
**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

CIV 2023-485-323

UNDER THE	Judicial Review Procedure Act 2016 and part 30 of the High Court Rules 2016
IN THE MATTER OF	an application for judicial review
BETWEEN	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INC
	Applicant
AND	MINISTER FOR THE ENVIRONMENT
	Respondent

STATEMENT OF DEFENCE

4 July 2023

**CROWN LAW
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The respondent by his solicitor says in response to the statement of claim dated 29 May 2023:

Parties

1. He admits paragraph 1.
2. He apprehends paragraph 2 is in the nature of submission to which he is not required to plead, but, to the extent paragraph 2 contains allegations of fact in respect of the applicant's purpose in bringing the proceeding, he has insufficient knowledge of and therefore denies those allegations.
3. He admits paragraph 3.
4. He admits paragraph 4.

The NPSFM and NES

5. He admits paragraph 5.
6. He admits paragraph 6.
7. He admits paragraph 7.
8. He is not required to plead to paragraph 8.
9. He admits paragraph 9, and relies on the National Policy Statement for Freshwater Management 2020 (**NPSFM**) as if pleaded in full.
10. He admits paragraph 10, and relies on the NPSFM as if pleaded in full.
11. He admits paragraph 11, save that the exception in 3.22(1)(a)(i) of the NPSFM (the customary harvest of food or resources undertaken in accordance with tikanga Māori) is not regulated by the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-F**), and otherwise relies on the NPSFM as if pleaded in full.
12. He admits paragraph 12, and relies on the NES-F as if pleaded in full (and notes, for the avoidance of doubt, that the term *minimum baseline* referred to in paragraph [12] is not taken to be a reference to *baseline state*, a term separately defined in the NPSFM).

The December 2022 amendments to the NPSFM and NES-F

13. He admits paragraph 13, save that amendments were also made to the NPSFM and NES-F that do not relate to natural inland wetlands.
14. He admits paragraph 14.
15. He is not required to plead to paragraph 15, but also refers to the amendments in paragraphs 13 and 14 of the statement of claim as the “December amendments” for ease of reference.
16. He apprehends paragraph 16 is in the nature of submission to which he is not required to plead, but says further:
 - 16.1 prior to 2020, wetland protection was poor and loss and degradation of wetlands was ongoing;
 - 16.2 in 2020 the Government put in place strong protections for wetlands through the NPSFM and NES-F aimed at preventing further inappropriate degradation and loss;
 - 16.3 following the making of the NPSFM and NES-F, activities within or adjacent to wetlands were, generally, ascribed a prohibited or non-complying status under the NES-F;
 - 16.4 this was subject to a number of specific consent pathways for prescribed purposes (with permitted, discretionary or restricted discretionary status), set out in the NES-F (and also referred to in the NPSFM);
 - 16.5 feedback was received that the new regulatory system was creating unintended consequences for a number of nationally and regionally significant sectors (for example, the need to quarry aggregate for the construction of housing materials);
 - 16.6 he agreed to consult on potential amendments to the NPSFM and NES-F to address the unintended consequences of the new regulatory scheme;

- 16.7 the results of public consultation, including the concerns of the applicant, were carefully considered as part of the amendment process;
- 16.8 consideration was given to entirely removing the general prohibition on activities within or adjacent to wetlands, but this was rejected in favour of adding additional consent pathways for specific activities;
- 16.9 the additional consent pathways are subject to specific 'gateway tests', and the relevant council must apply the Effects Management Hierarchy (**EMH**) before granting a resource consent (in addition to meeting other statutory requirements, and any other requirements imposed by the relevant council); and
- 16.10 the application of the EMH is further governed by Appendices 6 and 7 of the NPSFM, regarding aquatic offsetting and compensation. The appendices were included in the NPSFM following the suggestion of the applicant.
17. In respect of paragraph 17, he:
- 17.1 admits the amendments to the NES-F provided consent pathways for new purposes when previously those purposes had either 'prohibited' or 'non-complying' status under regulations 53 and 54 of the NES-F;
- 17.2 refers to and relies on the NES-F as if pleaded in full as to the activity status of those new purposes following the amendments;
- 17.3 says resource consents for the new purposes may only be granted if the specific gateway tests are met, and the EMH applied (including in accordance with NPSFM 3.22(2) & (3)); and
- 17.4 otherwise denies the allegations in paragraph 17 and refers to the NES-F and NPSFM as if pleaded in full.
18. He admits paragraph 18 and says further, in respect of the EMH:

