

**BEFORE THE COMMISSIONERS APPOINTED ON BEHALF
OF THE OTAGO REGIONAL COUNCIL**

Under The Resource Management Act 1991
(**Act/RMA**)

In the Matter of submissions on the Proposed
Otago Regional Policy Statement
2021 (non-freshwater parts) (**PRPS**)

On behalf of **OTAGO WATER RESOURCE USER
GROUP (OWRUG)**

Submitter OS00235 and FS00235

**FEDERATED FARMERS OF NEW
ZEALAND**

Submitter OS00239 and FS00239

DAIRYNZ LIMITED

Submitter FS00601

**OPENING LEGAL SUBMISSIONS OF COUNSEL FOR OWRUG,
FEDERATED FARMERS OF NEW ZEALAND, AND DAIRY NZ LIMITED**

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SUBMISSIONS OF COUNSEL ON BEHALF OF OWRUG, FEDERATED FARMERS AND DAIRY NZ

Is this really a freshwater submission?

1. The original submissions lodged by these submitters was wide ranging. They stem from the same core problem: the failure of the Council to comply with its duties in the preparation of an RPS. Specifically, the Council's failure to recognise that sections 5, 30, and 59-62 of the Act require that an RPS state the resource management issues for the region, and to state the objectives and policies for those issues. It is impermissible to fail to state the regionally significant ways in which access to natural resources enable people and communities to provide for their social, economic, and cultural well-being.
2. However, to understand why that matters, it is necessary to observe the way in which that failure affects the contents of the "engine room" domain chapters. That includes freshwater provisions.
3. These submissions do not ask the Panel to make changes to provisions identified as freshwater provisions. But they do ask the panel to consider those provisions, so that the consequences can be understood. For that reason, all of the submitters' evidence is being called now, even where much of it might be directed to freshwater matters. The submitters want to tell their whole story, so you understand their complaint.

How did we get here?

4. It is important to understand why this Proposed RPS was notified, when a new RPS was not even fully operative yet. The Panel needs to understand that this RPS was commenced to address a freshwater problem. And because that was its purpose, its focus and shortcomings might be better understood.
5. For most of the last 100 years, water for farming in Otago's water-short "central" has been supplied via deemed mining privileges dating back to the gold rush era. In the early 20th Century, the Crown began

converting mining infrastructure to irrigation schemes, in part to open up country for returning soldiers to farm.

6. Mining privileges were property rights. They were perpetual and could not be revoked without compensation. Thus Crown-established irrigation schemes had the benefit of perpetual water rights.
7. In the late 1980s economic reforms of the 4th Labour Government, the Crown's Otago irrigation schemes were sold to the farmers that received the water. The ink was scarcely dry on those transfers when the passing of the Resource Management Act in 1991 then converted the mining privileges to "deemed" permits that expired on the 30th anniversary of the Act.¹ Something over 500 deemed permits were then due to expire on 30 October 2021. This was unwelcome news to the farmers that had just bought the schemes from the Crown.
8. In the first quarter-century of the Otago Regional Council, farmers were encouraged to invest in efficient irrigation methods to support applications for replacement water permits. This was supported by provisions of the Regional Plan: Water that was notified in 1998. Many did so, adding substantial debt to their balance sheets to invest in storage and to convert from flood irrigation to spray.
9. Farmers began to organise themselves into catchment groups to apply for replacement water permits.
10. The first big irrigation scheme of the blocks was the Lindis Catchment. The Lindis Catchment Group (LCG) began working on their replacement permits strategy around 2007-8. Substantial resource science research and community consultation was carried out by both the ORC and the LCG.
11. On 8 August 2015 the ORC notified a change to its Regional Plan Water, Plan Change 5A, to introduce minimum flow and primary allocation limits for the Lindis Catchment. The purpose was to provide a framework for the permit replacement application.

¹ Section 417 of the Act.

12. The notified PC5A limits were wildly at variance to the public consultation proposal produced by the ORC's Resource Science team. LCG considered that the notified limits adopted by the ORC would not allow the continuance of farming in the catchment. The ORC's Resource Science Manager (the late Matt Hickey) resigned and started working as a consultant to LCG.
13. In 2016 Lindis Catchment Group appealed the ORC's decision on the Plan Change to the Environment Court and sought direct referral of its applications for replacement permits, to be heard together. In its first decision (on the Plan Change), the Environment Court was critical of the Regional Plan Water's policy framework to address water allocation. Nevertheless, LCG's appeal was allowed, and replacement permits granted.
14. Fish and Game appealed to the High Court but their appeal failed. While all that was going on, Council made progress consenting other schemes.²
15. The political fallout from the Environment Court's decisions in the LCG case and the ORC's consenting other catchments was substantial. On 16 May 2019 the Minister appointed Prof Peter Skelton under section 24A of the Act to:

to investigate whether the Otago Regional Council (the Council or ORC) is adequately carrying out its functions under section 30(1) of the RMA in relation to freshwater management and allocation of resources. This includes implementation of the current National Policy Statement for Freshwater Management 2017 (NPS-FM).³

16. Prof Skelton's executive summary is worth quoting at length:

The immediate issue facing the Council is the challenge of developing a fit for purpose planning framework ahead of the expiry of the deemed water permits on 1 October 2021.

² Counsel was involved in the Kyeburn Catchment, Last Chance Scheme, Long Gully, Luggate Creek, various takes in the Upper Clutha, and was involved in Manuherekia.

