

**BEFORE THE HEARINGS PANEL**

**IN THE MATTER** of Schedule 1 of the Resource Management Act  
1991

**AND**

**IN THE MATTER** of the Proposed Plan Change 9 to the Hawkes  
Bay Regional Plan

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**SUBMISSIONS OF COUNSEL ON BEHALF OF THE ENVIRONMENTAL DEFENCE SOCIETY  
INCORPORATED**

**25 MAY 2021**

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## Introduction

- 1 These submissions are presented on behalf of the Environmental Defence Society Incorporated (**EDS**) in support of its submission on proposed Plan Change 9 (**PC9**) to the Hawkes Bay Regional Plan (**Regional Plan**). PC9 proposes amendments to the Regional Plan to manage water quality and quantity for the Tūtaekurī, Ahuriri, Ngaruroro and Karamū (**TANK**) catchments.
- 2 EDS is a national public interest environmental organisation established in 1971. Its membership is largely comprised of resource management professionals. EDS seeks to achieve good environmental outcomes through improving the quality of New Zealand’s legal and policy frameworks and participating in statutory decision-making processes. EDS has been active in assessing the effectiveness of the Resource Management Act 1991 (**RMA**) and statutory planning documents in addressing key environmental issues, including freshwater.
- 3 These submissions focus on five key topics:
  - Statutory framework and the National Policy Statement for Freshwater Management
  - Te Mana o te Wai
  - Freshwater Management Units
  - Surface water quantity and allocation
  - Water quality and ecosystem health
- 4 In making these submissions, EDS adopts and relies on the planning evidence of Grey Wilson, dated 11 May 2021, filed by Ngāti Kahungunu Iwi Incorporated.

## Statutory framework

- 5 The Resource Management Act 1991 (**RMA**) sets out the framework for the management of water resources. The obligations on regional councils are clear and directive. Regional councils must (*inter alia*):
  - Safeguard the life-supporting capacity of air, water, soil and ecosystems (s5(2)(b)).
  - Have particular regard to the intrinsic values of ecosystems, maintenance and enhancement of the quality of the environment, and any finite characteristics of natural and physical resources (ss7(d), (f), (g)).
  - Control the use of land for the purpose of maintaining and enhancing the quality and quantity of water and the ecosystems in water bodies (s30(1)(c)(ii)(iii)(iiia)).
  - Control the taking, use, damming and diversion of water and the control of the quantity, level and flow of water in any water body (s30(1)(e)).
- 6 Flowing from the RMA is a hierarchy of planning documents. Each document is required to “give effect to” (meaning to implement) those superior to it in that hierarchy. At the top of

that hierarchy, regional plans must “give effect to” any national policy statement.<sup>1</sup> This is a strong directive and creates a firm obligation on the part of those subject to it.<sup>2</sup> Relevant to this plan change is the need for Council to give effect to the National Policy Statement for Freshwater Management (**NPSFM**).

*National Policy Statement for Freshwater Management 2020*

- 7 EDS considers that PC9, preparation of which commenced prior to the NPSFM 2020 coming into force, must give effect to the NPSFM 2020 to the extent it is within scope and in so far as it is “practicable” to do so.<sup>3</sup>
- 8 In coming to this conclusion, EDS relies on s 55 RMA and Part 4 (Timing and transitionals) of the NPSFM 2020, s 67 RMA as well as relevant case law.
- 9 Section 55 RMA sets out how local authorities are to recognise national policy statements. Section 55(2B) and (2C) set out that a local authority must make all amendments, other than those directed under s 55(2), that are required to give effect to the NPS using the Schedule 1 process. In all cases, the changes must happen:
  - a) As soon as practicable; or
  - b) Within the time frame specified in the NPS if any; or
  - c) Before the occurrence of any event specified in the NPS if any.
- 10 The NPSFM2020 is directive on timing. Clause 1.2(2) (Commencements) cross-references to Part 4 (Timing and transitionals). Clause 4.1 states that ‘*every local authority must give effect to this National Policy Statement as soon as reasonably practicable*’.<sup>4</sup> There is no transitional regime, for plan change processes that are part-way through. The extent to which it is practicable, will depend on how far the plan change has been through the statutory process. There is a spectrum, from notified, to decisions version, to appeals version, and appeals on points of law in the High Court (and other senior Courts). PC9 is at a relatively early stage. For example, many submitters were aware of the imminent replacement of the NPSFM 2017 with the NPSFM 2020, and referred to the proposed NPSFM 2020 in their submissions.
- 11 Strengthening EDS’s position is the requirement in s 67 RMA that regional plans must give effect to any national policy statement. The NPSFM 2020 specifically replaces the NPSFM 2014.<sup>5</sup> This means that if the plan is not required to give effect to the NPSFM 2020, there is no other instrument that applies. That would create a planning and policy vacuum.
- 12 There are no transitional provisions continuing the application of the NPSFM 2014 in relation to plans and policy statements that are already partway through the Schedule 1 process.

