

**BEFORE THE HEARING COMMISSIONERS**

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**UNDER THE** Resource Management Act 1991

**AND**

**IN THE MATTER** of the Proposed Otago Regional Policy Statement 2021

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**OPENING SUBMISSIONS FOR THE OTAGO REGIONAL COUNCIL ON THE  
LAND AND FRESHWATER CHAPTER OF THE PROPOSED REGIONAL  
POLICY STATEMENT**

Dated 1 . 05 2023

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**May it Please the Commissioners:**

**Introduction**

1. In its overview of the significant resource management issues for the region, the proposed Regional Policy Statement (“pORPS”) states<sup>1</sup>:

*“Introduction*

*Otago’s people and communities rely on the natural resources that Otago’s environment provides to enable their social, economic, and cultural well-being. Natural resources include freshwater (i.e. surface and groundwater, wetlands, estuaries), land and soil, terrestrial, and freshwater ecosystems, coastal and marine ecosystems, and air, landscapes, vegetation and natural landforms.*

*From an economic perspective natural resources support, and are impacted by, agricultural industries (e.g. grazing, cropping, horticulture, viticulture), urban development, industrial development, infrastructure, energy generation, transport, marine industries (fishing and aquaculture), tourism and mineral extraction. From a social and cultural perspective natural resources support and are impacted by recreation, housing, and cultural activities.”*

2. The Land and Freshwater chapter confronts the regional implications of the use, development and protection of land and freshwater.

**Legal Framework**

RMA

3. The starting point is the Resource Management Act (“RMA”) itself.
4. Land and freshwater are natural and physical resources to be sustainably managed<sup>2</sup>.
5. Sustainable management is:

“ ...

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<sup>1</sup> Proposed Regional Policy Statement 31 October 2022 Version at page 82.

<sup>2</sup> Sections 2 and 5 of the RMA; “land” includes land covered by water and the air space above: section 2 of the RMA; “freshwater” means all water except coastal water and geothermal water: section 2 of the RMA. Water means water in all its physical forms, including water vapour snow and ice: section 2 of the RMA.

- (2) *In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—*
- (a) *sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
  - (b) *safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
  - (c) *avoiding, remedying, or mitigating any adverse effects of activities on the environment.”*
6. The Supreme Court noted in *King Salmon*<sup>3</sup> this purpose is the “*guiding principle*” and stated that the obligation of those who perform functions under the Act to comply with the statutory objective is clear<sup>4</sup>. Sustainable management is to be promoted in all decision-making under the Act.
7. While section 5 includes the use and development of natural and physical resources to provide for the social, economic and cultural wellbeing of people and communities and their health and safety, such use and development must be reconciled with the intergenerational and environmental interests in section 5(2)(a), (b) and (c).
8. In addition, protection is a core element of sustainable management, although it is not the only aspect<sup>5</sup>.
9. In setting the framework for the use and development of land and freshwater, the proposed RPS seeks, in particular, to sustain their potential to meet the needs of future generations and to safeguard their life-supporting capacity.
10. Section 6 of the RMA lists matters of national importance which are to be recognised and provided for. These matters fall naturally within the concept of sustainable management in a New Zealand context<sup>6</sup>.
11. The list includes:

“6 *Matters of national importance*

*In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development,*

<sup>3</sup> *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593

<sup>4</sup> *King Salmon* at [21]

<sup>5</sup> *King Salmon* at [148] - [149]

<sup>6</sup> *King Salmon* at [26]

and protection of natural and physical resources, shall 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:

(b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:

...

(d) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:

(e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:"

12. Section 6 has a focus of protection and preservation as a matter of national importance. "Protection is a core element of sustainable management"<sup>7</sup>.

13. Section 6(a) and (b) are qualified. The resources described in paragraphs (a) and (b) are to be protection from inappropriate subdivision, use and development. What is "appropriate" is determined by what is to be protected. To put it another way, subdivision, use and development must be consistent with protection of those resources<sup>8</sup>.

14. In contrast, section 6(d) and (e) are not qualified and are much more absolute statements.

15. It is necessary have particular regard to matters in section 7 of the RMA, including:

"(a) kaitiakitanga:

(aa) the ethic of stewardship:

(b) the efficient use and development of natural and physical resources:

...

(c) the maintenance and enhancement of amenity values<sup>9</sup>:

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<sup>7</sup> King Salman at [28]

<sup>8</sup> King Salmon at [29]

<sup>9</sup> "amenity values means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes".