³ P Skelton, Report to the Minister for the Environment, 1 October 2019 <https://www.orc.govt.nz/media/7608/section-24a-otago-investigation-report-final-october-2019.pdf>.

It will be important to complete a new regional policy statement and a new land and water regional plan before undertaking the assessment of any new or replacement water consent applications. This will enable applications to be considered under the new freshwater planning framework and will halt the current unsatisfactory situation of ad hoc 'planning by consent'. This report recommends a pathway for achieving this.

In the interim, I consider the Minister for the Environment should recommend that the Otago Regional Council gives high priority to a planning process (which it has already commenced) to provide shortterm measures for managing freshwater until the new regional policy statement and the new land and water regional plan are completed. This includes Plan Change 6AA, the Omnibus Plan Change, and a robust resource consenting regime which will avoid the granting of long term consents during this interim period.

While interim measures are necessary, the major focus of the Council should be the significant upgrade of the planning framework. I consider that the Minister for the Environment should recommend to the Otago Regional Council that it takes all necessary steps to develop a fit-for-purpose freshwater management planning regime. This regime should give effect to the relevant national instruments and set a coherent framework for assessing all water consent applications, including those that are made to replace any deemed permits.

To achieve this, the Minister should recommend that the Otago Regional Council adopts a comprehensive programme of work which will involve a complete review of the Regional Policy Statement by November 2020, and a new land and water regional plan by 31 December 2023.⁴

17. Prof Skelton made two recommendations for special legislative change⁵:

5. that the Minister initiates the necessary legislative process to change the date for expiry of the deemed permits in section 413(3) of the RMA, from 1 October 2021 to 31 December 2025, being the date by which the Otago Regional Council's new land and water regional plan is to be operative. For the avoidance of doubt this recommendation to amend section 413(3) of the RMA applies only to the Otago region

6. that if the new freshwater planning legislative process is delayed for any reason, consideration be given to promoting

⁴ Ibid page 7

⁵ Ibid page 38

special legislation for the Otago region to establish a special hearing process to achieve completion of the Otago Regional Policy Statement by 2022 and the new land and water regional plan by 2025. This special legislation would need to provide for the hybrid hearings panel model and restricted appeals to the Environment Court.

18. The Minister declined to make those two changes. But did recommend that ORC “take all necessary steps to develop a fit for purpose freshwater management regime that gives effect to the relevant national instruments...”⁶ The Minister’s focus of freshwater management is clear.
19. Plan Change 7 was therefore introduced as a temporary holding measure. Work on the drafting of this proposed RPS began during the Plan Change 7 process. ORC staffed worked directly with Nga Runanga’s consultants⁷, as they were entitled to do. There was no direct engagement with farmer representative groups beyond the statutory process. Given the Minister’s direction, and the interests engaged, a very narrow policy focus is therefore unsurprising.
20. To put that change in context, it is useful to observe what the existing instruments say. Chapter 6 of the operative Regional Plan Water deals with water quantity. It contains the following objective:

6.3.2 To provide for the water needs of Otago’s primary and secondary industries, and community domestic water supplies.

Explanation The economic, social and cultural wellbeing of Otago’s people and communities relies on them securing suitable quantities of water. The present and reasonably foreseeable needs for water will therefore need to be met. This includes existing consumptive users who rely on current takes of water, as well as hydro-electric power generation and other non-consumptive users. Principal reasons for adopting This objective is adopted to ensure continued access for the taking of water. This recognises the importance of water in maintaining Otago’s communities and their primary and secondary industries.
Policies: 6.4.1 to 6.4.21, 6.5.2 to 6.5.5, 6.6.1 to 6.6.3

⁶ <https://environment.govt.nz/assets/uploads/letter-to-orc-re-s24a-investigation-from-hon-david-parker-18112019.pdf>

⁷ As is recorded in the evidence of Sandra McIntyre for Kai Taku Ki Otago at paragraph 4.

21. No party in *Lindis*, nor the Environment Court, nor Prof Skelton in his recommendation to the Minister, suggested that this objective was factually wrong or somehow inappropriate. Yet *Lindis* could not have been reconseented without that objective. The underlined words are statements of fact. They are as accurate today as they were when they were adopted.
22. The partially operative RPS 2019 is a recent instrument and is succinctly expressed. Yet it manages to recognise the importance of the use of land and access to fresh water:

Objective 1.1

Otago's resources are used sustainably to promote economic, social, and cultural wellbeing for its people and communities

Issue The social and economic wellbeing of Otago's communities depends on use and development of natural and physical resources.

23. There is a specific policy relating to water allocation:

Policy 3.1.3 Water allocation and use

Manage the allocation and use of fresh water by undertaking all of the following:

a) Recognising and providing for the social and economic benefits of sustainable water use;

b) Avoiding over-allocation, and phasing out existing over-allocation, resulting from takes and discharges;

c) Ensuring the efficient allocation and use of water by:

i. Requiring that the water allocated does not exceed what is necessary for its efficient use;

ii. Encouraging the development or upgrade of infrastructure that increases efficiency;

iii. Providing for temporary dewatering activities necessary for construction or maintenance.

24. By contrast, the Proposed RPS does not specifically acknowledge an intention to enable water to be allocated to economic uses at all. Nor does it acknowledge that regionally significant land uses depend upon access to land and freshwater to sustain people and communities.

