

**BEFORE THE HEARINGS PANEL**

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

**AND**

**IN THE MATTER** of the Proposed Central Hawke's Bay  
District Plan

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

**HEARING STREAM 1: NATURAL AND COASTAL ENVIRONMENT**

**9 MARCH 2022**

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## MAY IT PLEASE THE PANEL

### INTRODUCTION

1. The Royal Forest and Bird Protection Society Inc (Forest & Bird) supports many aspects of the Proposed Central Hawkes Bay District Plan (Proposed District Plan). However, further changes are required for it to be said the Proposed District Plan meets the requirements of the Resource Management Act 1991.
2. These legal submissions provide the legal context and basis for Forest & Bird's position on Policy NFL-P5 – which Forest & Bird seeks is removed in its entirety.
3. The S42A Report recommends retaining Policy NFL-P5:  
  
To recognise the regional social and economic significance of water storage within ONF-4 (Mākāroro Gorge)
4. The section 42A Report justifies Policy NFL-P5 based on:<sup>1</sup>
  - a. The purpose of the RMA set out in section 5.
  - b. That it “provides a balanced judgement, in keeping with the purpose and principles of the RMA.”
  - c. Facilitating the Ruataniwha Water Storage Scheme (RWSS) – which had consents granted in 2014 but has not been (and is unable to be) implemented.
5. This is an incorrect approach. It is essentially a version of the overall broad judgement approach which the Supreme Court in *Environmental Defence Society Incorporated Inc v The New Zealand King Salmon Company Limited*<sup>2</sup> (*King Salmon*) has discontinued.
6. Forest & Bird's concern is with the approach of including a policy catered to one activity as opposed to developing policy based on higher order directions under the RMA.

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<sup>1</sup> Officer's Report: “Natural Environment – Natural Features and Landscapes” (February 2022) at [6.3.7-6.3.9].

<sup>2</sup> [2014] NZSC 38 at [10].

7. These submissions outline the key aspects of the statutory framework before highlighting the issues with Policy NPL-P5.

## **STATUTORY FRAMEWORK**

8. The provisions under the Proposed District Plan must:
  - a. accord with and assist the Council in carrying out its functions under Part 2 of the RMA;<sup>3</sup>
  - b. meet the requirements of section 32 of the RMA, including whether the policies and rules are the most appropriate for achieving the objectives of the Plan;<sup>4</sup>
  - c. give effect to applicable national planning documents including the National Policy Statement for Freshwater Management 2020 (NPSFM);<sup>5</sup>
  - d. give effect to the Regional Policy Statement within the Hawkes Bay Regional Resource Management Plan; and
  - e. must not be inconsistent with a water conservation order or a regional plan for any matter related to a regional council function.<sup>6</sup>
9. Section 31(1)(b)(iii) of the RMA makes it a function of the district council to control land uses for the purpose of maintaining indigenous biological diversity. Case law confirms that this imposes a *duty* on councils and not a discretion.<sup>7</sup>

### **The role of Part 2**

10. The role of Part 2 in decision-making processes for plan changes/plan reviews has been refined by the Supreme Court in *King Salmon*. Absent invalidity, incomplete coverage or uncertainty of meaning in the relevant higher order statutory planning documents, there is no need to refer back to Part 2 of the

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<sup>3</sup> Section 74(1)(a) and (b), RMA.

<sup>4</sup> Section 74(1)(e), RMA.

<sup>5</sup> Section 75(3), RMA.

<sup>6</sup> Section 75(4), RMA.

<sup>7</sup> *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50 at [29]: “This function is not optional – it is something a regional council is required to do, whether it be easy or difficult”. *Property Rights in New Zealand Inc v Manawatu Regional Council* [2012] NZHC 1272 at [31].