(d) *intrinsic values*<sup>10</sup> of ecosystems:

...

(f) *maintenance and enhancement of the quality of the environment:*

(g) *any finite characteristics of natural and physical resources:*

(h) *the protection of the habitat of trout and salmon:*

(i) *the effects of climate change.”*

16. Section 8 requires decision-makers to take account of the principles of the Treaty of Waitangi.

17. A regional policy statement must be prepared in accordance with the Regional Council’s functions under section 30. So far as relevant to this topic, those functions are:

“30 *Functions of regional councils under this Act*

(1) *Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:*

(a) *the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:*

(b) *the preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance:*

...

(c) *the control of the use of land for the purpose of—*

(i) *soil conservation:*

(ii) *the maintenance and enhancement of the quality of water in water bodies and coastal water:*

(iii) *the maintenance of the quantity of water in water bodies and coastal water:*

(iiia) *the maintenance and enhancement of ecosystems in water bodies and coastal water:*

(iv) *the avoidance or mitigation of natural hazards:*

(v) *[Repealed]*

(ca) *the investigation of land for the purposes of identifying and monitoring contaminated land:*

...

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<sup>10</sup> *“Intrinsic values, in relation to ecosystems, means those aspects of ecosystems and their constituent parts which have value in their own right, including—*

(a) *their biological and genetic diversity; and*

(b) *the essential characteristics that determine an ecosystem’s integrity, form, functioning, and resilience”.*

- (e) *the control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—*
  - (i) *the setting of any maximum or minimum levels or flows of water:*
  - (ii) *the control of the range, or rate of change, of levels or flows of water:*
  - (iii) *the control of the taking or use of geothermal energy:*

...
- (fa) *if appropriate, the establishment of rules in a regional plan to allocate any of the following:*
  - (i) *the taking or use of water (other than open coastal water):*
  - (ii) *the taking or use of heat or energy from water (other than open coastal water):*
  - (iii) *the taking or use of heat or energy from the material surrounding geothermal water:*
  - (iv) *the capacity of air or water to assimilate a discharge of a contaminant:*

...
- (g) *in relation to any bed of a water body, the control of the introduction or planting of any plant in, on, or under that land, for the purpose of—*
  - (i) *soil conservation:*
  - (ii) *the maintenance and enhancement of the quality of water in that water body:*
  - (iii) *the maintenance of the quantity of water in that water body:*
  - (iv) *the avoidance or mitigation of natural hazards:*

...”

National Policy Statements

- 18. The regional policy statement must give effect to a National Policy Statement. The National Policy Statements flesh out Part 2, including section 5<sup>11</sup> with greater detail and specificity.
- 19. There are three National Policy Statements which must be applied in the Land and Freshwater provisions of the RPS:
  - 19.1. National Policy Statement for Freshwater Management 2020 (“NPSFM”);

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<sup>11</sup> *King Salmon* at [151]

- 19.2. National Policy Statement for Highly Productive Land 2022 (“NPSHPL”); and
- 19.3. National Policy Statement for Renewable Electricity Generation 2011 (“NPSREG”).
20. The national policy statements have limited application in this hearing which is confined to the non-freshwater parts of the pORPS.
21. The regional policy statement must also be prepared in accordance with any regulations. National Environmental Standards are regulations<sup>12</sup>. National Environmental Standards are akin to “rules” in a plan. There is no RMA direction to give effect to regulations in a regional policy statement. However, there is no point in including objectives, policies and methods in a regional policy statement that conflict with a National Environmental Standard because those objectives, policies and methods cannot be given effect to in lower order regional and district plans, except to the extent, if any, provided for in the National Environmental Standards themselves.
22. The framing of RPS provisions relating to land and freshwater must also take into account the default regulatory settings in the RMA itself.
23. The use<sup>13</sup> of land is permitted unless regulated (or prohibited) by a rule or a national environmental standard<sup>14</sup>.
24. In contrast, activities on the beds of lakes and rivers<sup>15</sup>, or affecting water<sup>16</sup> or discharges of water or contaminants are prohibited unless permitted by

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<sup>12</sup> Sections 2 and 43 of the RMA.

