

GW – Hearing Stream 6 - Indigenous Biodiversity – speaking notes for Forest & Bird

Some issues remaining from F&B perspective:

- Explanation to Policies 24A-24D needs some refinement. The reference to “coastal environments” in the first paragraph of the Explanation to Policy 24A needs to be deleted:
This policy applies to the use of biodiversity offsetting and biodiversity compensation to address the residual adverse effects on indigenous biodiversity in the terrestrial ~~and coastal~~ environments and aquatic offsetting and compensation to address the loss of extent or values of natural inland wetlands and rivers
- At the least, need to note that the NPSIB does not apply within the coastal marine area.
- Policy 24A – F&B still seeks “any individuals of Threatened or At Risk (Declining) taxa under the New Zealand Threat Classification System” be tacked on to clauses (b) and (c). Clause (c) does not refer to Appendix 1A to be considered “as a minimum”. Species’ threat status can change meaning Appendix 1A can easily become outdated – leading to discrepancies between Appendix 1A and the NZ Threat Classification System. Better to refer to the source to avoid confusion.
- Policy 24D is still inconsistent with the terms of the NZCPS and NPSFM¹. F&B seeks it is constrained to terrestrial biodiversity.

Comments on NZCPS

- Supreme Court in *Port Otago* stated: “the directive nature of the ports policy arises from the two verbs [to “recognise” something is “required”] taken together.”²
- Parallel policy formulations are not contained in the NPSET nor the NPS Renewables.
- Orthodox approach to interpreting policies set by *King Salmon* has not been overturned.³
- In *Port Otago*, the Court found that the terms used in NZCPS Policy 9 gives the Ports policy a “directive character” in the same category as NZCPS Policies 11, 13, 15 and 16.⁴
- *Port Otago* findings distinguishable on basis that we are not dealing with port activities, which have a functional need to locate in the CMA c.f. airports, roads etc.
- Except for where “work is required (and not merely desirable) for the safe and efficient operation of the ports”,⁵ NZCPS does not privilege infrastructure activities in the coastal environment over the protection of Policy 11 values.
- Following *King Salmon*, NZCPS underwent review in June 2017 but no changes followed.
- Airports in the coastal environment – hypothetical scenarios re maintenance breaching NZCPS Policy 11(a) are a consequentialist argument. In any event, sea level rise is another factor and other NZCPS Policies, ie Policy 25 engaged.

¹ For example, NPSFM 3.24: “The loss of river extent and values is avoided, unless the council is satisfied that: (a) there is a functional need for the activity in that location; and (b) the effects of the activity are managed by applying the effects management hierarchy.” Whereas proposed Policy 24D(1) broadly refers to operational need

² *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [69]

³ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [61]: “The language in which the policies are expressed will nevertheless be significant, particularly in determining how directive they are intended to be and thus how much or how little flexibility a subordinate decision-maker might have. As this Court said in *King Salmon*, the various objectives and policies in the NZCPS have been expressed in different ways deliberately. Some give decision-makers more flexibility or are less prescriptive than others. Others are expressed in more specific and directive terms. These differences in expression matter.”

⁴ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [71]

⁵ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [83(c)(i)]