

Submission to the proposed Plan Change 7

4 May 2020

To: Proposed Plan Change 7 – Water Permits
By email to Policy@orc.govt.nz

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1. Forest & Bird could not gain an advantage in trade competition through this submission.
2. Forest & Bird wishes to be heard in support of this submission, and would be prepared to consider presenting this submission in a joint case with others making a similar submission at any hearing.

Introduction

3. The Royal Forest & Bird Protection Society of New Zealand has been Aotearoa New Zealand's independent voice for nature since 1923. Forest & Bird's constitutional purpose is:

To take all reasonable steps within the power of the Society for the preservation and protection of the indigenous flora and fauna and the natural features of New Zealand.

4. Forest & Bird is actively involved in national and regional planning processes relating to freshwater, coastal environments and biodiversity across Aotearoa New Zealand. In addition, we have over 100,000 members and supporters who are passionate about freshwater protection.

Background and Context

5. Forest and Bird provided feedback on the management of deemed water permits and has made submissions and lodged appeals in relation to other recent plan changes to the Regional Plan, including for Plan change 6A and Plan Change 6AA. Forest and Bird is also an appellant and 274 party on the Otago RPS.

Submission

6. Forest & Birds preference is for an integrated and comprehensive regulatory framework for the take and use of freshwater. However, Forest & Bird recognises

the need for an interim approach to address water permits which expire prior to such a plan change becoming operative. It is important that this be done right and not cut corners. The PC7 focus on high values waterbodies is concerning as even “low value” waterbodies have important values and need to be managed to maintain environmental flows. Our concerns and specific comment on the proposed provisions are set out below.

Giving effect to the NPSFM

7. The National Policy Statement for Freshwater Management 2014 as amended 2017 (NPSFM) sets out an over arching objective to consider and recognise Te Mana o te Wai in the management of freshwater. This provides for a holistic and integrated approach to the management of freshwater which places the wellbeing of the water body at the forefront of decision making¹. The NPSFM also includes objectives and policies specific to water quantity². While the regional council has undertaken to progressively implement the policies of the NPSFM it must none the less give effect to the objectives of the NPSFM in its decision making on PC7.
8. Forest & Bird is concerned that PC7 as proposed would not avoid over-allocation, will further delay achieving the objectives of the NPSFM and that decisions made under the proposed PC7 framework would not require water take and use to be sustainably managed within limits.
9. Progressive implementation of the policies of the NPSFM must be fully implemented by the end of 2030³. An interim approach needs to provide a pathway to bringing water allocation into the NPSFM framework for the management of freshwater, not further delay giving effect to the NPSFM.
10. The environmental impacts of decisions under PC7 will be long term, extending beyond the consent duration times frames and influencing future allocation frameworks including environmental limits. Allowing for consent durations which extend 5 years after the council is required to implement the policies of the NPSFM and 10 years after the new LWRP is to have come into effect is inappropriate and does not support a precautionary approach.
11. In forest & Birds view PC7 as proposed is inconsistent with achieving Objectives B1 to B5 of the NPSFM. This is also uncertain when considered against the operative Plan due to the directive wording of the proposed provisions, the inability for council to decline controlled activity consents on the basis of adverse effects and the restricted matters to which council reserves its control. The NPSFM mandatory policy B7 appears to also be missing from the operative plan adding further uncertainty to achieving the objectives of the NPSFM.

¹ Page 7, National significance of fresh water and Te Mana o te Wai, The National Policy Statement for Freshwater Management 2014 as amended 2017

² See Appendix 1 attached to this submission.

³ Policy E1, E. Progressive implementation programme, NZCPS

12. The introduction to PC7 sets out that a new plan (implementing the policies of the NPSFM) will be operative in 2025⁴. However the Council’s Progressive Implementation Plan (PIP)⁵ suggests that the “new plan” won’t be notified until 2025. The PIP needs to be updated so that it sets out a programme to meet the operative 2025 date.

Relationship with operative plan provisions (the Plan) and RPS

13. The wording of PC7 and limited matters for control, limits opportunity for decisions makers under this consenting framework to have regard to other provisions of the operative Plan. In some cases this is appropriate, ie for consent duration. However, provisions in the operative Plan and the RPS which provide direction for the consideration of adverse effects are still relevant to the take and use activities under PC7.
14. Any reliance on the allocation limits in operative plan under Policy 6.4.2 is cautioned: The Schedule 2A – Schedule of specific minimum flows for primary allocation takes and a process for setting allocation limits in other cases. These provisions address the amount of water than can be allocated, it does not address the take of water when flows may be insufficient to support the taking of allocated water and ensure that ecological flows are maintained. Those allocation limits need to be supported by a condition requiring reduction and a cessation of take to maintain environmental flows.