<sup>13</sup> As defined in section 2 of the RMA:

*“use,—*

*(a) in sections 9, 10, 10A, 10B, 81(2), 176(1)(b)(i), and 193(a), means—*

*(i) alter, demolish, erect, extend, place, reconstruct, remove, or use a structure or part of a structure in, on, under, or over land:*

*(ii) drill, excavate, or tunnel land or disturb land in a similar way:*

*(iii) damage, destroy, or disturb the habitats of plants or animals in, on, or under land:*

*(iv) deposit a substance in, on, or under land:*

*(v) any other use of land; and*

*(b) in sections 9, 10A, 81(2), 176(1)(b)(i), and 193(a), also means to enter onto or pass across the surface of water in a lake or river”*

<sup>14</sup> Section 9 of the RMA.

<sup>15</sup> Section 13 of the RMA.

<sup>16</sup> Section 14 of the RMA.

a resource consent, a rule or a national environmental standard<sup>17</sup>. National environmental standards and plans may impose additional controls on discharges<sup>18</sup> and water.

25. The statutory water regime starts from the perspective of protection.

NPSFM

26. The application of the NPSFM is limited because the pORPS has been split into two parts.
27. This hearing is concerned with the parts that do not constitute a freshwater planning instrument ("FPI").
28. ORC has identified the provisions of the pORPS which constitute a FPI. The division of the pORPS was carried out in accordance with the judgment of the High Court in *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Incorporated*<sup>19</sup>.
29. The FPI comprises the provisions of the pORPS which directly relate to the maintenance and enhancement of freshwater quality or quantity.
30. The division of the proposed RPS into FPI and non FPI parts has not been challenged and this is not the forum for any challenge to be made.
31. In accordance with the High Court judgment, the FPI has been re-notified, submissions and further submissions have been received and the relevant documents submitted to the Chief Freshwater Commissioner.
32. The Freshwater Hearing Panel has now been appointed but no hearing directions have been issued.
33. The consequence is that most of the provisions which directly give effect to the NPSFM are subject to the freshwater hearing process and outside the scope of the present hearing.
34. Nonetheless, there are provisions in the NPSFM which will be material to the recommendations that this Panel must make.
35. Without attempting to be exhaustive, provisions likely to require this

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<sup>17</sup> Section 15 of the RMA.

<sup>18</sup> Section 15 of the RMA.

<sup>19</sup> [2022] NZHC 1777



Panels' attention are:

35.1. Te Mana o te Wai:

*“(1) Te Mana o te Wai is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.”*

35.2. The objective that natural and physical resources are managed in a way that prioritises:

- “(a) first, the health and well-being of water bodies and freshwater ecosystems*
- (b) second, the health needs of people (such as drinking water)*
- (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.”*

35.3. The following policies:

*“Policy 1: Freshwater is managed in a way that gives effect to Te Mana o te Wai.*

*Policy 2: Tangata whenua are actively involved in freshwater management (including decisionmaking processes), and Māori freshwater values are identified and provided for.*

*Policy 3: Freshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments.*

...

*Policy 6: There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.*

*Policy 7: The loss of river extent and values is avoided to the extent practicable.*

*Policy 8: The significant values of outstanding water bodies are protected.*

*Policy 9: The habitats of indigenous freshwater species are protected.*

*Policy 10: The habitat of trout and salmon is protected, insofar as this is consistent with Policy 9.*

*Policy 11: Freshwater is allocated and used efficiently, all existing over-allocation is phased out, and future*

*over-allocation is avoided.*

...

*Policy 15: Communities are enabled to provide for their social, economic, and cultural wellbeing in a way that is consistent with this National Policy Statement.”*

- 35.4. Part 3 of the National Policy Statement is a non-exhaustive list of things that local authorities must do to give effect to the objective and policies of the NPSFM. Part 3 does not limit the obligation under the RMA to give effect to the objective and policies in Part 2 of the NPSFM<sup>20</sup>. In particular a local authority may adopt more stringent measures than required by the NPSFM.
36. The NPSFM is the touchstone in considering submissions on the land and freshwater chapter.
37. Generally the evidence prepared for the hearing of this topic focuses on non FPI provisions of the land and freshwater chapter. That is not always the case.
38. For example, the joint case presented by OWRUG, Federated Farmers, and Dairy NZ appears to cover both the FPI and non FPI provisions. The Panel must discriminate between those provisions which are material to its task, and those which are the subject of the separate freshwater planning process.
39. The thrust of much of the evidence is that change in practice is inevitable, but that time-frames must allow for a reasonable and practicable transition.
40. Although not explicit, it appears that this evidence is directed towards the visions for freshwater for each freshwater management unit or rohe. Those provisions are for the freshwater planning process, not this hearing.
41. In the land and freshwater chapter, the critical concern for this Panel is to ensure that the use and development of land is consistent with the maintenance and enhancement of the health and wellbeing of waterbodies.
42. If not, there is no possibility of the NPSFM objective being achieved. Calls for amendments that allow the health and wellbeing of water to be

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<sup>20</sup> Clause 3.1(1).

compromised, do not give effect to the NPSFM and must be resisted<sup>21</sup>.

