

**BEFORE THE HEARING COMMITTEE**

**IN THE MATTER**

of Proposed Plan Change 9

**BETWEEN**

**ROYAL FOREST AND BIRD PROTECTION  
SOCIETY OF NEW ZEALAND INC**

**Submitter**

**AND**

**HAWKES BAY REGIONAL COUNCIL**

**Planning Authority**

---

**SUBMISSIONS OF COUNSEL FOR  
FOREST & BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED**

21 June 2021

---

---

Royal Forest and Bird Protection Society of New Zealand Inc.  
Solicitor acting: Peter Anderson  
PO Box 2516  
Christchurch 8140  
021 2866992  
p.anderson@forestandbird.org.nz

## **Introduction**

1. I present these submissions on behalf of the Royal Forest and Bird Protection Society of New Zealand Incorporated (Forest & Bird) in support of its submission and further submissions on Proposed Plan Change 9 (PC9) to the Hawkes Bay Regional Plan (Regional Plan).
2. While aspects of Forest & Bird's submission are addressed by the s42A report amendments to PC9, the concerns raised are largely unresolved by the report officer's recommendations.
3. These submissions focus on the requirement to give effect to the NPSFM2020. This raises a number of issues in this case, including with respect to scope, implementing Te Mana o te Wai, FMUs, attribute states. A particular concern is the failure of PC9 to phase out overallocation.
4. In these submissions I rely on the ecological evidence of Mr Kay for Forest & Bird relating to natural character and physical habitat quality.
5. There are some matters raised in the original and further submission that are not addressed in these legal submissions. In relation to these matters, Forest & Bird relies on its original and further submissions.

## **The Expert Evidence on behalf of Ngāti Kahungunu**

6. Forest & Bird considers that the approach taken to the expert evidence presented on behalf of Ngāti Kahungunu is in error.
7. In Minute 7, the Panel determined not accept the late expert evidence evidence from Ngaio Tiuka and Shade Smith, both on behalf of Ngāti Kahungunu Iwi Incorporated (the Ngāti Kahungunu expert evidence).
8. The provision of expert evidence in advance of the hearing is addressed in s 41B of the RMA, which provides:

### **41B Directions to provide evidence within time limits**

- (1) The authority may direct the applicant to provide briefs of evidence to the authority before the hearing.
- (2) The applicant must provide the briefs of evidence at least 10 working days before the hearing.
- (3) The authority may direct a person who has made a submission and who is intending to call expert evidence to provide briefs of the evidence to the authority before the hearing.
- (4) The person must provide the briefs of evidence at least **5 working days** before the hearing.

9. Minute 2 directs that *“Submitter expert evidence is to be filed by 5pm on Friday 7 May 2021, which is 15 working days after the receipt of the Council Officer’s Section 42A report and **10 working days** before the hearing commences”*.
10. In Minute 3 the Panel agreed to extend the date of expert evidence to 11 May 2021.
11. It is obvious that neither Minute 2 nor Minute 3, insofar as they require that evidence is provided 10 working days before the hearing, comply with s41B.
12. Questions of the inadmissibility of evidence are dealt with under the Evidence Act 2006. Section 7 is the critical section.

**7 Fundamental principle that relevant evidence admissible**

- (1) All relevant evidence is admissible in a proceeding except evidence that is—
    - (a) inadmissible under this Act or any other Act; or
    - (b) excluded under this Act or any other Act.
  - (2) Evidence that is not relevant is not admissible in a proceeding.
  - (3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.
13. There is no suggestion that the evidence is not relevant, and neither could there be.
  14. Minute 5 records that the Ngāti Kahungunu expert evidence was received on 16 May 2021, more than 5 working days before the commencement of the hearing.
  15. As the Ngāti Kahungunu expert evidence has been provided within the 5 working day limit set out in s41B, it could not be said to be inadmissible or excluded under s 7(1)(a) or (b) of the Evidence Act 2006.
  16. Even if the timeframes set out by the Panel were lawful, providing the evidence late does not make it inadmissible. There is no provision in the RMA that provides that evidence filed after the five working day is inadmissible or excluded.
  17. The Ngāti Kahungunu expert evidence is admissible and in ruling it inadmissible the Panel has made a clear and unambiguous error. This is a serious error which needs to be corrected. The Ngāti Kahungunu expert evidence needs to be admitted and given fair and proper consideration.

**Giving effect to the NPS-FM**

18. The RMA places clear and directive obligations on regional councils for the management of water resources.<sup>1</sup> Of particular relevance, at the top of the planning hierarchy, is the

---

<sup>1</sup> Paragraph 5 EDS legal submissions

National Policy Statement for Freshwater Management 2020 (NPSFM 2020) which a regional plan must give effect to.<sup>2</sup>