- 18.1 it must be applied sequentially (NPSFM 3.21(1));
 - 18.2 a resource consent must not be granted unless:
 - 18.2.1 the relevant council is satisfied the applicant has demonstrated how each step of the EMH will be applied to any loss of extent or values of the wetland (including cumulative effects and loss of potential value), particularly (without limitation) in relation to the values of: ecosystem health, indigenous biodiversity, hydrological functioning, Māori freshwater values and amenity values (NPSFM 3.22(3)(a)(i)); and
 - 18.2.2 if aquatic offsetting or aquatic compensation is applied, the applicant has complied with principles 1 to 6 in Appendix 6 and 7, and has had regard to the remaining principles in Appendix 6 and 7, as appropriate (NPSFM 3.22(3)(a)(ii)); and
 - 18.2.3 there are methods or measures that will ensure that the offsetting or compensation will be maintained and managed over time to achieve the conservation outcomes (NPSFM 3.22(3)(a)(iii));
 - 18.3 any consent granted is subject to:
 - 18.3.1 conditions that apply the EMH; and
 - 18.3.2 a condition requiring monitoring of the wetland at a scale commensurate with the risk of the loss of extent or values of the wetland; and
 - 18.3.3 conditions that specify how the requirements in NPSFM 3.22(1)(a)(iii) will be achieved;
- and
- 18.4 If aquatic compensation is not appropriate, the activity itself is avoided (NPSFM definition of EMH, 3.21(1)(f); Appendix 7(2)).

19. He admits paragraph 19, save that some of the activities for the new purposes were previously ascribed 'non-complying' status (meaning in theory a consent could be sought for those activities), and also that the December amendments amended other aspects of the NPSFM and NES-F.

The Effects Management Hierarchy

20. He admits paragraph 20, and relies on the NPSFM as if pleaded in full.
21. He admits paragraph 21, and relies on the NPSFM as if pleaded in full.
22. He admits paragraph 22, and relies on the NPSFM as if pleaded in full.

The decision-making process in relation to the December amendments

23. He admits paragraph 23, and relies on ss 46A(4) and 51(1) of the Resource Management Act 1991 (**Act**) as if pleaded in full.
24. He denies paragraph 24 and refers to *Managing our wetlands: A discussion document on proposed changes to the wetland regulations* (published on 6 September 2021), and the Regulatory Impact Statement *Changes to the wetland regulations* (published on 25 August 2021), in terms of the initial material provided to the public and iwi authorities.
25. In respect of paragraph 25:
- 25.1 he admits the quote sets out an overview of the regulatory framework, as regards the NPSFM and the pre- and post-amendment consent pathways and relies on the document, *Managing our wetlands: Policy rationale for exposure draft amendments 2022 (Policy Rationale)* as if pleaded in full; and
- 25.2 otherwise denies paragraph 25 and refers to the NPSFM and NES-F as if pleaded in full for the overall effect of the consent pathways.
26. He denies paragraph 26 and says further the material provided to him that was relevant to s 46A(4)(c) included:
- 26.1 the briefing *Essential Freshwater 2021 amendments – seeking drafting decisions for wetlands* (provided to the Minister on

- 10 February 2022) (BRF-1004);
- 26.2 the report *Managing our wetlands: Report, recommendations and summary of submissions* (provided to the Minister on 10 February 2022) (annexure 1 to BRF-1004) (**Summary of Submissions Report**);
- 26.3 the briefing *To support discussion of the wetland advice in BRF-1004 on 10 March 2022* (provided to the Minister on 9 March 2022) (BRF-1316);
- 26.4 the briefing *Wetland amendments exposure draft and consultation* (provided to the Minister on 19 May 2022) (BRF-1632);
- 26.5 the *Policy Rationale* (provided to the Minister on 19 May 2022) (appendix 3 to BRF-1632);
- 26.6 the briefing *Essential Freshwater – results of the exposure draft consultation on technical changes and wetland amendments* (provided to the Minister on 30 August 2022) (BRF-1889);
- 26.7 the briefing *Managing our wetlands in the coastal marine area* (provided to the Minister on 14 October 2022) (BRF-2072); and
- 26.8 the briefing *Cover briefing for Cabinet paper: Essential Freshwater 2022 Amendments – seeking final agreement on wetlands, technical, and stock exclusion amendment* (provided to the Minister on 17 November 2022) (BRF-2462). This included appendix 4: “*Amendments to the NES-F and NPS-FM 2022: Report and Recommendations*”.
27. He admits paragraph 27 and relies on the Summary of Submissions Report as if pleaded in full.
28. He admits paragraph 28 and relies on s 52(1)(c) of the Act as if pleaded in full.
29. He admits paragraph 29.