These are matters relevant to Council's statutory functions. Those wider functions have not been altered by the NPSFM2020. Thus when the Minister called for a "fit for purpose freshwater management regime" he did not and could not ask the Council to ignore the range of other matters required of an RPS by the Act.

25. The case for OWRUG, Federated Farmers, and Dairy NZ is that this Proposed RPS is an over-reaction to the Skelton Report and the Minister's recommendation. There is nothing in the proposed RPS that addresses how communities provide for the social and economic wellbeing. There is nothing to reflect the critical statement in objective 6.3.2 of the RPW, nor the statements in the PO RPS 2019.
26. In the Proposed RPS, Issue statements SRMR-I5 and I10 discuss the demand for freshwater and the effects of activities on freshwater, but express no need nor intention to enable people to access have to water except for cultural (RMIA-WAI- Wai Maori) reasons.
27. The L&FW domain chapter is silent about whether the social and economic needs of people and communities should be sustained by having access to land and freshwater. The policy framework is entirely in the negative - namely it only deals with things to be avoided.⁸
28. One wonders upon what evidence or advice the ORC has decided that a matter of critical economic importance to the community in 2019, is now not sufficiently important to justify a single enabling objective and policy in the proposed RPS.
29. Why does this matter? If the RPS does not acknowledge the critical importance of farming to Otago's communities, and farming in turn relies on them securing suitable quantities of water, then on what policy basis could the future Land and Water Regional Plan allocate water for that purpose? What policy considerations are relevant to in

^{8 8} This approach is consistent throughout the document. By way of example NFL-01, NFL-P2 and 3, HCV-WT-O1 and P2, ECO-P6. The only provision that ostensibly supports activities in rural areas and inexplicably located in the Urban Chapter (UFD-P7) is framed in terms of protecting other identified values and supporting rural amenity and character.

relation to things like the setting of river minimum flow limits? The RPS offers no direction.

30. Section 67(3) of the Act requires a Regional Plan to give effect to the RPS. A failure at RPS level will therefore cause a cascade of failures at every step below. The proposed RPS sets the Land and Water Regional Plan up to fail the community.

What does the Act require?

31. The RMA's purpose is to promote the management of the use, development, and protection of natural and physical resources to enable people and communities to provide for their social, economic and cultural wellbeing and for their health and safety while protecting the environment.⁹
32. Section 61 of the RMA provides that preparation and change of the PRPS must be in accordance with the functions of a regional council under s 30, including:¹⁰
- (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...":
33. Regional councils must always have a regional policy statement prepared through Schedule 1 in accordance with their function under various sections of the Act.¹¹ The purpose of the statement is to:¹²
- ...achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve *integrated management* of the natural and physical resources of the whole region. [emphasis added]
34. Integrated management already takes place on the region's farms. This theme is clear throughout the evidence that has been provided to the Panel. Two examples are the intergenerational aspects of farming

⁹ Resource Management Act 1991 (RMA), s 5.

¹⁰ RMA, s 30.

¹¹ RMA, ss 30, 60 and 61.

¹² At s 59.

that come through in Luke Kane’s evidence, and the farm level decisions described by Kelly Heckler that are consistent with ki uta ki tai. There is nothing in the Proposed RPS that recognises the way in which all of the different policy threads come together in a farming context. This points to the appropriateness of a new domain chapter that deals with all rural issues in an integrated way.

35. OWRUG, Federated Farmers, and Dairy NZ are asking the Panel to recognise the realities of integrated management in the food and fibre sector. The importance of the rural sector to Otago economically, culturally and socially is described at length in the evidence.¹³
36. The obligation to have objectives and policies in an RPS in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance is mandatory. That must include objectives and policies in relation to social and economic effects on people and communities.
37. A clear sign of where matters have gone awry is found on the “Introduction and General Themes” 42A Report dated 4 May 2022:

117. I acknowledge the importance of primary production to Otago’s regional economy, however as a philosophical position the pORPS has chosen not to provide policy direction on specific industries or economic uses of resources. Instead, it focuses on the outcomes sought from the sustainable management of resources and on putting in place management frameworks to protect or otherwise manage those resources, so that where the resource is available, use can occur (regardless of what that use is). For this reason, I do not recommend accepting the submission points by Federated Farmers, Gavan James Herlihy, Edgar Purcell, or Moutere Station seeking greater recognition of primary production.

38. That is an admission of dereliction of duty. It is not for the ORC to adopt a “philosophical position” at variance with the Act’s requirements. Part of the problem here is that the section 42A reporting officer is the same officer that wrote the section 32 report for the notified RPS. It is

¹³ See for example Evidence in Chief of Mario Cadena, Benje Patterson, James Dicey and Simon Glennie.

hardly surprising that the 42A report agrees with the section 32 report. That is poor practice and robs the 42A reporting of independence.

Regional significance

39. Otago's primary sector represents a larger proportion of economic activity in the region relative to other regions.¹⁴ The consequences of this are that regulatory changes that affect the food and fibre sector will have more significant impacts on the economic and social wellbeing of the community.¹⁵ This issue has not been appropriately recognised in the PRPS and as such there are inadequate provisions that address it. This failure means that the PRPS does not comply with the Act. concern as to the lack of regard to primary production in general, and food production in particular applies across the content and structure of the PRPS. As an example, in the context section under SRMR-I1, the s 42 report recommends:

...primary production can be disrupted in Otago's floodplains...