19. The Council consider the extent to which PC9 must give effect to the NPSFM 2020 is limited by the scope of the plan change and by the scope of submissions. In particular, they consider that there are limits to the changes that can be made in reliance of submissions.<sup>3</sup> They consider that submissions must be “on” PC9 to provide scope for changes and set out the following circumstances:
  - (a) it would need to address the change to the pre-existing status quo advanced by PPC9; and
  - (b) there must not be a real risk that people affected by PPC9 (if modified in response to the submission) would be denied an effective opportunity to participate in the plan change process.
20. EDS hold a slightly different view; that PC9 must give effect to the NPSFM 2020 regardless of the content and extent of submissions.<sup>4</sup>
21. While Forest & Bird does not seek that PC9 be withdrawn or declined where it does not fully give effect to the NPSFM 2020 within the scope of PC9, we do seek that PC9 is amended as necessary to ensure it is at least consistent with the Part 2 objectives and policies of NPSFM 2020 and does not unreasonably delay implementation under Part 3 of the NPSFM 2020.
22. In terms of any risk that people affected by PC9 would be denied effective opportunity to participate, I draw your attention to the fact that:
  - a. The public had the opportunity to consider the NPSFM 2020 which was approved by the Governor-General under section 52(2) of the Resource Management Act 1991 on 3 August 2020 (although it did not come into effect until 3 September 2020) before lodging submissions, as the closing date for submissions on PC9 was extended to 14 August 2020. The further submission period extended into November 2020.
  - b. The s42A report records<sup>5</sup> that there are 25 submission points that relate to the NPSFM 2020.
23. I agree with EDS, that in any event there is broad scope in submissions and it is unlikely there would be any scope issue with respect to giving effect to the NPSFM under the Council’s approach.

---

<sup>2</sup> Paragraph 6 EDS Legal submissions

<sup>3</sup> Paragraph 3.3 HBRC legal submissions

<sup>4</sup> Paragraph 24 EDS legal submissions

<sup>5</sup> Paragraph 118, s42A report for PC9

24. PC9 is one part of the Council’s programme to progressively implement the National Policy Statement for Freshwater Management 2020.<sup>6</sup> PC9 was intended to give effect to the NPSFM 2014 (updated 2017)<sup>7</sup> and the draft NPSFM 2020 was available in 2019 when the s32 report for PC9 was being written.
25. The case law relied on by the Council would suggest that the scope of PC9 is limited by the matters considered in the s32 report. I consider that relying on the s32 report to determine scope is problematic. This is because a s32 is not required to consider every option and the comprehensiveness of matters considered can vary depending on the author and Councils priorities at the time.
26. In this case the s32 report for PC9 makes no reference to the NPSFM2020, despite the draft NPSFM 2020 being available in 2019 when the s32 report was being written. This draft included many changes that were carried through into the final version, including the prioritisation for the management of resources that are now captured in the 2.1 Objective of the NPS-FM 2020. The fact that it was not considered in the s32 report does not make it irrelevant.
27. The approach adopted by the s42A reporting officers also appears to limit the scope of their consideration and recommendations on submissions due to wording that was agreed by the TANK Collaborative Stakeholder Group. The s42A report states that:<sup>8</sup>
- In assessing the submissions on the PPC9, we will give effect to the NPSFM2020 as much as possible and have adopted the following principles to help guide our recommendations.
- These are:
- a. There must be scope for the amendments provided within the submissions and within scope of the PPC9 content,
  - b. Terminology will be amended to reflect the NPSFM2020 wherever possible,
  - c. We know or can predict that the management impact arising from this alignment will be similar (i.e so it doesn’t significantly change expectations for values agreed during the TANK collaborative process or result in significantly increased costs in order to meet any new objective)
  - d. If it makes sense to do so – this is particularly relevant to the new NPSFM2020 provisions for sediment management.
  - e. It remains largely consistent with the PPC9 values and objectives as discussed by the TANK Group.
28. The agreements made through TANK group are not binding and were not all unanimous (and in fact decisions on some ‘controversial’ issues were deferred to the Council). The

---

<sup>6</sup> Paragraph 11, s42A report for PC9

<sup>7</sup> 5th paragraph, page 18 and section 7.3 page 95, of the s32 report PC9 2 May 2020.

<sup>8</sup> Paragraph 961 s42A report for PC9

extent to which PC9 gives effect to the NPSFM 2020 should not be limited by the TANK group considerations. Particularly as the TANK group concluded before the release of the draft NPSFM 2020<sup>9</sup> and therefore cannot be anticipated to have considered it. Nor should submitters be disadvantaged just because they were not part of the TANK group or were unable to participate in all discussions.

29. The approach at (c) and (e) above is problematic where amendments are necessary to give effect to the NPS-FM 2020 or to clarify that it is given effect to, but may not necessarily align with agreements from the TANK group. For example:
- a. Objective TANK 16<sup>10</sup> seeks to achieve a different outcome in terms of priority for water allocation than Objective 1.2 of the NPSFM 2020;
  - b. There is no TANK policy providing direction for all decision making to apply the hierarchy of obligations of Te Mana o te Wai. This means that future consent decision making will have to deal with conflicting requirements when having regard to the NPSFM 2020 and achieving objective TANK 16.
  - c. Additional attribute states<sup>11</sup> may be appropriate to achieve the values and objectives.
  - d. Forest & Bird's submission seeking to refocus the objectives to specify outcomes, and for the policies to direct process so that there are clear provisions giving effect to the NPS-FM 2020. However, the s42a has given limited consideration<sup>12</sup> to these points and there has been an apparent reluctance to modify the provisions as written by the TANK group.
  - e. The NPSFM 2020 requires the inclusion of 10 year target timeframes where target attribute states are long term however the s42A report<sup>13</sup> considers the lack of accurate predictive modelling tools as a basis to put off implementing this aspect of the NPSFM 2020.
30. Ultimately without clear objectives, policies, and methods to give effect to the NPS-FM 2020 there will be costs, including environmental costs, on future generations from deferring decision making now because of potential costs on current users. This is not consistent with the NPSFM 2020 Clause 3.20 direction that *"If a regional council detects that an FMU or part of an FMU is degraded or degrading, it must, as soon as practicable,*

---

<sup>9</sup> Endorsement for the official 'handover' of the TANK group's recommendation to the Regional Planning Committee was sought by HBRC staff in August 2018, with it going to the RPC shortly after.

