BEFORE THE HEARING COMMISSIONERS

UNDER THE Resource Management Act 1991

AND

IN THE MATTER of the Proposed Otago Regional Policy Statement 2021

OTAGO REGIONAL COUNCIL'S CLOSING SUBMISSIONS

Dated 29 May 2023

ROSS DOWLING MARQUET GRIFFIN SOLICITORS
DUNEDIN

Telephone: (03) 477 8046
Facsimile: (03) 477 6998
PO Box 1144, DX YP80015

Solicitor: A J Logan

OTAGO REGIONAL COUNCIL'S CLOSING SUBMISSIONS

May it Please the Commissioners:

Introduction

1. These closing submissions respond to legal issues and questions which have arisen during the hearings.

2. So far as possible, opening submissions are not repeated. Our opening submissions remain relevant, except where I indicate a change of position in these submissions.

3. These submissions are organised under the chapter headings of the pORPS.

Process

FPI vs non-FPI

4. The pORPS is split into two parts.

5. The non-freshwater planning instrument; which is the subject of this hearing.

6. And the freshwater planning instrument, which will shortly be the subject of a separate hearing in front of a panel appointed by the Chief Freshwater Commissioner.

7. Despite the statutory requirement[1] to follow different processes, the statutory duty[2] to achieve integrated management of the natural and physical resources of the entire region remains.

8. More simply, we need to end up with a single coherent RPS.

9. I submit that the most appropriate way to achieve this is as follows:

    9.1. After these submissions have been heard, adjourn the present

[1] Section 80A of the Act
[2] Section 59 of the Act

hearing until the conclusion of the freshwater hearing and the freshwater hearing panel has made its recommendations; then

9.2. Reopen this hearing. If any matters have arisen in the freshwater hearing and its recommendations which bear on matters at issue in this hearing, then it may be necessary to invite further submissions on those matters; then

9.3. Make the Panel's recommendations on the non-freshwater planning instrument the subject of this hearing.

10. I understand other counsel to have been accepting of this approach when it was raised at the LF hearing.

Port Otago v EDS

11. The Supreme Court is yet to give judgment in ***Port Otago v Environmental Defence Society*** SC6/022.

12. That judgment may have implications for the pORPS. Or it may not.

13. If the judgment is given before the Panel makes its recommendations, then I will inform the Panel.

Overarching legal issues

14. Without suggesting that any submission is of lesser importance, some submissions raise legal issues with broader implications.

15. Those issues are addressed in this section.

16. They are:

    16.1. The perceived overuse of “avoid”.

    16.2. Limits.

    16.3. A failure to enable people and communities to provide for their social, economic, and cultural well-being?

        16.3.1. A further resource management issue

        16.3.2. Mineral and aggregate extraction

        16.3.3. A separate rural chapter

        16.3.4. Provision for food and fibre

        16.3.5. Port activities

    16.4. Should effects management hierarchies end with a bottom line?

17. In part the discussion which follows shows criticism to have been misguided or overstated.

18. In other instances valid points raised by submitters have been heard and change made to the pORPS.

The perceived overuse of “avoid”

19. There has been criticism of the pORPS for overusing avoidance as a policy setting.

20. The word is used often in the pORPS.

21. That’s unsurprising. The concept of avoiding, remedying or mitigating adverse effects on the environment is at the heart of the Resource Management Act 1991 (“the Act”).

22. "Avoid" simply means "not allow" or "prevent the occurrence of".[3] Because the word has a clear meaning, it is oft used in the resource management context.

23. An important distinction to keep in mind is whether it is an effect which must be avoided, or an activity. Often these two concepts are conflated, and a requirement to avoid adverse effects is said to be akin to prohibiting an activity. That is not the case.

24. Generally, the concern is that the use of avoid in the pORPS will prevent activities from occurring.

25. Avoid is used in different ways in the pORPS. Context is everything.

26. Sometimes avoid is used to protect human activities (or humans themselves). For example, in EIT-INF-P15, "avoid" is used to restrict activities which are incompatible with regionally and nationally significant infrastructure. In AIR-P4(1), where the use is to protect people from noxious or dangerous effects of discharges to air. Or HAZ-CL-P18 where in context of waste facilities, adverse effects on the health and safety of people must be avoided.

27. Often "avoid" is used as a preference, but not necessarily the result. Commonly in the formulation "avoiding, remedying or mitigating". Or as the first step in an effects management hierarchy.

28. Or "avoid" is qualified in other ways: for example, in HCV-HH-P5 where adverse effects on special or outstanding historic heritage are to be avoided except where the heritage values are being integrated into a new use or adaptively reused.

29. In other instances, it is effects which reach a certain threshold which must be avoided. For example, avoiding <u>significant</u> adverse effects. Or avoiding the activity if residual adverse effects are more than minor in the two effects management hierarchies.

30. Sometimes adverse effects on a significant or outstanding natural resource must simply be avoided (sometimes formulated as avoiding

[3] *<u>Environmental Defence Society Inc</u> v <u>The New Zealand King Salmon Co Ltd</u>* [2014] 1 NZLR 593 at paragraph [96]

adverse effects on the values of that resource).

31. This occurs only when required because the receiving environment has a special feature or properties. It is the highest level of protection. Although activity remains possible, that is only the case if all relevant adverse effects are avoided.

32. This mor absolute formulation is rare.

33. Searching the reply version of the pORPS for "avoid adverse effects" or "avoiding adverse effects" reveals that this more absolute formulation appears only in the CE chapter (to give effect to the NZCPS), EIT-INF-P13(2)(b) (infrastructure being required to avoid adverse effects on the values that contribute to an area's outstanding nature or significance) and in EIT-INF-P16 (avoiding adverse effects from the National Grid on town centres, wāhi tūpuna etc).

34. While the word "avoid" is often used, it is only rarely used in a simple "avoid adverse effects on X" formulation.

35. That is not to say that the word "avoid" is not used to prevent or limit adverse effects or create bottom lines. It is. But rarely in the more absolute formulation.

36. The is no issue with overuse of avoidance.

37. The real issue is where to draw the (sometimes bottom) line.

38. This question arises in each instance where avoidance or other methods are used in the pORPS to manage adverse effects. It is at the heart of the Act and the pORPS

Limits

39. A related criticism is use of the word "limits" and, more importantly, the imposition of limits.

40. As notified, the pORPS used "within environmental limits" as a qualifier, particularly in the EIT chapter.

41. Those qualifiers are deleted in the reply version of the pORPS.

42. However, limits remain.

43. IM-P14 requires that regional and district plans identify limits beyond which the environment will be degraded and require that activities occur within those limits.

44. Other pORPS provisions either impose limits or identify where limits must be set.

45. For example, at the end of the effects management hierarchy in ECO-P6 there is, in effect, a limit that residual adverse effects cannot be more than minor.

46. Setting limits is a key part of the RMA.

47. In the context of considering the "environmental bottom line" approach versus the "overall judgment" approach, the Supreme Court in *King Salmon*[4] cited the speeches of the responsible Ministers at the time the Act was progressed through Parliament:

[107] We noted at [38] above that several early decisions of the Planning Tribunal adopted what has been described as the "environmental bottom line" approach to s 5. That approach finds some support in the speeches of responsible Ministers in the House. In the debate on the second reading of the Resource Management Bill, the Rt Hon Geoffrey Palmer said:

> *The Bill as reported back does not reflect a wish list of any one set of views. Instead, it continues to reflect the balancing of the range of views that society holds about the use of land, air, water and minerals, while recognising that there is an ecological bottom line to all of those questions.*

In introducing the Bill for its third reading, the Hon Simon Upton said:

> *The Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised. Provided that those objectives are met, what people get up to is their affair. As such, the Bill provides a 117 (28 August 1990) 510 NZPD 3950. 118 (4 July 1991) 516 NZPD 3019. more liberal regime for developers. On the other hand, activities will have to be compatible with hard environmental standards, and society will set those standards. Clause 4* [now s 5] *sets out the biophysical bottom line. Clauses 5*

[4] At paragraph [107]

and 6 [now ss 6 and 7] *set out further specific matters that expand on the issue. The Bill has a clear and rigorous procedure for the setting of environmental standards – and the debate will be concentrating on just where we set those standards. They are established by public process.*

[Emphasis added]

48. As an aside, these passages also support the proposition that the Act is about enabling people and communities to make their own decisions as to what activities are pursued to provide for their social, economic and cultural wellbeing. Within limits. As the Hon Simon Upton said in the speech cited above: "*…what people get up to is their affair.*" This is part of the approach taken by the ORC in preparing the pORPS.

49. The Court in *King Salmon* rejected the "overall judgement" approach in favour of the "environmental bottom line" approach.

50. In short, there are limits, and those limits can reflect in planning instruments as bottom lines. That is settled law.

51. The pORPS cannot be criticised for setting limits or identifying where they must be set in plans. That is clearly an approach which was open to the ORC.

52. As noted above, the real issue is where to draw the (bottom) line.

53. This issue plays out in the following sections.

A failure to enable people and communities to provide for their social, economic, and cultural well-being?

54. It must be borne in mind that the pORPS provides regional level objectives, policies and methods. Many things remain to be dealt with in regional and district plans. An example is water allocation.

55. Silence on an activity in the pORPS does not mean that the activity cannot be undertaken or is not enabled.

56. The Act was a shift from planning for activities to occur, to managing the effects of activities that people and communities seek to undertake.

57. In terms of section 5 of the Act it is people and communities who decide

which activities to undertake to provide for their own social, economic and cultural well-being (within limits).

58. It is not the purpose of the Act, nor the pORPS, to specifically enable or provide for each activity required for social, economic and cultural wellbeing.

59. That said, it is a purpose of the Act to manage the use and development of natural and physical resources.

60. And it is the purpose of the pORPS identify the resource management issues of the region and provide policies and methods to achieve integrated management.

61. This may require that use and development be enabled, or constrained, to achieve the purpose of the Act.

62. In the language of sections 5 and 59 of the Act, there will be resource management issues of the region which require the use and development of resources to be managed in a way or at a rate that both enables people and communities to provide for their social, economic and cultural wellbeing, and protects the environment.

A further resource management issue

63. Various submitters have sought the addition of a resource management issue to the SRMR chapter.

64. The basis for this has tended to be that an activity is very important to Otago and should therefore have an issue in SRMR.

65. Certainly, “significant resource management issues” do need to be something significant. But they also need to be “an issue”.

66. In the context of section 59 of the Act, that means that there must be an element of conflict. That could be a conflict between competing land uses, for example between urban and rural land use. Or it could be a conflict between an activity and the available resources or environmental limits or values. For example, irrigation and stock water needs and the quantity of available water.

67. There has been expert caucusing on this topic and two joint witness

statements filed with the Panel.

68. The SRMR chapter author has further considered this issue and recommends in her reply report that a new issue SRMR-10A be added to the pORPS:

"The social, cultural and economic well-being of Otago's communities depends on the use and development of natural and physical resources, but that use and development can compromise or conflict with the achievement of environmental outcomes."

69. The statement accompanying the issue goes on to recognise that uses such as infrastructure, primary production, mineral and aggregate extraction, tourism and industrial activities, are essential for the social, cultural and economic well-being of the region, but can also have adverse effects on the environment which need to be managed.

Mineral and aggregate extraction

70. Oceana Gold (New Zealand) Limited ("OGL") submits that the pORPS fails to give direct policy recognition of the importance of mining, fails to recognise the locational and functional needs of mining, and fails to provide any mining specific policy to manage effects.[5]

71. It submits that there is an: "*overall failure to address the importance of minerals and their future development in a responsible way.*"[6]

72. To address this the reply version of the pORPS has two key changes:

    72.1. At UFD-P7(4) (now in the LF-LS sub-chapter) there is recognition of the importance of mineral and aggregate resources, and that mining and aggregate activities can only be located where those resources are present; and

    72.2. At ECO-P4 there is the addition of mineral and aggregate extraction activities which have an operational or functional need to locate in the area, and which provide a national public benefit (for minerals) or a regional or national public benefit (aggregate).

[5] Paragraph 19 opening submissions dated 25 January 2023
[6] Paragraph 6, opening submissions dated 25 January 2023

73. The change at ECO-P4 gives mining and aggregate extraction access to the effects management hierarchy for indigenous biodiversity without first having to comply with ECO-P3.

74. The new SRMR-I10A also encompasses primary production (which includes mining and quarrying) and mineral and aggregate extraction.

75. Given the definition of primary production includes mining there is also recognition in UFD-O4, UFD-P7(6), UFD-P8(3) and UFD-P4(7).

A separate rural chapter

76. Including rural provisions in the UFD chapter was the subject of criticism at the hearing.

77. A practical consideration is that the rural provisions are not easy to find if included in UFD.

78. Perhaps more importantly, it was said that rural issues are important and warrant their own chapter.

79. From a legal perspective there is no requirement for a separate rural chapter, nor any impediment to rural provisions in the UFD chapter.[7]

80. Ms White in her original section 42A report[8] and in her reply report[9] sets out why inclusion of rural provisions in the UFD chapter is desirable, primarily from an integration perspective.

81. Nonetheless, the submissions and evidence to the contrary have had careful consideration.

82. Other provisions relevant to rural activities are found in the LF – Land and freshwater chapter.

83. For example, LF-LS-P19 concerning the protection of highly productive land.

84. Just as integration supports the inclusion of rural provisions in the UFD chapter, so it supports having all rural provisions together in one place.

---

7 Paragraphs 49 to 55 of my submissions dated 14 February 2023

8 Chapter 15: UFD – Urban Form and Development (27 April 2022), paras [210]-[220]

9 At paragraphs 29 to 34

The rural provisions should sit where rural issues lie

85. The rural resource management issues primarily concern access to land and water resources.

86. Mr Page for OWRUG, Federated Farmers and Dairy NZ has correctly submitted on the obligations of the ORC under sections 5, 30, and 59 to 62 to state regionally significant issues and objectives and policies for those issues.

87. Mr Page and others have submitted that a further issue needs to be stated, and as noted above this has been recommended for inclusion in the pORPS at SRMR-I10A.

88. For rural activities, that issue arises primarily in context of land and freshwater.

89. If rural provisions are to be brought together in one place, then the land and freshwater chapter is their natural home.

90. That is where the objective Mr Page's clients seek is to be found (LF-LS-O12(3)) as is the policy framework to manage the conflict which arises between the use of resources which we depend upon, and the finite nature of those resources and other environmental values.

National Planning Standards

91. Including the rural provisions in the LF chapter is also in accord with the National Planning Standards

92. The RPS must be made in accordance with the National Planning Standards[10].

93. The National Planning Standards neither require nor envisage a rural chapter in a Regional Policy Statement[11].

94. By comparison, the standards do anticipate rural zones and accompanying provisions in a District Plan[12].

---

10 Section 61(1)(da) RMA

11 Regional Policy Statement Structure Standard, Table 2

12 District Plan Structure Standard, Table 4

95. The RPS Structure Standard requires the RPS to be organised into domain and topic chapters.

96. The creation of a new chapter is permitted, but only if:

96.1. The subject matter is not covered by the structure in Table 2; and

96.2. The content of the new chapter is not synonymous with chapters in Table 2; and

96.3. The content is not a subset of any of the chapters in Table 2[13].

97. The rural chapter promoted by submitters fails at the first and third hurdles.

98. The proposed chapter must inevitably include land and freshwater matters. Land and freshwater matters are to be dealt with, in accordance with Table 2, in the land and freshwater chapter.

