

Before a Hearings Panel
Appointed by the Otago Regional Council

under: the Resource Management Act 1991

in the matter of: submissions and further submissions in relation to the
Proposed Otago Regional Policy Statement 2021
(excluding parts determined to be a freshwater planning
instrument)

and: **Sanford Limited**
Submitter #122

Memorandum on behalf of Sanford Limited

Dated: 18 May 2023

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MAY IT PLEASE THE HEARINGS PANEL

INTRODUCTION

- 1 During Sanford Limited's (*Sanford*) presentation at the hearing, the Panel asked counsel to address two legal matters in a written response.
- 2 This memorandum addresses those matters, which were:
 - 2.1 The use of an adaptive management approach in the proposed Otago Regional Policy Statement (*pORPS*).
 - 2.2 The legal implications of the differing terminology used in sections 6(a), (b) and (c) of the Resource Management Act 1991 (*RMA*).

ADAPTIVE MANAGEMENT

- 3 We understand that the Panel wishes to understand whether there is scope to include an adaptive management approach within the provisions of the pORPS, based on discussions during the hearing sessions about the appropriateness of such an approach and Panel members' experience in the aquaculture context.
- 4 As the Panel identified, Sanford's submission (at page 3), when outlining its proposed Project East salmon farm, stated (**our emphasis**):

*A precautionary approach is proposed that incorporates staged development and various **adaptive management** practices. It would see the Farming Areas developed incrementally, with a broad range of monitoring undertaken to confirm that environmental effects are as predicted.*
- 5 While Sanford did not expressly seek changes to the pORPS to incorporate adaptive management, the stated intent of its submission was to ensure that the pORPS appropriately provides for its future development plans, including the approach quoted above. In our submission, Sanford's submission accordingly provides scope for the inclusion of adaptive management in the pORPS.
- 6 In any case, we have reviewed other relevant submissions and have established that there are several submissions that expressly sought the inclusion of an adaptive management approach. These submissions are summarised in **Appendix 1** to this memorandum and clearly provide scope.

- 7 If it is of benefit to the Panel, counsel and Sanford's planner, Mr Low, have considered where reference to adaptive management might appropriately be made in the provisions. Our suggestion is:
- 7.1 CE-M3(6) – Regional plans; and
- 7.2 CE-M4(6X) – District plans.
- 8 Mr Low's suggested wording for inclusion in these sections is:
- (6) *include provisions requiring the adoption of a precautionary approach to assessing the effects of activities in the coastal environment, including the use of adaptive management where appropriate, in accordance with IM-P6 where:*
- (a) *there is scientific uncertainty, or*
- (b) *there are potentially significant or irreversible adverse effects, or*
- (c) *coastal resources are potentially vulnerable to effects from climate change,*

TERMINOLOGY IN SECTION 6 OF THE RMA

- 9 We understand that in previous hearing sessions the Panel has heard argument on the different terminology used in sections 6(a), (b) and (c) of the RMA. Specifically, the question is whether the omission of "*from inappropriate subdivision, use and development*" in section 6(c) results in a greater (or lesser) emphasis on this matter.
- 10 Our understanding of the general section 6 case law is that:
- 10.1 Section 6 does not prioritise or create an internal hierarchy of the various matters of national importance. Where there are competing interests between the matters, a decision-maker must weigh the significance of the competing interests in the circumstances of the particular case or plan-making context.¹
- 10.2 The term "protection" used in many of the section 6 matters means "*keep safe from harm, injury or damage*".² It has a directive and obligatory nature but is not absolute; the level of protection required to meet the duty in any given instance

¹ See *Auckland Council v Auckland Council* [2020] NZEnvC 70 for an example of the Environment Court weighing competing section 6 considerations.

² *Royal Forest and Bird Protection Society of New Zealand Incorporated v New Plymouth District Council* [2015] NZEnvC 219 at [63].

depends on the circumstances.³ In this sense, it does not translate to an “avoid” requirement in all instances.

- 10.3 Section 6 matters must be “recognised and provided for” as part of the sustainable management of natural and physical resources.⁴ In other words, section 6 is subordinate to section 5, and the enabling and management requirements of section 5 (of which protection is a part) are of equal importance.⁵
- 10.4 In plan-making terms, it is therefore a matter of weighing all relevant matters and incorporating them within the plan’s framework in order to produce a document that achieves the RMA’s purpose.⁶
- 11 Specifically on section 6(c):
- 11.1 Sections 6(a) and (b) refer to “inappropriate” subdivision, use and development, which suggests that there may be “appropriate” subdivision, use and development in areas to which these sections apply.⁷
- 11.2 While section 6(c) does not contain this “qualifier”, this does not mean its requirements are absolute. The nature or level of “protection” required must be determined by a territorial authority or regional council when preparing or reviewing its district or regional plan.⁸ For example, section 6(c) does not exclude the possibility of offsetting to manage adverse effects on section 6(c) matters.⁹
- 12 In our submission, the language used in sections 6(a), (b) and (c) accordingly does not result in a requirement for greater (or lesser) emphasis to automatically be placed on section 6(c). The level of preservation or protection required in any particular case will be

³ At [65].

⁴ *Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402, upheld in *Ngati Ruahine v Bay of Plenty Regional Council* [2012] NZHC 2407, [2012] NZRMA 523; *Environmental Defence Soc Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38, [2014] 1 NZLR 593 at [26].

⁵ *West Coast Regional Council v Friends of Shearer Swamp Incorporated* (2011) 16 ELRNZ 530 (HC) at [74].

⁶ *Environmental Defence Society v Mangonui County Council* [1989] 3 NZLR 257 (CA).

⁷ *Environmental Defence Soc Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38, [2014] 1 NZLR 593 at [98].

⁸ *Royal Forest and Bird Protection Society of New Zealand Incorporated v New Plymouth District Council* [2015] NZEnvC 219 at [65].

⁹ *MainPower New Zealand Limited v Hurunui District Council* [2011] NZEnvC 384.

context specific and necessarily determined by reference to what is sought to be protected.

Dated: 18 May 2023

A handwritten signature in blue ink, appearing to read 'J Appleyard', is written above a horizontal line.

J Appleyard / A Hawkins
Counsel for Sanford Limited

Appendix 1

Submissions addressing adaptive management approach

Submitter	Submission point
Beef & Lamb NZ and Deer Industry NZ (#237)	74(vi) – general: The pORPS should contain directive policies providing for an adaptive management planning framework for a catchment or sub – catchment, which allows for sustainable food production
Graymont (NZ) Limited (#22)	11 – amendments to IM-P15: <u>The application of the precautionary approach may include the adoption of adaptive management methods.</u>
Port Otago Limited (#301)	15 – amendments to IM-P15: Adopt a precautionary approach, <u>including through the use of adaptive management...</u>
Otago Rock Lobster Industry Association Inc and Pauamac 5 Incorporated (#125)	6 – general CE: enable responsive, adaptive management
Calder Stewart (#27)	4 – amend Methods section to include (ECO): <u>The encouragement of Best Practice adaptive management approaches to Land users as a means of ensuring values are identified and protected, and to build connections between land users and any cultural and ecological values.</u>