RMA when determining a plan change.<sup>8</sup> This is because the higher order planning document is assumed to already give substance to Part 2.<sup>9</sup>

11. If one or more of the three caveats apply, reference to Part 2 may be justified. For example, where there is incomplete coverage and a policy document does not “cover the field”, the decision-maker will have to consider whether Part 2 aids in dealing with the matter(s) not covered.<sup>10</sup>
12. If, in relation to a higher order planning document, there is conflict or tension between one or more provisions that pull in opposite and competing directions, the Supreme Court held that policies expressed in more directive terms will carry greater weight than those expressed in less directive terms.<sup>11</sup> For example, “avoid” is a stronger direction than “take account of”.<sup>12</sup>
13. Where conflict remains after examination of policies, analysis should start with the relevant policy statement, albeit informed by section 5 of the RMA.<sup>13</sup> The Supreme Court has emphasised that section 5 is not a “primary operative decision-making provision.”<sup>14</sup> It sets out the RMA’s overall objective but is not a section under which particular planning decisions are made.<sup>15</sup>

## **REMOVAL OF POLICY NFL-P5 IS REQUIRED**

### **RWSS consents are not authority to include NFL-P5**

14. Forest & Bird’s concern is Policy NFL-P5 identifies water storage in outstanding value areas as appropriate without proper consideration under the current and future planning frameworks. Whether an activity was appropriate under the past planning framework does not necessarily make it appropriate if considered again in the future. Such a presumption should not be built into the plan.

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<sup>8</sup> [2014] NZSC 38 at [85], [88].

<sup>9</sup> [2014] NZSC 38 at [30], [85].

<sup>10</sup> [2014] NZSC 38 at [88].

<sup>11</sup> [2014] NZSC 38 at [129].

<sup>12</sup> [2014] NZSC 38 at [129].

<sup>13</sup> [2014] NZSC 38 at [130].

<sup>14</sup> [2014] NZSC 38 at [130].

<sup>15</sup> [2014] NZSC 38 at [151].

15. The S42 Report relies on consents for the RWSS approved in 2014. It is incorrect to predicate plan provisions based on previously granted but unexercised resource consents. The findings relating to those consents are specific to evidence that was before a Board of Inquiry subject to different statutory requirements with different roles for decision-makers. For example, a district plan must “give effect to” higher order instruments pursuant to s 75(3) versus the requirements to “have regard to” such documents when considering resource consent applications pursuant to section 104.
16. Consents for the RWSS were considered under a different context. The planning context has changed significantly with the introduction of the NPSFM 2020.
17. Caution must therefore be applied in giving undue weight to unexercised consents.

**An “overall broad judgement” is unavailable**

18. The approach of developing policy to provide a “balanced judgement” in response to a particular activity is essentially an “overall broad judgement”.
19. The effect of *King Salmon* is that lower order planning documents cannot depart from the direction provided by national policy instruments (including the NPSFM), even if it is considered that a regional or activity-specific context requires departure from the national-level instruments.
20. This was confirmed by the High Court in *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*<sup>16</sup>. One of the policies in the Proposed Bay of Plenty Regional Coastal Plan unequivocally sought to avoid adverse effects in areas of high indigenous biodiversity. However, other policies recognised that it might be appropriate to grant consent for regionally significant infrastructure to locate in those areas in some circumstances. The Environment Court found that the provisions that recognised regionally significant infrastructure represented a “proportionate response” which gave effect to those tensions recognised by the NZCPS.

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<sup>16</sup> [2017] NZHC 3080.

21. On appeal the High Court found that the “proportionate response” approach taken by the Environment Court was, in effect, a version of the “overall broad judgement approach” which *King Salmon* had done away with. The High Court said:<sup>17</sup>

[The Environment Court] was suggesting that the benefits and costs of regionally significant infrastructure, seeking to locate in Indigenous Biological Diversity Areas A and that could have adverse effects on such areas, should be assessed on a case by case basis, having regard to all relevant factors. Given the majority’s decision in *King Salmon*, this approach was not available to it.