99. The solution is to include provisions focused on rural resources and activities in the land and freshwater chapter.

100. In the reply version of the pORPS all rural provisions are now contained in the LF-LS sub-chapter.

Provision for food and fibre

101. A separate rural chapter, bringing all rural provisions together has now been provided, albeit in the LF-LS chapter.

102. With the rural provisions brought together in the LF chapter it is more obvious that the pORPS does provide a policy framework to manage the conflict which arises between use of the rural resources which we depend upon, and the finite nature of those resources and other environmental values the issue. Broadly by:

102.1. Recognising the use of land and water resources for social, economic and cultural wellbeing;

102.2. Protecting rural land for rural use; and

[13] Regional Policy Statement Structure Standard, Clause 10

102.3. Identifying where limits must be set, and adverse effects otherwise managed.

103. These provisions include:

103.1. Recognition of the role that land and soil in providing for the social, economic and cultural well-being.[14]

103.2. Provision for the ongoing use of rural areas for primary production and rural industry and to not compromise the viability of primary production and rural communities.[15]

103.3. Pest management.[16]

103.4. Maintenance of soil quality.[17]

103.5. Maintenance of soil values.[18]

103.6. Minimising soil erosion.[19]

103.7. Promoting sustainable and resilient land use and management.[20]

103.8. Improving or maintaining freshwater quality or quantity by reducing contaminant discharges and managing land use.[21]

103.9. Protecting the availability and productive capacity of rural land.[22]

103.10. Managing development in rural areas, including by restricting non-rural activities.[23]

104. This (and the NPSFM) provides the policy framework for the rural land and water use aspects of the land and water plan which the ORC must notify.

105. That regional plan is where more detailed objectives, policies and rules

[14] LF-LS-O12(3)
[15] UFD-O4
[16] LF-LS-P16A
[17] LF-LS-P16
[18] LF-LS-P17
[19] LF-LS-P18
[20] LF-LS-20
[2121] LF-LS-P21
[22] LF-LS-P19
[23] UFD-P7

concerning land and water use should be expected.

106. The NPSFM regime is explored more fully in my submissions on the LF chapter. The key point for present purposes is that while acknowledging the importance of water to farming, in terms of the NPSFM, issues of access to and allocation of water fall to be dealt with by the regional plan in accordance with the NPSFM.

107. This aspect can and no doubt will be explored more fully in the FPI hearing.

108. In her submissions for Horticulture New Zealand Ms Ford seeks a further provision to protect land suitable for horticulture while the interim NPSFM definition of highly productive land applies.

109. There is merit in that submission and Ms Wharfe's evidence on the topic.

110. A provision protecting land suitable for horticulture or viticulture has been added to the reply report version of the pORPS as LF-LS-P19(2A).

The Port

111. Provision for commercial port activities is somewhat constrained by the NZCPS and *King Salmon*.

112. At paragraph 2.7 of his submissions dated 9 May 2023 Mr Andersen KC has proposed a somewhat enabling policy addition.

113. I understand that policy to be intended to come within the scope of the King Salmon judgment on the effect of the NZCPS.

114. I agree that it does.

115. The policy addition is at EIT-TRAN-P23(3A) of the reply report version of the pORPS.

Should effects management hierarchies end with a bottom line?

116. When regionally or nationally significant infrastructure cannot avoid locating in significant natural areas, natural wetlands, outstanding water bodies or wahi tupuna, the effects are to be managed by provisions in, respectively, the ECO chapter, the NESF, the LF-FW chapter, and the

HCV chapter.[24]

117. For significant natural areas, natural wetlands and outstanding water bodies this leads to the application of effects management hierarchies.

118. If more than minor adverse effects remain after following an effects management hierarchy, then the activity must be avoided (a 'bottom line').

119. At the hearing various formulations of bespoke effects management regimes were proposed, including for renewable electricity generation, the National Grid and electricity distribution.

120. All of these proposed regimes had one thing in common.

121. The bottom line is gone.

122. This is the key issue for the EIT chapter. When dealing with significant natural areas, natural wetlands and outstanding water bodies, after avoiding, mitigating, minimising, offsetting, compensating and adaptively managing, if more than minor adverse effects remain should some activities be able to proceed anyway?

123. Where the NPSFM effects management hierarchy applies (either via the NESF or included in the pORPS as required by the NPSFM) the answer is clear. And whatever is said in this pORPS, that hierarchy will apply. Residual adverse effects cannot be more than minor. That is the bottom line.

124. For significant indigenous vegetation and significant habitats of indigenous fauna (significant natural areas) there is no national policy statement or environmental standard.

125. There is an exposure draft Proposed National Policy Statement for Indigenous Biodiversity.

126. It includes an effects management hierarchy for, inter alia, specific infrastructure with significant national or regional public benefit. The effects management hierarchy includes a bottom line. The activity must be avoided if residual adverse effects are more than minor.

[24] EIT-INF-P13(2)

127. But, despite public consultation having closed in July 2022[25] the proposed policy statement has not been gazetted and has no legal standing.

128. That leaves sections 5 and 6 of the Act.

129. Section 6(c) requires that in achieving the purpose of the Act "*the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna*" be "*recognised and provided for*".

130. In section 6(c) "*protection*" is not qualified.

131. There is no choice to make about whether to protect significant natural areas. There must be protection.

132. My submission has been, and remains, that if when all is said and done there is no bottom line, then there is no protection.

133. The issue is not whether there is a bottom line, but where that bottom line is drawn.

134. The limit, or where the bottom line lies, has already been set for natural wetlands and outstanding water bodies. The NPSFM has done that. The activity must be avoided if residual adverse effects are more than minor.

135. The limit, or bottom line, for the protection of significant indigenous biodiversity is to be set by this pORPS.

136. As notified, if residual adverse effects remain after applying the effects management hierarchy, then the activity must be avoided.

137. In the ECO reply report a change has been recommended to that position[26].

138. If the change is adopted, then the position will be that the activity must be avoided only if more than minor residual adverse effects remain after applying the effects management hierarchy.

139. This change is consistent with *King Salmon* which contemplates "*minor or transitory*" adverse effects[27], albeit the context was avoidance in terms of

[25] See https://consult.environment.govt.nz/biodiversity/npsib-exposure-draft/
[26] At paragraph 18
[27] At paragraph [145]

the NZCPS rather than section 6.

140. It is also consistent with the NPSFM and the draft NPSIB.

141. And it would be an odd result if the NPSFM derived bottom line in the pORPS and the SNA bottom line differed.

142. In summary, my submission is that:

142.1. There must be a limit, or bottom line, to achieve protection of significant indigenous biodiversity;

142.2. The issue is not whether there should be a limit, but where the limit is set;

142.3. The recommended position for significant indigenous biodiversity is now more than minor residual adverse effects after applying the effects management hierarchy; and

142.4. That change is consistent with *King Salmon,* the NPSFM and the draft NPSIB.

Conclusion

143. The word avoid is used often, but only used rarely in its more absolute formulation.

144. It is settled law that there are limits or bottom lines.

145. The real issue is where any bottom lines should be drawn. Doing so is at the heart of sustainable management.

146. Criticism of the pORPS failing to enable people and communities to provide for their social, economic and cultural well-being is overstated.

147. However:

147.1. a further resource management issue has been identified;

147.2. provision has been made for mineral and aggregate extraction;

147.3. rural provisions have been drawn together to form a comprehensive whole in the LF-LS subchapter;

147.4. additional protection has been provided for horticulture and

viticulture land; and

147.5. the Port's requested enabling provision has been added to the pORPS.

148. Proposed industry specific bottom lines must be resisted. All formulations remove the bottom line at the end of the effects management hierarchies. Without the bottom line there is no protection.

149. This cannot occur with the NPSFM effects management hierarchy which is mandatory, and should not occur with the ECO effects management hierarchy.

150. It is proposed to amend the bottom line in the ECO effects management hierarchy to become more than minor residual adverse effects.

151. That is consistent with ***King Salmon*** and the NPSFM effects management hierarchy which applies under different pORPS provisions and via the NESF.

Introduction and General Provisions – Interpretation

152. In one of the hearings the Panel queried the use of the word minimise rather than mitigate.

153. I do not believe there is any relevant legal meaning of minimise.

154. It simply means to reduce something as much as possible.

155. Whereas mitigate means to reduce. Any degree of reduction constitutes mitigation.

156. Minimise is therefore a higher standard because the reduction must be as much as possible.

MW - Mana Whenua

157. The legal issues arising are:

157.1. MW-P4

157.2. Maori land definition - jurisdiction

157.3. SILNA land

157.4. Aquaculture

157.5. MW-M4 – introductory words

157.6. MW-M4(1) – bias

157.7. MW-M4(2) - lawfulness

MW-P4

158. This policy reads[28]:

"**MW-P4 – Sustainable use of ~~Māori land~~ Native Reserves and *Māori land*[349]**

Kāi Tahu are able to ~~protect,~~[350] develop and use *land* and resources within native reserves and ~~land held under Te Ture Whenua Māori Act 1993~~ *Māori land* [351] in accordance with mātauraka and tikaka, ~~a way consistent with their culture and traditions and~~ to provide for their[352] economic, cultural and social aspirations, including for *papakāika*, marae and marae related activities.~~, while:~~

~~(1) avoiding adverse effects on the health and safety of people,~~

~~(2) avoiding significant adverse effects on matters of national importance, and~~

~~(3) avoiding, remedying, or mitigating other adverse effects.~~[353]"

159. Concern has been raised by some submitters about the proposed deletion of the qualifiers.

160. However, the policy is not without qualifiers even with the deletion. Native reserves and Māori land must be used in accordance with mātauraka and tikaka. The concepts of tikaka and mātauraka are explained earlier in the

[28] All references are to the 31 October 2022 version of the proposed RPS unless otherwise stated.

Mana Whenua chapter.

"**Tikaka and kawa**[233]

Tikaka and kawa Māori encompass ~~encompasses~~[234] the beliefs, values, practices, protocols,[235] and procedures that guide appropriate codes of conduct, or ways of behaving. In the context of natural resource management, observing tikaka and kawa[236] is part of the ethic and exercise of *kaitiakitaka*. Tikaka and kawa are ~~It is~~[237] underpinned by a body of mātauraka (traditional knowledge) and are ~~is~~[238] based on a general understanding that people belong to the *land* and have a responsibility to care for and manage the land. These concepts and values incorporate ~~It incorporates~~[239] forms of social control to manage the relationship of people and the *environment*, including concepts such as tapu, noa and rāhui.

Tikaka and kawa are ~~is~~[240] based on traditional practices but are ~~is~~[241] dynamic and continue ~~continues~~[242] to evolve in response to different situations.

Mātauraka

Mātauraka, within this region, is Kāi Tahu customary knowledge passed down from one generation to the next, used in the present, and will continue to be developed for the future. It involves observing, experiencing, participating, studying, and understanding the world from an indigenous cultural perspective. It is a tool for thinking, organising information, considering the ethics of knowledge, and informing us about our world and our place in it. Incorporation of mātauraka in resource management decision-making is important to ensure that cultural interests are appropriately recognised and provided for.[243]"

161. Tikaka is described as "*in the context of natural resource management, observing tikaka and kawa is part of the ethic and exercise of kaitiakitaka*". Tikaka and kawa are underpinned by mātauraka.

162. Further, the provision does not stand on its own. The IM chapter states all provisions of the RPS relevant to a particular issue apply[29]. Where there is conflict that cannot be resolved by the recognized canons for

[29] IM-P1.

interpreting a planning instrument, or if that fails, recourse to superior documents, then the life-supporting capacity and mauri of the natural environment and health of people prevail over the ability of people and communities to provide for their social, economic and cultural wellbeing now and into the future.

163. Providing for mana whenua's social, cultural and economic well-being while recognising their cultural values assists in achieving integrated sustainable management[30].

Māori Land definition - jurisdiction

164. There is no definition of Māori Land in the notified policy statement. Instead, there is a definition of Te Ture Whenua Māori land in the proposed RPS:

> "***Te Ture Whenua Maori land***
>
> *means land with the following status:*
>
> *(a) Māori communal land gazetted as Māori reservation under s338 Te Ture Whenua Maori Act 1993; and*
>
> *(b) Māori customary land and Māori freehold land as defined in s4 and s129 Te Ture Whenua Maori Act 1993.*"

165. In the 31 October 2022 iteration, as explained in supplementary evidence from James Adams, a new term "*Māori Land*" and an associated definition were proposed by him. Since the hearing, Mr Adams has refined the definition:

> "**Māori Land**[140]
>
> for the purposes of this RPS, means land within the region that is:
>
> (1) owned by Te Rūnanga o Ngāi Tahu or its constituent papatipu rūnaka and to be used for the purpose of:
>
> (a) Locating *papakāika* development away from land that is either at *risk* from *natural hazards*, including climate change effects such as sea level rise, or is otherwise unsuitable for *papakāika* development,
>
> (b) extending the area of an existing *papakāika* development.
>
> (2) Māori communal *land* gazetted as Māori reservation under s338 Te Ture Whenua Māori Act 1993;
>
> (3) Māori customary *land* and Māori freehold *land* as defined in s4 and s129 Te Ture Whenua Māori Act 1993;

[30] IM-P3.

(4) former *Māori land* or general land owned by Māori (as those terms are defined in Te Ture Whenua Māori Act 1993) that has at any time been acquired by the Crown or any local or public body for a public work or other public purpose, and has been subsequently returned to its former Kāi Tahu owners or their successors and remains in their ownership;

(5) general *land* owned by Māori (as defined in Te Ture Whenua Māori Act 1993) that was previously Māori freehold *land*, has ceased to have that status under an order of the Māori Land Court made on or after 1 July 1993 or under Part 1 of the Māori Affairs Amendment Act 1967 on or after 1 April 1968, that is in the ownership of Kāi Tahu whānui;

(6) vested in a Trust or Māori incorporation under Te Ture Whenua Māori Act 1993;

(7) held or claimed (whether as an entitlement, part of an ancillary claim, or because it was transferred or vested) either:

(a) as part of redress for the settlement of Treaty of Waitangi claims; or

(b) by the exercise of rights under a Treaty settlement Act or Treaty settlement deed (as those terms are defined under the Urban Development Act 2020);

(8) owned by a person or persons with documentary evidence of Kāi Tahu whakapapa connection to the *land*, where that evidence is provided by either the Māori Land Court or the Te Rūnanga o Ngāi Tahu Whakapapa Unit."

166. It is intended that "*Māori Land*" replace "*Te Ture Whenua Maori land*" although that deletion was, in error, not shown in the earlier marked up versions of the proposed RPS. The deletion is marked up in the 23 May version.

167. In submissions for Transpower, Ms Scott argued there is no jurisdiction to introduce a new term, "*Māori Land*", with effect across the proposed RPS.

168. The introduction of "*Māori Land*" is footnoted to submission points 00234.009 Te Rūnanga o Ngāi Tahu, 00226.053 Kāi Tahu ki Otago and 00010.002 Cain whanau. The numbering is taken from the Summary of Decisions requested.