43. For instance, DCC wants regionally significant infrastructure to be exempt from the obligation to maintain or enhance the health and wellbeing of freshwater<sup>22</sup>. There is no foundation for this exception, nor any similar exclusions sought by sector interests. The NPSFM cannot be watered down in that way.

#### NPSHPL

44. This NPS came into force on 17 October 2022.
45. Its commencement postdates both the notification of the pORPS, and the closing of submissions on it.
46. The ability to make changes to the RPS is constrained by the submissions received. In her evidence, Ms Boyd has carefully identified where the NPSHPL can be given effect to, within the scope of submissions received.
47. While it is inviting to take the opportunity to make other amendments which would give effect to the NPSHPL, there is no jurisdiction to do so.
48. With that important qualification, the NPSHPL has particular relevance to the land and soils (LF-LS) subchapter. To the extent that its provisions are within scope of the NPSHPL must be given effect to.
49. The sole objective of the NPSHPL is to protect highly productive land for use in land-based primary production, now and into the future.
50. Land-based primary production means production from agricultural, pastoral, horticultural, or forestry activities, that is reliant on the soil resource of the land.
51. “*Highly productive land*” is to be mapped by Regional Councils and included in regional policy statements.
52. Pending mapping in the regional policy statement, highly productive land is deemed to be land zone general rural or rural production and identified as land use capability Class 1, 2, or 3 of the New Zealand Land Resource Inventory, or by more detailed mapping that uses the Land Use Capability

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<sup>21</sup> E.g., Evidence of Paul Freeland at paragraph 26.

<sup>22</sup> Paul Freeland at paragraphs 23 to 26.

classification<sup>23</sup>. There is an exception for land that is either identified for future urban development or subject to a Council initiated or adopted notified plan change to rezone it from general rural or rural production to urban or rural lifestyle.

53. Clause 3.4 specifies how mapping is to be carried out and may include land, which is not LUC 1, 2, or 3 land if the land is, or has the potential to be, highly productive for land-based primary production having regard to soil type, physical characteristics of the land and soil, and climate<sup>24</sup>.
54. The maps must be prepared in collaboration with territorial authorities and in consultation with tangata whenua. Maps are open to submission and appeal in a First Schedule process.
55. Evidence from Horticulture New Zealand proposes that land other than LUC 1, 2 or 3 be identified as “*highly productive land*” until such time as the mapping required by the NPSHPL is undertaken<sup>25</sup>.
56. That approach cuts across the transitional classification of highly productive land in the NPSHPL<sup>26</sup>. It would not therefore give effect to the NPSHPL. It is not an approach that is open to this Panel.

### NPSREG

57. This NPS acknowledges and gives effect to the Government’s commitment to renewable electricity generation by reducing greenhouse gas emissions caused by the production and use of energy.
58. The NPSREG seeks to deliver “*clean, secure, affordable energy while treating the environment responsibly*”<sup>27</sup>. The NPS does not apply to the allocation and prioritisation of freshwater. Those matters are to be addressed by regional councils at a catchment or regional level separately.
59. The NPS recognises that renewable electricity generation can have adverse environmental effects, in particular at a local level<sup>28</sup>.

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<sup>23</sup> Clauses 1.3 and 3.5(7).

<sup>24</sup> Clause 3.4(3).

<sup>25</sup> Lynette Wharf for Horticulture New Zealand, at paragraphs 152-166

<sup>26</sup> Clauses 1.3 and 3.5(7).

<sup>27</sup> Preamble at page 3 of the NPSREG.

<sup>28</sup> Preamble at page 3 of the NPSREG.

