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	Plan Change 1 to the Natural Resources Plan for the Wellington Region

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Legal submissions for the Royal Forest & Bird Protection Society Inc

Hearing Stream 3 (Rural land use activities, Forestry and Vegetation Clearance, and Earthworks)

9 May 2025

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MAY IT PLEASE THE COMMISSIONERS

1. The Royal Forest & Bird Protection Society Inc (**Forest & Bird**) lodged submissions and further submissions on Proposed Plan Change 1 (**PC1**) to the Natural Resources Plan for the Wellington Region.
2. While aspects of Forest & Bird's submission are adequately addressed in the s42A reports, many concerns raised are largely unresolved. There are instances of important provisions that Forest & Bird supports and seeks retention of – which the s 42A reports have recommended dismantling.
3. The critical issues for Forest & Bird in Hearing Stream 3 relate to the management of diffuse discharges, nitrogen management, stock access, and the use of setbacks. For matters relating to forestry and vegetation clearance, Forest & Bird adopts the legal submissions of the Environmental Defence Society.
4. There are some matters raised in the original and further submissions that are not addressed in these legal submissions. In relation to these matters, Forest & Bird relies on its original and further submissions.

Statutory and planning considerations

RMA

5. Section 6 of the RMA lists the matters of national importance to be "recognised and provided for" in decisions. All are relevant, but of most concern to Forest & Bird are:
    a. Section 6(a): "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."
    b. Section 6(c): "the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna"
6. Regional Councils are also required to control land use and other activities for the purpose of "the maintenance and enhancement of the quality of water".[1] As observed by the Environment Court in *Ngati Kahungunu v Hawkes Bay Regional Council,* "this function is not optional – it is something a regional council is required to do, whether it be difficult or easy."[2]

[1] RMA section 30(1)(c)(iii)
[2] *Ngati Kahungunu v Hawkes Bay Regional Council* [2015] NZEnvC 50 at [29]

The National Policy Statement for Freshwater Management

7. The National Policy Statement for Freshwater Management (NPSFM) applies to all freshwater (including groundwater) and, to the extent they are affected by freshwater, to receiving environments (which may include estuaries and the wider coastal marine area).[3] It fulfils the section 6 requirements by directing, among other matters:

    a. **2.1 Objective:** The objective of the is National Policy Statement is to ensure that natural and physical resources are managed in a way that prioritises (a) first, the health and well-being of water bodies and freshwater ecosystems.

    b. **Policy 5:** Freshwater is managed (including through a National Objectives Framework) to ensure that the health and well-being of degraded water bodies and freshwater ecosystems is improved, and the health and well-being of all other water bodies and freshwater ecosystems is maintained and (if communities choose) improved.

    c. **Policy 9:** The habitats of indigenous freshwater species are protected.

    d. **Policy 13:** The condition of water bodies and freshwater ecosystems is systematically monitored over time, and action is taken where freshwater is degraded, and to reverse deteriorating trends.

New Zealand Coastal Policy Statement

8. The New Zealand Coastal Policy Statement (NZCPS) applies to the coastal environment, not just the coastal marine area, and contains several provisions relevant to managing water quality. Key provisions include:

9. Objective 1:

> To safeguard the integrity, form, functioning and resilience of the coastal environment and sustain its ecosystems, including marine and intertidal areas, estuaries, dunes and land, by:
>
> …
>
> maintaining coastal water quality, and enhancing it where it has deteriorated from what would otherwise be its natural condition, with significant adverse effects on ecology and habitat, because of discharges associated with human activity.

10. Policy 22:

> **Sedimentation**

[3] NPSFM clause 1.5

(1) Assess and monitor sedimentation levels and impacts on the coastal environment.

(2) Require that subdivision, use, or development will not result in a significant increase in sedimentation in the coastal marine area, or other coastal water.

(3) Control the impacts of vegetation removal on sedimentation including the impacts of harvesting plantation forestry.