169. Submission point 00234.009 by Te Rūnanga o Ngāi Tahu on MW-P4 supports the policy with amendments:

"Kāi Tahu whānui are able to protect, develop and use land and resources within native reserves, ~~and~~ land held under the Te Ture Whenua Māori Act 1993, and land with an ancestral connection, in accordance with matauraka and tikaka, and providing for their economic, cultural and social aspirations, including for papakāika, marae and marae related activities, while~~:~~

(3) avoiding adverse effects on the health and safety of people,

(4) ~~avoiding significant adverse effects on matters of national importance,~~ and

(5) Avoiding, remedying, or mitigating other adverse effects.

Consequential amendments may be required elsewhere in the plan."

170. The explanation in the submission states:

"*Te Rūnanga is aware that there may be limited land available for the purposes of papakāinga or other development, and as such, considers that the expansion of the policy to include ancestral land is appropriate.*" (emphasis added)

171. Submission point 00226.053 by Aukaha on MW-M5 is to require local authorities to amend their regional and district plans to "*provide for the use of native reserves, ~~and~~ land held under Te Ture Whenua Māori Act 1993 and land with a particular ancestral connection in accordance with MW – P4, …*" (emphasis added).

172. The notified version of MW-M5 read:

"**MW–M5 – *Regional* and *district plans***

Local authorities must amend their *regional* and *district plans* to:

(1) take Iwi Management Plans and resource management issues of significance to Kāi Tahu (RMIA) into account,

(2) provide for the use of native reserves and *land* held under Te Ture Whenua Māori Act 1993 in accordance with MW-P4, and

(3) incorporate active protection of areas and resources recognised in the NTCSA 1998."

173. Although not footnoted on the pORPS, Aukaha made a similar submission to Te Rūnanga o Ngāi Tahu on MW-P4[31].

174. In its submission Aukaha also made a broader point:

"*3.6 Policies enabling Kāi Tahu to use land in native reserves and Te Ture Whenua Māori (TTWM) land for a variety of purposes are supported – whether papakāika, marae or associated activities. Kā Rūnaka consider this is appropriate recognition of Te Tiriti principles and responds to a long history of mana whenua being alienated from whenua and resources. This management approach should recognise that there is other whenua with ancestral connection, outside native reserves/TTWM land, for which mana whenua hold aspirations for cultural use.*" (emphasis added)

[31] Submission point 00226.048. SODR.

175. The final point referenced in the footnote is 00010.002 Cain whānau: "*retain the list of Māori Land Reserves and amend to include land subject to be returned to landowners under ancillary claim provisions*". The Cain submission does not go any further and does not support the use and definition of "*Māori Land*".

176. There is no submission expressly seeking the inclusion of the term "*Māori Land*". There is no submission expressly seeking a definition of *"Māori Land*".

177. There is no submission seeking a definition of "*ancestral lands*" or "*lands with an ancestral connection*".

178. Nonetheless, in Te Rūnanga o Ngāi Tahu's and in Aukaha's submissions, the words "*ancestral lands*" or "*ancestral connection*" have been used.

179. Submissions determine the jurisdiction to make amendments to a notified planning instrument.

180. The basic principles set out in *Countdown Properties (Northlands) Ltd* v *Dunedin City Council* [1994] NZRMA 145 at [164]-[168] still apply.

181. Legitimate changes are:

181.1. Those sought in written submissions;

181.2. Those that correspond to the grounds stated in submissions;

181.3. Those that address cases presented at the hearing of submissions, but nonetheless have foundation in a submission; and

181.4. Amendments to wording not altering meaning and effect.

182. There is no jurisdiction to make any other changes[32].

183. "*Ancestral land*" and "*land with an ancestral connection*" are matters raised in relevant submissions. Terminology which responds to those

[32] See the additional useful summary in *Environmental Defence Society Inc* v *Otorohanga District Council* [2014] NZEnvC 070 where an attempt was made unsuccessfully to add new outstanding landscapes and landscapes of high amenity value to a proposed District Plan when those changes were not sought in submissions and the submission relied on did not envisage additional areas being included at least without a further planning process being undertaken.

submissions, such as the term "*Māori Land*" and a definition of "*Māori Land*" is within jurisdiction.

184. Defining "*Māori Land*" has practical effects in the following provisions:

"**MW-P4 – Sustainable use of ~~Māori land~~ Native Reserves and *Māori land*[349]**

Kāi Tahu are able to ~~protect,~~[350] develop and use *land* and resources within native reserves and ~~land held under Te Ture Whenua Māori Act 1993~~ *Māori land* [351] in accordance with mātauraka and tikaka, ~~a way consistent with their culture and traditions and~~ to provide for their[352] economic, cultural and social aspirations, including for *papakāika*, marae and marae related activities.~~, while:~~

~~(1) avoiding adverse *effects* on the health and safety of people,~~

~~(2) avoiding significant adverse *effects* on matters of national importance, and~~

~~(3) avoiding, remedying, or mitigating other adverse *effects*.~~[353]"

ECO-P4 – Provisions for new activities

"Outside the coastal environment, ~~M~~maintain[1174] Otago's indigenous *biodiversity* by following the sequential steps in the *effects management hierarchy (in relation to indigenous biodiversity)*[1175] set out in ECO-P6 when making decisions on plans, applications for *resource consent* or notices of requirement for the following activities in *significant natural areas* or where they may adversely affect *indigenous species* and ecosystems that are taoka that have been identified by *mana whenua* as requiring protection:[1176]

…

(2) the development of *papakāika*, marae and ancillary facilities associated with customary activities on Native reserves and *Māori land,*[1182]

(3) the use of Native reserves and *Māori land* ~~in a way that will make a significant contribution~~[1185] to enable *mana whenua* to maintain their connection to their whenua and enhance~~ing the~~[1186] social, cultural or economic well-being, ~~of *takata whenua*~~,[1187]

…"

"**ECO-M7A — Kāi Tahu kaitiakitaka**

Local authorities must partner with Kāi Tahu in the management of *indigenous biodiversity* to the extent desired by *mana whenua*, including by:

(1) actively supporting the role of *mana whenua* as kaitaiki,

(2) facilitating opportunities for *mana whenua* to be involved in resource management (including decision making),

(3) enabling the *mahika kai* practices of *mana whenua* in accordance with tikaka,

(4) working with *mana whenua* to determine appropriate management approaches for *indigenous biodiversity* within native reserves and *Māori land*,

(5) supporting *mana whenua* initiatives that contribute to restoring or enhancing te hauora o te koiora (the health of *indigenous biodiversity*),

(6) where appropriate, incorporating Kāi Tahu mātauraka and tikaka in *indigenous biodiversity* management and monitoring, and

(7) providing relevant information to *mana whenua* for the purposes of *indigenous biodiversity* management and monitoring.[1242]"

"**HAZ-NH-P11 Kāi Tahu rakatirataka**

Recognise and provide for the rakatirataka of Kāi Tahu by:

(1) enabling *mana whenua* to lead approaches on the management of *natural hazard risks* affecting native reserves and *Māori land,* and

(2) including Kāi Tahu in decision-making on the management of *natural hazard risks* affecting the values of *wāhi tūpuna*.[1449]"

185. From Transpower's perspective the problem arose because it proposed a policy for the National Grid which used the term "*Māori Land*". That policy has not been adopted by ORC report-writers.

186. Section 6(e) of the RMA requires recognition and provision for the relationship of Māori culture and traditions with their ancestral lands. The Act does not define "*ancestral lands*".

187. It is open to amend a regional policy statement to elaborate on what are "*ancestral lands*" for purposes of managing the natural and physical resources in the region and giving effect to the imperative in section 6(e), so long as the amendment is founded on a submission. The nexus between the amendment and the submissions is clear.

188. Similarly, where and how the term is used in the policy statement is also important.

189. Mr Freeland a planning witness for the Dunedin City Council made two related points. First, he said that Māori Land should be mapped in the RPS. It is not. Secondly, he was concerned that the definition would operate unfairly because the public would not know what land was Māori Land – as land was bought and sold.

190. With respect, Mr Freeland's concerns are without merit.

191. The purpose of a regional policy statement is to set a uniform resource management planning framework across the region.

192. While it may map areas, it does not have to.

193. For example, the regional policy statement contains a number of provisions about outstanding natural features and landscapes, areas of significant indigenous vegetation, significant habitats for indigenous fauna and sites of historic heritage. None of them are mapped. They do not need to be in a regional policy statement.

194. Mapping, if necessary, can occur in subordinate regional and district plans. That is typically where maps of outstanding natural features and landscapes, significant areas of indigenous biodiversity and sites of significant historic heritage are found.

195. There are neither legal nor planning requirements to include maps of Māori Land in a regional policy statement.

196. The mapping should be in the plans in order to give effect to directions in national and regional policy statements. The plans will also have associated rules and other methods.

197. That is what the Kāi Tahu planning witnesses envisaged, particularly Sandra McIntyre. Detailed provisions concerning the use and development of Māori Land are expected by Kāi Tahu to be included at a district plan level.

198. On that basis, the concerns expressed by Mr Freeland about the perceived ambulatory nature of the definition of Māori Land disappear. District plan provisions will not change in their application to Māori Land identified in the district plans simply because of ownership changes.

199. That process is what is anticipated, indeed directed, by MW-M5(2):

> "(2) provide for the use of native reserves and ***Māori***[372] ***land*** in accordance with MW-P4, and recognise Kāi Tahu rakatirataka over this ***land*** by enabling ***mana whenua*** to lead approaches to manage any adverse ***effects*** of such use on the ***environment***,[373]"

SILNA Land

200. The use and development of land formerly subject to the South Island Landless Natives Act 1906 has been touched on in this hearing.

201. The following is provided as background information.

202. For background I draw on a brief article by Judge Reeves of the Māori Land Court[33]. The article records that in the mid to late 19th century a number of investigations found Kāi Tahu as an iwi and its members had been left without a sufficient land base. The Crown made land available to "*South Island landless Māori*". By 1905, 142,463 acres had been allocated to 4,064 people.

203. The South Island Landless Natives Act 1906 was passed to formally authorise the transfers which had been made. The Act was repealed in 1909. Not all grants had been formally completed.

204. The Act defined a "*landless natives*" as meaning Māori in the South Island "*who are not in possession of sufficient land to provide for their support and maintenance*".

205. The land allocated was regarded as poor quality, isolated and inaccessible, and distant from traditional lands which had been alienated.

206. In the Kāi Tahu Wai 27 Claim, the Waitangi Tribunal described the SILNA allocation as a "*cruel hoax*".

207. The preamble to the Ngāi Tahu Claims Settlement Act 1998 records that the Crown failed in purchasing the Murihiku Block to set aside reserves requested by Kāi Tahu, failed to preserve for Kāi Tahu reasonable access to food resources and failed to ensure Kāi Tahu retained sufficient land for existing and future needs. The failure to remedy these faults by, among other things, the South Island Landless Natives Act, breached the Crown's duty to act in the utmost good faith towards Ngāi Tahu[34].

208. At the time of the Ngāi Tahu Claims Settlement Act was enacted there were four unallocated blocks, including one in Otago, the "*Hāwea/Wanaka Block*" known as "*Sticky Forest*". There is a mechanism in the Ngāi Tahu

[33] South Island Landless Natives Act 1908 (SILNA): past, present and future, January 2021.
[34] Paragraph M

Claims Settlement Act for the Māori Land Court to identify successors and their interests in this land.

209. It should be noted, for completeness, that the Environment Court has held that SILNA land is subject to the Resource Management Act and in particular regulation by regional and district plans[35].

Aquaculture

210. The proposed policy MW-P2(8A) and method MW-M5(3A) have been sought by Kai Tahu.

211. Essentially they require regional and district plans to recognise and provide for aquaculture settlement outcomes under the Māori Commercial Aquaculture Claims Settlement Act 2004.

212. There is no mandatory statutory obligation upon a regional council to do so either in its policy statement or in its plans, in particular its Regional Coastal Plan. However, there is the ability to do so. The Panel has heard evidence that settlements are desired by Kāi Tahu and that space be set aside to enable settlement agreements to be effectively implemented.

MW-M4

213. In his Section 42A report, Mr Adams proposed that the introductory words for this method read:

> "*Local authorities must facilitate Kāi Tahu involvement in resource management (including decision-making) to the extent desired by mana whenua, including by …*"

214. At the hearing it was suggested that the underlined words gave mana whenua too much control over Council processes.

215. That perception is incorrect.

216. Local authorities retain their statutory functions, powers and duties.

217. Nonetheless, the RMA includes various mechanisms by which mana

[35] *Minister of Conservation* v *Southland District Council* EnvC Auckland A 39-01, 19 April 2001, paragraphs [105] to [113]

whenua can participate in RMA processes and decisions. These include:

217.1. A transfer of functions, powers and duties to an iwi authority under Section 33 of the RMA.

217.2. Appointment of commissioners under Section 34A of the RMA.

217.3. Joint management agreements under Section 36B of the RMA.

217.4. Mana Whakahono ā Rohe: Iwi participation agreements under Subpart 2 of Part 5 of the RMA.

218. Those avenues are to be used only to the extent that mana whenua are willing and able to do so.

219. In his reply report, Mr Adams has proposed rewording the opening of M4 to read:

"*Local authorities must facilitate Kāi Tahu involvement in resource management (including decision-making) to the extent mana whenua consider themselves able to accommodate by …*"

MW-M4(1)

220. This method read, when notified:

"…

(1) including accredited Kāi Tahu commissioners on hearing panels for *resource consent* applications, notices of requirements,[315] plan changes or plans where Kāi Tahu values may be affected,

…"

221. The Panel raised on the first day of the hearing whether this subclause offended the rule against bias.

222. It is accepted that having Kāi Tahu commissioners to be decision-makers when Kāi Tahu values could be affected may contravene the "*nemo judex*"[36] limb of the rules of fairness and natural justice.

223. The Kāi Tahu submissions and evidence were clear that situation was not intended. Kāi Tahu explained that it keeps a list of commissioners who it considers appropriate because of their background and expertise to sit on

[36] "No person may judge in a case in which they have an interest."

hearings panels where Kāi Tahu values are involved. The list of commissioners includes persons who are not Kāi Tahu. Where conflicts might arise, then persons who are not Kāi Tahu are nominated. The example of Commissioner Kirikiri was given.

224. This explanation does not correspond to the wording of subclause (1) in its notified form. On the face of it, it states that persons who are Kāi Tahu must be commissioners when Kāi Tahu values may be affected.

225. The solution is to change subclause (1) to read "*including accredited commissioners approved or nominated by Kāi Tahu …*".

MW-M4(2)

226. The Panel has questioned the lawfulness of the direction in this method to require local authorities to resource Kāi Tahu participation in the resource management decision-making, including by funding.

227. It has been suggested that each constituent local authority under the Local Government Act, has sovereignty to determine what, if any, funding it allocates to facilitate Kāi Tahu participation in resource management decision-making.

228. A regional policy statement must set out the objectives to be achieved, policies to achieve those objectives and the methods to be used to implement the policies.

