the role of mana whenua / tangata whenua as kaitiaki in relation to indigenous biodiversity in the region.

5. Policy IE.4 and Method 32 seek to better recognise and provide for the important role that landowners and the community have as environmental stewards in relation to indigenous biodiversity.

35. Provisions aimed at managing effects on indigenous biodiversity, including those set out above, have been wrongly allocated to the FPP. It is clear from both the words of the provisions themselves, and the s32 analysis, that they were not intended as freshwater provisions. The provisions were not designed to regulate activities because of their effect on freshwater quality or quantity, and nor do they have a direct link with freshwater quality or quantity, in the way that is required under s80A.

36. Their allocation to the FPP appears to have happened as an afterthought.

37. Many of the changes are to give effect to the draft NPSIB. It would be completely inappropriate to allocate provisions intended to give effect to

national direction of biodiversity generally to a process designed specifically for expediting specific freshwater matters.

38. In fact, the GWRC itself recognised that because the NPSIB was not yet gazetted, the Schedule 1 process would be important to ensure alignment with the eventual national direction:

Change 1 is an important opportunity to align the RPS with the imminent NPS-IB. While this is at exposure draft stage now (so not gazetted), the direction is clear and if the NPS-IB is gazetted later this year as intended by the government, **Council can address any matters of misalignment through the Schedule 1 process.** Feedback from mana whenua / tangata whenua partners is very supportive of amended indigenous biodiversity provisions, including strengthened and new provisions to recognise and provide for their values.¹³

39. Further, the draft NPSIB is unlikely to apply to freshwater. Draft NPSIB cl. 1.3 appears to reflect an intention that biodiversity in freshwater will not be managed under the NPSIB.¹⁴
40. That means that RPS provisions intended to give effect to national direction on biodiversity outside freshwater, would be decided by a process specifically designed for freshwater planning. This absurd outcome cannot be allowed to proceed.
41. In the following section, the Objectives in chapter 3.6 are highlighted, as examples of the incorrect allocation of the biodiversity provisions to the FPP process. The same problems exist for all of the indigenous biodiversity provisions, which is evident from the words of the provisions themselves, and the s32 analysis.

Objective 16

42. Objective 16 has been amended to encompass an amended Objective 16 and also new Objective 16A, 16B and 16C. The stated intent for these provisions relate to biodiversity broadly. It is clear that there were not intended as freshwater planning provisions. Objective 16 reads:

Indigenous ecosystems and habitats with significant ecosystem functions and services and/or biodiversity values are maintained protected, enhanced, and restored to a healthy functioning state.

43. Under a heading entitled 'Intent of change', the reasons for amending Objective 16 are:

¹³ Section 32 report, pg 96.

¹⁴ Draft NPSIB clause 1.3 (relevantly):

(1) This National Policy Statement applies to indigenous biodiversity throughout Aotearoa New Zealand, other than indigenous biodiversity in the coastal marine area and aquatic indigenous biodiversity.

(2) However:

...

(c) provisions relating to restoration extend to include wetlands (see clauses 3.21 and 3.22);

- a. to acknowledge that indigenous ecosystems and habitats can have significant values that are broader than for indigenous biodiversity. An example is given: ‘e.g. modified wetland ecosystems can have significant values for improving water quality or for slowing the flow of water’;
- b. to provide consistency with RMA s6(c) which requires protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna as a matter of national importance that must be recognised and provided for; and
- c. to be consistent with the draft NPSIB.¹⁵

44. In our view, this is an example of an indirectly linked provision. While the objective recognises the ecosystem service value of indigenous ecosystems and habitats, it is a stretch to say that this provision is directly linked to the maintenance of freshwater quality and quantity. It is a biodiversity provision, which simply also recognises the co-benefits of protecting that biodiversity.

45. The provision squarely covers a very broad range of ecosystems. It is clear that it was never intended as a freshwater provision.

Objectives 16A, 16B, 16C

46. The three new objectives are squarely biodiversity focussed. They are not designed to regulate activities because of their effect on freshwater, nor are they in any other way directly linked to freshwater.

47. Objective 16A is:

The region’s indigenous ecosystems are maintained, enhanced, and restored to a healthy functioning state, improving their resilience to increasing environmental pressures, particularly climate change, and giving effect to Te Rito o te Harakeke.