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<sup>1</sup> RMA, s 67(3)(a)

<sup>2</sup> *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [77]

<sup>3</sup> This conclusion is reached notwithstanding the direction in the RMA to give full effect to the NPSFM2020 by 31 December 2024 and an acknowledgment that the NPSFM2020 contains implementation steps that must be undertaken before it can be fully implemented.

<sup>4</sup> NPSFM2020, Clause 4.1

<sup>5</sup> NPSFM2020 p 2

Therefore, Council cannot continue on the basis that PC9 give effect to the NPSFM 2014 (as amended in 2017), as it no longer exists.

#### Relevant case law

- 13 There are several High Court authorities on the obligation on councils to give effect to previous iterations of the NPSFM. These cases are not directly on point, because they relate to earlier versions of the NPSFM. The principles established by these decisions are relevant and persuasive, but not binding. Importantly, both High Court decisions related to Plan Change provisions that had been through the statutory process, including decisions version and appeals version, and were operative subject only to appeals on points of law.
- 14 In *Hawke's Bay and Eastern Fish and Game Council v Hawke's Bay Regional Council* the High Court considered the question of which freshwater policy statement ought to be given effect. The Court acknowledged that the decision-maker would have already given effect to the NPSFM 2011 in relation to most of the Plan Change, but would have to give effect to the NPSFM 2014 in relation to the specific issue referred back to it. It considered that appropriate. The NPSFM 2014 was the operative policy statement, and this approach recognised that the Executive wanted the NPSFM 2014 to be implemented as promptly as possible, and best reflected the requirement of s 67(3)(a).
- 15 In *Horticulture New Zealand v Manawatu-Wanganui Regional Council*,<sup>6</sup> the High Court held that the Environment Court was not obliged to give effect to the National Policy Statement for Freshwater Management 2011. The Court emphasised that the Environment Court's jurisdiction is functionally limited. It is confined by the scope of appeals, and in turn further limited by the scope of submissions and further submissions. Given that context, it considered that the Council (and the Court) was not obliged to attempt to give effect to the NPSFM in the course of the appellate process.<sup>7</sup> EDS submits this decision is problematic, and the later decision (Hawke's Bay) more correctly states the law. As noted, there is no decisions version available for PC9. This is a first instance hearing and the functional limitations on the Environment Court on appeal do not apply here.
- 16 EDS considers that the *Hawke's Bay and Eastern Fish and Game Council v Hawke's Bay Regional Council* ought to be preferred on the basis:
  - a) It better reflects the requirement of ss 55 and 67 RMA
  - b) It is consistent with NPSFM 2020 Part 4: Timing and transitionals.
  - c) In circumstances where the NPSFM 2014 has been revoked, it is consistent with the Executive's intention to provide national direction on freshwater management. If PC9 is not required to give effect to the NPSFM 2020, there is no applicable national policy direction for freshwater.

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<sup>6</sup> *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492

<sup>7</sup> At [99] – [100]