229. The key objective is MW-O1:

> "**MW-O1 – Principles of Te Tiriti o Waitangi**
>
> The principles of Te Tiriti o Waitangi are given effect in resource management processes and decisions, utilising a partnership approach between councils and ~~Papatipu Rūnaka~~ papatipu rūnaka[328] to ensure that what is valued by *mana whenua* is actively protected in the region."

230. Partnership with mana whenua in resource management of the region is fundamental. This is achieved by MW-P2:

"**MW-P2 – Treaty principles**

Local authorities exercise their functions and powers in accordance with the principles of Te Tiriti o Waitangi ~~Treaty principles,~~[329] by:

(1) recognising the status of Kāi Tahu as *mana whenua*[330] and facilitating Kāi Tahu involvement in decision-making as a ~~Treaty~~ partner under Te Tiriti o Waitangi,[331]

(2) including Kāi Tahu in resource management processes, ~~and~~ implementation and decision-making[332] to the extent desired by *mana whenua,*

(3) recognising and providing for Kai Tahu values, and addressing resource management issues of significance to Kāi Tahu,[333] as identified by *mana whenua*, in resource management processes and plan implementation,

(4) recognising and providing for the relationship of Kāi Tahu culture and traditions with their ancestral lands~~,~~ and waters, ~~water,~~ encompassing wai māori and wai tai, significant sites, *wāhi tūpuna,* wāhi tapu and wāhi taoka, and other taoka by ensuring that Kāi Tahu have the ability to identify these relationships and determine how best to express them,[334]

(5) ensuring that *regional plans*[335] and *district plans* recognise and provide for Kāi Tahu relationships with Statutory Acknowledgement Areas, tōpuni, *nohoaka* and customary fisheries identified in the NTCSA~~, 1998~~[336] including by actively protecting the mauri of these areas,

(6) having particular regard to the responsibility ~~ability~~ of Kāi Tahu to exercise their role as kaitiaki ~~kaitiakitaka~~ as an expression of mana and rakatirataka,[337]

(7) actively pursuing opportunities for:

(a) delegation or transfer of functions to Kāi Tahu, and

(b) partnership or joint management arrangements, ~~and~~ [338]

(8) taking into account iwi management plans when making resource management decisions~~.~~,[339]

(8A) *regional plans* and *district plans* recognising and providing for aquaculture settlement outcomes identified under the Māori Commercial Aquaculture Claims Settlement Act 2004, [340] and

(8B) recognising and providing for mātauraka and tikaka in environmental and resource management.[341]"

231. MW-M4(2) is a necessary method to implement MW-P2. Without resourcing, including funding, policy MW-P2 would be meaningless and ineffective. As Mr Adams notes in his reply report, resourcing is not limited by funding.

232. The cascade of planning instruments under the RMA necessarily results

in higher order documents imposing obligations and costs on local authorities preparing, adopting and implementing subordinate instruments. District plans must give effect to regional policy statements. The methods in a district plan must replicate or expand on those in the regional document. The resourcing and funding obligations in the regional policy statement have to be given effect to in a district plan. In turn, the district plan must be observed by the territorial authority concerned[37].

233. Local authorities have a large number of legal obligations and duties, including the RMA and instruments made under it. Local Government Act planning processes do not absolve them of those duties. Long-term and Annual Plans make explicit how they are going to carry out those duties, how much they will spend on those activities and how they fund them. Nothing in the proposed RPS is incompatible with those corporate planning processes.

234. The same analysis applies to mandatory deadlines set in the RPS.

[37] Section 84 of the RMA

SRMR – Significant resource management issues for the region

235. The sole legal issue dealt with in this section is jurisdiction for SRMR-I7 amendments.

236. The question of whether there should be another significant resource management issue is dealt with in the overarching issues section.

Jurisdiction for SRMR-I7 amendments

237. During the hearing on the SRMR chapter, the Panel asked whether the recommended amendments to *SRMR-I7* stray into freshwater issues, and if so, whether they must be deferred to the freshwater process.

238. The amendments proposed include the addition of the following text:

238.1. "*anthropogenic alteration of waterways (such as damming, abstraction, bed manipulation, draining wetlands), the discharge of contaminants*";

238.2. "*nutrients entrapped in land run-off*"; and

238.3. "*the introduction of invasive species and fishing*".

239. SMRM-I7 is not a freshwater planning instrument ("FPI") provision. It does not directly relate to maintaining or enhancing the quantity and quality of freshwater.

240. The amendments proposed respond to submissions on the non-freshwater parts of the proposed RPS.

241. Recommendations arising from submissions on SRMR-I7 can be considered (and adopted) even if they relate in some way to freshwater issues.

242. The division of the pORPS under s 80A RMA has already occurred. Section 80A is no longer applicable. So long as new words or provisions arise from a within scope submission on a non-FPI provision there is no issue.

243. This panel has jurisdiction to consider and make recommendations on the proposed amendments.

244. In any case, the amendments do not meet the test for inclusion in a freshwater planning instrument because they do not "*directly relate to the maintenance or enhancement of the quality or quantity of freshwater*".

245. The first addition is an explanation of why native fish communities are degraded. The second and third additions explain degradation of the marine environment. None of them directly relate to maintaining or enhancing freshwater quantity or quality.

246. Had they been included when I advised on the split, they would have remained in the non-FPI part of the document.

RMIA – Resource management issues of significance to iwi authorities in the region

248. The matters raised during the course of the hearing are planning matters to which James Adams has replied in his report.

249. No legal issues arise.

IM – Integrated management

250. The legal issues addressed are:

250.1. The use of adaptive management.

250.2. Te Mana o te Wai and the IM-P1 order of priorities.

250.3. *King Salmon* and "*particular environments*".

Adaptive Management

251. During the hearings, submitters and members of the panel noted the absence of any explicit reference to adaptive management in the pORPS.[38]

252. Adaptive management is a recognised resource management tool for managing the effects of activities when there are uncertainties about the effects of those activities on the receiving environment.

253. A typical example is that resource consent decisions are often made based on modelling predictions. Modelled outcomes are inherently uncertain. Adaptive management is used to respond to mismatches between anticipated and actual outcomes in the environment.

254. Adaptive management can be framed to avoid undesired adverse effects.

255. Adaptive management has been applied nationally to aquaculture activities, and locally to port activities such as the disposal at sea of dredged spoil.

256. The proposed response is to include adaptive management in the IM chapter by amendment to IM-P6.

257. This removes any uncertainty as to whether the pORPS contemplates that adaptive management is a technique that can be used.

258. This approach is preferable to providing for adaptive management in discrete subject matter chapters.

[38] For example the submissions of Beef & Lamb NZ dated at paragraphs 34 to 37.

Te Mana o te Wai and the IM-P1 order of priorities

259. The provision within the IM chapter which received the most attention during the hearing was IM-P1 – Integrated approach to decision-making.

260. The principal criticisms from submitters were that:

260.1. ORC had inappropriately co-opted the hierarchy of obligations of Te Mana o te Wai in the NPSFM and applied it beyond freshwater to the natural environment generally; and

260.2. IM-P1 is inconsistent with section 5 of the Act and therefore unlawful.

261. IM-P1 (reply report version) provides.

IM-P1 – Integrated approach to decision-making

Giving effect to the integrated package of objectives and policies in this RPS requires decision-makers to consider all provisions relevant to an issue or decision and apply them according to the terms in which they are expressed, and if there is a conflict between provisions that cannot be resolved by the application of higher order documents, prioritise:

(1) the life-supporting capacity and mauri of air, water, soil, and ecosystems, and then
(2) the health and safety of people and communities, and their ability to provide for their social, economic, and cultural well-being, now and in the future.

262. Earlier iterations of IM-P1 had greater similarities with the hierarchy of obligations in Te Mana o te Wai than the final recommended version.

263. As submitted in opening, the elaboration of sustainable management in a subordinate planning instrument such as the RPS, is likely to have parallels in other similar documents such as the NPSFM which are also designed to expand upon and give effect to Part 2.

264. There is nothing improper about that, and nor is it surprising.

265. The pORPS and the NPSFM derive from the same statutory mandate.

266. Broadly the first limb of IM-P1 is consistent with section 5(2)(b) of the Act, and the second limb is consistent with the introductory paragraph in section 5(2).

267. But IM-P1 should not be viewed as a mere paraphrasing of section 5. To

do so would be pointless.

268. Rather, it is guidance as to the meaning of the pORPS itself. It is saying that absent clear words, or a higher order direction, it is not intended that the life-supporting capacity of air, water etc be subservient.

269. This is a legitimate approach to take to the management of the region's resources. The "while" at the end of the introductory paragraph in section 5(2) of the Act means "at the same time as".[39] The well-beings are not to be promoted without also safeguarding life-supporting capacity.

270. Aurora Energy Limited, Network Waitaki Limited and Powernet Limited ("the EDBs") submit that any conflict should be resolved through the directiveness of the language and the relevance of a provision to the particular issue.

271. That is how the relationship between different provisions should be reconciled.

272. However, IM-P1 states that provisions are to be applied according to the terms in which they are expressed, and that it is only if conflict remains, and cannot be resolved by the application of higher order documents, that the priority is to be applied.

273. In other words, the 'failsafe' applies only after what Mr Peirce proposes has already occurred.

274. Mr Peirce also submits that individual provisions should use suitable language (eg stronger and more directive for some things, not for others) to enable reconciliation to occur in the normal way. Generally, this is how the pORPS is drafted. The 'failsafe' is just that.

275. Contact Energy submits against IM-P1 for reasons including that it fails to recognise the NPSREG[40]. But the priorities in IM-P1 only apply if conflict between provisions remains after recourse to higher order documents such as the NPSREG.

276. Mr Somerville KC for Beef & Lamb New Zealand Limited and Deer Industry New Zealand supports the wording of IM-P1 (then IM-P2) in his

[39] *King Salmon* at paragraph [24]
[40] Contact Energy submissions dated 3 February 2023 at paragraph 60

submissions dated 8 February 2023.[41] Mr Cameron for Kai Tahu also supports IM-P1 in his submissions dated 8 February 2023.[42]

King Salmon **and "*particular environments*"**

277. During the hearing, the Panel referred to paragraph 24(d) of *King Salmon*: [emphasis added]

> *"Fourth, the use of the word "protection" in the phrase "use, development and protection of natural and physical resources" and the use of the word "avoiding" in subpara (c) indicate that s 5(2) contemplates that* ***particular environments*** *may need to be protected from the adverse effects of activities in order to implement the policy of sustainable management; that is, sustainable management of natural and physical resources involves protection of the environment as well as its use and development. The definition indicates that environmental protection is a core element of sustainable management, so that a policy of preventing the adverse effects of development on particular areas is consistent with sustainable management."*

278. The Panel put to counsel that under paragraph 24(d) of *King Salmon,* protection is confined to "*particular environments*" and those "*particular environments*" need to be identified to justify a bottom-line approach.

279. Policies 13(1)(a) and 15(a) of the NZCPS were at issue in *King Salmon.* Both are pure avoid policies (ie avoid adverse effects of activities on…).

280. The "*particular environments*" to which those policies apply are "*areas of the coastal environment with outstanding natural character*" and "*outstanding natural features and outstanding natural landscapes in the coastal environment*" respectively.

281. That is the context in which the comment about "*particular environments"* was made.

282. Later in the judgment the Court states:

> *[90] … To illustrate, s 5(2)(c) of the RMA talks about "avoiding, remedying or mitigating any adverse effects of activities on the environment" and s 6(a) identifies "the preservation of the natural character of the coastal environment (including the coastal marine area) … and the protection of [it] from inappropriate subdivision, use and development" as a matter of*

[41] At paragraph 42

[42] At paragraphs 4 to 13. Note he also supports a minor amendment proposed by Ms McIntyre.

national importance to be recognised and provided for. The NZCPS builds on those principles, particularly in policies 13 and 15. Those two policies provide a graduated scheme of protection and preservation based on the features of particular coastal localities, requiring avoidance of adverse effects in outstanding areas but allowing for avoidance, mitigation or remedying in others.

283. This is the approach taken in the pORPS. The level of protection depends upon the features of the area concerned ("*particular environments*").

284. For example, in context of indigenous biodiversity, the highest level of protection is reserved for areas of significant indigenous vegetation and significant habitats of indigenous fauna. Or, for natural features landscapes, outstanding natural features and landscapes are protected to greater extent than highly valued natural features and landscapes.

AIR – Air

285. The legal issues addressed are:

285.1. Whether ambient air quality may be maintained to a standard higher than the National Environmental Standards for Air Quality[43] ("NESAQ").

285.2. Whether nuisance effects should be avoided "where reasonably practicable".

285.3. A Panel question as to the legal standing of the Air Quality Strategy for Otago.

Ambient air quality standards

286. AIR-P1 provides that <u>at a minimum</u> ambient air quality standards are to be maintained by, inter alia, complying with ambient air quality limits.

287. The reference to limits and not the limits in the NESAQ is intentional.

288. The NESAQ sets <u>minimum</u> ambient air quality standards.

289. Regulation 28 of the NESAQ provides that: "*A rule, resource consent, or bylaw that is more stringent than these regulations prevails over the regulations*."

290. Clearly, greater stringency is permissible.

291. Standards are set for five contaminants, being carbon monoxide, nitrogen dioxide, ozone, PM_{10} and sulphur dioxide.

292. There are other contaminants which adversely affect ambient air quality, and in turn, human health. And some of the standards in the NESAQ are now considered to be insufficiently protective of human health. For example, $PM_{2.5}$ is now regarded internationally as a key parameter for protection from adverse health effects.

293. It is intended that regional plans may, if desirable, based on evidence regarding the impact of contaminant levels on human health:

[43] Resource Management (National Environmental Standards for Air Quality) Regulations 2004

293.1. Set more stringent limits than the NESAQ; and

293.2. Set ambient air quality limits for contaminants not subject to the NESAQ.

Avoidance of nuisance effects

294. In the notified pORPS nuisance effects were dealt with in AIR-P4 and P5, which is now AIR-P4 in the reply report version of the pORPS.

295. For Dunedin City Council, Mr Garbett proposed a standard of "*avoid where reasonably practicable*".

296. He cited *Aratiatia Livestock Limited v Southland Regional Council* [2019] NZEnvC 208 at paragraphs 303 and 304, and policies 4 to 12 in Annexure 1.

297. The preceding discussion[44] concerns whether policies should be effects-based (ie avoid effects, where effects can be directly attributed to an individual property) or risk-based (avoiding the risk of effects, where effects cannot be directly attributed to an individual property).

298. The discussion was about the contamination of water.

299. At paragraph 304, the Court accepted: "the thrust of" evidence that in the first instance adverse effects are to be avoided. And adopted wording to say that: *"… where it is reasonably practicable to do so adverse effects are to be avoided."*

300. The context here is different, dealing with the nuisance effects of point source discharges to air (noxious, dangerous, offensive or objectionable). These are "hotline discharges" ie the things that people commonly ring the pollution hotline about.