<sup>10</sup> Both as notified and after the s42A amendments.

<sup>11</sup> Additional attributes sought by submission 233.3 were rejected because of values having been agreed by the TANK Group.

<sup>12</sup> e.g. s42a para. 194(e), 197, 208, 209

<sup>13</sup> Paragraph 989 s42A report for PC9

*take action to halt or reverse the degradation (for example, by making or changing a regional plan, or preparing an action plan).”).*”

31. In addition, there may be some values that can be still be set through this process in collaboration with relevant parties such as tangata whenua for Māori freshwater values.<sup>14</sup>
32. In my submission, EDS is correct that there would be a policy vacuum if decision makers do not consider that PC9 is required to give effect to the NPS-FM 2020.
33. PC9 was notified under the 2017 NPSFM. When submissions closed the NPSFM 2020 had been approved by the Governor-General, although it was not in effect.
34. A number of submissions, including Forest & Bird’s submission, considered the NPS-FM 2020 as the document was available, although not yet in force, prior to the close of submissions. In seeking amendments to PC9 Forest & Bird’s submission noted that amendments sought may need to be adapted because of the NPSFM 2020.
35. The important point here is that PC9 must give effect to the NPSFM 2020. The NPSFM is clear that decisions must still be made in a way that best gives effect to the NPSFM 2020 using best available information at the time.<sup>15</sup>
36. To that end, where the proposed plan wording does not give effect to, or would lead to permitted activities or consenting decisions which are inconsistent with, the NPSFM 2020, amendments will need to be made to ensure PC9 gives effect to the NPSFM 2020. There is scope to do this within the content of submissions lodged.

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

37. Forest & Bird’s submission considered both the NPSFM 2017 and the NPSFM 2020 with respect to Te Mana o te Wai. Forest & Bird’s submission considered that the approach to Te Mana o te Wai was a key area where PC9 failed to give effect to the NPSFM. While Forest & Bird’s submission did not specifically seek relief to “give effect to Te Mana o te Wai”, it sought numerous changes to that effect, including to “amend all policies to give effect to the NPSFM (noting the 2020 NPS comes into effect 3 September 2020)” and other submissions have specifically sought such relief.
38. The failure of the plan to give effect to Te Mana o te Wai starts with the PC9 objectives<sup>16</sup>. However, the s42A recommendations do not go far enough to give effect to Te Mana o te Wai. While amendments have been recommended in the s42A to clarify outcomes to

---

<sup>14</sup> 3.4 (2) NPS-FM 2020

<sup>15</sup> 1.6, 3.10(3), 3.11(8)(b), 3.14(2)(b) and 3.16(4)(b) of the NPS-FM 2020

<sup>16</sup> Forest & Bird’s submission sought to delete and replace all objectives as they were unclear and uncertain as to the intended outcomes.

some extent within the objectives, the objectives do not give effect to Te Mana o te Wai. There are two objectives which specifically refer to Te Mana o te Wai and another which addresses allocation priorities. Examples are:

- a. OBJ TANK 2, which still includes a reference to the NPSFM 2017 which is no longer relevant. The wording is that “Te Mana o te Wai... [is] is upheld and recognised” may be similar but is not as directive as “to give effect to” which is now required under the NPSFM 2020
  - b. OBJ TANK 5 suggests that Te Mana o te Wai will be achieved through collectively managing all specified attributes. This is so uncertain and unambiguous as to be meaningless.
  - c. OBJ TANK 16, which sets out the priority for allocation but does not put as a first priority the health and well-being of water bodies and freshwater ecosystems. Given that the values for waterbodies may represent different community desires and needs it cannot be assumed that the hierarchy of obligation in Te Mana o te Wai is given effect to within the limits and targets that the priority order is subject to.
39. I do not agree with the s42A<sup>17</sup> that the Obj 16 priority order aligns with the NPSFM 2020 hierarchy of obligations.
40. Not only does the wording of the objective itself set a different priority, but the priorities are subject to limits, targets and flow regimes which provide for the values that were not established through decision making which applied the hierarchy of obligations. This is not to say that the identification of values requires that hierarchy approach, but decision making on allocation does. This objective clearly conflicts with the NPSFM 2020.
41. In addition, the PC9 policies and rules embed existing water use, by effectively allowing consents to roll over. The Council proposes “working with water users to drive more efficient and effective use to complement Councils focus on water storage.”<sup>18</sup> This approach will not achieve outcomes where degradation has or is continuing to occur will be sufficient where there is no ability for enforcement under the PC9 approach. Regulation is where the hard calls are made and limits set to avoid and phase out over-allocation.
42. However, even within the regulatory approach the proposed plan fails to give effect to Te Mana o te Wai. This is because the controlled activity status does not provide an effective mechanism for council to address the hierarchy of obligations in Te Mana o te

---

<sup>17</sup> para 1230

<sup>18</sup> pg. 18 of the LTP - <https://www.consultations.nz/assets/Consultations/HBRC-LTP-assets/Time-to-Act-our-consultation-document-for-the-long-term-plan-2021-2031.pdf>



Wai. A controlled activity consent pathway prioritises the continuation of the existing activity in decision making.