22. These findings are equally applicable to areas of outstanding natural landscapes and features.

### **Implementing the Proposed District Plan’s objectives**

23. The s 42A Report has recommended amending the relevant objective applicable to outstanding natural features and landscapes, NFL-O1, in a way that is acceptable to Forest & Bird:

NFL-O1 - Outstanding natural features and landscapes ~~that are important to the identity of the District~~ are retained and protected from inappropriate subdivision, use and development.

24. The policies of the Proposed District Plan must achieve this objective, and potential options for its achievement must be assessed using the tests in s 32, including assessing their efficiency and their effectiveness, and taking into account the risk of acting or not acting.<sup>18</sup>

25. In *King Salmon*, the Supreme Court held that where the term “inappropriate” is used in the context of protecting areas from inappropriate subdivision, use or development, the natural meaning is that “inappropriateness” should be assessed by reference to what it is that is sought to be protected. The Court referred to the wording of s 6(b), then went on to hold that:<sup>19</sup>

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<sup>17</sup> *Royal Forest and Bird Protection Society Inc v Bay of Plenty Regional Council* [2017] NZHC 3080, at [106].

<sup>18</sup> The S32 Report does not appear to have assessed the efficiency and effectiveness or costs and benefits of NFL-P5.

<sup>19</sup> *Environmental Defence Society v NZ King Salmon Ltd* [2014] NZSC 38 at [101].

A planning instrument which provides that any subdivision, use or development that **adversely affects** an area of outstanding natural attributes is inappropriate is consistent with this provision.

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...“inappropriate” should be interpreted in s 6(a), (b) and (f) against the backdrop of what is sought to be protected or preserved.

26. On that basis, Objective NFL-O1 can be taken to mean that the attributes and values of outstanding natural features and landscapes and outstanding natural character areas are to be protected from any subdivision, use or development that would *adversely affect* them.

27. ECO-O1 also provides as follows:

Protect the District's areas of significant indigenous vegetation and /or significant habitats of indigenous fauna, particularly those within wetlands, braided rivers, and coastal margins, from activities that may adversely affect them.

28. The two objectives are expressed in specific and directive terms. In my submission, they do not provide flexibility and scope for choice.

29. The “Outstanding Natural Landscape Assessment Report” for the Mākāroro Gorge, referred to in the s 42A Report found that:<sup>20</sup>

Research undertaken for the RWSS found a range of indigenous vegetation types in the upper gorge, including Black Beech Forest, Mountain Beech Forest, Podocarp Broadleaf Forest, Broadleaf Forest, Kowhai Broadleaf treelands scrub/tussockland and Broadleaf small leaved monocot scrub/cliffland. Aspects of these vegetation types are expected to occur through the gorge. An ecological assessment of the entire gorge length is expected to find it to be a Significant Natural Area that would warrant recognition under RMA s6(c).

30. The s42A report recognises:<sup>21</sup>

The PDP response is not to regulate farming land use within identified landscapes, but instead focus on addressing those specific activities that pose the greatest threat to the landscape values present, which the Landscape Assessment Report has identified as mostly being one or more of the following: loss of indigenous vegetation cover, exotic plantation forestry, built development, and substantial earthworks, as well as activities that can damage cultural features/values within a landscape.

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<sup>20</sup>Appendix C to the Officer’s Report: “Natural Environment – Natural Features and Landscapes (February 2022) at 48.

<sup>21</sup> Officer’s Report: “Natural Environment – Natural Features and Landscapes (February 2022) at [4.3.15].