And under the economy section of SRMR-I2 it is noted:

...agriculture may benefit from warmer temperatures, longer growing seasons and elevated carbon dioxide...

40. Such descriptions do nothing to describe the impacts flood and drought can have on food and fibre communities. Nor do these statements recognise the role of existing and future infrastructure to provide climate change and natural hazard resilience for the food and fibre production community.
41. This sector is already under strain. There is much existing regulatory change in the pipeline which is already having impacts on the rural sector. These changes have their practical challenges. These challenges, and the novel solutions that the sector has been using to solve them are described in the evidence.¹⁶ But it is getting harder and harder to keep up.

¹⁴ Evidence in Chief of Benje Patterson, at [30]-[36].

¹⁵ As described in the evidence of Joanna Hay and Mike Lord.

¹⁶ See Evidence in Chief of Kate Scott, Susie McKeague, Ian Lloyd, Brendan Sheehan, Jenny McGimpsey and Miranda Hunter.

NPSFM2020

42. Legal submissions of counsel for Beef and Lamb NZ and Deer Industry NZ on the NPS FM2020 are acknowledged and supported.¹⁷
43. The PRPS needs to include objectives that enable and support farmers to transition to a planning framework that gives effect to Te Mana o Te Wai.

Te Mana o Te Wai

44. Every regional council must give effect¹⁸ to Te Mana o Te Wai, which is the fundamental concept of the NPSFM:¹⁹

(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*. ...

(5) There is a hierarchy of obligations in Te Mana o te Wai 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.

[emphasis added]

45. This PRPS has wider functions than merely giving effect to the NPSFM2020. However, Te Mana o te Wai, ki uta ki tai and integrated management of natural resources cannot be disregarded, pursuant to part 1 of schedule 1 of the Act.²⁰ A regional council preparing a regional policy statement must give effect to the principles of Te Mana o te Wai in consideration of all matters it is separately concerned with.²¹

¹⁷ <https://www.orc.govt.nz/media/13812/beef-plus-lamb-opening-submissions-im.pdf>.

¹⁸ NPSFM, at cl 3.2(2).

¹⁹ NPSFM, at cl 1.3.

²⁰ *Otago Regional Council v Royal Forest and Bird Protection Society* [2022] NZHC 1777, at [207].

²¹ RMA, s 61(1)(b) and (da) and sch 1 cl 50(d); *Otago Regional Council v Royal Forest and Bird Protection Society* [2022] NZHC 1777, at [160].

46. Relevant policies of the NPSFM include:

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 5: Freshwater is managed (including through a National Objectives Framework) to ensure that the health and well-being of degraded water bodies and freshwater ecosystems is improved, and the health and well-being of all other water bodies and freshwater ecosystems is maintained and (if communities choose) improved.

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

[emphasis added]

47. These policies demonstrate that regulation of land use must contemplate its relationship with freshwater. Such effects must be managed (including by communities) to ensure the health and well-being of waterways. Policy 15 enables communities such as the food and fibre sector to provide for their own wellbeing in such decisions.

*Application of Te Mana o Te Wai to farmers*48. The NPSFM encourages decision-making at a catchment and sub-catchment level. Te Mana o te Wai extends beyond the freshwater realm in being between the water, the wider *environment* and the *community*.49. 'Environment' is not defined in the NPSFM but under the RMA it includes:²²

(a) ecosystems and their constituent parts, including people and communities; and

(b) all natural and physical resources; and

(c) amenity values; and

(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters

²² RMA, s 2 'environment'.

50. 'Community' is not defined under the RMA, NPSFM or National Planning Standards. In our submission the dictionary meaning of 'community' is therefore most appropriate:²³

the people living in one particular area or people who are considered as a unit because of their common interests, social group or nationality

51. Farmers are a community both in locality terms and because they have common economic circumstances and a common interest in access to natural resources and food and fibre production.
52. The repeated references to 'community' in cl 1.3(5), Policies 5 and 15 and the definition of 'environment' confirms that the needs of people and communities form an important part of Te Mana o te Wai.
53. The reference to 'natural and physical resources' in the definition of environment further links to the food and fibre community, which relies on such resources. Provision for the wellbeing of the food and fibre community is also consistent with the purpose of the Act.²⁴
54. The evidence filed demonstrates that food and fibre production is crucial socially, economically, and culturally to Otago.

Where do farmers fit within the three priorities of the NPSFM?

55. In our submission the submitters' interests are also relevant to priorities 1 and 2 of the NPSFM, under clause 1.3(5).
56. The NPSFM's sole objective is in part directive – it is to ensure natural and physical resources are managed in a way that prioritises:²⁵
- (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.

²³ Online Cambridge English Dictionary, 'community'. Accessed 27 February 2023.

²⁴ RMA, s 5(2).

²⁵ *Re Otago Regional Council* [2021] NZEnvC 164, at [32].

57. However in part, the objective is not directive. The section 32 analysis for the NPS FM2020 explained the single objective in this way:

The ingredients of section 5 of the RMA are in the Objective but are re-arranged to give greater specificity by prioritising the health of freshwater above other resource use and development.