301. For many years it has been the position in Otago that these effects are to be avoided.

302. Policy 8.2.8 of the Regional Plan: Air for Otago 1998 provides:

"To avoid discharges to air being noxious, dangerous, offensive or objectionable on the surrounding local environment"

[44] At paragraphs 298 to

303. The explanation for that policy includes:

> *"Irrespective of any other control on discharges, a condition will be placed on all relevant permitted activities to prevent, where necessary, any noxious, dangerous, offensive or objectionable effects at or beyond property boundaries."*

304. Typically, since the Air Plan has been in force, consents for air discharges have included a condition that these nuisance effects are not permitted off-site.

305. This is achieved by applying the FIDOL (frequency, intensity, duration, offensiveness/character, location) assessment methodology.

306. It is not about preventing discharges. It is about preventing off-site nuisance effects.

307. Techniques such as dust suppression and odour scrubbing are used to avoid nuisances. Consent conditions are imposed to this end.

308. Doing so is necessary to maintain amenity values, and the quality of the environment in terms of section 7(c) and (g) of the Act.

309. I reiterate that the proposed policy setting of avoiding noxious or dangerous effects, and ensuring discharges do not cause offensive or objectionable effects is not about avoiding the activity causing the effect.

310. Nor is it a subjective avoidance standard.

311. It is about avoiding effects that reach a threshold (noxious, dangerous, offensive, objectionable).

312. There is an accepted and widely used method to do this in an objective manner, taking account of factors such as location, intensity, level of offensiveness and so on.

313. This is the established policy setting in Otago and should not be walked back.

Air Quality Strategy for Otago

314. The Air Quality Strategy for Otago was referred to in AIR-M2(5).

315. The Air Quality Strategy has no legal standing.

316. The chapter author has recommended that AIR-M2(5) be deleted.

CE - Coastal Environment

317. The legal issues arising from the hearing are:

317.1. CE-P5 – identification of coastal indigenous biodiversity

317.2. CE M3(6) and CE M4(6) – scientific uncertainty

CE-P5 – identification of coastal indigenous biodiversity

318. In the reply version of the pORPS this policy has moved to ECO-P7

319. This policy provides that indigenous biodiversity in the coastal environment be protected by, firstly, identification of indigenous biodiversity, and then, by avoidance of adverse effects on the types of indigenous biodiversity listed in CE-P5(1) or avoiding significant adverse effects and avoiding remedying or mitigating other adverse effects on the biodiversity listed in CE-P5(2).

320. During the hearing, two issues were raised:

320.1. Whether identification is required by the NZCPS; and

320.2. Whether ORC is assuming too onerous an obligation to identify indigenous biodiversity in the coastal environment, particularly in the coastal marine area.

321. As the Chair pointed out, Policy 11 of the NZCPS, which deals with indigenous biodiversity in the coastal environment, does not expressly require identification of indigenous biodiversity in that environment. In comparison, Policies 13 (Natural Character) and 15 (Natural Features and Natural Landscapes) do.

322. That is plainly correct.

323. However, there is nothing which prevents a RPS going beyond the NZCPS.

324. Indeed, the function of a RPS is to articulate at a regional level how the NZCPS will be implemented.

325. Policy 11 of the NZCPS requires qualified protection of specified indigenous biodiversity.

326. Effects on that biodiversity cannot be avoided, where required, or in other cases, avoided, remedied and mitigated, unless the existence and location of biodiversity is known. Identification is necessary to implement Policy 11.

327. The Chair asked whether the Board of Inquiry report on the draft NZCPS elucidated why there was a difference between Policy 11 on the one hand and Policies 13 and 15 on the other.

328. It is clear from the report[45] that the Board expected that DOC would provide the information necessary to implement the policy.

329. It is therefore understandable that identification of "*indigenous biodiversity*" is omitted from Policy 11. The NZCPS is a package of directions to local authorities, not to DOC.

330. In the event, information has not been collated and published by DOC in the way in which the Board anticipated.

331. That leads to the second point about what information is actually available.

332. The concern was that, at least in the marine environment, little work had been done and ORC was imposing upon itself a significant and costly obligation.

333. Substantial progress had in fact been made by the Regional Council through the NIWA report, Identification of Significant Ecological Areas for the Otago Coastal Marine Area, June 2022; although the report does identify gaps in available information and makes recommendations for cost-effective ground-truthing and monitoring programmes[46].

334. ORC does not resile from the task of identifying important and vulnerable biodiversity in the coastal environment.

CE-M3(6) and CE-M4(6)

335. These methods direct that regional and district plans require a precautionary approach in assessing the effects of activities on the

[45] Proposed New Zealand Coastal Policy Statement 2008 – Board of Inquiry Report and Recommendations: Volume 2, pages 190-196

[46] NIWA Identification of Significant Ecological Areas for the Otago Coastal Marine Area, June 2022, page 7

coastal environment where, among other things, there is scientific uncertainty.

336. During the hearing, the Panel asked whether "*scientific uncertainty*" extends to gaps in knowledge.

337. Deficits in knowledge in this context do create scientific uncertainty.

338. Identifying species and obtaining information about the effects of activities on them are matters of science. When there are information shortfalls, there is scientific uncertainty.

Land and Freshwater

Introduction

339. This section responds to the legal issues which arose in the hearing on the Land and Freshwater chapter.

340. Much of this chapter of the RPS is beyond the scope of this hearing. Some of the legal issues are relevant both in this process and in the FPI hearings. There is some overlap with the case which the Regional Council will present at the FPI hearings.

341. Some matters will not be covered. These include:

341.1. The expression of Te Mana o te Wai.

341.2. The Visions.

341.3. The objectives, policies and methods directly related to the quality and quantity of freshwater, including, in particular, the use of freshwater in the LF-FW - Freshwater and LF-LS - Land and Soil subchapters.

342. These submissions address:

342.1. Provision for rural water

342.2. Natural state

342.3. Trout and Salmon

342.4. Outstanding waterbodies

342.5. Productive land

Provision for rural water

343. At the hearing on this topic submissions were made that the RPS has failed to deal with the use of water by people and communities to provide for their social, economic and cultural well-being.

344. Particularly in connection with rural water use.

345. The NPSFM is prescriptive.

346. In short, the allocation of water for rural and other uses is for regional plans, not regional policy statements.

347. To demonstrate this, I set out below a summary of the relevant NPSFM provisions.

348. While the focus of the NPSFM is on freshwater quality and quantity, its provisions extend much more widely. The relevant NPSFM provisions include:

348.1. The fundamental concept of Te Mana o te Wai[47]. Te Mana o te Wai might be perceived as a "*water-centric*" concept. It embraces "*restoring and preserving the balance between the water, the wider environment and the community*". Importantly it embraces freshwater quality and quantity which is principally given effect to[48] in the FPI. But it is more and informs decision-making on the use, development and protection of all resources that directly or indirectly interact with freshwater.

348.2. The active engagement of mana whenua in freshwater management and the identification and protection of Māori freshwater values[49].

348.3. Te Mana o te Wai establishes a set of priorities:

(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[50].

348.4. The sole objective of the NPSFM is to ensure that natural and

47 Clauses 1.3, 3.1 and 3.2 NPSFM

48 In particular, through LF-WAI-P3 and P4

49 Clause 1.3 and Policy 2, and Clauses 3.2, 3.4 and 3.7(1)(a) NPSFM. "*Māori freshwater values*" mean mahika kai and any other value identified for a FMU or part of an FMU through collaboration between mana whenua and the Regional Council – Clause 1.4 NPSFM

50 Clause 1.3(5) NPSFM

physical resources are managed in accordance with those priorities[51]. "*Natural and physical resources*" is all resources. These priorities are not limited to the FPI. They must be applied to recommendations in this forum which have impacts on freshwater.

348.5. Integrated management which considers the effects of the use and development of land on freshwater[52]. The RPS has responded to this direction[53].

348.6. Wetland management[54]. The NPS directs specific provisions be included in a Regional Plan. Nonetheless, the proposed RPS has also given effect to these provisions[55].

348.7. Management of the extent and values of rivers[56]. The NPS directs specific provisions be included in a Regional Plan. Nonetheless, the RPS has also given effect to these provisions[57].

348.8. Identification of outstanding waterbodies and protection of their significant values[58]. The RPS gives effect to this policy[59].

348.9. Protection of fish habitats and control of species interactions[60]. The RPS gives effect to the relevant policies[61].

348.10. Communities are able to provide for their social, economic and cultural well-being in a way that is consistent with the National Policy Statement[62]. This policy is discussed in more detail below.

349. While there is a statutory obligation for a RPS to give effect to a National Policy Statement, a feature of the NPSFM is that it specifically allocates some matters to a RPS and others to a Regional Plan. Other obligations

---

51 Clause 2.1 NPSFM
52 Policy 3 and Clause 3.5 NPSFM
53 In particular, LF-WAI-P3
54 Policy 6, Clauses 3.21, 3.22 and 3.23 NPSFM
55 LF-FW-P8, LF-FW-P13A and LF-FW-P13
56 Policy 7, and Clauses 3.21 and 3.24 NPSFM
57 LF-FW-P13, LF-FW-P13A and LF-FW-P14
58 Policy 8 NPSFM
59 LF-FW-P11, LF-FW-P12 and LF-FW-M5
60 Policies 9 and 10 NPSFM
61 LF-FW-M8A
62 Policy 15 NPSFM

sit outside regional planning instruments altogether.

350. What a Regional Policy Statement specifically must do is:

350.1. Contain an objective on how management of the freshwater of a region gives effect to Te Mana o te Wai[63]. This objective is part of the freshwater planning process.

350.2. Contain long-term visions for freshwater management units. Submissions and evidence criticised the visions in the notified RPS. Those visions are part of the freshwater planning process. Criticisms will be responded to during those hearings.

350.3. Include provisions for the integrated management of the effects of, the use and development of land on freshwater and the use and development of land and freshwater on receiving environments[64]. The combined FPI and non-FPI- parts of the RPS implement that obligation.

351. These mandatory requirements have been met.

352. They do not necessarily exhaust the role of a RPS in implementation of the National Policy Statement.

353. But when submissions seek additional provisions in the Land and Freshwater chapter, the question is how much further can and should the RPS go?

354. There are two constraints.

354.1. First submissions seeking objectives and policies about access to and use of water belong to the FPI process. The question about how much water is available for use, posed by Mr Page, is quintessentially a FPI matter.

354.2. Second, the NPSFM itself directs that its objective be achieved and its policies be implemented primarily at the Regional Plan level, leapfrogging the Regional Policy Statement.

[63] Clause 3.2(3) NPSFM
[64] Clause 3.5(2) NPSFM

355. While the Regional Policy Statement must set long-term visions for freshwater management units, how those visions are to be achieved is to be expressed in the Regional Plan. The contention that the RPS is deficient by not addressing implementation of the visions is misconceived.

356. The key mechanism by which the NPSFM is implemented is the National Objectives Framework ("NOF") for which the "*heavy lifting*" will be done in the Land and Water Regional Plan by:

356.1. Identifying freshwater values for each FMU[65]. There are mandatory values:

(a) Ecosystem health (water quality, water quantity, habitat, aquatic life, ecological processes), with bottom lines[66].

(b) Human contact, also subject to bottom lines.

(c) Threatened species.

(d) Mahika kai.

356.2. Other values must be considered:

(a) Natural form and character;

(b) Drinking water supply;

(c) Wai tapu;

(d) Transport and tauranga waka;

(e) Fishing;

(f) Hydroelectric power;

(g) Animal drinking water;

(h) Irrigation, cultivation and production of food and beverages; and

(i) Commercial and industrial use.

[65] Clause 3.9 NPSFM
[66] Clause 3.10 NPSFM

356.3. Other values may also be identified.

356.4. Environmental outcomes for each value must be included as objectives in the Regional Plan[67].

356.5. Attributes, that is measurable characteristics, for each value must be set, when required by the NPSFM, and, as far as practicable, in all other circumstances. The baseline state of each attribute must be identified. Target attributes must be fixed for each attribute identified, together with timeframes for achieving those target attributes[68].

356.6. Target attributes must be at or better than their current state.

356.7. Environmental flows and levels, take limits and limits on resource use are tools to achieve the environmental outcomes set as objectives in the Regional Plan; They must be included as rules in the Regional Plan[69].

356.8. Action plans comprising regulatory and non-regulatory measures are an additional method for achieving the environmental outcomes for freshwater; Action Plans may be appended to the Regional Plan or published separately.

356.9. This framework provides for transitional arrangements including interim target attribute states[70], and a phased approach to environmental flows and levels so that the desired outcomes are achieved over time[71].

357. The summary here is brief. The provisions themselves are detailed, prescriptive and comprehensive.

358. The takeaway points are:

358.1. First, to the extent that the NPSFM requires, the proposed RPS discharges its obligations under the National Objectives Framework.

---

67 Clause 3.9 NPSFM
68 Clauses 3.10 and 3.11 NPSFM
69 Clauses 3.11, 3.12, 3.13, 3.14, 3.16 and 3.17 NPSFM
70 Clause 3.11(6) NPSFM
71 Clause 3.16(2) NPSFM

358.2. The National Objectives Framework is largely implemented through the Regional Plan, not through a RPS.

358.3. The NOF is the engine room for giving effect to the NPSFM. It is in effect a code and needs no RPS gloss or overlay.

358.4. The implementation of the NOF process requires at all stages engagement with mana whenua and communities. Recognition in the RPS of community involvement is not necessary.

358.5. The questions posed at the hearing about how much of the water resource will be available to users will be answered through the NOF process.

358.6. Submissions which sought to pre-empt or replace the NOF processes and predetermine their outcomes are misconceived.

358.7. Through the NOF, the values, methods and outcomes are fixed at an appropriate level; not at a regional scale using a one-size fits all model that many submitters feared[72].

358.8. Recreational uses of waterbodies are live matters in implementing the NOF, along with all other demands on freshwater as a resource contributing to social, cultural and economic well-being.

358.9. At all stages, decision-making must give effect to the objective and policies of the NPSFM and reflect the fundamental concept that is Te Mana o te Wai[73].

359. The priorities in the hierarchy of obligations in Te Mana o te Wai are deliberate and distinct. The word "*priorities*" and the numerical ranking makes that clear and unarguable. Those priorities must be respected and applied. Providing for social, economic and cultural well-being of people and communities must be undertaken in accordance with those priorities[74].

360. There is a tendency in submissions and evidence to conflate those

[72] Clauses 3.2(1) and (2), 3.3(3), 3.7(1) and 3.15(4) NPSFM
[73] Clauses 3.1, 3.2 and 3.7 NPSFM
[74] Policy 15 NPSFM

priorities and even reorder them. That is simply not permissible. They are clear and unambiguous. They must be applied on their terms.

Natural State

361. Fish and Game sought amendments to LFWAIP3 to include an additional subclause:

> "*(9) Preferentially considers effects against the naturalised flow and unpolluted state of a waterbody when making flow and quality decisions about the health, well-being and resilience of waterbodies and freshwater ecosystems, including when setting limits or environmental outcomes.*"

362. Two principal comments can be made about this proposal.

363. First, it is out of place in this policy. As the heading and chapeau state, the policy is about integrated management. The preceding subclauses all serve that purpose. The proposed additional clause does not.

364. That aside, the proposed addition introduces problematic hypotheticals. What is a "*naturalised flow*"; what is the "*unpolluted state of a waterbody*"? "*Naturalised flow*" is a seductively simple phrase. In reality, it conceals uncertainties and controversies.