- d) Both High Court decisions relate to earlier iterations of the NPSFM, with different policy wording and imperatives.
- 17 Since the NPSFM 2020 came into force, there have been several decisions which have superficially analysed the extent to which the NPSFM 2020 must be given effect to in planning processes that had commenced before it came into force.
- 18 In *Aratiatia Livestock Limited v Southland Regional Council*<sup>8</sup> the Court’s approach to finalising the objective of the Southland Water and Land Plan made it clear that it had to give effect to the NPSFM 2020.<sup>9</sup>
- 19 More recently in *Minister of Conservation v Northland Regional Council*,<sup>10</sup> the Court held that:
- [T]he NPS-FM 2020 is a matter to which we should have regard and if there is a difference in outcome from the application of the NPS-FM 2020 rather than the NPS 2014, we need to consider whether it is more appropriate to achieve that outcome than that under the NPS-FM 2014.
- 20 In that case, the Court held that there was no change in focus or desired outcomes between the NPSFM 2014 and the NPSFM 2020. Both instruments “give primacy to ecological values”. Based on that finding, it did not matter (for the Court’s purposes) which prevailed.
- 21 The decision has limited precedent value, given that it largely dealt with issues agreed by consent, and where the decisions version relied on the NPSFM 2017. It appears that the threshold question (whether to give effect to the NPSFM 2020) was not substantially argued; the NPSFM 2020 was not the subject of extensive evidence (at [34]).
- 22 In a scenario where there is a difference in outcome between the two NPSFMs that is relevant to the provisions being analysed, EDS considers that, with respect, the Courts approach is incorrect.<sup>11</sup> The NPSFM 2014 had already been revoked and could not therefore have been relevant to the Court’s decision.

#### Scope

- 23 EDS agrees with the analysis set out in the legal submissions for Council as to the scope limitations of PC9.<sup>12</sup> PC9 is limited to the spatial area it covers (the TANK catchments) and to the aspects of the Hawkes Bay Regional Council Resource Management Plan to which it relates.
- 24 As a starting point, EDS submits that PC9 must give effect to the NPSFM 2020 regardless of the content and extent of submissions. If PC9 does not give effect to the NPSFM 2020, within the scope of PC9, then it must be withdrawn or declined.

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<sup>8</sup> *Aratiatia Livestock Limited v Southland Regional Council* [2020] NZEnvC 191

<sup>9</sup> See [15] – [21]

<sup>10</sup> *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 001

<sup>11</sup> The decision at [31] refers to a ‘future’ obligation, but does not analyse the immediacy of wording in Clause 4.1, discussed above.

<sup>12</sup> At [4.8]

- 25 In any event, EDS considers there is considerable scope to amend PC9 to give effect to the NPSFM 2020. This is on the basis that:
- a) The NPSFM 2020's policies as set out in Clause 2.2 and are broadly framed. Many align with direction in the NPSFM 2017, meaning PC9 should already have been developed so as to give effect to those provisions.
  - b) Although the instruction to decision-makers regarding Te Mana o te Wai has changed ("give effect to" vs "recognise and consider"), the concept of Te Mana o te Wai, its importance and its position as being the foundation for freshwater management is not new. The concept was first introduced in 2014, updated in 2017, and has now been further strengthened in 2020.
  - c) There are submissions that directly address the need for PC9 to give effect to the NPSFM 2020.
- 26 EDS considers that PC9 as notified and amended by the s42A Hearings Report does not give effect to the NPSFM 2020. Specific reasons for this are outlined below.

### ***Te Mana o te Wai***

- 27 Taken holistically, PC9 does not give effect to Te Mana o te Wai. Te Mana o te Wai creates a hierarchy of obligations that prioritises first the health and wellbeing of the water bodies and freshwater ecosystems; second, the health needs of people; and third, the ability of people and communities to provide for their social, economic and cultural wellbeing.
- 28 Case law has held that it is a matter of national significance that the management of freshwater is through a framework that considers and recognises Te Mana o te Wai as an integral part of freshwater management. By upholding Te Mana o te Wai the mauri of the water is acknowledged and protected.<sup>13</sup>
- 29 By failing to address water quantity and quality issues, PC9 does not prioritise the health of the water body and instead provides for the continuation of existing activities at the core of its provisions. EDS considers that there is scope to implement the fundamental concept of Te Mana o te Wai through changes in wording sought to provisions to reflect the hierarchy of obligations it sets out.

### ***Freshwater Management Units***

- 30 The NPSFM 2020 sets out that Regional Councils must identify Freshwater Management Units (**FMUs**), the values that apply to the FMU and an environmental outcome that for every value.<sup>14</sup> It is not clear whether PC9s Freshwater Quality Management Units (and other various terms) are included for the purpose of the NPSFM 2020.
- 31 The concept of FMUs encourages a pragmatic approach to freshwater management. The NPSFM does not mandate a single correct approach to identifying FMUs, or part FMUs. The

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<sup>13</sup> *Aratiatia Livestock v Southland Regional Council* [2019] NZEnvC 208 at [21].