48. The intent of the change is:

- a. To incorporate the concept of Te Rito o te Harakeke which is a fundamental concept at the core of the exposure draft NPS-IB; and
- b. to provide for the maintenance, enhancement and restoration of indigenous biodiversity generally, not just significant indigenous biodiversity, as required by the RMA s30(ga), the Aotearoa New Zealand Biodiversity Strategy and the exposure draft NPS-IB (2022).¹⁶

49. Objective 16B is:

Mana whenua / tangata whenua values relating to indigenous biodiversity, particularly taonga species, and the important relationship between indigenous

¹⁵ Section 32 report, pg 95.

¹⁶ Section 32 report, pg 96.

ecosystem health and well-being, are given effect to in decision-making, and mana whenua / tangata whenua are supported to exercise their kaitiakitanga for indigenous biodiversity.

50. The intent of the change is:

- a. to recognise and provide for Māori values for indigenous biodiversity and their role as kaitiaki, as required by Outcome 4 of Te Mana o te Taiao;
- b. to align with the draft NPSIB: including its fundamental concept of Te Rito o te Harakeke, its policy direction to recognise the role of mana whenua / tangata whenua as kaitiaki and enable mana whenua / tangata whenua to exercise this role for indigenous biodiversity in their rohe, and requirements to identify and protect taonga species, populations, and ecosystems (in agreement with mana whenua / tangata whenua).¹⁷

51. Objective 16C is:

Landowner and community values in relation to indigenous biodiversity are recognised and provided for and their roles as stewards are supported.

52. The intent of the change is:

- a. to better recognise the important role that landowners have as stewards for indigenous biodiversity, which aligns with the draft NPS-IB, and also gives effect to Objectives 8 and 9 of the ANZBS which seek to better support and collaborate with landowners and community members on conservation.

The Objectives are not freshwater planning provisions

53. As the Panels will be aware, Appendix E of the s32 report includes Table E-3, which notes the justification of each provision for allocation in the FPP or the P1S1 process. The s42A report writer supports the PC1 allocation, but notes that “I have not addressed legal issues associated with the allocation of provisions between the FPP and the S1P1 processes as this is a legal matter and a matter for the Hearing Panel to determine.”¹⁸

54. In justifying the inclusion of Objective 16, 16A and 16B in the FPP, the s32 report states:

Indigenous ecosystem health includes freshwater ecosystem health, which is intrinsically and directly linked to protecting and enhancing freshwater quality and quantity.¹⁹

55. For Objective 16C, the justification is:

¹⁷ Section 32 report, pg 96.

¹⁸ Section 42A report, General Submissions, paragraph 106.

¹⁹ Section 32 report, App E, pg 392.

Community and landowner values relating to indigenous biodiversity are intrinsically and directly linked to protecting and enhancing freshwater quality and quantity. Efforts supported by this objective often include fencing, wetland restoration and riparian planting among other actions.²⁰

56. In Forest & Bird's view:

- a. The objectives are not "directly related to matters that will impact on the quality and quantity of freshwater;"²¹
- b. And even if they are, they also cover issues that are required to be managed by the P1S1 process.

57. It is noteworthy that there are almost no references to water in the parts of the s32 report on chapter 3.6. The overwhelming focus is biodiversity generally.

58. In the section entitled 'Indigenous ecosystems: appropriateness of objectives', as set out above, the reasons for each change are given. None of these reasons refer to the NPSFM. There is a brief mention of water quality for Objective 16.²² The reasons do refer to other national direction, statutory documents, RMA provisions relating to biodiversity, and also a brief mention of the importance of healthy ecosystems for resilience to climate change.²³

59. It is acknowledged that the amended Objective 16 now addresses not only the biodiversity values of indigenous ecosystems and habitats, but also their 'ecosystem functions.' In this sense, as noted by the s32 report, the Objective covers an aspect of ecosystems that may also have benefits to water quality. However, the Objective is primarily designed to give effect to s6(c)RMA, which requires protection of significant biodiversity.

60. Objectives 16-16C are then analysed with respect to relevance, usefulness and achievability.²⁴ Other than the ecosystem services (Obj. 16) link to water quality already discussed, water is not mentioned. National direction such as the NPSIB and Emissions Reduction Plan and National Adaptation Plan, are mentioned; the NPSFM is not. None of the other parts in this section address any connection to regulation for the purpose of freshwater quality or quantity.

61. In the later section, entitled 'Indigenous ecosystems evaluation – efficient and effectiveness of provisions', there is similarly no mention of the relationship between the provisions and freshwater management.²⁵

²⁰ Ibid.

²¹ Decision, paragraph [202].

²² 'Objective 16 is amended to acknowledge that indigenous ecosystems and habitats can have significant values that are broader than for indigenous biodiversity, e.g. modified wetland ecosystems can have significant values for improving water quality or for slowing the flow of water.' Section 32 report, pg 95.