43. Restricted discretionary rules could include matters to ensure decisions give effect to Te Mana o te Wai, however many of the matters for discretion are uncertain in terms of such scope. For example:
  - a. Rule 6 includes Condition 5 which is a matter of discretion for “5 *The extent to which the land use change will affect the ability to meet water quality objectives*”. However, the plan does not include “water quality objectives”.<sup>19</sup>
  - b. Re-consenting under Rule 9 and 10 matters relating to quantity, rate and timing and the consideration of efficient water use, however are not clear in terms of the priority of obligations in Te mana o te wai.
  - c. The change in activity status to Rules 15 and 18<sup>20</sup> also fails to include scope within the matters of discretion for considering hierarchy of obligations in Te Mana o te Wai.
  - d. The rules which allow for continued overallocation, such as Rule TANK 10, which appears to allow for continued stream-depleting takes provided the consent holder contributes to a ‘flow maintenance’ scheme.
44. The limitations within the rules and lack of clear objectives and policy for Te Mana of te Wai means that the PC9 as proposed and with s42A amendments fails to give effect to Te Mana o te Wai and is inconsistent with Policy 1 of the NPSFM 2020.
45. Te Mana of te Wai should be central to decision making. However, the central concept in PC9 is retaining the status quo.
46. As EDS points out the concept of Te Mana o te Wai was in previous iterations of the NPS-FM.
47. Te Mana o te Wai was central to the NPSFM 2017 version which PC9 was designed to give effect to and appears to have been considered through the TANK group process. The NPSFM 2020 should be given effect to for the reasons I set out above. In my submission there is no sound basis for consultation limitations as s42A says that mean PC9 can't give effect to Te Mana o te Wai.

---

<sup>19</sup> While there are still a number of references to “water quality objectives” there is no such heading setting out such objectives. The s42A amendment have replaced most references to “water quality objectives” with “attribute state” and the heading for Schedule 26 Freshwater Quality Objective uses slightly different wording which is confusing where the schedule itself is not referred to.

<sup>20</sup> s42A recommended amendments

## FMUs and attribute states

48. Forest & Birds submission raised a number of concerns with terminology and the lack of identified FMU's in PC9. While some terminology has been clarified and changed to align with the NPSFM 2020, PC9 still fails to identify FMU's.
49. EDS has considered the approach for identifying FMUs in the NPSFM and I agree that this offers no impediment to Council identifying FMUs through the PC9 process. The breakdown of TANK catchments into five areas already set out under Schedule 26.1 to 26.5 provides one option for identifying these areas as FMU's. However, we note that waterbodies which are not yet captured by freshwater quality objective areas in Schedule 26 will need to either be added within those areas or as additional FMU(s).
50. The NPSFM 2020 requires interim target attribute states of no more than 10 years where timeframes for achieving target attribute states are long term. The reasoning for not including these interim timeframes set out in the s42A report<sup>21</sup> is the lack of accurate predictive modelling tools, is not an adequate basis to put off implementing this aspect of the NPSFM 2020. There is no guarantee that modelling improvements will resolve this issue.
51. In addition, without setting timeframes there is no clear measure of progresses. The NOF requires councils to act<sup>22</sup> if degradation is detected. Without interim attribute targets progress to longer term attribute targets may become meaningless particularly where aspiration targets are set and there is no commitment for reaching targets in the short to medium term. This makes it harder to implement action necessary to reach aspirational targets which some may consider out of reach, to become a reality. The sooner Council can establish whether measures are adequate to meet target attributes, including interim target attributes, the sooner further action can be taken.
52. Forest & Bird considers that to give effect to the NPSFM 2020, where long term target attribute states are to be met by 2040 as shown in Schedule 26, at least one interim target attribute is needed to meet the no more than 10 year requirement. Where a long term attribute target state would not be met by 2040 then interim attribute states will be needed both before and after 2040. The lack of specified interim and long term timeframes for some attribute targets means that the FMU approach cannot be effectively achieved by PC9. The NPSFM 2020<sup>23</sup> does not require perfect information when setting attribute targets, only the best available. The 10 year plan review period also provides opportunity to engage with community to improve and clarify attribute targets.