(4) Reduce sediment loadings in runoff and in stormwater systems through controls on land use activities.

11. The NZCPS also contains provisions dealing with biodiversity,[4] and requires avoidance of adverse effects on certain species and habitats.[5] This is relevant to the management of waterbodies in the coastal environment which provide habitat to threatened and at-risk species.[6] The NZCPS also applies to activities outside the coastal environment that influence the coastal environment

Regional Policy Statement for the Wellington Region

12. The following provisions of Regional Policy Statement for the Wellington Region (RPS) are also relevant:

Policy 15 Managing the effects of earthworks and vegetation clearance – district and regional plans
Regional and district plans manage the effects of earthworks and vegetation clearance as follows:
(a) regional plans shall include policies, rules and/or methods that:
(i) control the effects of earthworks and vegetation clearance including through setbacks from wetlands and riparian margins, to achieve the target attribute states for water bodies and freshwater ecosystems, including receiving environments; and
(ii) in the absence of target attribute states, minimise silt and sediment runoff into freshwater and receiving environments, or onto land that may enter water; and
(iii) minimise erosion; and
(iv) manage sediment associated with earthworks except as specified in clause (b)iv.

(b) district plans shall include policies, rules and/or methods that:
(i) require urban development to follow existing land contours, to the extent practicable; and
(ii) minimise the extent and volume of earthworks required for urban development; and
(iii) require setbacks from waterbodies and other receiving environments for vegetation clearance and earthworks activities; and
(iv) manage sediment associated with earthworks less than 3000m2 ; and

Policy 18: Maintaining and improving the health and wellbeing of water bodies and freshwater ecosystem health – regional plans
Regional plans shall include policies, rules and/or methods that give effect to Te Mana o te Wai, and in doing so maintain and improve the health and wellbeing of water bodies and freshwater ecosystem health, including by:
(f) protecting the *habitats* of *indigenous freshwater* species; and

[4] NZCPS Policy 11(a)
[5] NZCPS Policy 11(b)
[6] NZCPS Policy 11(a)(i)

…
(j) protecting and reinstating *riparian habitat;* and
…
(m) restricting stock access to estuaries, *rivers*, *lakes* and *wetland*; and

Policy P36: Restoring Te Awarua-o-Porirua Harbour, Wellington Harbour (Port Nicholson) and Wairarapa Moana
The ecological health and significant values of Te Awarua-o-Porirua Harbour, Wellington Harbour (Port Nicholson) and Wairarapa Moana will be restored including by:
(a) managing activities, erosion-prone land, and riparian margins to reduce sedimentation rates and pollutant inputs, to meet the water quality, aquatic ecosystem health and mahinga kai objectives set out in Tables 3.4 to 3.8, and

Rural land use

Diffuse discharges – WH.P21, WH.P22, P.20 and P.P21

13. The s42A Report recommends amendments to policies WH.P21, WH.P22, P.20 and P.P21 which remove the direction to "cap" diffuse discharges. Instead, the report recommends:

    a. that diffuse discharges are "minimised";[7] and

    b. removing use of a "recognised nitrogen risk assessment tool" to measure nitrogen discharge risk.

14. Forest & Bird is concerned that this approach leaves a lacuna in terms of maintaining the health and wellbeing of water bodies and freshwater ecosystems. This approach is problematic for the following reasons:

    a. It provides for an argument to be raised that effects of diffuse discharges will be "minimised", or otherwise "reduced to the smallest amount reasonably practicable." This approach invites arguments in each consent process as to what is "minimised," or "reasonably practicable". The term "practicable" was considered by the High Court in *Tauranga Environmental Protection Society v Tauranga City Council*.[8] The High Court observed that costs are relevant when considering "practicability or to practicality" [9], and that "what cost is "too" high to satisfy an alternative not being "practicable" is a matter of fact and degree to be assessed in the circumstances".[10]