²³ Section 32 report, pages 95-97.

²⁴ Section 32 report, pages 99-102.

²⁵ Section 32 report, pages 191-200. There is a brief mention that the preferred approach 'Provides better scope to meet iwi aspirations to restore the mana and mauri of waterways and indigenous ecosystems' on page 198, and a reference to the ecosystem services of identified SNAs, pg 195.

62. Furthermore, freshwater is already adequately covered by many other provisions in the RPS, which are squarely directly related to the maintenance of freshwater quality and quantity. Some of these are listed in the s32 as related to the Chapter 3.6 provisions.²⁶ They include (paraphrased):
- a. Objective 12 – management of resources in a way that prioritises aspects of freshwater as set out in the NPSFM; and sets out Te Mana o te Wai.
 - b. Objective 13 – that the region’s water bodies support healthy functioning ecosystems.
63. There is therefore no need to pull the Indigenous Ecosystems provisions into the FPP.
64. The same comments can be made of the *Indigenous Ecosystems introductory text*, and *Indigenous Ecosystems Issues 1, 2 and 3*, and Table 6(a). These RPS provisions are required to go through the P1S1 process.

Other biodiversity provisions

65. As set out above, other than in Chapter 3.6, PC1 makes several amendments to provisions for indigenous biodiversity:
- a. Policies;
 - b. Appendix 1A (relating to biodiversity offsetting and compensation);
 - c. Methods;
 - d. Anticipated environmental results; and
 - e. Definitions.
66. All of the same considerations apply. The provisions are not directly linked to the maintenance of freshwater quality or quantity, and have not been proposed to regulate activities because of their effect on freshwater quality or quantity. The link with freshwater is far too indirect for these provisions to be included in the FPP. The provisions are in many cases, to give effect to the NPSIB, or to better give effect to other biodiversity related obligations under the RMA.
67. The s32 report makes clear that the policy package is for biodiversity management, not freshwater management:
- a. Policies 23 and 24 are amended to specify a completion date for the identification of SNAs; method 21 makes a corresponding change;²⁷

²⁶ Section 32 report, pages 97-98.

²⁷ Section 32 report, page 191.

- b. Policy 24 has been amended to deal with the limits to biodiversity offsetting and compensation; Appendix 1A provides detail to that concept;²⁸
- c. Policy 47 is amended to incorporate biodiversity offsetting and biodiversity compensation;
- d. Policy 1E.3 and Method IE.3 relates to a process in partnership with mana whenua/tangata whenua for systematic conservation planning. Policy IE.3 states that it is to give effect to Te Rito o te Harakeke, which is the fundamental concept in the draft NPSIB. Method IE.3 is about regional conservation strategies – again, a requirement of the NPSIB.
- e. Policies IE.1 and IE.2, and Method IE.1, IE.3, IE.4, and Method 32) seek to better recognise and provide for Māori values for indigenous biodiversity and recognise and provide for the role of mana whenua / tangata whenua as kaitiaki in relation to indigenous biodiversity in the region.²⁹ These provisions are squarely biodiversity focussed, and do not mention water. Method IE.1, for example, is explicitly to give effect to Te Rito o te Harakeke. Method IE.4 is the only provision that touches on freshwater management – it deals with monitoring in partnership with mana whenua/tangata whenua, in relation to both Te Mana o te Wai and Te Rito o te Harakeke, and also to inform the regional biodiversity strategy.
- f. Policy IE.4 provides recognition of the role of landowners as stewards of indigenous biodiversity, and does not mention water;
- g. Method 32 covers engagement with the community and partnership with mana whenua/tangata whenua in relation to: identifying significant biodiversity areas, areas with significant cultural or historical values, ONFLs, and nature-based solutions to climate change; developing a regional biodiversity strategy; protecting rivers and lakes listed in Appendix 1. This is a very broad method, that does not meet the test of being directly linked to freshwater management. The link is peripheral, and further, the method deals with several matters that are required to be dealt with in the P1S1 process.

68. The new/amended definitions likewise are for the purpose of biodiversity provisions. The definitions do not appear to be separately discussed in the s32 report, but they are terms that are used in the biodiversity provisions. The following relevant terms have been allocated to the FPP:

- a. Biodiversity compensation (e.g. Policy 24)
- b. Biodiversity offsetting (e.g. Policy 24)

²⁸ Ibid.

²⁹ Section 32 report, page 192.