Proposed Objective 10A.1

15. The objective sets out the purpose of the new chapter 10A.

Objective 10A.1.1 Transition toward the long-term sustainable management of surface water resources in the Otago region by establishing an interim planning framework to manage new water permits, and the replacement of deemed permits and water permits to take and use surface water (including groundwater considered as surface water) where those water permits expire prior to 31 December 2025, until the new Land and Water Regional Plan is made operative.

16. However its focus on ‘long-term’ suggests that sustainable management is not important in the short term or as part of the interim measures. This is inconsistent with achieving Objective B5 of the NPSFM.

17. Relief sought:

- a. Clarify what “the new Land and Water Regional Plan” is and that it will give effect to the NPSFM.
- b. Delete the words “long term”

⁴ page iii, Introduction Proposed Plan Change 7 (Water Permits) to the Regional Plan: Water for Otago, 2020

⁵ Appendix 2 attached to this submission.

- c. Remove reference to the new plan. Consider including an explanation to the objective. Alternatively add a footnote or definition to explain the new regional plan.

Proposed Policies

18. Forest & Bird supports the overall intent of the policies in providing for short consent duration as a key requirement for the interim allocation framework. However the policies do not ensure that over allocation is avoided and are not sufficient to phase out over-allocation. Nor do they set clear direction to safeguard the life supporting capacity of freshwater through sustainably managing water quantity within limits. The directive wording of these policies and the implementation through a controlled activity status means that the existing policies of the operative plan which do address ecological values and limits could not be used as a basis to decline consent.
19. Forest and bird supports the limitation on irrigation under Policy 10A.2.1. However the direction for the granting of consents is problematic on the basis of:
 - a. No increase in the rate of abstraction
 - b. Retaining existing condition on residual flow, minimum flow or take cessation.
 - c. A reduction in the volume of water allocated for abstraction
20. This is because no increase, does not provide direction for reduction in the rate of abstraction which may be appropriate. The existing conditions may no longer be appropriate. There is no direction for a residual, minimum or environmental flow limit condition to be added. The extent of a reduction is not specified.
21. Policy 10A.2.3 which provides an exemption to the 6 year consent duration on the basis of “no more than minor effects” is also problematic. It is uncertain on what basis no more than minor is determined, whether this is considered in terms of effects on specific values and includes localised impacts. This could be clarified by stating what is to be protected and maintained.
22. Providing for 15-year consents (end of 2035) is not short term in our view. This would extend consent duration beyond the timeframe for implementing the NPSFM and beyond the 10 year life of the new LWRP.
23. The policy direction of an unspecified reduction is uncertain and could result in little change. This is not effective as an interim and precautionary approach. There is a risk that re-consenting on the basis set out will not avoid or remove over allocation or operate within environmental limits. This is particularly concerning as the policy is implemented through a controlled activity rule for which consent cannot be declined. Setting out a specific minimum reduction of at least 20% is appropriate for controlled activities in our view.
24. There is some uncertainty of the relationship between the policies as:
 - a. they are irrespective of each other as well as policies in the operative Plan.

- b. The terms “resource consent” and a “new resource consent” are used interchangeably.

Relief sought:

- c. Include direction for a minimum flow limit to be included on any consents which are granted.
 - d. Amend Policy 10A.2.1 (c) to read “There is no increase and preferably a decrease in the instantaneous rate of abstraction”.
 - e. Amend Policy 10A.2.1 (e) to set out:
 - i. a preference for activities which will have reduction in allocation of at least 20%.
 - ii. the consideration of activities where a reduction which is above 20% so long as it is below the original volume of water allocation.
 - f. In Policy 10A.2.1 add a requirement for inclusion of a condition for cessation of take to maintain ecological flows.
 - g. Amend Policy 10A.2.3 (b) by changing 31 December 2035 to 31 December 2030.
 - h. Amend Policy 10A.2.3 (a) by removing the words “no more than minor” and replacing with outcomes that must be met, such as safeguarding the life supporting capacity ecosystem processes and indigenous species including their associated ecosystems of fresh water to give effect to Objective B1 NPS.
 - i. Amend Policies 10A.2.2 and 10A.2.3 by deleting the word “new” in front of resource consent.
 - j. Amend Policy 10A.2.2 to read “Subject to Policy 10.2.3 and Irrespective of any other policies in the Plan...”
 - k. Add policy that gives effect to the mandatory direction of the NPSFM.
25. Including the specific requirements, as Forest and Bird proposes, allows for three consenting pathways;
- a. by splitting the proposed controlled activity rule so that activities which do not have a reduction of at least 20% become a restricted discretionary; and
 - b. by tightening the non-complying activity rule by capping the extended consent duration at end of 2030.