The intent of the objective is not that the first priority (clause 2.1(1)(a)) be read as a bottom line with the goal of achieving a pristine or “pre-human” water quality state. Rather, the intent is to shift the way that we think about managing freshwater and guide the implementation of the National Objectives Framework (NOF) process prescribed in the NPS-FM 2020.40

*The Objective is clear in its priorities but flexible in its approach, which is consistent with the effects-based approach under the RMA. There is nothing in its wording to suggest it creates a strict priority on competing interests, and councils will need to exercise their discretion guided by clear and strong direction. The NOF in Part 3, subpart 2, anticipates that different values and objectives may be identified for different catchments.*²⁶

Underlining added.

58. On that approach, it is not strictly necessary to identify where farming sits amongst the 3 priorities. There will be overlap and repetition as the following demonstrates.

The first priority

59. The health and well-being of water bodies and freshwater ecosystems under the first priority relies substantially on their relationship to the land occupied by farmers.
60. Consideration of primary production as part of ecological processes is a compulsory value under Appendix 1A of the NPSFM.²⁷ Under Appendix 1B, Irrigation, cultivation, and production of food and beverages is an “other value that must be considered”.
61. Integrated management acknowledges that the use of land around fresh water bodies must be relevant to the health and wellbeing of those water bodies and freshwater ecosystems.

²⁶Action for Healthy Waterways, section 32 evaluation for the Ministry for the Environment, Harrison Grierson document identification number R001v3-AK147658-01-final-22July2020, at section 5.5, pages 2-23.

²⁷ NPSFM, Appendix 1A 1 ‘Ecological processes’.

62. The extent to which the first priority is provided for will depend upon “environmental outcomes” adopted as objectives in a Regional Plan under clause 3.9 of the NPSFM2020. Appendix 1B values (including irrigation and food production) must be considered in relation to each FMU.

The second priority

63. The second priority is the health needs of people. The membership of the ‘health needs’ group is non exhaustive in including ‘*such as* drinking water’.
64. By providing a non-exhaustive list of human health needs it follows that the provisions include health needs beyond drinking water.
65. In our submission the most basic human health need after drinking water is food. Without food we die. That basic fact is not altered by whether food is purchased or grown in your own back yard. Urban communities rely on farmers to keep them alive.
66. “The health needs of people” is not limited to people in New Zealand. The production of food for export is just as relevant to achieving the second hierarchy of obligations as growing food for your own consumption. There is no mandate apparent from the NPSFM2020 to excluding commercial food production from the second tier. Most of us eat food grown by someone else.
67. The Producers submit that food (and fibre) are health needs under the second priority.

The Third Priority

68. This effectively captures everything else. It includes social, economic, and cultural values, which (for example) must include the mauri of water. Mauri must be a cultural value and thus a third-tier consideration because only mana whenua can judge what it is and

what is sufficient.²⁸ That is why the submitters object to its inclusion at the forefront of LF-WAI-01.

69. The point of mention this is not to be provocative, but to demonstrate the circularity of the three-tier hierarchy of TMOTW. Each tier will have elements of the other and drawing hard boundaries was neither intended (according to the NPSFM's section 32 report) nor useful.

How does the Panel give effect to Te Mana o te Wai?

70. Clause 3.2(3) of the NPSFM2020 requires:

(3) Every regional council must include an objective in its regional policy statement that describes how the management of freshwater in the region will give effect to Te Mana o te Wai.

71. That objective does not sit in a vacuum. What Te Mana o te Wai means for this region and for each FMU cannot be known if the needs of the community are not known and articulated as objectives and policies in the RPS. The ORC's wider non-freshwater functions in section 30 of the Act feed into how Council will manage freshwater to give effect to Te Mana o Te Wai in a regional context. Otherwise, there would be no need for it in the RPS at all.
72. It is consistent with Policy 15 of the NPSFM to enable the food and fibre community to provide for their social, economic, and cultural well-being. This requires consideration of the costs and benefits of regulatory change for these communities. Te Mana o te Wai might be "water centric", but the extent to which each priority is provided for occurs in a local social context.
73. Decision-making at farm or catchment level can be consistent with Te Mana o Te Wai, as is demonstrated within the evidence.²⁹
74. Neither the Act nor the NPS FM2020 allows an RPS to ignore the importance of the relationship between land and freshwater to

²⁸ LF-WAI-E1 Explanation, third paragraph page 163 of the 31 October 2022 tracked version.

²⁹ See for example the evidence of Susie McKeague and Emma Crutchley regarding buffering minimum flows. This is an example of putting the health of the waterbody first.

communities by leaving considerations of the NPSFM entirely to the freshwater process.

75. To see what happens when such interests are not protected, we direct the Panel to the evidence of the witnesses relating to the on-ground effects of extensive policy direction.³⁰ In our submission this evidence shows the need for adequate time to respond to change.

NPSHPL

76. A further example of regulatory change in recent months comes in the form of the National Policy Statement on Highly Productive Land 2022.
77. The NPSHPL at clause 3.2 relevantly provides:

3.2 Integrated management

(1) Regional councils and territorial authorities must identify highly productive land, and manage the effects of subdivision, use, and development of highly productive land, in an integrated way, which means:

(a) considering how land-based primary production, including supporting activities, interact with freshwater management at a catchment level; ...

...

(c) taking a long-term, strategic approach to protecting and managing highly productive land for future generations.