<sup>14</sup> NPSFM2020, Clauses 3.8 and 3.9

definition of FMUs is intentionally flexible. Councils are able to identify FMUs as a distinct process separate to the process of engaging with communities on identifying freshwater values. Alternatively, this process could be done in parallel, with Councils identifying FMUs at the same time as engaging with communities on freshwater values.<sup>15</sup> This outlines that there is no impediment to Council identifying FMUs through the PC9 process.

- 32 As set out in Appendix 1 of Ms Wilson's evidence, not all water bodies are contained within PC9's Freshwater Quality Management Units. EDS considers that there is scope within PC9, and within its own submission, to address this and to comprehensively identify all FMUs within the Hawkes Bay region to give effect to the NPSFM 2020. Council may identify long-term visions for freshwater; these may be set at FMU, part of an FMU, or catchment level (Clause 3.3, NPSFM 2020). If FMUs cannot be incorporated in PC9, then it should be withdrawn or declined, and Council should start over with a process that leads to a compliant plan.

### ***Water quantity and over allocation***

- 33 Water allocation and quantity are arguably the biggest resource management issues for the TANK catchments. The section 42A report identifies that there are areas of surface and groundwater that are over-allocated, and that, in order to meet obligations under the RMA and the NPSFM, must be phased out.<sup>16</sup>
- 34 PC9 does not achieve this. Instead, it provides for the continuation of the status quo by allowing consented abstractions to match current levels of abstraction.<sup>17</sup> This fails to give effect to the direction in the NPSFM2020 that *'freshwater is allocated and used efficiently, all existing over-allocation is phased out and future over-allocation is avoided'*.<sup>18</sup> Policy 11 uses directive language, in contrast to other policies, and therefore requires priority (under *King Salmon* principles).
- 35 PC9 fails to set environmental flows and levels at a level that achieves the environmental outcomes for the FMU.<sup>19</sup> Water allocation is not directed to occur at a rate that provides for ecosystem health or other instream freshwater values. At low flow, the hydrological regime of rivers can be significantly altered reducing habitat retention for indigenous species. This is contrary to the direction in the NPSFM 2020 and s30(1)(c) RMA.

### ***Water quality and ecosystem health***

- 36 PC9 fails to adequately address issues with water quality, which is degraded in parts of the TANK catchments. The policies relating to the effects of land use on water quality adopt a non-regulatory and adaptive management approach which fails to provide a clear pathway of how

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<sup>15</sup> A Guide to Identifying Freshwater Management Units: Under the National Policy Statement for Freshwater Management 2014 (2016), section 2 and 3 (NB: this guidance is still relevant to the NPSFM2020 and had not yet been superseded: <https://environment.govt.nz/acts-and-regulations/national-policy-statements/national-policy-statement-freshwater-management/#guidance-under-development>)

<sup>16</sup> Section 42A report, section 15.1

<sup>17</sup> Wilson at [41]

<sup>18</sup> NPSFM2020, Policy 11

<sup>19</sup> NPSFM2020, Clause 3.16

the targets in Schedule 26 will be met.<sup>20</sup>The timeframes for meeting the targets are unambitious and if retained, require interim targets to assess progress.<sup>21</sup>

- 37 Target attributes in Schedule 26 do not give effect to the tables in Appendix 2A of the NPSFM 2020, and some attributes are missing in their entirety from PC9.

#### **Relief**

- 38 PC9 as currently proposed fails to give effect to higher order documents, primarily the NPSFM 2020. As set out above, Council is required to give effect to the provisions in the NPSFM 2020 as soon as reasonably practicable.
- 39 EDS seeks the relief set out in Appendix 1 of Ms Wilson's planning evidence to the extent that it is applicable to EDS's submission. However, in order to give effect to the NPSFM 2020 the amendments required are substantial. An alternative, and preferable option, is to withdraw or decline PC9 on the basis that it has been superseded by the NPSFM 2020. This would provide a cleaner, more precise outcome that is likely to limit the need for further appeals on the plan change.

Dated this 25<sup>th</sup> day of May 2021



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<sup>20</sup> Wilson at [62]

<sup>21</sup> NPSFM2020, section 3.11(6)(a)