26. Forest & Bird recognises that a controlled activity rule does provide greater certainty to users and that certainty is particularly important for existing users. However this must not override achieving environmental outcomes and bottom lines.

Rules

27. As stated above the decision maker does not retain discretion to decline an application for a controlled activity resource consent. In our view this is inappropriate where over allocation may already exist or occur through granting such

a consent. It is important to recognise that over allocation relates to both quantity and quality and the relationship between water take and use on them.

28. Forest & Bird supports the scope of these rules as applying to only currently (at the time of application) authorised deemed permits and authorised permits for the take and use of surface water. This means that any “new” activities would be considered under the operative plan rules and with the direction of policy 10A.2.2 limiting those consents to 6 years. There may need to be consequential changes to rules in the operative plan to ensure that decision makers have discretion to address consent duration.
29. Given the wording of these rules, that they apply “despite any other rule” there may need to be a check that this would not override any prohibited activity rules.

Relief sought:

- a. Retain the activity description for Rule 10A.3.1.1
- b. Amend the conditions of Rule 10A.3.1.1 as follows:
 - i. Delete condition (ii) as it conflicts with the activity description requirement.
 - ii. Retain condition (iii)
 - iii. Amend condition (v) as follows:

“The currently authorised activity includes an ~~Any~~ existing residual flow, minimum flow, or take cessation condition (whichever is applicable) and this is included in the application for resource consent; and”
 - iv. Amend condition (vi) as follows:

“The volume of water taken shall be at least 20% less ~~no more~~ than the average maximum of the daily volume limit, or monthly volume limit, or annual volume limit (whichever one or more are applicable) recorded during the period 1 July 2012 – 30 June 2017, and calculated in accordance with the method in Schedule 10A.4.”
- c. Amend the matter of Control in Rule 10A.3.1.1 to include:
 - i. Effects on any wetland; and
 - ii. Effects on indigenous biological diversity
- d. Add a new restricted discretionary activity rule 10A.3.1.1X which applies where conditions (v) and/or (vi) of Rule 10A.3.11 are not met. This rule is to include:
 - i. An activity description the same as for Rule 10A.3.1.1 and which complies with all other conditions of that rule.
 - ii. Any conditions necessary to address this submission

- iii. Matters for discretion including at the applicable conditions already identified for the controlled activity rule, including conditions (vi) but without the 20% requirement and the additional matters set out above.
 - iv. Provision for public notification.
 - v. Guidance on setting minimum flows as set out in Appendix 3 to this submission.
- e. Amend Rule 10A.3.2 so that:
- i. The activity description is worded the same as for rule 10A.3.1.1
 - ii. The wording of where the rule applies read:

“... that does not meet any one or more of the conditions (i) to (iii) of Rule 10A.3.1.1 or does not meet any one or more of the conditions of Rule 10A.3.1.1X is a non - complying activity.

Conclusions

30. Forest & Bird is strongly supportive of the limited duration of 6 years and would agree to a small extension beyond that through a non complying activity classification out to 2030 but not beyond this date.
31. However, as proposed PC7 provides for consent duration of up to 15 years. This is not a short duration as it extends beyond the date upon which plans have to fully implement the policies of the NPSFM.
32. Forest & Bird will support a clear and explicit rules-based system for water take and use activities above water quantity, quality bottom lines that maintain ecological values.
33. For the reasons set out above, Forest & Bird supports PC7 in part and seeks that changes are made to address all concerns raised above including those where specific relief is set out above, consequential changes or other changes to address the relief sought.

Thank you for receiving this submission

Appendix 1

NPSFM – provisions of particular relevance to PC7

B. Water quantity

Objective B1

To safeguard the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of fresh water, in sustainably managing the taking, using, damming, or diverting of fresh water.

Objective B2

To avoid any further over-allocation of fresh water and phase out existing over-allocation.

Objective B3

To improve and maximise the efficient allocation and efficient use of water.

Objective B4

To protect significant values of wetlands and of outstanding freshwater bodies.

Objective B5

To enable communities to provide for their economic well-being, including productive economic opportunities, in sustainably managing fresh water quantity, within limits.

Policy B1

By every regional council making or changing regional plans to the extent needed to ensure the plans establish freshwater objectives in accordance with Policies CA1-CA4 and set environmental flows and/or levels for all freshwater management units in its region (except ponds and naturally ephemeral water bodies) to give effect to the objectives in this national policy statement, having regard to at least the following:

- a) the reasonably foreseeable impacts of climate change;
- b) the connection between water bodies; and
- c) the connections between freshwater bodies and coastal water.