---

<sup>21</sup> Paragraph 989 s42A report for PC9

<sup>22</sup> 3.7 (3) NPS-FM 2020

<sup>23</sup> 3.11 (8) of the NPSFM 2020

## **Water quality and ecosystem health**

53. Forest & Bird supports the s42A officer recommendations to combine Schedules 27 into Schedule 26. This provides a clear link for all attribute states with the objectives, policies and rules which reference schedule 26 but did not reference Schedule 27.
54. Forest & Bird is generally supportive of the attributes and attribute state 2040 targets identified in Schedule 26 to measure ecosystem health and protect drinking water.
55. However, a number of other attributes and attribute state targets are uncertain or missing as set out in Forest & Bird's submission and as evident in the 'blank spaces' in the Schedule 26 tables. Waiting for a "kotahi review"<sup>24</sup> to fill these gaps is not only unexplained in PC9, it detracts from implementing the FMU requirements under the NPS-FM 2020 and ultimately fails to give effect to the NPS-FM 2020.
56. In particular Forest & Bird's submission sought the inclusion of attributes and a measure for changes in natural character and physical habitat quality. This was sought to address a generally low level of focus on physical habitat and natural character in PC9 policies and methods. Physical habitat is recognised as a component of ecosystem health in the NPSFM (both the 2017 and 2020) and direction to protect habitat and natural character included in both the NPSFM (2017 and 2020) and RMA. Forest & Bird has also sought these amendments to PC9 to address concerns with the ecological effects of HBRC's current approach to 'managing' its rivers for flood protection without consideration to the wellbeing of the waterbody. This is further explained in the evidence of Mr Kay on behalf of Forest & Bird.
57. Mr Kay's proposes a simple approach to monitoring changes in physical habitat and natural character in rivers, using ratio-based before/after comparisons known as the Habitat Quality Index and Natural Character Index to assess change in the condition of habitat or natural character. His evidence also suggests limits on potential changes in these indices to ensure habitat and natural character are maintained while allowing for natural variability.
58. Incorporating an explicit attribute state targets and subsequent requirements to monitor natural character and physical habitat will ensure degradation of these values does not occur, and opportunities for improvement are identified.

## **Water quantity**

59. Forest & Bird's submission raised a number of concerns with the PC9 provisions for flow maintenance, augmentation and enhancement of stream flows and groundwater. These

---

<sup>24</sup> This is referenced a number of times on schedule 26, however no explanation or guidance on such a review is included in PC9 its s32 report or the S42A report for PC9.

measures are not without adverse effects and do not resolve the cause of over-allocation. For example, POL TANK 39 commits the Council to mitigate stream depleting effects of groundwater takes (i.e. over-allocation) by, amongst other things, ensuring that stream flow maintenance and habitat enhancement schemes are constructed and operating within ten years of the operative date of the Plan. Nowhere in that policy is there a requirement to phase out over-allocation.

60. Propping up allocation in this way results in further investment and dependence on a water allocation system that is unsustainable and inconsistent with the NPS-FM 2020.
61. At best such provisions provide for remediation or mitigation of adverse effects and at worst is compensation for over-allocation. These provisions do not “avoid” future over-allocation or phase out existing over-allocation. This does not recognise the fundamental importance of protecting the health of freshwater or prioritise the health and well-being of water bodies as a first priority in the management of freshwater<sup>25</sup>.
62. The NPS-FM 2020<sup>26</sup>, like the 2017<sup>27</sup> version before it, requires regional councils to phase out over-allocation and avoid future over-allocation.

**over-allocation**, in relation to both the quantity and quality of freshwater, is the situation where:

- (a) resource use exceeds a limit; or
- (b) if limits have not been set, an FMU or part of an FMU is degraded or degrading<sup>28</sup>

63. Forest & Bird’s submission is that flow maintenance, enhancement and augmentation approaches should only be used as temporary measures if at all. Forest & Bird recognise that managed aquifer recharge or stream flow compensation might be necessary in very specific circumstances for community water supplies or to ensure survival of indigenous species. Any provision for such measures must be subject to actions being taken to phase out existing over-allocation of the water body and avoid future over-allocation.
64. In my submission, these measures should be separated from plan provisions for water storage. This is because water storage should be available in appropriate circumstances to water users to improve reliability of supply but not to prop up over-allocation by mitigating or remediating adverse effects of resource use exceeding a limit or causing degradation.

---

<sup>25</sup> 1.3 and 2.1 of the NPS-FM 2020

<sup>26</sup> Policy 11 of the NPS-FM 2020

<sup>27</sup> Objective B2 of the NPS-FM 2014 (updated 2017)

<sup>28</sup> Over-allocation is defined under 1.4 Interpretation, NPS-FM 2020

65. Forest & Bird considers that water storage schemes should be for direct provision of water to users rather than as a mitigation to waterbodies that are over-allocated.
66. Forest & Birds submission<sup>29</sup> also raised concerns that water take allocation under PC9 sought to manage water to the status quo rather than set environmental limits (including minimum flows) necessary to protect ecosystem health, phase out over-allocation, and prevent future over-allocation.
67. This is evidenced in POL TANK 42, which sets out to develop a plan change to ensure any over-allocation is phased out, after water has been re-allocated in accordance with POL TANK 36-38.

