I MUA NGĀ KAIKŌMIHANA WHAKAWĀ MOTUHAKE
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 Wellington Regional Policy Statement (**RPS**)

Legal submissions for the Royal Forest & Bird Protection Society Inc

Hearing Stream 6 (Indigenous ecosystems)

5 February 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 Change 1 to the Regional Policy Statement for the Wellington Region as it relates to Indigenous Ecosystems.

2. These submissions provide the legal context and basis to support remaining amendments sought by Forest & Bird, particularly unresolved matters in the Section 42A Report relating to effects management.

Statutory and planning framework

3. Counsel agrees with:
   a. the legal submissions for Greater Wellington on the application of the National Policy Statement for Indigenous Biodiversity (NPSIB).[1] Specifically, that the NPSIB must be given effect to insofar as there is scope.
   b. The recommendation in the S42A report that all Indigenous Ecosystem provisions ought to be addressed through the Schedule 1 process of the RMA.[2]
4. While practitioners are well-aware, key statutory imperatives relevant to the content of this Hearing Stream 6 are reiterated:
   a. 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.
   b. Maintaining indigenous biodiversity is a statutory function of both regional and district councils.[3]

Issue 10: Policy 24 and Appendix 1A

Policy 24 - Giving effect to the NPSIB

5. The s42A Report recommends that Policy 24 be amended as follows:

> Protecting indigenous ecosystems and habitats with significant indigenous biodiversity values – district and regional plans
> <u>As soon as reasonably practicable and by no later than 4 August 2028</u>, ~~D~~<u>d</u>istrict and regional plans shall include policies, rules and methods to protect indigenous

[1] Legal submissions on behalf of Wellington Regional Council – Hearing Stream 6, dated 19 December 2023
[2] Section 42A Hearing Report Hearing Stream 6 dated 11 December 2023, at [73]-[74]
[3] Sections 30(1)(ga), 31(1)(b)(iii)

ecosystems and habitats with significant indigenous biodiversity values from inappropriate subdivision, use and development, including by applying:
(a) Clause 3.10 and Clause 3.11 of the National Policy Statement for Indigenous Biodiversity 2023 to manage adverse effects on significant indigenous biodiversity values in the terrestrial environment;
(b) Policy 11 of the New Zealand Coastal Policy Statement 2010 to manage adverse effects on indigenous biodiversity values in the coastal environment; and
(c) Policies 18A and 18B in this Regional Policy Statement to manage adverse effects on the values and extent of natural inland wetlands and rivers.

6. Forest & Bird does not support the approach of cross-referencing relevant effects management hierarchies from national policy statements (Option 1).

7. Option 1 does not discharge the statutory obligation to give effect to these national policy documents as required by section 62(3) of the RMA.

8. Further, signals of a changing national policy context are an irrelevant consideration. Signals of future amendments do not form part of the list of matters to be considered by a regional council when preparing and changing its regional policy statement under s 61 of the RMA.[4]

9. The planning rationale in the evidence of Ms Burns for Rangitāne o Wairarapa is also respectfully adopted in this regard.[5] If the cross-reference method is used, any ensuing changes to the NPSIB, either via amendment or repeal, will results in blurring the policy intent or otherwise creating a large gap which may compromise the ability meet the statutory obligations in s 6(c) and ss 30 and 31 RMA, and to safeguard life-supporting capacity of ecosystems which is required to achieve sustainable management in accordance with s 5(2) RMA.

10. Accordingly, Forest & Bird supports the exploration of Options 2 or 3 put forward in the Section 42A report, but with additional amendments to ensure infrastructure is not exempt from environmental bottom lines contained in higher order direction

[4] *(1) A regional council must prepare and change its regional policy statement in accordance with—*
(a) its functions under section 30; and
(b) the provisions of Part 2; and
(c) its obligation (if any) to prepare an evaluation report in accordance with section 32; and
(d) its obligation to have particular regard to an evaluation report prepared in accordance with section 32; and
(da) a national policy statement, a New Zealand coastal policy statement, and a national planning standard; and
(e) any regulations

[5] Statement of Evidence of Maggie Burns dated 26 January 2024 at [46]-[52].

(discussed below). This is consistent with Forest & Bird's submission, which sought that the addition in the RPS of a full requirement "to give effect to a full set of mandatory offsetting and compensation principles."[6]

Pathways for infrastructure (including renewable electricity generation)

11. Forest & Bird opposes any sector-based carve-outs (including for renewable electricity generation and transmission assets and activities). It seeks that any gaps left by the NPSIB is filled in the RPS process to ensure such activities are still subject to relevant effects management hierarchies.