365. The NPSFM avoids those problems. It does not use the terms "*naturalised flow*" and "*unpolluted state*"[75].

366. In essence, the NPSFM takes the contemporary state of freshwater and requires it to be managed to meet national bottom lines (where applicable) and target attribute states. Those targets must be set at or above the baseline. The baseline is essentially the status quo[76].

367. Policy 5 of the NPSFM summarises the approach:

> "*Freshwater is managed (including through a National Objectives Framework) to ensure that the health and well-being of degraded waterbodies and freshwater ecosystems is improved, and the health and well-being of other waterbodies and freshwater ecosystems is maintained and (if communities choose) improved.*"

---

[75] Its only reference to a natural state is in relation to naturally hard-bottomed rivers, which is their state before the arrival of humans in New Zealand. The NPSFM doesn't require that state be restored. What it does require is that monitoring be undertaken to inform a decision whether it is appropriate to return the bed to a hard-bottomed condition (Clause 3.25 NPSFM).

[76] Definitions of "*baseline state*", "*degraded*" and "*degrading*" in Clause 1.4 and Clauses 3.10 to 3.11 NPSFM

368. The NPSFM steps away from hypothetical natural states of freshwater. It takes the existing environment and requires it to be maintained or improved.

369. The clause promoted by Fish and Game does not give effect to NPSFM.

Trout and Salmon

370. Fish and Game made submissions on the habitat of trout and salmon.

371. At the hearing, Counsel for Fish and Game argued that this matter could also be dealt with as part of the freshwater hearing process.

372. There are two difficulties with that approach.

373. The first is that habitat, in the sense of water quality and quantity, will be dealt with as part of the freshwater planning instrument. However, interaction between species is not a matter directly related to the maintenance or enhancement of freshwater quality or quantity.

374. Secondly. it is the subject of a submission by Fish and Game in this process.

375. In response to that submission, Ms Boyd has recommended a new method, LF-FW-M8A, identifying and managing interactions between salmonids and indigenous species.

376. The matter is plainly within the jurisdiction of this Panel. The submission remains on foot. A recommendation must be made on the submission and Ms Boyd's proposed method.

Outstanding Waterbodies

377. Policy 8 of the NPSFM is that the significant values of outstanding waterbodies are protected.

378. LF-FW-P11 and LF-FW-P12 relate to the identification of outstanding waterbodies. Identification is to be in accordance with APP1.

379. Manawa (Trustpower) made a submission seeking APP1 of the notified proposed Regional Policy Statement be replaced with a new appendix attached to its submission.

380. Ms Boyd recommended in her Section 42A report that the Manawa submission be accepted.

381. After considering the presentations during the hearing, Ms Boyd has changed her position. Her closing report proposes changes to the notified version of APP1 instead of substituting the appendix presented by Manawa.

382. Counsel for Fish and Game contended there would be a breach of natural justice if the Panel were to adopt the Manawa version of APP1.

383. Ms Baker-Galloway is, with respect, incorrect.

384. Manawa made a submission. The alternative APP1 is attached to its submission.

385. There was a right to make further submissions.

386. During the hearing, persons interested in APP1 have had the opportunity of commenting on the notified version and Manawa's alternative. Ms Baker-Galloway herself did so.

387. No issues of natural justice arise in these circumstances.

388. It is for the Panel to assess the merits of the notified version along with any amendments to or replacement of it. All options are open to it.

Productive Land

389. After notification of the proposed RPS, the National Policy Statement for Highly Productive Land (NPSHPL) came into force.

390. Amendments were recommended to the proposed RPS to give effect to the NPSHPL, to the extent that submissions allowed.

391. As a result of submissions and evidence presented during the hearing, Ms Boyd has recommended some finetuning. These amendments better give effect to the NPSHPL. No legal issues arise.

392. Horticulture and viticulture are important regional activities that require access to suitable land. Often that land is outside LUC classes 1, 2 and 3. As such, the NPSHPL does not apply to that land. In response to evidence from Hort NZ, OWRUG and others, Ms Boyd has recommended

the protection of land suitable for horticulture and viticulture on at least an interim basis. No legal issues arise.

ECO – Ecosystems and Indigenous Biodiversity

393. These submissions address:

393.1. The meaning of '*protect*' and '*maintain*'.

393.2. The management of significant natural areas together with taoka.

393.3. The 'appropriate scale' for protection.

393.4. Section 104(1)(ab) and the use of 'limits'.

393.5. '*Prescriptive Limits*' and NPSFM alignment.

393.6. The legality of ECO-P5.

393.7. Memorandum of Sanford Limited dated 18 May 2023.

Protect and Maintain

394. In the Ecosystem and Indigenous Biological Diversity hearing, the Otago Regional Council ("ORC") submitted that:

"*A regional council has a mandatory, statutory obligation to "maintain" indigenous biodiversity.*

Section 30(1)(ga) provides:

> *(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:*
>
> *…*
>
> *(ga) the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity:*

"To maintain" means "to protect" which in turn means "to keep safe from harm or injury"[77].

395. The Panel asked ORC to reconsider its position with respect to the meaning of "*maintain*". At hearing the Panel viewed this as a submission that all biodiversity, no matter how insignificant, was elevated to a matter of national importance, because the direction in s 6 is to "*protect*".

396. ORC cited the High Court decision in *Canyon Vineyard Ltd* v *Central*

[77] *Canyon Vineyard Ltd* v *Central Otago District Council* [2022] NZHC 2458

Otago District Council[78], an appeal alleging, among other things, the Environment Court had misinterpreted the meaning of "*maintain*"[79].

397. Under the heading "*Meaning of 'to maintain'*" the Environment Court stated[80] (in the context of s 7(c)):

> *"(a) the requirement to "maintain" allows a council to protect rather than preserve or enhance, and*
>
> *(b) to "protect" means to "keep safe from harm or injury" although it does not require prevention or prohibition."*

398. The High Court held that no error arose in the Environment Court's decision in this regard[81].

399. The High Court also held that despite a submission to the contrary, Port *Otago* v *Dunedin City Council*[82] did provide a definition of "*maintain*" at paragraph [42] (emphasis added):

> *"We accept Mr Hilder's submission that the word maintain includes the meaning of protect. In consequence and having concluded that the Proposed Plan should maintain or enhance amenity values the Council may determine that it will protect those rather than preserve or enhance them. Whether the wording in Part II is used with the degree of precision suggested by counsel in this case is a matter on which we do not wish to express a final opinion. Even if the word is used with that level of precision, the use of the word protect by the Council is a method by which the Plan can have regard to amenity values under section 7(c). It may be that the words used in sections 6 and 7 particularly are not intended to be used with the level of chancery draughtsmanship suggested by the parties in this case. The words preserve, protect, maintain may be preferable to the overall purpose of the Act contained in section 5(2) of sustainable management. On either approach the Council is able to seek to* ***protect*** *as a policy to achieve the purpose of the Act."*

400. This meaning has been endorsed in *Royal Forest and Bird Protection*

---

78 [2022] NZHC 2458
79 Ibid at [100](b)
80 *Canyon Vineyard Ltd* v *Central Otago District Council* [2021] NZEnvC 136 at [147]
81 [2022] NZHC 2458 at [125]
82 EnvC C004/02

Society of New Zealand Inc v *New Plymouth District Council*[83] in the context of s 6(c). The Environment Court observed that while the term "*protection*" was undefined in the Act, its meaning can be ascertained from case law:

"It will be seen that s 6(c) identifies the protection of significant indigenous vegetation and significant habitats of indigenous fauna as a matter of national importance. The word protection is not defined in RMA. We use it in the sense identified in decisions such as Environmental Defence Society v Mangonui County Council and Port Otago Ltd v Dunedin City Council as meaning to keep safe from harm, injury or damage. The only gloss which we would put on to that meaning is that it is implicit in the concept of protection that adequate protection is required.

401. Something is maintained in its current state if it is protected, that is kept from harm.

402. The Court of Appeal in *Attorney-General* v *Trustees of Motiti Rohe Moana Trust*[84] used the terms "*maintain*" and "*protect*" interchangeably in its discussion of s 30(1)(ga). Examples include:

402.1. "…*Section 30(1)(ga) of the RMA is concerned with protecting indigenous biodiversity*…"[85].

402.2. "…*s 30(1)(ga) protects all forms of indigenous organisms and their ecosystems*"[86].

402.3. "*It [s 30(1)(ga)] protects indigenous biodiversity not just as a resource but for its intrinsic value and for its "ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values*"[87].

402.4. "*It [s 30(1)(ga)] permits a regional council to set what may be a different baseline for permissible effects on indigenous biodiversity in any given area*"[88].

---

83 [2015] NZEnvC 219, (2015) 19 ELRNZ 122 at [63]
84 [2019] NZCA 532 at [62]
85 Ibid at [52]
86 Ibid at [52](a)
87 Ibid at [52](b)
88 Ibid at [52](d)

402.5. *"…The protection of indigenous biodiversity is vested in a regional council, not the Minister, under s 30(1)(ga)"*[89].

403. While ORC noted that "*maintain*" and "*protect*" are used interchangeably in case law, it does not follow that ORC was submitting that all indigenous biological diversity is elevated to a matter of national importance in s 6 regardless of its value. That is not how the pORPS is framed.

404. Policy ECO-P2 – *Identifying significant natural areas and taoka* and ECO-P3 – *Protecting significant natural areas and taoka* give effect to section 6, being matters identified as nationally important in the RMA.

405. ECO-P3 provides "*hard bottom lines*" for adverse effects on significant natural areas and taoka which have been identified by mana whenua as requiring protection. It does not allow for any adverse effects that result in reduction of SNA areas or values that are identified and mapped in accordance with ECO-P2(1)(a) or for any loss of taoka values identified by mana whenua as requiring protection under ECO-P2(1)(b). If an activity results in any of those adverse effects, the activity itself must be avoided. Other effects are managed using the effects management hierarchy in ECO-P6.

406. ECO-P4 creates exceptions for new activities that are generally regionally or nationally significant and that have a locational or functional need to locate in the particular area.

407. Other exceptions in ECO-P4 include mahika kai and kaimoana practices by mana whenua. That exception gives effect to section 6(e) "*the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga*".

408. These exceptions are managed using the effects management hierarchy in ECO-P6, without being subject to the avoidance requirement in ECO-P3.

409. Indigenous biodiversity that is not significant is maintained and managed solely by ECO-P6. This policy provides for an effects management hierarchy to manage adverse effects on indigenous biodiversity. It also allows for adverse effects to be offset and/or compensated for in

[89] Ibid at [62]

accordance with APP3 and APP4 if they cannot be avoided, remedied or mitigated.

410. The activity itself only needs to be avoided under ECO-P6 if it results in adverse effects expressly disallowed in Appendix APP3 or APP4 (for example, the loss of irreplaceable or vulnerable indigenous biodiversity) and if the activity cannot be re-designed in such a way to overcome those stipulated limits.

411. Section 6 contains matters that have been identified as matters of national importance. This section imposes mandatory obligations on all persons exercising functions and powers under the RMA to "*recognise and provide for*" those matters.

412. Section 30(1)(ga) imposes a mandatory obligation on regional councils to establish, implement and review objectives, policies and methods for maintaining indigenous biodiversity. It is an obligation to maintain all indigenous biodiversity[90], of which the matters in s 6(c) are a subset.

413. The sections are distinct and create different obligations on persons exercising functions under the RMA. The interchangeable use of the words "*protect*" and "*maintain*" does not and cannot elevate the maintenance of all indigenous biodiversity to a matter of national importance.

414. That proposition would ignore:

414.1. the hierarchical nature of the RMA; and

414.2. the fact that s6 matters have been specifically identified and provided for as matters of national importance in Part 2.

415. In the proposed RPS the direction in ECO-P3 is to avoid adverse effects on matters of national importance (with limited exceptions), giving effect to s 6.

416. With respect to ORC's function under section 30(1)(ga), the proposed RPS in ECO-P6 uses an effects management hierarchy to maintain indigenous biodiversity by managing more than minor adverse effects of

[90] Property Rights in New Zealand Inc v Manawatu-Wanganui Regional Council [2012] NZHC 1272 ay [31]

an activity.

Significant Natural Areas and Taoka

417. The pORPS manages taoka together with SNAs, by requiring their identification in accordance with ECO-P2 and their protection in accordance with ECO-P3.

418. During the ECO hearing the Panel noted that direction in s 6(e) is to recognise and provide for the *relationship* of Māori with taoka, whereas direction in s 6(c) is to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna. The Panel asked if it is justifiable to treat the SNAs and taoka the same.

419. In short, the answer is yes. Preserving the taoka is an important part of recognising and providing for Maoris relationship with it.

420. It is entirely appropriate and open to the ORC to recognise and provide for these two s 6 matters in the same or similar manner in the pORPS.

421. This is also consistent with section 8 of the Act, which provides:

> "*In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)*."

422. The principles of Te Tiriti o Waitangi require active protection of Māori interests which include taoka species.

423. At hearing concerns were expressed about how widely ECO-P3 could apply. As recommended in the 42A report, ECO-P3 applies to all indigenous ecosystems and species that are taoka, regardless of abundance or value to mana whenua.

424. These concerns have been addressed by recommended amendments to the ECO chapter to narrow the application of the protection afforded in ECO-P3 from taoka values to those "*which have been identified by mana whenua as requiring protection*". Other taoka will be managed using the effects management hierarchy in P6.

Appropriate Scale for protection

425. The Panel has asked whether the protection of areas of significant

indigenous vegetation and significant habitats of indigenous fauna in s 6(c) is to occur at the ecological district scale, a district scale, a regional scale or a national scale and has enquired whether there is any case law which provides guidance on the appropriate "*scale"*.

426. The case law does not provide any hard and fast rules as to scale. National importance is not a prerequisite. Something can be significant or outstanding without having to be nationally significant or outstanding[91].

427. The Court of Appeal in *Man O'War Station Ltd v Auckland Council*[92] held that the issue of whether land has attributes sufficient to make it an outstanding landscape within the ambit of s 6(b) requires an essentially factual assessment based upon the inherent quality of the landscape itself. The Court did state that for a regional policy statement the regional scale is appropriate for outstanding natural features and landscapes. *Royal Forest and Bird Protection Society of New Zealand Incorporated v Auckland City Council* [93] held that the same principle must apply to an area qualifying for protection under s 6(c).

428. In *Royal Forest and Bird Protection Society of New Zealand Inc* v *New Plymouth District Council*[94] the Environment Court stated:

> *"... areas of significant indigenous vegetation and significant habitats of indigenous fauna ... which s6(c) seeks to protect as a matter of national importance include areas and habitats of regional and district significance, in this case the SNAs subject to these proceedings."*

429. In *Minister of Conservation* v *Western Bay of Plenty District Council*[95] the Environment Court said:

> *"Importantly, in determining whether an area of indigenous vegetation or a habitat of indigenous fauna is significant for the purpose of paragraph (c), the area or habitat is not required of itself, or in combination with other areas or habitats, to be nationally important. Neither does its importance have to be regional in character or otherwise exceed the bounds of the planning district. Rather, it is a question of identifying and assessing (with the aid of qualified advice and assistance) those areas or habitats that are significant within the district as to require protection."*

430. It appears from the case law that an area may be significant under s 6(c)

---

91 *West Coast RC* v *Friends of Shearer Swamp Inc* (2011) 16 ELRNZ 530 (HC)

92 *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24, [2017] NZRMA 121at [61]

93 R*oyal Forest and Bird Protection Society of New Zealand Incorporated v Auckland City Council* NZHC [2017] 1606 at [19]

94 [2015] NZEnvC 219 at [23]

95 ENC Auckland A71/2001, 3 August 2001 at [18]

because of its national, regional or district significance.