78. Every local authority must give effect to the NPSHPL from its commencement date, being 17 October 2022.³¹
79. This means there is now a mandatory obligation through the NPSHPL for the ORC to consider how land-based primary production, including supporting activities, interact with freshwater management at a catchment level.
80. Land-based primary production means production, from agricultural, pastoral, horticultural, or forestry activities, that is reliant on the soil resource of the land.³²

³⁰ See for example Evidence in Chief of Jeremy Anderson, Emma Crutchley and Jeff Winmill for how these changes have impacted the Maniototo.

³¹ NPSHPL, at 4.1.

³² NPSHPL, at 1.3.

81. Supporting activities means those activities reasonably necessary to support land-based primary production on that land (such as on-site processing and packing, equipment storage, and animal housing).³³
82. Supporting activities, at least in Otago, includes access to water.
83. Infrastructure and its importance are a common theme throughout the evidence provided. For example Richard Plunket, Tim O'Sullivan and Bruce Jolly describe the importance of irrigation infrastructure in the region and the need for it to be integrated with other entities.
84. Irrigation water supply infrastructure is part of the definition of "infrastructure" in the Act. The evidence points to shared irrigation infrastructure being regionally significant in Otago.
85. Land use classes 1-3 (default "highly productive land" in the NPSHPL) affect a relatively small proportion of Otago's rural land resource. But section 59 of the Act requires an RPS to include policies and methods to achieve integrated management of the natural and physical resources of the whole region.
86. We submit that the PRPS does not provide sufficient policy direction to give effect to the NPSHPL in the context of the integrated management of land based primary production, including supporting activities and how these interact with freshwater planning at a catchment level. Bluntly, land-based primary production in much of Otago is dependent on access to water. The RPS is obliged to acknowledge that. It does not.
87. The Joint Witness Statements of planning professionals dated 22 March 2023 and 29 March 2023 identified new Significant Resource Management Issues – Infrastructure and resource use respectively. The objectives and policies do not adequately recognise these issues.
88. A new rural chapter with an appropriate suite of objectives and policies is required, particularly in relation to resource use. Recognition of

³³ NPSHPL, at 1.3. Supporting activities means those activities reasonably necessary to support land-based primary production on that land (such as on-site processing and packing, equipment storage, and animal housing).

shared irrigation infrastructure is required as infrastructure of regional significance. We suggest that a direction is needed for the ORC to draft such a chapter.

Climate change - SRMR-I2

89. We note in relation to Part 2 – Resource Management Overview, the s42A report author recommended, on the basis of a submission from Fish and Game,³⁴ that the following sentence be added to SRMR-I2 under the Environmental Impact Snapshot:

Human adaptation to climate change, such as building or expanding dams or flood protection schemes, may give rise to adverse impacts on ecosystems, in addition to those imposed by climate change itself, and may also exacerbate the original risk.

90. Pursuant to s 61(2)(e) of the Act, when preparing or changing a regional policy statement, the regional council shall have regard to:
- any national adaptation plan made in accordance with section 5ZS of the Climate Change Response Act 2002.
91. Aotearoa's first National Adaptation Plan was published in August 2022 by the Ministry for the Environment.
92. In that Plan it is noted:³⁵

Landowners, food and fibre businesses and rural communities are especially vulnerable to both acute climate events and more gradual climate change impacts that affect water availability and security. These effects also limit options for landowners to implement climate resilient land uses, including owners of underdeveloped land (much of which is Māori-owned). Action 6.6: Implement the Water Availability and Security programme will help food and fibre sectors and rural communities have appropriate access to water, and support tangata whenua aspirations. The programme will enable the transition to a sustainable food and fibre sector, and support the resilience of rural communities and the welfare of animals.

93. Action 6.6 then states:

Climate change increases natural water variability, affecting access to freshwater across the country.

The Water Availability and Security programme will help food and fibre businesses and rural communities adapt to increasingly variable natural

³⁴ 00231.024 Fish & Game.

³⁵ At page 103.

water availability through a range of complementary activities to both reduce demand and make best use of available water. It will help restore and maintain the health of waterways, taking its lead from the National Policy Statement on Freshwater Management.

By 2024, the Ministry for Primary Industries (MPI) will form a permanent team to address water availability and security in the food and fibre sectors and rural communities. This work will include partnering with Māori, rural communities and other sectors to find solutions.

94. It is also noted in the Adaptation Plan that Action 6.6 will support resilient infrastructure (p 137), resilient communities (p 151) and a resilient economy and financial system (p 171).
95. In our submission, the proposed addition recommended in the s 42A report is contrary to the National Adaptation Plan. Giving proper regard to the Adaptation Plan means that this recommendation should be rejected.
96. In our submission, the following text should instead be added under the Environmental Impact Snapshot:
- Landowners, food and fibre businesses and rural communities are especially vulnerable to both acute climate events and more gradual climate change impacts that affect water availability and security. These effects also limit options for landowners to implement climate resilient land uses, including owners of underdeveloped land (much of which is Māori-owned).
97. In our submission this will provide more accurate recognition of the importance of water security and water availability to the food and fibre sector in Otago, the sector's vulnerability to climate change and the importance to be able to adapt to rapid change.

Integrated Management and the requirements of the Act

59 Purpose of regional policy statements

The purpose of a regional policy statement is to achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.

98. Integrated management is a fundamental purpose of an RPS under section 59 of the Act. The proposed RPS has a whole chapter on integration. Policy IMP1 acknowledges the ability of people and communities to provide for their social and economic wellbeing, though

only after the life supporting capacity and mauri of the natural environment. The policies then go on to detail things like mana whenua values (IM-P3) ecosystem health (IM-P4) and climate change (IM-P8 and IM-P10, P12), and “human impact” (IM-P14). But there is nothing that particularises what the community needs to sustain itself economically. It is just assumed that if the natural environment is ok, then people will have jobs and ways in which they can afford to feed and house themselves.