30. In respect of paragraph 30:
- 30.1 he admits subparagraph (a), save that the paragraph quoted from on pages 9 and 26 of the Section 32 Report ends as follows:
- As the overarching objective and polices of the NPS-FM remain unchanged these are not assessed again here against Part 2 of the RMA (for this, see the *Action for Health Waterways 2020 section 32 report*). The assessment is therefore about the relevance of the amending proposals to the existing objective and policies and the extent to which these would remain if the amending proposal were to take effect;
- 30.2 he admits subparagraph (b);
- 30.3 he admits subparagraph (c), save that the paragraph quoted from on page 28 of the Section 32 Report starts: “The amended natural wetland definition will remove ambiguity and assist implementation”;
- 30.4 he admits subparagraph (d);
- 30.5 he admits subparagraph (e), save that the paragraph quoted from on page 30 of the Section 32 Report ends: “(see Part 4.3.3(B) of this report for proposed amendments that strengthen the application of this)”;
- 30.6 he admits subparagraph (f);
- 30.7 he admits subparagraph (g); and
- 30.8 otherwise refers to the Section 32 report as if pleaded in full.
31. He admits paragraph 31.
32. In respect of paragraph 32:
- 32.1 he admits subparagraph (a);
- 32.2 he denies subparagraph (b) and says further that the objectives of the December amendments, as described at page 18 of the *Regulatory Impact Statement: Changes to wetland regulations (inland wetlands) (RIS)*, were also to:

- provide clarity and consistency to councils and other stakeholders about when regulatory requirements governing natural inland natural wetlands in the NPS-FM and NES-F apply, and do not apply;
- ensure regulation (consenting) of activities in inland wetlands and associated buffers is proportionate to potential environmental impacts and/or scope to offset these impacts; including activities that are currently prohibited/ non-complying and discretionary; and
- avoid unnecessary or unfair costs to stakeholders that result from uncertain, unduly onerous and/or inappropriate legal requirements in the NES-F;

32.3 he admits subparagraph (c);

32.4 he admits subparagraph (d), save that it concludes with:

We acknowledge that these are strong assumptions about the effectiveness of the gateway test and EMH. These are still relatively new instruments which have only been used since the introduction of the NPS-FM and NES-F in 2020; hence there is limited experience with which to assess their effectiveness;

and

32.5 otherwise relies on the RIS as if pleaded in full.

33. He admits paragraph 33.

34. He admits the public statement dated 8 December 2022 included the text quoted at paragraph 34, but denies this reflects the Minister's entire understanding and intention regarding the December amendments, and refers to the extensive decision-making process undertaken in the lead-up to the December amendments, and the *Summary of recommendations and the Minister for the Environment's decisions on amendments to the NPS-FM 2020* prepared under s 52(3)(c) of the Act.

35. In respect of paragraph 35:

35.1 he admits he considered and had regard to all of the documents referred to, and those listed at paragraph 26 above;

35.2 apprehends subparagraph (b) is in the nature of submission to which he is not required to plead; and

35.3 otherwise denies paragraph 35 and says further that:

- 35.3.1 he understood the requirements of the Act;
- 35.3.2 he was undertaking an amendment process of the NPSFM and NES-F; and
- 35.3.3 he had the purpose, understood and intended that activities under the new consent pathways would result in no net loss of wetland extent and values, save for the possibility that there could be net loss of wetland extent and values, but only if aquatic offsetting was **not possible**, and if aquatic compensation would address the extent or values to be lost through **positive gains** to conservation outcomes. Activities would be avoided if aquatic compensation was not appropriate (i.e., in terms of conservation outcomes, the extent or values were not able to be compensated for).