12. The carve-out in the NPSIB is unusual in that it ousts the role of section 6(c) of the Resource Management Act 1991 for two specific sectors where there is no clear statutory basis to do so. It could also have the perverse effect of overriding other parts of Part 2 of the RMA, including ss 6(e)[7] and 8.[8]

13. While the previous Government indicated a replacement NPS for electricity transmission and renewable energy to potentially plug this gap, the final content and timing of any replacement is not known. In the meantime, counsel submits the Panel cannot rely on the NPSIB as giving effect to the purposes and principles of the Act insofar as renewable electricity generation is concerned.

14. Amendments to the RPS to fill this gap have a statutory basis in section 6(c) as a matter to be recognised and provided for. The NPSIB, an Executive-made document, cannot override the operation of s 6 of the RMA, an Act of Parliament.

15. In *King Salmon,* the Supreme Court makes clear that "absent invalidity, incomplete coverage or uncertainty of meaning" in the intervening statutory documents, there is usually no need to look at Part 2 of the RMA, otherwise known as "the caveats" in *King Salmon.*[9] These caveats apply here, as the NPSIB is clearly "incomplete" in its coverage", thus it is necessary to go to Part 2 of the RMA in this instance.

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[6] Submission on Proposed Change 1 to the Regional Policy Statement for the Wellington Region 20 October 2022 at page 26

[7] The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga

[8] In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[9] *Environmental Defence Society v King Salmon* [2014] NZSC 38 at [85].

Policy 24A – 10% net gain

16. Forest & Bird reserves its position on the reference to a "10% net gain" in Policy 24A, which is now referred in clause (d) as follows:

> (d) District and regional plans shall include policies and methods that require biodiversity offsetting or aquatic offsetting to achieve at least a net gain, and **preferably a 10% net gain** or greater, in indigenous biodiversity outcomes to address residual adverse effects on indigenous biodiversity, extent, or values. This requires demonstrating, and then achieving, net gains in the type, amount, and condition of the indigenous biodiversity, extent, or values impacted. Calculating net gain requires a like-for-like quantitative loss/ gain calculation of the indigenous biodiversity values (type, amount, and condition) affected by the proposed activity;

17. While the redrafting of Policy 24A may be an improvement, the reference to "10% net gain" does not overcome the inherent uncertainties associated with biodiversity modelling. The issue with 10% net gain is that it assumes a level of accuracy in the offsetting models (to confirm a 10% net gain) which does not exist. The problems associated with modelling to confirm losses and gains is best expressed by Corkery and others in a recent paper "Poorly designed biodiversity loss-gain models facilitate biodiversity loss in New Zealand":[10]

> Depending on how they are designed and used, models can considerably undervalue existing biodiversity and overvalue certain management interventions. Bias in models can lead to consistently negative ecological outcomes across many development projects. Omissions, miscalculations, and directional biases in the assumptions of a model can aggregate to large errors in predictions.
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> …
>
> …it is conceivable that decision-makers may be inclined to place undue weight on predictions in situations where uncertainties and assumptions are obscured in the presentation of model outputs. As indicated by the Te Kuha case study, not all models currently used by practitioners in Aotearoa/New Zealand produce reliable calculations.

18. A general reference to "net gain" as opposed to specifying a quantum of net gain may drive better ecological outcomes.

Policy 24A – application in the coastal environment

19. Forest & Bird remains concerned with the application of Policy 24A. The explanation notes:

> Policy 24A recognises that the outcomes achievable through the use of biodiversity or aquatic offsetting and compensation are different. A 'net gain' outcome from

[10] Corkery and others ""Poorly designed biodiversity loss-gain models facilitate biodiversity loss in New Zealand" (2023) Vol 47(1) New Zealand Journal of Ecology, at 5-6.

> offsetting is expected to achieve an objectively verifiable increase in the target values, while a compensation outcome is more subjective and less preferable. **This policy applies to the use of biodiversity offsetting and biodiversity compensation to address the residual adverse effects on indigenous biodiversity in the terrestrial and coastal environments and aquatic offsetting and compensation to address the loss of extent or values of natural inland wetlands and rivers**.

20. The explanation states offsetting and compensation apply in the coastal environment. This could mislead and is inaccurate in that:
    a. the NZCPS, which applies in the coastal environment:
        i. makes no express reference to offsetting and compensation.
        ii. applies exclusively in the coastal marine area.
    b. "Terrestrial environment" in the NPSIB includes land and associated natural and physical resources above mean high-water springs[11] – therefore the coastal marine area is outside the purview of the NPSIB.