### **Notification**

68. The s42A officer has not accepted Forest & Bird's submission to provide more scope for public notification of proposals to intensify land use under TANK Rules 5 and 6 or to change the controlled activity classification of Rule 5.
69. However, the s42A officer has suggested changes to the non-notification wording which I would like to address. The wording proposed is:

*"If the 2040 target attribute states in Schedule 26 are being met in the catchment, consent applications in that catchment will be considered without public notification and without the need to, obtain written approval of affected persons."*

70. At first glance the determination of whether or not a catchment meets the 2040 targets provides a clear trigger for notification and some certainty that such applications would not be considered 'non-notified' within over allocated catchments. However, upon closer examination there are a number of uncertainties as to how non-notification would be determined.
71. It is not entirely clear whether the non-notification clause would only be triggered when all 2040 target attribute states in Schedule 26 for a catchment are met, or just those more 'directly' connected to N leaching (e.g. DIN, ammonia toxicity, etc.). If this is the requirement, then it may be some time before notification becomes a requirement.
72. If it is intended that only the target attribute states most relevant to the rule (e.g. DIN, ammonia toxicity, etc.) must be met then Forest & Bird has further concerns. For example, under Rule 5, if notification is to be determined based on whether the catchment meets the attribute target states relating to N leaching (as that is the nutrient which the rule requires to be assessed under Schedule 29), then potentially only the attribute target states for nitrate toxicity, ammonia toxicity and DIN in Schedule 26

---

<sup>29</sup> Para 6.23 Forest & Bird submission 14 August 2020

would be considered. Forest & Bird considers this approach would be inappropriate as changes in N leaching could also have implications for periphyton and MCI attribute target states, among other attributes.

73. In either case, Forest & Bird considers that council should retain discretion for notification to be considered on an 'application-by-application' basis. When the 2040 targets have been met public notification will be an appropriate consideration given community interest and input to ensure that waterbodies that do meet the 2040 targets stay that way.
74. The potential lack of opportunity for public notification under Rule 5 where council must grant consent as a controlled activity is particular concerning as this fails to consider implication of cumulative effects given the ability to increase N loss under that rule.

### **Climate change**

75. Forest & Birds submission set out a number of concerns that PC9 as proposed did not provide any outcomes or direction to consider the impacts of climate change on the natural environment.
76. The s42A makes changes. The Objective is simplified to read:

Climate change are taken into account when making decisions about land and water management within the TANK catchments.
77. Rather than include clear requirements for activities be undertaken sustainably in a changing climate, the policy amendments focus on ensuring activities are resilient to climate change (e.g. Policy TANK 39 b). While new Policy TANK 61 provides some consideration of climate change effects on ecosystems, biodiversity, and freshwater bodies (amongst other things) there is no clear direction to change behaviour, for example to consider reductions in water takes to ensure ecosystem functions are retained during droughts, or to provide riparian planting to increase shade and provide resilience to higher flows.
78. Further, continuing to take water from the ground to 'top up' or compensate for losses in surface water flows (as would be allowed through stream flow 'augmentation' schemes) doesn't consider the long term impact on groundwater. This is not a sustainable solution for the impacts of climate change on waterbodies.

### **NES stock exclusion**

79. The s42A approach to managing the NES on Stock Exclusion appears to be to delete relevant provision in the plan rather than considering whether provisions should be more stringent than the NES to address submissions. Forest & Bird's submission

suggested that PC9 could include more stringent direction than the new stock exclusion and setback rules from central government, however this does not appear to have been considered.

## **Conclusion**

80. Forest & Bird supports the following amendments recommended in s42A:
  - a. POL TANK 21 – clear regulatory approach to land use change which avoids land use change where increased nitrogen loss contributes to target attribute states in Schedule 26 for dissolved nitrogen not being met.
  - b. That Schedules 27 is combined into Schedule 26
81. Forest & Bird still has the following concerns:
  - a. a controlled activity classification for land use change with higher leaching levels (TANK Rule 5) does not afford appropriate discretion to decline consent;
  - b. a lack of clear direction in provisions to phase out existing over-allocation and avoid any further over-allocation;
  - c. policies for allocation or re-allocation do not incorporate the priorities of the hierarchy obligations of Te Mana o te Wai;
  - d. implementing policies to provide for the priorities in Objective 16 is not consistent with Objective 1.2 of the NPS-FM 2020;
  - e. that policy direction does not recognise the stream depleting effect of groundwater takes as “over-allocation”;
  - f. policies for flow maintenance/augmentation fail to include direction to reduce existing over-allocation;
  - g. the policy wording puts onus on the Council to achieve outcomes and maintain, reduce adverse effects, not users; and
  - h. the true cost of water takes and discharges to the natural environment is not recognised.

82. The fundamental issue with the policies is that the requirements to avoid future over-allocation, phase out existing over-allocation, and manage resources in a way that prioritises the hierarchy obligations of Te Mana o te Wai are not integrated into policy direction for the management of freshwater quantity or quality.

Dated: 21 June 2021

A handwritten signature in black ink, appearing to read 'P Anderson', is centered on a light gray rectangular background.