[7] Defined under the Operative NRP as: "Reduce to the smallest amount reasonably practicable. Minimised, minimising and minimisation have the corresponding meaning"
[8] *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201
[9] *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201 at [147]
[10] *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201 at [148]. This is unlike the term "possible", where the High Court observed at [149]: The plain meaning of

b. It may lead to "death by a thousand cuts" if incremental increases are provided for, that cumulatively have a significant impact.

c. The direction to "minimise", given its subjectivity, is a poor way to manage the potentially significant cumulative adverse effects. This can lead to inconsistent decision-making and is not efficient resource management planning.

d. It may ultimately lead to greater diffuse contaminant discharge from rural activities, acknowledged in the s 32 Report.[11]

e. It does not fulfil the NPSFM Policy 5 direction to ensure the health and well-being of all other water bodies and freshwater ecosystems is maintained. While Forest & Bird understands that not all waterbodies in the Whaitua may be degraded for nitrogen, the health and well-being of these waterbodies must still be maintained. A direction to "minimise" diffuse discharges is incongruous with the direction to maintain ecosystem health.

f. Further, the evidence of Dr Greer refutes submissions which assert that "N loss management is unnecessary because nitrogen is not a problem in the region's freshwater bodies to begin with."[12] Dr Greer's evidence is that "there is an environmental risk associated with allowing nitrogen losses to increase, that being non-compliance with the DIN nutrient outcomes and, consequently, the periphyton biomass TASs in Tables 8.4 and 9.2 of PC1."[13]

15. For these reasons, Forest & Bird submits that the references to "capping" in notified versions WH.P21, WH.P22, P.20 and P.P21 must be retained.

"Recognised nitrogen risk assessment tool" – definitions, P.P21, WH.P22, and Sch 36

16. The section 42A report recommends removing use of a "recognised nitrogen risk assessment tool" from PC1 (including from the definition, policies P.P21, WH.P22, and Schedule 36: Additional requirements for Farm Environment Plans).

17. Forest & Bird's submissions did not oppose the use of a nitrogen risk assessment tool, but the method by which an appropriate tool is determined. The notified framework allows a tool to be used to fulfil the policies in the plan by a process

"possible" in NH 11(1)(b) suggests that if an alternative is technically feasible it is possible, whatever the cost.

[11] Section 32 Report – Part D, page 140

[12] Greer EIC for HS3 at [49]

[13] Greer EIC for HS3 at [49]

outside Schedule 1 – which means anything could be approved so long as its 'quantitative' and assesses risk of nitrogen discharge.

18. Forest & Bird still supports the use of a nitrogen risk assessment tool and considers the s42A report has gone too far by recommending it be removed. Rather than removing it, the definition could be improved by including objective criteria that the tool must meet. These could usefully include that the tool is transparent, relates to actual risk, includes biophysical factors, is based on published peer-review science and has been calibrated for use in the biophysical environment and farming system it is being applied to.

Farming activities on property between 4 hectares and 20 hectares - WH.R26 and P.R25

19. The s42A Report recommends the deletion of rules WH.R26 and P.R25. Forest & Bird does not accept the deletion of these rules. Its original submission sought an amendment to clause (e) to provide that "annual nitrogen fertiliser use, the annual stocking rate, and the winter stocking rate is provided to the Wellington Regional Council annually".[14] This ensures the council has information on land use pressures to so they can appropriately manage inputs and set limits on resource use. NPSFM Policy 13 also directs this.[15]

20. It is important that the rules are retained as these form part of the response to addressing the problem of nitrogen loss and diffuse discharges traversed earlier.

Livestock access to a small river – WH.R28

21. Forest & Bird's submission sought the retention of notified WH.R28, which requires stock to be excluded from streams that are smaller than 1 metre, unless:

    a. For stock crossing; or

    b. Where the farm environment plan for the farm includes a small stream riparian programme and the farm environment plan is certified.

22. The s42A report writer has recommended amendments to WH.R28 which may confuse and have the effect of relaxing existing requirements for stock exclusion under the NRP.