The effect of the December amendments

- 36. He denies paragraph 36 and says further:
 - 36.1 prior to amendment, the NES-F and NPSFM provided the EMH to allow for consent pathways, while also providing a high level of protection to wetlands in accordance with Policy 6 of the NPSFM;
 - 36.2 the December amendments added additional consent pathways, but also strengthened the application of the EMH;
 - 36.3 aquatic compensation is only available if aquatic offsetting is not *possible* (NPSFM definition of EMH 3.21(1)(e));
 - 36.4 if aquatic compensation is available under the EMH, it must be applied at a scale where the positive effects outweigh the adverse effects (NPSFM Appendix 7(3)); and
 - 36.5 aquatic compensation is not available under the EMH if it is not appropriate, i.e. the extent or values are not able to be compensated for (NPSFM Appendix 7(2)).

The coal mining amendments

37. He admits paragraph 37, save that regulation 45D(5) also refers to the discharge of water.
38. He admits paragraph 38, and says further that a resource consent under regulation 45D must not be granted unless the consent authority has first (NES-F, r 45D(6)):
- 38.1 satisfied itself that the extraction of the minerals will provide significant national or regional benefits; and
 - 38.2 satisfied itself that there is a functional need for the extraction of minerals and ancillary activities in that location; and
 - 38.3 applied the EMH.
39. In respect of paragraph 39, he admits that the Summary of Submissions Report and the Policy Rationale considered the Government's goals for renewable electricity generation, the Climate Change Commission's advice and New Zealand's targets under the Climate Change Response Act 2002, but otherwise denies paragraph 39.
40. He denies paragraph 40, says further that the intention was always that the sunset clause would apply to the ability to obtain consent (the consent pathway) and refers to:
- 40.1 page 50 of the Summary of Submissions Report: "A viable option... is to allow the proposed **consent pathway** to apply to the mining of thermal coal for a set period" (emphasis added); and
 - 40.2 page 21 of the Policy Rationale document: "We have considered the above, and the proposal is to provide a **consent pathway** for thermal coal mining only until 2030" (emphasis added).
41. He apprehends paragraph 41 is in the nature of submission to which he is not required to plead, but says further that:
- 41.1 regard was had to the Government's goals for renewable

electricity generation, the Climate Change Commission's advice and New Zealand's targets under the Climate Change Response Act 2002, and effort made to align the coal mining amendments with those matters where possible; but

41.2 it is inapt for the applicant to try to convert those matters into legally enforceable metrics in this context; and

41.3 to the extent paragraph 41 contains allegations of fact, he denies those allegations and relies on the text of the documents referred to in paragraph 41 as if pleaded in full.

42. In respect of paragraph 42:

42.1 he admits he considered and had regard to all of the documents referred to, and those listed at paragraph 26 above;

42.2 apprehends subparagraph (b) is in the nature of submission to which he is not required to plead;

42.3 repeats paragraph 41 above; and

42.4 otherwise denies paragraph 42 and says further that he intended that the coal mining amendments aligned, where possible given the context, with the Government's goals for renewable electricity generation, the Climate Change Commission's advice and New Zealand's targets under the Climate Change Response Act 2002.

Effect of the coal mining amendments

43. He denies paragraph 43, and repeats paragraphs 41 and 42 above.

GROUND ON WHICH RELIEF IS SOUGHT, AND RELIEF SOUGHT**First cause of action – the new purposes**

44. He apprehends that paragraph 44 is in the nature of submission to which he is not required to plead, but to the extent paragraph 44 contains allegations of fact, denies those allegations.

Relief sought

45. He is not required to plead to paragraph 45.

Second cause of action – thermal coal mining

46. He apprehends that paragraph 46 is in the nature of submission to which he is not required to plead, but to the extent paragraph 46 contains allegations of fact, denies those allegations.

Relief sought

47. He is not required to plead to paragraph 47.

This document is filed by Polly Higbee, solicitor for the respondent, of Crown Law.

The address for service of the respondent is Crown Law, Level 3, Justice Centre, 19 Aitken Street, Wellington 6011. Documents for service on the respondent may be left at this address for service or may be:

- (a) posted to the solicitor at PO Box 2858, Wellington 6140; or
- (b) left for the solicitor at a document exchange for direction to DX SP20208, Wellington Central; or
- (c) emailed to the solicitor at Polly.Higbee@crownlaw.govt.nz provided that the documents are also emailed to Rebekah.Fistonich@crownlaw.govt.nz.