- c. Ecological connectivity (e.g. Policy IE.3)
- d. Ecological integrity (e.g. Policy IE.3)
- e. Ecosystem health (e.g. Policy IE.3)
- f. Enhancement (in relation to indigenous biodiversity)
- g. Naturally uncommon ecosystems (in Appendix 1A)
- h. Nature-based solutions (not in the specific biodiversity provisions, but in Policy CC.7)
- i. Protect (in relation to indigenous biodiversity)
- j. Resilience (in relation to a natural ecosystem)
- k. Restoration (e.g. Method 53)
- l. Te Rito o te Harakeke (in several policies, from the draft NPSIB)
- m. Threatened ecosystems or species (e.g. Policy 24)
- n. Tree canopy cover (not in the specific biodiversity provisions, but in Policy CC.14)

69. It is clear that these definitions must be considered under the standard P1S1 process.

Provisions for matters other than indigenous biodiversity

70. While we have not provided detailed analysis on all the topics/provisions allocated to the FPP, given what we have found with respect to the biodiversity provisions, many of the same conclusions will be able to be drawn.

71. As noted above, Forest & Bird's position is that the following provisions have been wrongly allocated to the FPP:

- a. Overarching provisions e.g. Chapter 3
- b. Climate change provisions e.g. Chapter 3.1A.
- c. Natural hazard provisions e.g. Objective 20.
- d. Urban design provisions e.g. Objective 22, Policy 31.
- e. Provisions concerning wetlands in the coastal marine area (the NPSFM only applies to "natural inland wetlands").
- f. The policies and methods that give effect to the above provisions.

72. Following the High Court decision, the Otago Regional Council has re-notified the freshwater parts of its RPS. It is notable how confined those provisions are to freshwater matters.³⁰
73. We note that the biodiversity provisions of the Otago pRPS are not listed as freshwater provisions, despite covering very similar subject matter to the provisions in PC1.³¹ The Otago pRPS acknowledges the ties between ecosystems and ecosystem services relating to wetlands for example,³² and includes a specific provision recognising the links between the terrestrial environment and freshwater.³³ All biodiversity provisions are P1S1 provisions.

Way forward

74. Forest & Bird accordingly seeks that only those provisions coming within the ambit expressed by the High Court above go through the freshwater planning process.
75. In our view, all of the provisions dealing with indigenous biodiversity must be reallocated to the P1S1 hearings process.
76. There are likely to be many other parts of the RPS that must follow the standard process, including the provisions for climate change, natural hazards, and urban design. A short pause may be needed for the GWRC to review their previous allocation decisions.
77. It is crucial that the correct provisions are heard by the appropriate panel. As the Panels are well aware, the FPP has constrained appeal rights. That fact supported the High Court's finding that the starting point should be that the RPS provisions proceed in the normal way, via P1S1.³⁴
78. If non-freshwater provisions are heard and decided on by the Freshwater Panel, those findings will be vulnerable to appeal to the High Court, as the incorrect jurisdiction will have been used. If the High Court finds that the provisions should not have been heard under the FPP, the GWRC will essentially have to 'start again.'
79. In *ORC v Forest & Bird*, the High Court ordered the Council to reconsider which provisions were freshwater planning provisions, in light of the Court's decision. Those parts of the notified RPS that were not freshwater planning provisions could proceed under the normal P1S1 process.³⁵ With respect to the parts that were appropriately dealt with via s80A, the ORC was effectively back at square

³⁰ The re-notified RPS, showing the split between FPP and non-FPP provisions, can be found here <https://www.orc.govt.nz/media/12961/porps-fpi-version-for-re-notification.pdf>.

³¹ Ibid, at pages 143-151.

³² Ibid at page 85.

³³ ECP-P10, ibid, at page 146

³⁴ [2022] NZHC 1777, at [203].

³⁵ [2022] NZHC at [231](c).

one, as those provisions could not proceed. The ORC had to renotify the freshwater parts of the plan.³⁶

80. We note that the GWRC is in a better position than the ORC, because it already has established two hearings panels. In our view, if the Council reallocates the non-freshwater provisions to the P1S1 process, the process can carry on, and renotification may not be required. A short delay may be required for the reallocation process.
81. If there are any provisions that the GWRC considers genuinely are directly linked to both freshwater matters and other matters, then those may need to be withdrawn, redrafted (so as to split the freshwater and non-freshwater aspects), and renotified.

Dated 13 June 2023



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³⁶ For various documents relating to that process, see <https://www.orc.govt.nz/plans-policies-reports/regional-plans-and-policies/otago-regional-policy-statements/freshwater-planning-instrument-parts-of-proposed-otago-regional-policy-statement-porps-2021>.