[14] And to retain the balance of the rule

[15] "The condition of water bodies and freshwater ecosystems is systematically monitored over time, and action is taken where freshwater is degraded, and to reverse deteriorating trends"

23. The NRP sets stock exclusion requirements based on stock type and whether a surface water body falls under "Category 1" or "Category 2":

Category 1 surface water body	**Category 1 surface water body** includes, and is limited to the following parts of a **surface water body** or the coastal marine area: (a) outstanding water bodies identified in Schedule A (outstanding water bodies), and (b) sites with significant **mana whenua** values identified in Schedule C (mana whenua), and (c) inanga spawning habitat identified in Schedule F1b (inanga spawning habitats), and (d) habitats for indigenous birds in rivers identified in Schedule F2a (birds-rivers), and (e) **natural wetlands** identified in Schedule F3 (identified natural wetlands), and (f) estuaries identified in Schedule F4 (coastal sites), and (g) within 1,000m upstream of a surface water abstraction site for a **community drinking water supply** shown on Map 39.

Category 2 surface water body	**Category 2 surface water body** includes, and is limited to limited to the following parts of a **surface water body** or the coastal marine area: (a) estuaries other than those identified in Schedule F4 (coastal sites), and (b) within the mapped lowland areas shown on Map 45, any (i) Schedule F1 river, (ii) other rivers that have an **active bed** width of 1m or wider, and (iii) **water races**, and (c) rivers and streams important to trout spawning habitat identified in Schedule I (trout habitat), and (d) **natural lakes**, but excludes any part of a **surface water body** or the coastal marine area that meets the definition of a **Category 1 surface water body**.

24. Rule R98(a) of the NRP already requires all livestock to be excluded for Category 1 surface waterbodies, including inanga spawning sites, from 31 July 2019.

25. Rule R98(b) already requires:

> (b) From 31 July 2022, access by:
>
> (i) cattle, farmed deer or farmed pigs to a **Category 2 surface water body**, (except for a Schedule F1 river that is less than 1m wide), and
>
> (ii) **dairy cows** to a river that is not a **Category 1 or Category 2 surface water body** and has an **active bed** width of 1m or wider at the location of the access,
>
> may occur provided the access is only at a **stock crossing point** and the cattle (including **dairy cows**), farmed deer or farmed pigs:
>
> (iii) are supervised and actively driven across the water body, and
>
> (iv) do not cross the same water body more than twice in any month.

26. A "Category 2 surface water body" comprises rivers in lowland areas. However slope is not a factor for dairy cows and "Category 1 surface body" rivers, which must be

excluded from a river that has an active bed width of 1m or wider in accordance in R98(b)(ii) regardless of whether the river is lowland or not.

27. The s 42A report has recommended changes to have the stock exclusion requirement apply outside low slope land in the Mākara catchment, but only to rivers that are greater than 1 metre wide. It is questionable whether this change is within scope of the plan change. The proposed amendments are also more lenient than some existing NRP requirements which already require stock exclusion from Category 1 surface water bodies (including inanga spawning sites). These important sites which overlap with the boundary of the Mākara catchment are shown in Appendix One.

28. The recommended amendments are also more lenient than the existing requirement to exclude dairy cows from a river that has an active bed width of 1m or wider (per Rule R98(b)), in that they provide ability for a Farm Environment Plan certifier to waive the requirements on a case-by-case basis.

29. Forest & Bird is concerned that users of the NRP may misunderstand WH.R28 as prevailing over existing NRP rules in the Mākara catchment. This should not be the case. Forest & Bird submits that WH.R28 requires additional drafting to clarify that, in the event of conflict between WH.R28 and existing NRP stock exclusion requirements, the more stringent existing NRP provisions prevail.

30. It is unclear why only streams greater than one-metre wide have been isolated, given that streams smaller than one metre also make a high proportion of the river length in the Mākara and Ohariu catchment:[16]

Table 3: Summary of pastoral stream length in the Mākara and Ohariu catchment that is in combination a) Less than and greater than one metre wide; b) on low slope land and not on low slope land; c) on farms greater than and less than 20 hectares.