21. The NPSIB expressly stipulates that while both the NZCPS and NPSIB apply in the "terrestrial coastal environment", where there is a conflict, the NZCPS prevails.[12]

22. Counsel submits that the room for conflict between the two documents is large. Using wetlands for example, the NZCPS contains strong policies that apply to wetlands and their values. Many of those policies (particularly Policies 11, 13, and 15)[13] are more directive than the NPSIB. Coastal wetlands such as those containing saltmarsh may also traverse both the coastal marine area and the "terrestrial environment". It is therefore important that provisions on effects management are certain as to where offsetting and compensation is permissible. The explanation therefore needs to be amended to clarify that Policy 24A does not apply in the coastal marine area, and that where there is conflict in the coastal environment, the NZCPS prevails.

Appendix 1A – When biodiversity offsetting and compensation is not appropriate

23. Recommended Policy 24A refers to Appendix 1A as follows:

> (b) In evaluating whether biodiversity offsetting or aquatic offsetting is inappropriate because of irreplaceability or vulnerability of the indigenous biodiversity, extent, or values affected, **the feasibility to offset residual adverse**

[11] NPSIB, clause 1.6
[12] NPSIB, clause 1.4
[13] Concerning Indigenous biological diversity, preservation of natural character, and natural features and natural landscapes, respectively.

> **effects on any threatened or naturally uncommon ecosystem or threatened species listed in Appendix 1A must be considered as a minimum**; and
> (c) In evaluating whether biodiversity compensation or aquatic compensation is inappropriate because of the irreplaceability or vulnerability of the indigenous biodiversity, extent, or values affected, recognise that it **is inappropriate to use biodiversity compensation or aquatic compensation where residual adverse effects affect an ecosystem or species that is listed in Appendix 1A as threatened or naturally uncommon**; and

24. Forest & Bird's submissions noted concern with the static nature of Appendix 1A, which does not account for changes occurring in the environment which can change the status of a species or ecosystem. This is somewhat assuaged by the addition of the following terms added to beginning of Appendix 1A itself:

> The species listed in Table 17 are the nationally Threatened species and ecosystems and naturally uncommon ecosystems that are found within the Wellington Region, as detailed in the relevant publications listed on the Department of Conservation's New Zealand Threat Classification web page. These ecosystems and species are assessed as being "vulnerable" or "irreplaceable" in accordance with the principles as to when biodiversity offsetting and biodiversity compensation is inappropriate. Note that the species list will change over time as national threat lists are updated or more knowledge is gained about the presence or absence of a species in the Wellington Region. **The most up-to-date threat classification should be used at the time of making an assessment under Policy 24A or Policy 47 (h) and (i).**

25. However, the way Appendix 1A is referred in Policy 24A(b) and (c) leaves room for doubt as to whether a worsened threat status of a species not referred in Appendix 1A must be considered when determining whether offsetting or compensation is appropriate. To overcome this, the following terms could be added after the reference to "Appendix 1A" in both (b) and (c): "and any individuals of Threatened or At Risk (Declining) taxa under the New Zealand Threat Classification System".

26. This approach accords with approach taken by the Environment Court's final decision in *Oceana Gold Ltd v Otago Regional Council.*[14] The Court's interim decision was appealed to the High court, who confirmed:[15]
    a. it was lawful for a regional policy statement to include specific limits on when biodiversity offsetting and compensation are available; but that
    b. a biodiversity offset or compensation must ensure "there is no loss of individuals of rare or vulnerable species as defined in the reports published prior to 14 January 2019 under the New Zealand Threat Classification System" was unlawful because the NZTCS does not define those terms.

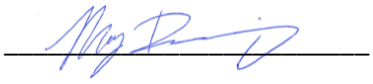
[14] [2020] NZEnvC 137
[15] *Oceana Gold Ltd v Otago Regional Council* [2020] NZHC 436 at [20]-[24]

27. The High Court remitted the issue back to the Environment Court to "provide a workable definition in relation to affected species".[16]

28. On referral back, the Environment Court amended the limit to require no loss of individuals of Threatened or At Risk (Declining) taxa under the New Zealand Threat Classification System, on the basis these categories correspond with rare or vulnerable.[17] The outstanding dispute amongst parties for the Environment Court's final decision related to whether mānuka and kānuka ought be excluded.

29. Counsel submits that responding to the section 6(c) direction regarding matters of national importance requires plan provisions that can accommodate ongoing identification and protection of threatened and at-risk species in response to new or changing information and circumstances.

Dated this 5th day of February 2024



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[16] *Oceana Gold Ltd v Otago Regional Council* [2020] NZHC 436 at [23]
[17] [2020] NZEnvC 137 at [11]