99. The problem is that in order for integration to occur, all of the issues have to be brought into account in the policies and methods. That is what section 59 requires. So, how do Otago communities provide for the social and economic needs? There is no policy of that kind in the Integrated Management Chapter, nor in the Land and Freshwater domain chapter.
100. LF-WAI-P3 demonstrates the point. That policy requires the use of freshwater and land to be managed in accordance with tikanga and kawa, using an integrated approach that addresses specified considerations. (1)-(4) relate to ecological values, (5) relates to urban growth, (6) relates to climate change, and (7) and (8) pointlessly repeat cumulative effects and a “precautionary approach”.
101. Applying LF-WAI-P3 whilst purporting to address integrated management, does not require consideration of the social and economic needs of people (other than mana whenua) at all. That is self evidently NOT integrated management and utterly fails to live up to the purpose of an RPS explained in section 59. The needs of the community are entirely absent.
102. The problem is then repeated by policy LF-WAI-P4- Giving effect to Te Mana o te Wai. Putting aside the legal pointlessness of a policy that requires decision makers to apply policies, the specified provisions to be applied are only policies LF-WAI-01, and P1-P4. What about all the rest, does integrated management not require ALL relevant policies to be considered? Certainly, the Act does. And yet none of those specified policies particularise the ways in which communities require

access to natural resources to sustain themselves. The policies do not advance what Te Mana o te Wai means to Otago's communities. Yet that is what Clause 3.2(3) of the NPSFM2020 requires:

(3) Every regional council must include an objective in its regional policy statement that describes how the management of freshwater in the region will give effect to Te Mana o te Wai.

103. This proposed RPS hasn't grasped that nettle, because it has put to one side the fact that people need access to freshwater.
104. It is therefore not surprising the L&FW Domain policy framework is a long list of policies that in a myriad of different ways, require adverse effects on freshwater values to be avoided. There is nothing against which those values must be balanced. Its as if people don't exist.
105. The RPS forgets entirely about the structure of Part 2 of the Act, which the NPS FM2020 is still subservient to. Only the "natural character" of rivers (6(a)) and the relation of Maori with their ancestral waters (6(e)) are section 6 matters that must be recognised and provided for. Not every facet of freshwater or ecological function must be "recognised and provided for".
106. Under section 7 of the Act, kaitiakitanga, the intrinsic values of ecosystems, and the habitat of trout and salmon rank alongside the "efficient use and development of natural resources" (s.7(b)) as matters to which particular regard must be had. And yet, policy concerning the efficient use of land and freshwater is missing from the Land and Freshwater domain chapter. The failure to address the ways in which the efficient use of natural resources is important to the community is a fundamental failure to comply with the Act.
107. The matter is explained to a small extent by the 42A report. At para 239 of the 4 May 2022 report, the officer addresses and recommends rejection of OWRUG's submission.

LF-WAI-P3 is a high-level policy setting out the considerations required in order to manage land and water in an integrated way. I do not consider it would be appropriate for a strategic policy such as this to begin differentiating between activities or industries. I believe the

reference to community well-beings considerably broadens the intent of the policy, which is focused on the environmental aspects of managing resources in an integrated way, not on the use of those resources. The purpose of this sub-section is to set out the concept of Te Mana o te Wai in the Otago context, not to make directions about acceptable or unacceptable uses of resources.

108. This statement is revealing. The officer evidently thinks it is possible to make integrated decisions about the use of natural resources without any consideration been given to the social and economic needs of communities in Otago. That flies in the face of section 5 of the Act.
109. At its most basic level, the Act regulates the behaviour of humans. The natural world does not require regulation but for the competing interests of people. And even then, that is only because the quantity and quality of natural resources are scarce (in economic terms). That is why policy is required- to identify and integrate competing claims for needs to be met by access to natural resources.
110. That fundamental task is addressed by Part 2 of the Act and is expressed as the function of an RPS in section 59. It has been ignored by the reporting officer under the false premise that for so long as natural resources themselves are sustained, nothing else is required in relation to regulating their use and development. That overlooks the necessary function of providing for the needs of people through the efficient use and development of natural resources.

Efficiency and effectiveness: Long Term Visions

111. A regional policy statement must state the procedures used to monitor the efficiency and effectiveness of the policies or methods contained in the statement.³⁶
112. The LF-VM visions for Otago's FMUs are shaded blue and so the objectives and policies are for another day. But, the methods, principal reasons, and anticipated environmental outcomes are not shaded blue. Therefore, you do need to address them. You must be satisfied that

³⁶ RMA, s 62(1)(j).

“the outcomes they seek are achieved within the timeframes specified”³⁷. So what is the outcome that must be achieved?

113. It is unclear in the PRPS exactly what changes are required to achieve the visions in the FMUs. Cl 3.3 of the NPSFM2020 requires each FMU to have a long-term vision. Visions are required to be:

(2) Long-term visions:

(a) may be set at FMU, part of an FMU, or catchment level; and

(b) must set goals that are ambitious but reasonable (that is, difficult to achieve but not impossible); and

(c) identify a timeframe to achieve those goals that is both ambitious and reasonable (for example, 30 years after the commencement date).