31. A water storage facility in the Mākāroro Gorge would encompass several of these activities which the S 42A Report regards as a “threat”.
32. The s42A Report acknowledges that the Landscape Assessment Report has undertaken its assessment based on the RWSS dam not forming part of the ‘existing environment’.<sup>22</sup>
33. The s42A report recognises, in its analysis of other NFL policies, that when considering existing activities in outstanding natural features and landscapes:<sup>23</sup>

this should be tempered to only those existing land uses where the identified characteristics and values contained in the schedule in the PDP (NFL-SCHED6) are maintained.
34. This rationale should be carried through to analysis of NFL-P5. If a water storage facility were to be constructed in the Mākāroro Gorge, the characteristics and values of the gorge would not be maintained in accordance the objectives.
35. An interpretation of the objectives as providing for water storage in the Mākāroro Gorge where it would adversely affect the values and attributes of those areas would not be consistent with directive language of Objectives NFL-O1 and ECO-O1. It would involve reading down their clear wording. As discussed below, it would also fail to give effect to the relevant higher order planning documents.

### **The RPS**

36. The Hawke’s Bay Regional Policy Statement (RPS) is contained within the Hawke’s Bay Regional Resource Management Plan (RRMP). It contains no direction on outstanding natural features and landscapes except for within the coastal environment which is addressed in the Regional Coastal Environment Plan. The relevant policy directions in the coastal environment are contained in the Section 32 Topic Report.<sup>24</sup>

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<sup>22</sup> Officer’s Report: “Natural Environment – Natural Features and Landscapes (February 2022) at [6.3.3].

<sup>23</sup> Officer’s Report: “Natural Environment – Natural Features and Landscapes” (February 2022) at [8.3.9].

<sup>24</sup> “Natural Features and Landscapes – Section 32 Topic Report” (May 2021) at [2.3.1].

37. Outside the coastal environment, it is therefore appropriate to look at the next document in the hierarchy, the NPSFM. The RPS and RRMP predate the NPSFM and do not provide complete coverage (falling within the *King Salmon* caveats).

### The NPSFM

38. The National Policy Statement for Freshwater Management 2020 (NPSFM) came into force in September 2020. It is a relevant national policy statement for you to consider.<sup>25</sup>
39. The Proposed District Plan must “give effect to” the objectives and policies in Part 2 of the NPSFM. “Give effect to” means “implement.”<sup>26</sup>
40. Important NPSFM directives for the purpose of this hearing include:
- a. Ensuring natural and physical resources are managed in a way that prioritises the health and well-being of water bodies and freshwater ecosystems **above** other considerations, including above the ability of people and communities to provide for their social, economic, and cultural well-being.<sup>27</sup>
  - b. Freshwater is managed in a way that gives effect to Te Mana o te Wai.<sup>28</sup>
  - c. The loss of river extent and values is avoided to the extent practicable.<sup>29</sup>
  - d. The habitats of indigenous freshwater species are protected.<sup>30</sup>
41. While the NPSFM does not address outstanding natural character, features, and landscapes per se, it is nevertheless applicable. The NPSFM articulates matters of national significance that are relevant to achieving the purpose of the RMA in relation to freshwater management. While freshwater management is

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<sup>25</sup> Section 74(1)(ea).

<sup>26</sup> [2014] NZSC 38 at [77].

<sup>27</sup> Objective 1, NPSFM.

<sup>28</sup> Policy 1, NPSFM.

<sup>29</sup> Policy 6, NPSFM.

<sup>30</sup> Policy 9, NPSFM.

largely a regional council function under s 30(1), district plans must not be inconsistent with regional plans or any matter specified in s 30(1).<sup>31</sup>

42. NFL-P5 diminishes the priority the NPSFM affords to the health and wellbeing of waterbodies and freshwater ecosystems. Freshwater is required to be managed in a way that “gives effect to Te Mana o te Wai”.<sup>32</sup> The integrated ki uta ki tai approach required by Te Mana o te wai requires both regional councils and territorial authorities to:<sup>33</sup>

- a. Recognise the interconnectedness of the whole environment, from the mountains and lakes, down to the rivers to hāpua (lagoons), wahapū (estuaries) and to the sea; and
- b. **Recognise interactions between freshwater, land, water bodies, ecosystems, and receiving environments;** and
- c. **Manage freshwater, and land use and development,** in catchments in an **integrated and sustainable way to avoid, remedy, or mitigate adverse effects,** including cumulative effects, on the health and well-being of water bodies, freshwater ecosystems, and receiving environments; and

43. The NPSFM prioritises the health and well-being of water bodies and freshwater ecosystems over other matters. Under the NPSFM, water storage is essentially a “third order priority.”<sup>34</sup> Policy NFL-P5 provides an imbalance in favour of water storage generally, above other relevant activities and values.

