

## Response to Hearing Panel Question on Policy 4.102

Given the emphasis in *Lindis Catchment Group Incorporated vs Otago Regional Council* [2019] NZEnvC 166 on the adverse effects resulting from the predation of indigenous freshwater species by trout (see in particular paragraphs [172], [185] and [207]), and the fact that the NPSFM does not safeguard introduced fish species, is it appropriate to delete Policy 4.102 or could it instead be amended to, for example, preclude the passage of introduced fish species that could result in the predation of say the 11 freshwater species listed in the recommended definition of “Critical Habitat of Threatened Indigenous Freshwater Species”, with a focus on new structures or replacement consents for existing structures?

*Response: Andrea Richardson*

On reflection, and having considered proposed Policy 4.102 against the existing policy framework in the LWRP, relevantly Policy 4.3, we are of the view that the issues which proposed Policy 4.102 initially sought to address are largely addressed by Policy 4.3, namely the passage of migratory fish species.

Policy 4.3(e) of the LWRP provides, “Surface water bodies are managed so that: ... (e) the passage for migratory fish species is maintained unless restrictions are required to protect populations of native fish”.

However, proposed Policy 4.102 also sought to ensure that any instream structures, such as culverts or weirs, do not facilitate the passage of any invasive, pest, or nuisance fish species into the mapped ‘Indigenous Freshwater Species Habitat’ areas.

If the Hearing Panel considers there is sufficient scope to amend proposed Policy 4.102 to better reflect the policy intent, the following wording is proposed:

[4.102 Ensure that any alteration or removal of existing instream structures would not facilitate the passage of non-indigenous fish species into any Critical Habitat of Threatened Indigenous Freshwater Species.](#)

**If so, would it be appropriate to consequentially amend Rules 5.137(9), 5.138(4), 5.140A(1), 5.140(3) and 5.151(3) to cross-refer to Policy 4.102?**

*Response: Andrea Richardson*

If the Hearing Panel considers that there is scope, we consider it is appropriate to introduce a new condition into Rules 5.137 and 5.140A to give effect to Policy 4.102 (as amended above):

Rule 5.137

[10. For any permanent culvert that will be altered or removed, the location is not downstream of any Critical Habitat of Threatened Indigenous Freshwater Species.](#)

Rule 5.140A

6. For any equipment or device and any associated support structures that will be altered or removed, the location is not downstream of any Critical Habitat of Threatened Indigenous Freshwater Species.

The intent of Policy 4.102 is to provide protection of indigenous species habitat located upstream of small, permanent, in-stream structures (such as culverts) which currently prevent the passage of introduced fish species. Therefore, consequential amendments to Rules 5.140 and 5.151 are not considered necessary to give effect to Policy 4.102 as these rules cover structures that are only temporarily in place. Similarly, no consequential changes are recommended to Rule 5.138 as defences against water are unlikely to preclude the passage of fish to the same extent as a culvert.

**Should Rules 5.140(3) and 5.151(3) refer to “existing fish passage” so as to be consistent with Rules 5.137(9), 5.138(4) and 5.140A(1)?**

*Response: Andrea Richardson*

Yes. The phrase “any existing fish passage” would provide consistency with Rules 5.137(9), 5.138(4) and 5.140A(1), and would also better give effect to clause (e) of Policy 4.3 which refers to fish passage in terms of being “maintained”.

**Are those passages of the Env C decision among the alleged errors of law the subject of the pending appeal to the High Court?**

*Response: Philip Maw/Imogen Edwards*

Yes, the Notice of Appeal lodged with the High Court by Otago Fish and Game Council references the Environment Court’s findings in paragraphs [172] and [185].

The Notice of Appeal more broadly challenges the findings in relation to the application of section 7(h) of the RMA, citing particularly the approach taken in paragraphs [161]-[212]. The Notice of Appeal further raises a challenge in relation to the interpretation of the NPSFM (particularly in relation to safeguarding the life supporting capacity and ecosystem processes as they relate to indigenous species ahead of trout).