60. The Infrastructure chapter provides for renewable electricity generation generally.
61. Hydroelectric power is a form of renewable electricity generation, and interacts with this chapter.
62. The NPSREG requires management of adverse effects. Where adverse effects cannot be avoided, remedied or mitigated, then decision-makers must consider offsets and compensation which benefit the local environment or community affected<sup>29</sup>.
63. This effects management regime has been refined by the 2022 amendments to the NPSFM.
64. Where the adverse effects of hydroelectric power facilities impinge on the values or extent of natural inland wetlands or rivers, then the effects management hierarchy in the NPSFM applies<sup>30</sup>.
65. These provisions are mandatory. They apply to “*specified infrastructure*” which includes for the present purposes renewable electricity generation facilities<sup>31</sup>. These later, specific directive provisions take priority over the more open-textured provisions of the NPSREG.
66. In her evidence<sup>32</sup>, Ms Boyd has reviewed the 2022 amendments to the NPSFM.
67. Her recommended amendments to the LF-FW subchapter adopt, where it applies, the effects management hierarchy, introduced to the NPSFM by the 2022 amendments<sup>33</sup>.

### **Pest Species**

68. Issue 3 of the proposed RPS is “*pest species pose an ongoing threat to indigenous biodiversity, economic activities and landscapes*”.
69. Wilding conifers are identified in the elaboration of the issue as such a

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<sup>29</sup> Policy C2 of the NPSREG.

<sup>30</sup> Clauses 3.21 – 3.24 and 3.34.

<sup>31</sup> The NPSFM states specified infrastructure includes regionally significant infrastructure identified as such a regional policy statement. The proposed RPS includes renewable electricity generation facilities in its list of regionally significant infrastructure on pages 42-43 of the proposed RPS 31 October 2022 version. Clause 3.21 of the NPSFM.

<sup>32</sup> Fourth Brief of Evidence of Supplementary Evidence dated 24 February 2023

<sup>33</sup> See in particular LF-FW-P13 and P13A.

pest species<sup>34</sup>.

70. “Wilding conifer” is defined to have the same meaning as in the NES for Plantation Forestry (“NES-PF”):

*“means a self-established conifer species tree resulting from seed spread from plantation forestry, shelter belts, amenity planting, or an already established wilding conifer species tree population”.*

71. The NES-PF regulates wilding tree spread from plantation forestry.
72. Plan rules may not be more stringent than the NES-PF unless the rule:
- 72.1. gives effect to an objective developed to give effect to the NPSFM;
  - 72.2. gives effect to any of Policies 11, 13, 15 and 22 of the NZCPS;
  - 72.3. provides protection of outstanding natural features and landscapes from inappropriate use and development;
  - 72.4. protects a significant natural area;
  - 72.5. regulates activities conducted within 1 kilometre upstream of the abstraction point of a drinking water supply for more than 25 people;
  - 72.6. regulates forestry quarrying activities conducted over a shallow water table less than 30 metres below ground level that is above an aquifer used for human drinking water supply<sup>35</sup>.
73. The Director-General of Conservation and Earnslaw One have proposed additions to the LF-LS subchapter to control the spread of wilding conifers. ORC is sympathetic but as drafted the amendments appear to establish policies, which conflict with the NES-PF. For that reason Ms Boyd has refrained from endorsing them.

## Conclusion

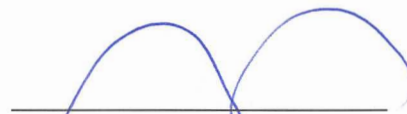
74. The split of the proposed RPS creates practical problems. These are outlined in paragraphs 3 to 33 inclusive of Ms Boyd’s opening statement.

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<sup>34</sup> Proposed RPS, page 89.

<sup>35</sup> Regulation 6 NES-PF.

75. Hearings on the non FPI part are scheduled to be completed before the FPI hearings will commence.
76. There are, as Ms Boyd outlines, interactions between the two sections. At some point, the two parts need to be stitched seamlessly together.
77. Because of the timing of the different processes, the best way of achieving that goal is for this Panel to adjourn the hearings on the non FPI part after the Council's reply. The Panel should refrain from reporting or making any recommendations on submissions.
78. Once the freshwater Panel has reported, the non FPI hearings can then be reopened to enable the Council and submitters to address the implications of the FPI recommendations for the non FPI section of the proposed RPS<sup>36</sup>.



A J Logan

Counsel for the Otago Regional Council

Dated: 1.05.2023

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<sup>36</sup> It may be necessary to seek an extension of time from the Chief Freshwater Commissioner for notification of the Council's Decisions on the freshwater planning instrument; Clause 52 of the First Schedule requires decisions to be publicly no later than 40 working days after the Council is provided with the Freshwater Hearings Panel's report. The Chief Freshwater Commissioner may extend that time under Clause 47 of the First Schedule for up to 12 months.