114. The NPSFM2020 offers no free pass from the requirements of section 32 of the Act. Clause 3.6(4) makes that clear.

115. So, in order to be valid, the ORC must demonstrate that a vision is able to be achieved. It has not done that. And it cannot do that because they are expressed at such generality, it is impossible to know what they require. Farmers do not know what is being asked of them. All that they know is that they are the ones who will pay for it. There is not even an attempt at a section 32 analysis that identifies, let alone quantifies, the costs and benefits of achieving the visions.

116. Although this hearing relates to the non-freshwater provisions, the need to acknowledge the regional significance of the food and fibre sector, the difficulties that community has in achieving change, and provide for suitable transition periods needs to be acknowledged in the earlier chapters of the PRPS.³⁸ That is something this Panel can and should do. That should then inform the content of visions that are achievable.

117. Further still, in the absence of a policy framework that acknowledges the social and economic importance of food and fibre production to

³⁷ LF-VM-AER3

³⁸ Brief of Evidence of Susie McKeague, at 14.

communities, a proper foundation for evaluating costs and benefits under section 32 is not available.

Relief sought

118. These submissions are necessarily addressed at a high level rather than presenting a deep dive into the drafting changes sought. Those changes are set out in Appendix 2. The main point here is that the RPS must acknowledge and adopt objectives and policies in relation to food and fibre production as a regionally significant use of land.
119. Planning witnesses have produced a joint witness statement agreeing upon a new SRMR for access to natural resources³⁹. It has been expressed in rather abstract terms. But what it shows, is that there is consensus that something more is required to acknowledge the economic importance of access to resources to balance the “effects” issues. That must then find its into the domain chapters or else it is worth nothing.
120. It is self-evident that there are competing considerations at play in resource use and allocation. Yet the L&FW domain chapter does not read that way. Nor do the other chapters. Without identifying and addressing competing considerations, all of the “effects” issues present as if they have section 6 status and must be “recognised and provided for” no matter what the cost. Explicitly addressing competing tensions is what a policy statement is for- to provide direction for sub-ordinate documents.
121. Further, the Land and Freshwater section of the PRPS should lay out a framework for setting timeframes to achieve long-term visions (once there are valid ones) over a transition period, for the Regional Council to use when developing regional plan provisions to achieve long-term visions for freshwater across the Otago region. This framework must allow the food and fibre sector time to adjust at a rate that accounts for the potentially significant impacts on their social, economic, and

³⁹ SRMR topic JWS dated 29 March 2023:

https://www.orc.govt.nz/media/14099/srmr-new- resource-users_jws_final.pdf

cultural well-being. The Panel must know what the visions require and must have evidence that visions are objectively quantifiable and achievable.

Highly productive land

122. In the absence of a new Rural Chapter, the PRPS provisions, and in particular the Land and Freshwater chapter, should be amended to provide actual and appropriate recognition of the importance of primary production land and the economic uses of soil.
123. The submitters support the recognition and prioritisation of using highly productive land for primary production in the PRPS but seek that this recognition should extend to all land used for food and fibre production.
124. These provisions must contemplate the relationship between productive land and access to freshwater in a way that will flow into the freshwater provisions.

New Rural Chapter

125. The commencement of the NPS HPL points to a new rural domain chapter being most appropriate. The NPS REG seems to support energy having its own section in a domain chapter, and the urban form and development domain is supported by the NPSUD.
126. Given the interplay between infrastructure, freshwater, land use, highly productive land, climate change, and natural hazard resilience, a subject-specific chapter seems the most appropriate way to ensure integrated management.
127. A rural chapter would also seem to be the logical counterpart to a domain chapter dealing with urban form and development.
128. It is of course accepted that the existing domain chapters can be retrofitted with appropriate objectives and policies, but that is not the favoured solution.

Witnesses

129. The submitters have provided 22 evidence briefs. The authors and topics of these briefs are described at **Appendix 1**.

Dated 1 May 2023

A handwritten signature in blue ink, appearing to be 'Phil Page / Gus Griffin', with a stylized, cursive script.

Phil Page / Gus Griffin

Counsel for Otago Water Resource Users Group, Federated Farmers and Dairy NZ

Appendix 1 – Witness order

Witness	Time allocated	In person vs online
Witnesses to appear on 3 May 2023		
Benje Patterson	30 minutes	Online
Mario Fernandez	30 minutes	Online
Simon Glennie	30 minutes	In person
Jenny McGimpsey	30 minutes	In person
Jo Hay	15 minutes	In person
Kate Scott	30 minutes	Online
Susie McKeague	30 minutes	In person
Ian Lloyd	30 minutes	Online
Brendan Sheehan	30 minutes	Online
Miranda Hunter	30 minutes	Online
Mike Freeman	30 minutes	Online
Witnesses to appear on 4 May 2023		
Jeremy Anderson	15 minutes	In person

Emma Crutchley	15 minutes	In person
Jeffrey Ian Winmill	15 minutes	In person
Richard Plunket	15 minutes	Online
Tim O'Sullivan	15 minutes	Online
Kelly Heckler	15 minutes	In person
Logan Wallace	15 minutes	In person
Luke Kane	15 minutes	In person
James Dicey	15 minutes	Online
Mike Lord	15 minutes	In person

Appendix 2 – Relief Sought- to be filed as a separate document.