431. It is worth noting the High Court case *West Coast RC v Friends of Shearer Swamp Inc*[96] which was an unsuccessful appeal by the regional council alleging that the Environment Court made national issues, being the national scarcity of wetlands, rather than regional issues, the primary focus for determining significance. The regional council claimed this approach would result in too many wetlands on the West Coast being protected, at the expense of people and communities being able to support themselves. The council argued that this failure would force the West Coast, which has a relative abundance of wetlands, to compensate for the acute shortage of wetlands elsewhere in the country. The Court rejected that argument on the grounds that the Environment Court did keep a regional focus, and it was open to the Environment Court to find that because something is nationally significant, it was necessarily regionally significant[97].

432. This case is relevant in the Otago context, particularly, the Macraes ecological district, where the Critically Endangered ephemeral wetlands are relatively abundant, Wildlands having mapped approximately 3,000 in inland Otago[98], but are nationally uncommon. Similar arguments have been made to the Panel in these hearings[99], for example by Mr Keesing for Manawa Energy and Contact Energy Limited.

Section 104(1)(ab)

433. At the ECO hearing, Mr Christensen on behalf of Oceana Gold (New Zealand) Limited ("OGL") submitted that a limits approach to offsetting and compensation "*is simply not available as a matter of law in the context of the pORPS*" and "*the position in the notified pORPS is therefore in error*".

434. To support this submission, during the LF hearing, Mr Christensen referred to the recent decision of *Royal Forest and Bird Protection Society of New Zealand Inc* v *DCC*[100], and in particular paragraph [97] where

---

96 *West Coast RC* v *Friends of Shearer Swamp Inc* (2011) 16 ELRNZ 530 (HC)
97 Ibid at [50], [51], [52], [53], [54], [55], [56], [57]
98 Wildlands Report (2020a)
99 Statement of Evidence of Dr Vaughan Keesing on behalf of Contact Energy Limited dated 23 November 2022 at paragraph [7.23], and for Manawa Energy at paragraph [6.23]
100 [2023] NZEnvC 79 at [97]

Judge Steven referred to the fact that s 104(1)(ab) is now law, and did not apply when the Environment Court settled 5.4.6 and 5.4.6A of RPS 19.

435. Mr Christensen's submission is that policies would now be different because the law is now different.

436. This submission is wrong at law.

437. In *Royal Forest and Bird Protection Society of New Zealand Inc v West Coast Regional Council and Buller District Council*[101], another recent case presided over by Judge Steven, she held:

> *"[398] Due to the wording of the policies in Chapter 7 RPS, and the very directive approach of the NPSFM in relation to biodiversity values, we are prevented from accounting for the offsetting and/or compensatory measures proposed by the applicant in terms of our consideration of the proposal under those instruments, notwithstanding their relevance as positive effects in the context of s104(1)(a).*
>
> *[399] However, it is for the court to decide what weight should be given to the matters of relevance identified in s104. We find that these positive effects relevant in the s104(1)(a) context do not overcome our effects based findings on ecological effects that have informed our s104(1)(b) evaluation."*

438. This decision was on an application for a resource consents for a coal mine at Te Kuha on the West Coast, and directly engaged s 104. While s 104(1)(ab) did not apply in that case because of the lodgement date of the application, Judge Steven held *"nothing much turns on that as the positive effects are able to be considered under s104(1)(a)"*[102].

439. Judge Steven's comment at paragraph [97] of *Royal Forest and Bird Protection Society of New Zealand Inc* v *DCC* cannot be taken to mean that limits on offsetting in specific circumstances are now inappropriate. The Judge was not asked to decide that question and did not do so. At most, the Judge's observation indicates the result may have been different. But for the reasons below, that does not follow.

440. The advice given by the Ministry for the Environment in a briefing paper to the Select Committee on the Resource Legislation Amendment Bill which, when passed, introduced s104(1)(ab) provides insight into

---

101 [2023] NZEnvC 68
102 Ibid at [79]

Parliament's intention when enacting the provision[103]: [emphasis added]

> *"Any consideration of offsetting must be made subject to Part 2, therefore the ability of the decision-maker to refuse a consent if the proposal is not consistent with Part 2 is retained. We consider that this addresses the concern that the proposal will contribute to the erosion of environmental bottom lines.*
>
> *Environmental bottom lines can be established through provisions contained in various RMA instruments such as policy statements, and plans. When making a decision on a resource consent under s104, decision-makers will be required to 'have regard' to the relevant provisions of these policy statements and plans (which may or may not establish bottom lines) as well as the proposed offsetting clause.*
>
> *The requirement for councils to 'have regard to' particular matters in section 104 does not mean that each consideration in section 104(1) is given equal weighting. Applications will be assessed against the content and directive nature of relevant planning provisions, and its position in the planning hierarchy. The Ministry considers that RMA instruments with more prescriptive provisions (ie, 'environmental bottom lines') would therefore be awarded more weight than flexible measures of provisions that only specify a broad policy intent. As such, we consider that environmental bottom lines will be awarded greater weighting under section 104 than environmental offsetting/compensation. It will also be possible for the objectives and policies of RMA instruments to specify whether offsetting is either acceptable or unacceptable in certain situations. This will help clarify the role of offsetting in regards to bottom lines."*

441. In other words, the advice to the Select Committee was that offsetting and compensation proposals under s104(1)(ab) would be evaluated through the lens of relevant policies which may include environmental bottom lines and/or restrictions on when offsetting or compensation is available.

442. Further, ORC agrees with the oral submission of Ms Burkhardt for Manawa Energy on this matter. Ms Burkhardt stated, "*I don't think you cannot recognise that it is permissible for plans, as directed through national direction to put prescriptive limits on offsetting and compensation*". And if Mr Christensen's submission were correct that s 104(1)(ab) necessarily prevents prescriptive limits "*there are a lot of corrections that need to be made to plans up and down the country*" which have avoid approaches "*which don't even allow you to entertain mitigate, remedy or the offsetting or compensation, particularly in the NZCPS would be an example. You see those avoid policies carry through for s 6 matters …*" "*… the submissions made by Mr Christensen … would have far*

[103] Departmental Report Number 2 dated 8 November 2016 at page 323

reaching implications, which work against it being the correct interpretation".

443. An applicant's offer of compensation or offset is a matter to which a consent authority must have regard under section 104(1)(ab).

444. Equally, the consent authority must have regard to the relevant objectives and policies of a Regional Policy Statement under s104(1)(b).

445. One of the functions of a Regional Policy Statement is to have provisions which inform, guide and direct decision making on the use, development and protection of natural and physical resources-.

446. Subordinate instruments made under the RMA express in greater detail how the purpose and principles of the RMA are to be applied in Regional and District contexts, otherwise they serve no useful purpose.

447. It is no different to section 104(1)(a) which allows regard to any actual and potential effects. Policy statements and plans regulate how effects under s104(1)(a) are to be treated and how consent decisions are ultimately to be made. The Te Kuha decision illustrates this point. In fact, every consent decision measures effects against the objectives and policies of planning instruments.

448. Section 104(1)(ab) is "*subject to Part 2*." We know from *King Salmon* that in the context of a plan change, by giving effect to the relevant higher order planning instrument a regional council is necessarily "*acting in accordance with*" Part 2 and there is no need to refer back to Part 2[104].

449. Similarly, in the context of s104, the Court of Appeal in *RJ Davidson Family Trust* v *Marlborough District Council*[105] held that if a plan has been competently prepared under the Act it may be that in many cases the consent authority will feel assured in taking the view that there is no need to refer to Part 2 because doing so would not add anything to the evaluative exercise. It would be unusual for consent decision to be made in a way which flies in the face of a directive policy.

[104] *King Salmon* at [85]
[105] *RJ Davidson Family Trust* v *Marlborough District Council* [2018] NZLR 283 at [74]

Prescriptive Limits and NPSFM alignment

450. Related to OGL's submission on the legality of "*prescriptive limits*", OGL has sought the effects management hierarchy in the National Policy Statement for Freshwater Management ("NPSFM") be applied to terrestrial ecology in the pORPS, as it refers to "*principles*", rather than "*presumptive limits*".

451. From an ecological perspective, ORC defers to the expert advice of Dr Kelvin Lloyd on the appropriateness of applying the NPSFM effects management hierarchy to terrestrial ecology.

452. However, from a legal perspective, ORC submits that the pORPS is already largely aligned with the NPSFM offsetting and compensation provisions, because the offsetting and compensation "principles" must in part at least be complied with.

453. Clause 3.22(3) of the NPSFM is set out below (my emphasis added):

> "***3.22 Natural inland wetlands***
>
> *…*
>
> *(3) Every regional council must make or change its regional plan to ensure that an application referred to in subclause (2) is not granted unless:*
>
> *(a) the council is satisfied that:*
>
> *(i) the applicant has demonstrated how each step of the effects management hierarchy will be applied to any loss of extent or values of the wetland (including cumulative effects and loss of potential value), particularly (without limitation) in relation to the values of: ecosystem health, indigenous biodiversity, hydrological functioning, Māori freshwater values, and amenity values; and*
>
> *(ii) if aquatic offsetting or aquatic compensation is applied, the applicant has **complied with** principles 1 to 6 in Appendix 6 and 7, and has had regard to the remaining principles in Appendix 6 and 7, as appropriate, and*
>
> *(iii) there are methods or measures that will ensure that the offsetting or compensation will be maintained and managed over time to achieve the conservation outcomes; and*
>
> *(b) any consent granted is subject to:*

(i) conditions that apply the effects management hierarchy; and

(ii) a condition requiring monitoring of the wetland at a scale commensurate with the risk of the loss of extent or values of the wetland; and

(iii) conditions that specify how the requirements in (a)(iii) will be achieved."

Existing Use Rights – ECO-P5

454. During the hearing, Commissioner Cubitt questioned the legality of ECO-P5 with respect to existing use rights. He referred to the recent case of *Southland District Council* v *Chartres*[106], which involved the clearance and re-clearance of indigenous vegetation in accordance with what the Respondent claimed was existing use rights.

455. The pORPS cannot curtail existing use rights under section 10 of the Act.

456. ECO-P5 is in conflict with section 10 of the Act.

457. Accordingly, the 42A author has recommended the deletion of ECO-P5.

Memorandum of Sanford Limited

458. On 18 May 2023, Ms Appleyard as counsel for Sanford Limited filed a memorandum which addressed the terminology in section 6 of the RMA.

459. Ms Appleyard submitted that:

459.1. *"section 6 is subordinate to section 5"*[107]

459.2. *"Sections 6(a) and (b) refer to "inappropriate" subdivision, use and development*[108]*… 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. For example, section 6(c) does not exclude the possibility of offsetting to manage adverse effects on section 6(c) matters*[109]*".*

106 [2022] NZEnvC 215
107 Memorandum on behalf of Sanford Limited dated 18 May 2023 at [10.3]
108 Ibid at [11.1]
109 Ibid at [11.2]

459.3. *"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)[110]."*

460. With respect, I disagree.

461. I refer the Panel to the following passages from *King Salmon* (emphasis added):

"[26] Section 5 sets out the core purpose of the RMA – the promotion of sustainable management of natural and physical resources. Sections 6, 7 and 8 supplement that by stating the particular obligations of those administering the RMA in relation to the various matters identified. …."

"[28] It is significant that three of the seven matters of national importance identified in s 6 relate to the preservation or protection of certain areas, either absolutely or from "inappropriate" subdivision, use and development (that is, s 6(a), (b) and (c))..."

462. The omission from section 6(c) must in accordance with ordinary principles of interpretation be taken to be intentional, and given meaning. A stronger protection is clearly intended.

463. For completeness it should be noted that the pORPS does not provide for "absolute" protection of significant natural areas.

[110] Ibid at [12]

EIT – Energy, infrastructure and transport

464. The legal issues addressed are:

464.1. The proposed new national policy direction

464.2. Whether the National Policy Statement on Electricity Transmission 2008 ("NPSET") a comprehensive regime for the environmental effects of the National Grid.

The proposed new national policy direction

465. Since the hearing on this topic the Minister for the Environment together with the Minister for Energy Resources has released for consultation in draft:

465.1. Proposed National Policy Statement on Renewable Electricity Generation; and

465.2. Proposed National Policy Statement on Electricity Transmission.[111]

466. They were released with a consultation document[112] and summary of proposed changes[113].

467. Together, these documents comprise public notice under section 46A(4)(a) of the Act of the proposed national direction and the reasons why the Ministers consider that proposal to be consistent with the purpose of the Act[114].

468. They do not, however, have legal standing as documents to which regard must be had under section 61 of the Act. They may eventually come into force in their current form, with amendments, or not at all.

---

[111] Available at https://www.mbie.govt.nz/dmsdocument/26314-proposed-national-policy-statement-for-renewable-electricity-generation and https://www.mbie.govt.nz/dmsdocument/26315-proposed-national-policy-statement-for-electricity-transmission

[112] Available at https://www.mbie.govt.nz/dmsdocument/26387-strengthening-national-direction-on-renewable-energy-generation-and-electricity-transmission-consulation-doc-pdf

[113] Available at https://www.mbie.govt.nz/dmsdocument/26388-national-direction-on-renewable-electricity-generation-and-electricity-transmission-summary-document-pdf

[114] Cabinet paper 11 May 2023 at paragraphs 60 to 63; available here: https://www.mbie.govt.nz/dmsdocument/26606-strengthening-national-direction-on-renewable-electricity-generation-and-electricity-transmission-proactiverelease-pdf

469. The existing national policy statements on these topics remain in full force and effect and must be given effect to under section 62(3) of the Act.

470. Mr Langman has commented on these draft national policy statements in his reply report[115].

471. Mr Langman's comments on the proposed changes are interesting because in the proposed national policy statements section 6 matters are recognised and provided for in a similar manner to the pORPS.

Whether the NPSET is a comprehensive regime for the environmental effects of the National Grid

472. In his opening submissions for Transpower New Zealand Limited Mr Conway submits that the NPSET is a comprehensive regime for the environmental effects of the National Grid[116].

473. It is not.

474. The High Court judgment in *Transpower New Zealand Limited v Auckland Council*[117] puts this beyond doubt.

475. The relevant passage of that judgment is as follows:
[Full passage included for context; emphasis added.]

"[80] Ms Caldwell, for the Council, and Mr Allan, for CDL, submitted that King Salmon confers a discretion on decision-makers and that it is not overly prescriptive. They referred me to a paragraph in the decision. It reads as follows:

> *The Minister might, of course, have said in the NZCPS that the objectives and policies contained in it are simply factors that regional councils and others must consider in appropriate contexts and give such weight as they think necessary. That is not, however, how the NZCPS is framed.*

They noted that the NPSET contains a preamble, and that, relevantly, it reads as follows:

[115] At section 2.1
[116] At paragraph 4.6
[117] [2017] NZHC 281

The national policy statement is to be applied by decision-makers under the Act. The objectives and policies are intended to guide decision-makers in drafting plan rules, in making decisions on the notification of the resource consents and in the determination of resource consent applications, and in considering notices of requirement for designations for transmission activities.