Farm type	Pastoral stream classification	Length of river (km)
Across all farms	>1m wide streams on low slope land	13.5
	<1m wide streams on low slope land	4.6
	>1m wide streams outside low slope land	28.5
	<1m wide streams outside low slope land	23.2

31. It is understood that:

[16] Greer EIC for HS3 at [49]

a. small streams less than one metre wide provide important habitat for many species, and greater amounts of the habitat preferred by native fish species than larger streams.

b. The nature of larger streams is that they have higher flow and so cannot readily retain habitat features such as instream debris, shading, and steep stable banks.[17]

c. Headwater streams may also contribute a much larger proportion of the catchment contaminant load than larger waterways.

32. Therefore, if further stock exclusion requirements are to apply outside low slope land in the Mākara catchment, in addition to those already regulated by the NRP, Forest & Bird submits that they should also apply to small streams less than one metre.[18]

33. The s 42A report has recommended there be an exception from the requirement to exclude stock from streams greater than 1 metre wide where a Farm Environment Plan Certifier certifies the following:[19]

> 2. In relation to rivers greater than 1m wide on land that is not **low slope land**, an assessment that demonstrates that fencing (including temporary fencing) the river or any part of the river to achieve cattle, farmed pigs and deer exclusion:
>
> (a) is impractical due to flood risk, land slope and/or accessibility limitations; or
>
> (b) is unnecessary because a natural barrier exists that effectively exclude stock from accessing the river; or
>
> (c) would involve earthworks with adverse effects that outweigh the benefits having regard to the risk of cattle, farmed pigs and deer accessing the river; and
>
> For the avoidance of doubt, 2 above does not apply to rivers on **low slope land**.

34. Forest & Bird does not support this exception, which effectively provides a "get out of jail free pass". The assessment required involves interpretation to determine subjective elements such as "impractical" and "adverse effects that outweigh the

[17] Jowett, I.G; Richardson, j, Boubee JAT 2009: Effects of riparian manipulation on stream communities in small streams: two case studies *New Zealand Journal of Marine and Freshwater Research 43:* 763-774

[18] With consequential deletion of the recommended amendment to Policy WH.P21(d) "excluding stock from water bodies wider than 1m as a limit on land use,"

[19] Schedule 36, Part E

benefits," that render Rule WH.R28 ineffective and lacks the requisite certainty for the permitted activity rule. As noted earlier, terms such as "practicable" and "practical" are subjective, and may lead to inconsistent outcomes. It also isolates "fencing" as the only means of stock exclusion, when other methods are available i.e. implementing riparian planting to create natural barriers.

Earthworks

Permitted Activity rules for earthworks - WH.R23 and P.R22

35. Forest & Bird's submission sought amendments to the rules controlling earthworks and vegetation clearance to increase restrictions around works in riparian and estuarine areas. The submission was that a 5-metre setback is not enough and that 10 metres is necessary.

36. The RPS acknowledges that sediment from earthworks is affecting coastal water quality and shellfish beds.[20] The RPS describes sedimentation as a regionally significant issue, as "some land uses and earthworks can cause increased rates of sedimentation in low energy receiving environments, smothering aquatic life, for example in Porirua Harbour."[21] It is clear that sediment must be carefully managed on land so that the objectives of the RPS, NPSFM and NZCPS are met.