44. Forest & Bird’s position is that removing NFL-P5 is necessary to ensure the Plan aligns with the NPSFM directives. Reference to Part 2 of the RMA supports this interpretation, as discussed as follows.

## **Part 2 of the RMA**

45. In terms of section 5, The Supreme Court in *King Salmon* observed that:<sup>35</sup>

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<sup>31</sup> RMA, s 75(4)(b).

<sup>32</sup> NPSFM, Policy 1.

<sup>33</sup> NPSFM, cl 3.5(1).

<sup>34</sup> Objective 1(c) “third, the ability of people and communities to provide for their social, economic and cultural well-being.”

<sup>35</sup> *Environmental Defence Society v NZ King Salmon Ltd* [2014] NZSC 38, at [24d].

...the use of the word “protection” in the phrase “use, development and protection of natural and physical resources” and the use of the word “avoiding” in sub-para (c) indicate that s 5(2) contemplates that particular environments may need to be protected from the adverse effects of activities in order to implement the policy of sustainable management; that is, sustainable management of natural and physical resources involves protection of the environment as well as its use and development. **The definition indicates that environmental protection is a core element of sustainable management, so that a policy of preventing the adverse effects of development on particular areas is consistent with sustainable management.**

46. Section 6 requires district councils to recognise and provide for the following matters of national importance:

- 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.<sup>36</sup>
- b. The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development.<sup>37</sup>
- c. The protection of significant indigenous vegetation or significant habitat of indigenous fauna.<sup>38</sup>

47. The Supreme Court observes the language of section 6 as:<sup>39</sup>

[u]nderscoring the point that preservation and protection of the environment is an element of sustainable management of natural and physical resources. Section 6(a) and 6(b) are intended to make it clear that those implementing the RMA must take steps to implement that protective element of sustainable management.

48. The direction to “recognise” the benefits of water storage in NFL-P5 undermines the protection element of sections 5 and 6 of the RMA.

49. The s42A Report acknowledges:<sup>40</sup>

the requirement in section 6(b) of the RMA is to recognise and provide for the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development which, in my view, indicates a presumption that such features and landscapes will be retained largely in their current state.

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<sup>36</sup> Section 6(a), RMA.

<sup>37</sup> Section 6(b), RMA.

<sup>38</sup> Section 6(c), RMA.

<sup>39</sup> *Environmental Defence Society v NZ King Salmon Ltd* [2014] NZSC 38 at [148].

<sup>40</sup> Officer’s Report: “Natural Environment – Natural Features and Landscapes” (February 2022) at [8.3.12].

50. This is inconsistent with the 42A report's position regarding NFL-P5, which recognises and appears to support a potential change in an outstanding natural feature that would have a detrimental effect on characteristics and values.
51. The direction to "recognise" in Policy NFL-5 creates a presumption that water storage should occur and that it is appropriate within ONF-4. This is unsupported given:
- a. the important values identified in the Mākāroro Gorge which have been recognised under the Proposed District Plan; and
  - b. that water storage recognised in Policy NFL-5 will give rise to inappropriate effects on the natural character and indigenous biodiversity values.
52. Removing Policy NFL-5 ensures the Proposed District Plan's policy framework is consistent with the directives for protection articulated under its objectives, the NPSFM, in accordance with its functions and Part 2 of the RMA.

**Dated** this 9<sup>th</sup> day of March 2022



**May Downing**

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