---

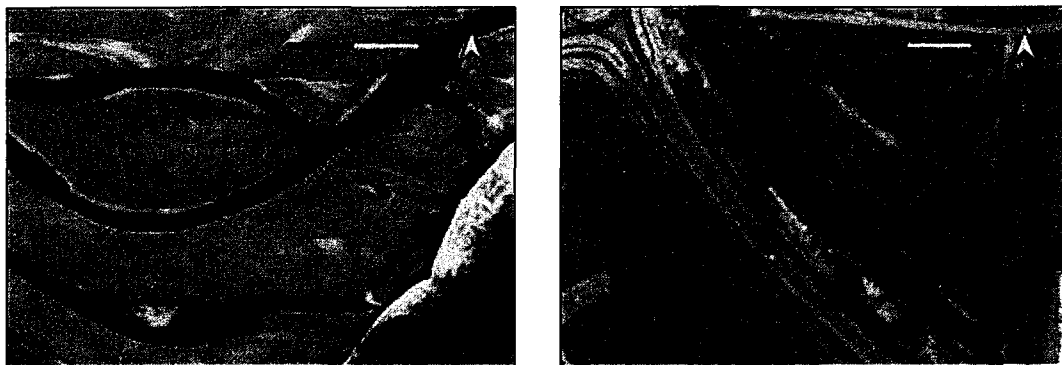
Peter Anderson  
Counsel for Royal Forest And Bird Protection Society of New Zealand



**Summary of the Evidence of Thomas James Kay (dated 11 May 2021)**

on behalf of Forest & Bird, in the matter of HBRC's Plan Change 9 / TANK (21/06/2021)

1. In my evidence I consider an assessment method to measure changes in the natural character and/or habitat quality of rivers and streams, and make proposals for how this could be incorporated into Plan Change 9 (PC9). The method—the 'Natural Character Index' (NCI) / 'Habitat Quality Index' (HQI)—and my proposals are presented on the basis they will assist council in giving effect to the National Policy Statement for Freshwater Management 2020 (NPSFM) and the Resource Management Act 1991 (RMA) by enabling the measurement of changes in attributes important to natural character and/or habitat quality.
2. River habitat and natural character are defined by physical in-stream and riparian features such as riffles, pools, and shading, in combination with the 'wider' characteristics of the channel and floodplain. The quality of habitat and natural character are highly interdependent and usually highly correlated – i.e. very high natural character and very high habitat quality often occur together, such as in 'natural' or 'near-natural' environments like National Parks, or in water bodies afforded Water Conservation Orders.
3. Where there is a diverse range of in-stream features, and high integrity of riparian features, habitat quality is generally considered high (see Figure 1, left). Where these features are lacking in diversity or integrity, habitat quality is generally considered low (see Fig. 1, right).
4. Where high diversity and integrity of such features is combined with a more 'natural' channel form (i.e. one that is not channelised or constrained) and a functional floodplain (i.e. one that is connected to the river channel) natural character is generally considered high. Where the opposite stands, natural character is generally considered low (Fig. 1).



**Figure 1:** Left: High natural character, high habitat quality (Ngaruroro River near Whanawhana). Right: Low natural character, low habitat quality (Karamū Stream at Pakowhai Rd/Te Ara Kahikatea intersection). Same scale.

5. Human activity and intervention has degraded, and continues to degrade, the physical habitat quality and natural character of rivers and streams.<sup>1</sup>
6. As noted in my evidence (para. 15-16), the RMA (section 6(a)) and the NPSFM (Policy 9) require that natural character and freshwater habitats are preserved and protected. The NPSFM also identifies 'habitat' as one of 5 core biophysical components of its compulsory 'ecosystem health' value. The NPS is clear that "it is necessary that *all* of [these components] are managed" (emphasis added). It defines habitat as "the physical form, structure, and extent of the water body, its bed, banks and margins; its riparian vegetation; and its connections to the floodplain and to groundwater." This description clearly

<sup>1</sup> Examples of this are provided in my evidence (para. 26, and Figures 3, 3a, 3b, 4a, 4b, 5).

overlaps with those for habitat and natural character I described above and in my evidence (p. 5-8), as well as with those in the literature (e.g. Petrove et al., in Death et al. (n.d.c)).

7. My evidence sets out that the measurement of changes in attributes of natural character and/or habitat quality is an appropriate and useful approach to meeting the requirements of the RMA and NPSFM. I have discussed how, without measurement of such attributes, the plan will not be able to demonstrate that objectives for enhancement, improvement, or restoration of freshwater ecosystems have (or have not) been met.
8. The NCI and HQI (which are essentially synonymous) are tools for measuring changes in habitat quality and natural character that can be incorporated into PC9 to address this issue.
9. The NCI/HQI was developed to identify and quantify change in the natural character or habitat quality of a river over time. This is achieved by comparing numeric measurements of habitat or natural character 'now' with measurements at the same site at a reference point in time and using those to create a ratio. If no change has occurred, the condition 'now' is the same as the reference condition and the ratio is 1.00. If there has been a reduction in the measure, the ratio will be less than 1.00. If there has been an increase in the measure, the ratio will exceed 1.00.
10. For example, as illustrated in my evidence (Fig. 6, p. 15), the average width of the active channel of a reach of the Rangitata River (in Canterbury) in 1937 was 569m. In 2016/2018 it was 382 m. The NCI for this parameter in this reach is 0.67 because:

$$NCI_{active\ channel} = \frac{width\ in\ 2016/2018}{width\ in\ 1937} = \frac{382}{569} = 0.67$$