37. The Environment Court's decision *Minister of Conservation v Northland Regional Council*[22] is relevant here. In this case, the Minister of Conservation sought a 10-metre setback for both land preparation and earthworks adjacent to natural wetlands, lakes, rivers with a slope greater than 10 degrees, and inanga spawning sites. Having heard scientific evidence that a 10 metre buffer around riparian margins (including stock exclusion, vegetated buffers and setbacks) gives a superior result to a 5 metre buffer in terms of the reduction of sediment load to water, the Environment Court accepted that evidence and found a 10 metre setback was

[20] RPS Chapter 3.2 Introduction. The adverse effects of sedimentation are addressed in Dr Greer's EIC for HS2 at [25.3] for example fish can be impacted by "reduced recruitment of migrating juveniles, clogged gills, reduced feeding performance, and diminished food availability", and [25.9]: "The effects of sediment deposition on macroinvertebrates can alter food availability to the fish species that prey upon them, which can affect growth rates and community structure. Deposited sediment can also affect the reproductive performance of freshwater fish species. The availability of spawning habitat is a major determinant in the success or failure of fish populations, and large amounts of deposited sediment can have significant impacts on fish species that spawn in or on the bed substrate."
[21] RPS Chapter 3.2, 3(c)
[22] *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 77.

required.[23] In making this finding, the Environment Court made the following observations:

a. "Te Mana o Te Wai requires the improvement of water that is degraded."[24]

b. There is "good evidence that a 10 metre better removes fine sediment from runoff and throughflow than a 5 metre setback".[25]

c. When considering natural wetland and lakes, the Court note that "the more static nature and longer residence time of water in wetlands and lakes, with limited flushing flows, compared to that in rivers, is important."[26] A 10-metre setback is justified for these features due to their "rarity and susceptibility on a regional and national scale."[27]

d. The Court recognises that the more conservative setback may come at a cost in terms of potential reduction in productive land areas, but that "the significant benefit achieved in improving sediment control will benefit indigenous species, inanga, and other fish stocks may in fact provide for the sustainability of the environment on a more diversified and longer term basis.[28]

e. A 10 metre setback is not unreasonable.[29]

38. Notably, the Environment Court found that if a lesser setback is required that seeking a resource consent is an available and appropriate option:[30]

> [128] Consent can be sought, and special conditions imposed where a lesser setback is justified, to ensure protection of the environment. We do note that many farms including several we visited had already taken steps to separate Inanga spawning areas and other waterways from the farming operations. We consider those to be examples of good and sustainable practice. It is to be encouraged.

39. Forest & Bird submits that the same approach is justified in both Whaitua, particularly as sediment is a regionally significant issue and the RPS contains the following outcomes:

a. Policy 15 direction to control the effects of earthworks and vegetation clearance including through setbacks from wetlands and riparian margins, to achieve the

[23] *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 77 at [77f] and [82].
[24] *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 77 at [82].
[25] *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 77 at [98]
[26] *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 77 at [99]
[27] *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 77 at [100]
[28] *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 77 at [126]
[29] *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 77 at [127]
[30] *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 77 at [128]

target attribute states for water bodies and freshwater ecosystems, including receiving environments.

b. Policy 18 (j) regional plan must maintain and improve the health and wellbeing of water bodies and freshwater ecosystem health including by "protecting and reinstating riparian habitat."

c. Policy 36 of the RPS acknowledges the need to restore Te Awarua-o-Porirua Harbour and Wellington Harbour.

Conclusion

40. These submissions have outlined recommendations in the s42A reports that suffer deficiencies. The recommendations unfortunately fail to address the long-standing freshwater issues – many of which are nationally and regionally significant and which higher order policy direction, now ingrained in the RPS, aims to address. Some may be rectified relatively easily through straightforward amendments – such as retaining the notified wording of WH.P21, WH.P22, P.20 and P.P21 which concern diffuse discharges, retaining and making slight amendments to rules WH.R26 and P.R25 which relate to farming activities on properties of between 4 hectares and 20 hectares, and amending setback distances in WH.R23 and P.R22**.** Other issues, for example the recommended amendments to provisions for stock access to rivers in the Mākara catchment and the use of nitrogen risk assessment tool, would benefit from further investigation and reconsidered drafting.

Dated this 9th day of May 2025

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Appendix One: Map showing overlap of Makara stream catchment, Category 1 Surface Waterbodies, and Schedule F1b Inanga Spawning Habitat