Policy B2

By every regional council making or changing regional plans to the extent needed to provide for the efficient allocation of fresh water to activities, within the limits set to give effect to Policy B1.

Policy B6

By every regional council setting a defined timeframe and methods in regional plans by which over-allocation must be phased out, including by reviewing water permits and consents to help ensure the total amount of water allocated in the freshwater management unit is reduced to the level set to give effect to Policy B1.

Policy B7 and direction (under section 55) to regional councils

By every regional council amending regional plans (without using the process in Schedule 1) to the extent needed to ensure the plans include the following policy to apply until any changes under Schedule 1 to give effect to Policy B1 (allocation limits), Policy B2 (allocation), and Policy B6 (over-allocation) have become operative:

1. *When considering any application the consent authority must have regard to the following matters:*

- a. *the extent to which the change would adversely affect safeguarding the life-supporting capacity of fresh water and of any associated ecosystem and*
 - b. *the extent to which it is feasible and dependable that any adverse effect on the life supporting capacity of fresh water and of any associated ecosystem resulting from the change would be avoided.*
2. *This policy applies to:*
 - a. *any new activity and*
 - b. *change in the character, intensity or scale of any established activity – that involves any taking, using, damming or diverting of fresh water or draining of any wetland which is likely to result in any more than minor adverse change in the natural variability of flows or level of any fresh water, compared to that which immediately preceded the commencement of the new activity or the change in the established activity (or in the case of a change in an intermittent or seasonal activity, compared to that on the last occasion on which the activity was carried out).*
3. *This policy does not apply to any application for consent first lodged before the National Policy Statement for Freshwater Management 2011 took effect on 1 July 2011.”*

Appendix 2

Otago Regional Councils Progressive Implementation Program NPSFM⁶

Our Progressive Implementation Programme (PIP)

Stage	Process	Completed by
Establish Freshwater Management Units (FMUs)	Objective CA 1 and Policy CA1 outline the process for setting Freshwater Management Units. This would be confirmed by Council resolution.	April 2019
Develop framework for Water Management in Otago	S 79 review of Water Plan, including three waters, land use gaps Stocktake and gap analysis of water plan against the NPS-FM, NES Drinking Water, and other relevant National Direction Consolidation of existing work programmes	April 2020, comprising the following: S79 review commencing February 2019; Land use gaps identified by July 2019; Stocktake and gap analysis completed by April 2019 Analysis of Rural Water Quality Strategy
	Alignment with Rural Water Quality Strategy, where practical	
Technical and specialist work Programme to understand baseline knowledge	Stocktake of baseline information for each FMUs	August 2019
Values conversation	Policy CA2 outlines the value setting process	Commencing October 2019, and progressively moving through each FMU
Technical and specialist Work Programme to support limit setting	Using the values to understand the technical work programme required to set objectives	Commencing August 2019
Plan review		Notified December 2025

⁶ <https://goodwaterinotago.orc.govt.nz/national-policy-statements>

Appendix 3

Proposal for an NES on Ecological Flows and Water Levels⁷

5.1.3 Proposed interim limits for rivers and streams

To meet the requirements to clearly establish a limit on the available water, the interim flows for rivers and streams specify:

- a minimum flow – a flow at which the abstraction of water ceases
- an allocation limit – a limit on the amount of water that can be abstracted from the resource that will ensure that flow variability is maintained and the river is not held at its minimum flow for excessive periods of time.

If an existing environmental flow in a plan meets one requirement but not the other, then the interim provisions shall apply to the requirement not addressed by the plan.

For rivers and streams with mean flows less than or equal to 5 m³/s

A minimum flow of 90% of the mean annual low flow (MALF) as calculated by the regional council and an allocation limit of, whichever is the greater of:

- 30% of MALF as calculated by the regional council
- the total allocation from the catchment on the date that the national environmental standard comes into force less any resource consents surrendered, lapsed, cancelled or not replaced.

For rivers and streams with mean flows greater than 5 m³/s

A minimum flow of 80% of MALF as calculated by the regional council and an allocation limit of, whichever is the greater of:

- 50% of MALF as calculated by the regional council
- the total allocation from the catchment on the date that the Standard comes into force less any resource consents surrendered, lapsed, cancelled or not replaced.

⁷ Proposed National Environmental Standard on Ecological Flows and Water Level: Discussion document, March 2008
Publication reference number: ME 86
<https://www.mfe.govt.nz/publications/fresh-water/proposed-national-environmental-standard-ecological-flows-and-water-level-12>