However, the national policy statement is not meant to be a substitute for, or prevail over, the Act's statutory purpose or the statutory tests already in existence. Further the national policy statement is subject to Part 2 of the Act.

For decision-makers under the Act, the national policy statement is intended to be a relevant consideration to be weighed along with other considerations in achieving the sustainable management purpose of the Act.

They also pointed to the provenance of the New Zealand Coastal Policy Statement (s 56) and to the provenance of the NPSET (s 45(1)). They argued that the NPSET is a lesser form of national policy statement than the New Zealand Coastal Policy Statement. They argued that the NPSET provisions are not strict "avoid" policies, and that they are for guidance only, and not directive. They argued that the regional policy statement and the other provisions contained in the regional plan and the district plan are consistent with the guidance provided by the NPSET and that they recognise other planning imperatives as required by Part 2 of the Act.

[81] Mr Gardner-Hopkins, in response, argued that the observations in the preamble state the law as it was understood to be in 2008 when the NPSET was gazetted. He submitted that the observations in the preamble have been overtaken by King Salmon, and that the key policies – in particular policy 10 – in the NPSET are in any event strong and directive. He submitted that the NPSET is not a subordinate or "less equal" policy statement.

[82] In my judgment, there is force in Mr Gardner-Hopkins argument that the preamble to the NPSET was based upon the law as it was understood to be prior to the King Salmon decision. It is now clear that to the extent that the preamble was purporting to state matters of law, it is now incorrect because the Supreme Court has declared what the law has always

been.[37] However, this argument fails to acknowledge that the Supreme Court in King Salmon recorded that a national policy statement can provide that its policies are simply matters decision-makers must consider in the appropriate context, and give such weight as they consider necessary. The NPSET so provides and the Minister has not sought to amend the preamble since the King Salmon was released.

[83] I also agree with Ms Caldwell and Mr Allan that the New Zealand Coastal Policy Statement at issue in King Salmon, and the NPSET, derive from different sections of the Act, which use different terms. Section 56 makes it clear that the purpose of the New Zealand Coastal Policy Statement is to state policies in order to achieve the purpose of the Act. In contrast, the NPSET was promulgated under s 45(1). Its purpose is to state objectives and policies that are relevant to achieving the purpose of the Act. Section 56 suggests that the New Zealand Coastal Policy Statement is intended to give effect to the Part 2 provisions in relation to the coastal environment. A national policy statement promulgated pursuant to s 45 contains provisions relevant to achieving the Resource Management Act's purpose. The provisions are not an exclusive list of relevant matters and they do not necessarily encompass the statutory purpose. In this regard I note that a number of the policies relied on in this case, including Policy 10, start with the words "(i)n achieving the purpose of the Act".

[84] I accept the submission advanced by Ms Caldwell and Mr Allan that the NPSET is not as all embracing of the Resource Management Act's purpose set out in s 5 as is the New Zealand Coastal Policy Statement. In my judgment, a decision-maker can properly consider the Resource Management Act's statutory purpose, and other Part 2 matters, as well as the NPSET, when exercising functions and powers under the Resource Management Act. They are not however entitled to ignore the NPSET; rather they must consider it and give it such weight as they think necessary."

476. The NPSET is not comprehensive in setting out a regime for environmental effects of the national grid.

477. The NPSET must be given effect to in accordance with its terms.

478. The NPSET itself states that it is not meant to be a substitute for the Act's

statutory purpose, that it is subject to Part 2 of the Act, and that it is intended to be a relevant consideration to be weighed along with other considerations in achieving the sustainable management purpose of the Act.

479. In large part this is why a strengthened national direction on electricity transmission is now proposed. A strengthened national direction that still recognises and provides for section 6 matters in a similar manner to the pORPS.

480. For completeness, nor is the NPSREG a comprehensive regime to manage the environmental effects of renewable electricity generation.

HAZ – Hazards and Risks

481. The outstanding legal issues and questions are:

481.1. What if any power is there under the Act to require existing land use in hazardous areas to end (ie "managed retreat").

481.2. The national adaptation plan[118] and section 61(2)(e) of the Act.

481.3. Avoidance of significant risks.

Managed Retreat

482. The following confirms my oral submission at the hearing.

483. Section 10(4) of the Act provides that section 10 does not apply to any use of land controlled under section 30(1)(c) of the Act.

484. Section 30(1)(c) of the Act gives regional councils the function of controlling the use of land for purposes including the avoidance or mitigation of natural hazards.

485. Accordingly, regional plans may include provisions controlling (including prohibiting) land uses in areas subject to natural hazards.

486. Section 20A of the Act provides limited continued use rights pending regional plan rules becoming operative, and determination (including appeals) of any resource consent application under those rules. But it is clear that existing uses can be extinguished, with those uses becoming unlawful.

487. District plans may not do so.

488. Under section 85 of the Act if a provision renders land incapable of reasonable use, then any person with an interest in the land may challenge the rule by submission on a plan change or herself seeking a plan change.

489. If the challenge is unsuccessful, then if the Environment Court is satisfied on appeal that the provision renders the land incapable of reasonable use and places an unfair burden on the interest holder, then it may direct the

[118] Made under section 5ZS of the Climate Change Response Act 2002.

local authority (at the local authority's election) to do one of the following:

489.1. Modify, delete or replace the provision; or

489.2. If the interest holder agrees, acquire her interest under the Public Works Act 1981, but only if the interest was acquired before the provision was notified.

490. I would expect that for any significant managed retreat proposal there would be consideration of factors beyond the provisions of the Act and consultation with the affected community. And that there may be location specific plan and/or policy statement changes.

491. These powers were recently considered by the Environment Court in *Awatarariki Residents Incorporated v Bay of Plenty Regional Council and Whakatane District Council* [2020] NZEnvC 215.

National adaptation plan and section 61(2)(e) of the Act

492. In my submissions dated 26 April 2023 I set out the relevant part of the National Adaptation Plan[119].

493. The passage cited stated that it was non-statutory guidance but that from 30 November 2022 councils would be required to have regard to it.

494. The panel queried the source of that date.

495. 30 November is the date section 61(2)(e) was inserted into the Act by section 17 of the Resource Management Amendment Act 2020 (2020 No 30).

496. However, that Act also amended Schedule 12 of the Resource Management Act, adding further transitional provisions.

497. Clause 6 of Schedule 12 provides, inter alia, that if a regional policy statement was notified before section 61(2)(d) and (e) came into effect (ie 30 November 2022), then the regional policy statement must be determined as if those amendments had not been enacted.

498. Therefore, because the pORPS was publicly notified before 30 November

[119] At paragraph 18.

2023, this Panel is not required to have regard to the National Adaptation Plan under section 61(2)(e) of the Act.

499. However, the National Adaptation Plan and the Emissions Reduction Plan are arguably management plans and strategies prepared under other Acts to which regard shall be had under section 61(2)(a)(i).

500. For completeness, I record that the oft mentioned 2050 Target is found in section 5Q of the Climate Change Response Act 2002, and that the effects of climate change must be given particular regard under section 7(i) of the Act.

Avoidance of significant risks

Avoidance of risk vs avoidance of activity

501. As notified HAZ-NH-P3(1) required that: "*when the natural hazard risks are significant, the activity is avoided*".

502. The recommendation of Mr Maclennan in his reply report[120] is that the provision be amended to provide: "*significant natural hazard risks are avoided*".

503. This provision gives effect to section 6(h) of the Act.

504. Section 6(h) provides for: "*the management of significant risks from natural hazards*".

505. It is the risks that are to be managed.

506. The change is therefore appropriate in terms of the Act.

507. It is an important change, making it clearer that the policy is about risk avoidance, not activity avoidance.

508. This is illustrated by examples given at the hearing, the Milford Highway and the Clyde Damn.

509. The concern was whether those things could be constructed under this policy.

[120] Section 2.5 of Mr Maclennan's reply report

510. Under the revised wording it is more obvious that the policy does not close the door to major projects.

511. The Clyde Damn example also illustrates the desirability of such a policy, especially if resident at Clyde. Where the severity of impact is high, design and construction to avoid the risk is essential.

Meaning of significant

512. Mr Maclennan's recommended change to HAZ-NH-P2[121] makes it clearer that reference in the HAZ chapter to significant, tolerable or acceptable levels of risk means risk assessed in accordance with APP6.

513. "Significant" in the HAZ chapter does not have the same meaning as in section 6(h) of the Act. A risk assessed as significant under APP6 is a very high level of risk.

514. The amendment makes this clearer.

515. Potential for confusion remains, but this is the nomenclature used by those in the business of assessing natural hazard risk. And natural hazard risk will not be assessed by lay people.

[121] Section 2.4 of Mr Maclennan's reply report.

HCV – Historic and cultural values

516. These submissions deal with one legal point regarding the application of HCV-HH-P5(2).

517. During the hearing, the Panel noted that the direction in s 6 with respect to historic heritage is "*(f) the protection of historic heritage from inappropriate subdivision, use and development*", whereas HCV-HH-P5(2) as drafted appears "*unqualified*".

518. As the Supreme Court stated in *King Salmon*[122], *"'inappropriate' should be interpreted in s 6(a), (b) and (f) against the backdrop of what is sought to be protected or preserved*."

519. HCV-HH-P5(2) requires avoidance of adverse effects on areas or places with special or outstanding historic heritage, whereas section 6(f) refers to all historic heritage.

520. Further, HCV-HH-P5(2) provides an exception where historic heritage values are being integrated into new activities or adaptively reused.

521. There is also subclause (6) which provides that infrastructure is not subject to the policy.

522. For all other areas with historic heritage values or qualities, HCV-HH-P5(2)(a) and (b) applies, with avoidance of significant adverse effects and other adverse effects avoided as a first priority, then remedied or mitigated.

[122] *King Salmon* [2014] 1 NZLR 593 at [105]

NFL – Natural features and landscapes

523. The outstanding legal issues and questions are:

523.1. Section 7 of the Act and highly valued natural features and landscapes.

523.2. The avoidance approach and telecommunications infrastructure.

Section 7 of the Act and highly valued natural features and landscapes

524. During the hearing there was discussion regarding section 7 and highly valued natural features and landscapes.

525. In particular, whether there should be requirements to identify highly valued natural landscapes and features under NFL-P1 and to avoid significant adverse effects on their values under NFL-P3(1), and whether highly valued natural landscapes and features should be dealt with in the pORPS at all.

526. Sections 7(c) and (f) of the Act are relevant. Respectively, they are: "*the maintenance and enhancement of amenity values"* and "*maintenance and enhancement of the quality of the environment*".

527. Decision-makers, including this Panel must "*have particular regard to*" these matters in achieving the purpose of the Act. In considering section 7 policies in the pORPS, the fundamental question is whether those policies achieve the purpose of the Act.

528. Highly valued natural landscapes and features are defined in the pORPS as being: "…*areas which contain attributes and values of significance under Sections 7(c) and 7(f) of the RMA*…".

529. In the pORPS highly valued natural features and landscapes are always section 7 matters. Natural features and landscapes which do not contain significant section 7(c) and (f) attributes and values will fall outside the definition.

530. Put differently, highly valued natural features and landscapes are by definition section 7 matters, which must be dealt with in the pORPS.

531. It follows that provision for identification of highly valued natural features

and landscapes is needed.

532. NFL-P3(1) requiring the avoidance of significant adverse effects on the values of highly valued natural features and landscapes is clearly directed towards maintaining these features and landscapes.

533. NFL-P3 is not however a pure avoid policy. It is significant adverse effects on the values of the feature or landscape which are to be avoided, with other adverse effects to be avoided, remedied or mitigated.

534. This is consistent with sections 5 and 7 of the Act in that while the policy seeks to maintain highly valued natural features and landscapes (which itself is a community 'well-being'), there is no requirement to avoid activities within these areas, enabling other 'well-being' activities to occur. But this must occur in a way that does not significantly adversely affect the relevant values.

535. The reply version of the pORPS includes amendment which will more clearly enable the use and development of highly valued natural features and landscapes for community well-being.

536. EIT-INF-P13(1)(h) now lists highly valued natural features and landscapes, and NFL-P3 expressly provides that infrastructure is managed in accordance with that policy.

537. If infrastructure is regionally or nationally significant then under EIT-INF-P13 it is to avoid locating in highly valued natural features and landscapes if that is practicable, but otherwise to minimise adverse effects on the relevant values.

538. This change more clearly ensures that infrastructure important for the wellbeing of people and communities is not prevented due to an unavoidable effect on a highly valued natural feature or landscape. This is consistent with section 5 of the Act.

539. More generally, NFL-P1 and P3 as notified, and as now recommended, are well within the bounds of how a regional policy maker may give effect to sections 5 and 7(c) and (f) of the Act.

The avoidance approach and telecommunications infrastructure

540. Counsel for Spark New Zealand Trading Limited, Vodafone New Zealand

Limited and Chorus New Zealand Limited ("the Telecommunications Companies") expressed concern that the strong avoidance approach in the pORPS fetters the ability to locate infrastructure in areas identified as highly valued natural features or landscapes when there is a functional and/or operational need for that infrastructure to be located there.[123]

541. The Telecommunications Companies supported the amended version NFL-P2 in Mr Maclennan's supplementary evidence on the basis that the amendment sought to the definition of regionally significant infrastructure is also made[124].

542. The amendment sought is to list telecommunication and radio communication "networks" instead of "facilities". That change is recommended by Mr Langman and shown in the reply version of the pORPS.

543. In his reply report[125] Mr Maclennan has recommended a further amended version of NFL-P2.

544. If Mr Langman's recommended change to the regionally significant infrastructure definition is adopted, then NFL-P2 will not apply to telecommunications networks.

[123] At paragraph 2.2 of Mr Minhinnick's submissions dated 1 May 2023
[124] At paragraph 2.6 of Mr Minhinnick's submissions
[125] Section 6

UFD – Urban form and development

545. The only matter is an update on APP10.

546. The issue of a separate rural chapter is dealt with in the overarching issues section.

APP10 update

547. In my UFD submissions dated 14 February 2023 I informed the Panel that APP10 is a placeholder for insertion of the relevant housing bottom lines under the NPSUD.

548. And that the insertion of the bottom lines is not for this Panel. ORC must insert the bottom lines without using the process in Schedule 1 of the Act, under section 55 of the Act.

549. For completeness, the ORC has inserted the housing bottom lines in the Partially Operative Regional Policy Statement 2019.[126]

550. The housing bottom lines will be added to the pORPS when it is operative[127].

SJ Anderson

Counsel for the Otago Regional Council

Dated: 29 May2023

[126] https://www.orc.govt.nz/news-and-events/news-and-media-releases/2022/april/amendment-1-to-partially-operative-regional-policy-statement-2019

[127] See clause 3.6(2)(a) of the NPSUD