11. Several parameters (e.g. channel width, sinuosity, floodplain width) would be measured for a full assessment (the number would depend on the objective of the assessment, nature of the river, and availability of data), each generating a separate value, and the median used to provide an 'overall' NCI/HQI score, and therefore an indication on the change in condition of the reach (e.g. in the above example, it can be expressed that the channel width 'now' is 67% of what it was in 1937, or there has been a 33% reduction).
12. As explained in my EiC, the NCI/HQI has been used to assess changes in rivers across New Zealand, including the Hutt, Waikanae, Otaki, Rangitikei, Motueka, Rangitata, Ngaruroro, and Waiohine Rivers, as well as the Ebro River in Spain and the Sava River in Croatia (Fuller et al., 2014, 2020; Kay, 2020; Appendices 1 & 2 of my evidence; Death et al., n.d.a., n.d.c.).
13. In my evidence (para. 71) I suggest how the NCI/HQI could be incorporated into PC9.
14. In my evidence I find that PC9, as proposed and as amended by the s42A report, includes several references to habitat and natural character in its objectives and policies, and one relevant attribute in Schedule 26 (deposited sediment). However, it does not incorporate sufficient attributes or methods in this regard to ensure the health and well-being of freshwater ecosystems is maintained or improved, and that habitats of indigenous freshwater species are protected.
15. As proposed, the only attribute explicitly connected to 'habitat' in Schedule 26 is 'deposited sediment' (a mandatory attribute under the NPSFM) and, even then, that is only applied in some catchments (in some places in schedule 26 there is no target attribute state associated with deposited sediment and instead reference is made to a "Kotahi Review").

16. This lack of objectives or target attributes states (in Schedule 26) for habitat and natural character is a risk for ecosystem health in the TANK catchments.
17. In my evidence I propose an addition to the schedules: 'Schedule 26.X: Natural Character / Habitat Quality Limits' (p. 20) to incorporate NCI/HQI attribute 'limits' into PC9. This includes numeric *and narrative* limits on natural character and habitat quality for all TANK catchments. For the most part, this suggests a numeric median limit of 0.85 and a 'minimum component' limit of 0.60. A slightly higher limit (0.90 and 0.80) is proposed for the Upper Ngaruroro (headwaters) as these are valuable<sup>2</sup> natural/near-natural state areas and are mostly geologically confined, so very little natural fluctuation in character/habitat would be expected. Additional, more specific limits, are proposed for the Lower Ngaruroro<sup>2</sup>, based on detailed work from the Ngaruroro WCO case. These are accompanied by a narrative target/limit.
18. Changes in format to Schedule 26 and the 'Appendix 2 - Planning Maps' resulting from the s42A report (which I had not reviewed prior to drafting the proposed table) mean minor amendments to the table proposed in my evidence (Schedule 26.X) are required to fit with however FMUs are defined. However, regardless of how FMUs are defined, *for the purpose of applied management*, respective median and 'minimum' limits of 0.85 and 0.60 should be sufficient 'bottom lines' for most water bodies. Ideally, a slightly higher threshold should be applied to 'headwater' water bodies<sup>3</sup>, and the specific 'Lower Ngaruroro' thresholds should still apply, as should the narrative target/limit<sup>4</sup>.
19. It must be stressed that I propose these as *minimum* (i.e. 'bottom line') numeric thresholds against which NCI/HQI monitoring should be assessed to help inform what 'maintenance' looks like, while allowing for fluctuations in components of natural character (e.g. channel width, sinuosity) that are expected in rivers as 'constantly adjusting' systems. This is not dissimilar to how the NPS provides a 'window' for many ecosystem health attributes—e.g. 'maintaining' MCI scores in the 'B' band could mean keeping them between 110-130, not necessarily keeping them constant. However, the intent of council should generally be to keep NCI/HQI scores >1.00 and to identify whether any component scores below 1.00 should be cause for concern.
20. In summary, habitat quality and natural character are as important as water quantity and quality for ecosystem health. Degradation of natural character and habitat, and therefore degradation of ecosystem health, has occurred and continues to occur. Effective methods to measure change in natural character and habitat quality are vital to ensure regional councils halt (and reverse) this degradation and meet the requirements of policy direction in regard to these values.
21. Incorporating the NCI/HQI into PC9, including through Schedule 26 targets/limits (but also through amendments to policies and methods), will help ensure its use in State of the Environment monitoring, incorporation into and monitoring of compliance with resource consent conditions, and consideration in river management decisions, thereby assisting in halting and reversing the degradation of habitat quality and natural character.
22. I agree with Forest & Bird that amending PC9 to include the use of the NCI/HQI will assist in achieving the objectives of the NPSFM and the RMA.

---

<sup>2</sup> Potentially 'outstanding' subject to PC7 (OWB) and Env. Court (Ngaruroro WCO) decisions.

<sup>3</sup> A median of 0.9 was proposed in the evidence of Prof. Russell Death for these sorts of water bodies for the hearings on the Wellington Natural Resource Plan (NRP) (though no 'minimum' value was included). See footnote on page 18 of my evidence for links to Prof. Death's evidence.

<sup>4</sup> Having a narrative is a similar approach to targets originally recommended for the Wellington NRP by Prof. Death, but also GWRC staff – see pages 18, 30, of <http://www.gw.govt.nz/assets/Plans--Publications/Regional-Plan-Review/Draft-Regional-Plan-docs/2014-Technical-Reports/RecommendedchangestoScheduleHattributesoutcomesforthedraftNaturalResourcesPlan-Rivers-streams.pdf>

