

**BEFORE THE FRESHWATER HEARINGS PANEL**

**UNDER** the Resource Management Act  
1991 (the **Act** or **RMA**)

**IN THE MATTER** of an original submission on the  
Proposed Regional Policy  
Statement for Otago 2021  
(**PRPS**)

**BETWEEN** **OTAGO WATER RESOURCE  
USER GROUP**

**Submitter FPI043**

**FEDERATED FARMERS NZ  
INC**

**Submitter FPI026 and  
FSFPI026**

**DAIRYNZ**

**Submitter FPI024 and  
FSFPI024**

**AND** **OTAGO REGIONAL COUNCIL  
(ORC)**

**Local Authority**

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**LEGAL SUBMISSIONS OF COUNSEL ON BEHALF OF FARMING SUBMITTERS**

**DATED 29 AUGUST 2023**

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## SUBMISSIONS OF COUNSEL ON BEHALF OF FARMING SUBMITTERS

### Introduction

1. These submissions are made on behalf of OWRUG, Federated Farmers NZ Inc and DairyNZ (**Submitters**) regarding the freshwater parts of the Proposed Regional Policy Statement for Otago 2021 (**PRPS**).
2. The Submitters have filed extensive evidence addressing the particular importance of the food and fibre sector in Otago and the challenges faced by the sector in responding to changing regulatory environment. Much of this evidence has already traversed through the non-freshwater part of this process where the Submitters sought provisions to better recognise the sector's contribution to the Region and its need to utilise resources in order to provide for the wellbeing of the community. A number of the Lay witnesses have added to their evidence specifically addressing the consultation process where they have participated in it and also the work that is being done within catchments by community catchment groups. Evidence has also been filed by Kate Scott and Claire Perkins addressing planning matters, suggested provisions and to provide context regarding the regulatory regimes already in place.
3. In these submissions the following matters will be traversed:
  - (a) How did we get here?
    - (i) What is engagement?
    - (ii) Have the ORC engaged with communities?
    - (iii) Do the freshwater visions reflect the community's input?
    - (iv) Do the PRPS visions satisfy the requirements of the NPSFM?
    - (v) What is ambitious but reasonable?
    - (vi) How do we fix it?
  - (b) Does the RPS faithfully reflect the fundamental concept of Te Mana o Te Wai?
    - (i) The place of mauri
  - (c) Is a region-wide objective lawful?
  - (d) Discussion in relation to matters in evidence:
    - (i) Rebuttal evidence of Mr Farrell
    - (ii) Supplementary evidence of Ms Boyd regarding the NPSIB.

4. In broad terms the case for the submitters is this: The ORC has not engaged with communities in the development of the PRPS as required by the NPSFM, particularly the Otago expression of Te Mana o Te Wai and the freshwater visions. The PRPS visions do not accurately reflect the values that communities did tell the Council about during consultation, resulting in visions that are substantively deficient. If the deficiencies in the visions are not corrected, they will permeate the lower order documents that are required to give effect to this PRPS. That will result in Te Mana o Te Wai and the purpose of the RMA not being achieved.
5. However, the submitters do not want to go back to square one. Instead, they seek a suite of changes and new process provisions that will provide a framework for the deficiencies to be corrected through subsequent steps in the process. These changes would facilitate and direct an ongoing engagement process with communities.

#### **How did we get here?**

6. It would be fair to say that all stakeholders in the PRPS process have been operating under sub-optimal timeframes imposed upon them by the Minister. Added to that has been the vagaries of the Covid-19 response that coincided with much of the pre-notification consultation phase. The purpose of the commentary that follows is to identify for the panel the issues that the submitters say exist with the consultation process, as opposed to the engagement process that is required by the NPSFM.
7. These issues suffuse the PRPS and give rise to the matters of concern to the submitters.

#### *What is Engagement?*

8. Development of the Otago expression of Te Mana o Te Wai and the Visions requires engagement with communities and tangata whenua.<sup>1</sup> It is submitted that the process followed by the ORC was a process of consultation. The use of the term 'engagement' requires something more than just consultation. It implies a deeper

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<sup>1</sup> NPSFM, cl 3.3(3)(a).

<sup>2</sup> R E Allan (ed). *The Concise Oxford Dictionary of Current English*. (8th ed, Clarendon Press, Oxford, 1991).

process, an involved one that allows the Community to really grasp the nettle. It is submitted that an engagement process would have involved circling back to the Communities with draft visions and their consequences so the Community could understand the implications and adjust them if necessary to better achieve the vision.

9. Engagement with communities and tangata whenua is central to the implementation of Te Mana o Te Wai. Clause 3.2 (1) compels the council to engage on how Te Mana o Te Wai applies in Otago. Clause 3.2(2)(b) compels the council to engage with communities and tangata whenua to identify long-term visions.
10. Clause 3.3(3)(a) requires every long-term vision to be developed through engagement with communities and tangata whenua. To that end Te mana o Te Wai is intended to be for the Community, by the Community.
11. Engagement and consultation are not the same thing. Consultation may form part of an engagement process, but it is only one part of it. It is submitted that legislators have been deliberate when using the term 'engage' in the NPSFM.
12. The definitions of engage and consult highlight the difference in approach. They are not synonyms.
13. Consult means 'seek information or advice', whereas engage means 'participate or become involved, to establish meaningful contact or connection'.<sup>2</sup>
14. The Department of Prime Minister and Cabinet discusses the importance of engagement for policy development, noting:
  - (a) Community engagement in policy making allows those who are affected by a decision or interested in an issue to be involved in policy design, development and decision making.
  - (b) Community engagement (according to the International Association for Public Participation) can involve:
    - (i) Informing – providing information to help people understand problems, opportunities or issues, and alternative solutions.

- (ii) Consulting – obtaining public feedback on analysis, alternatives or decisions.
  - (iii) Involving – working directly with the public to ensure concerns and aspirations are consistently understood and considered.
  - (iv) Collaborating – partnering with the public in the design or decision-making process, including to identify alternatives or preferred solutions.
  - (v) Empowering – placing decision making in the hands of the public.
- (c) Community engagement is important when hard choices have to be made, when disruption may result or when we want to govern what people and organisations can do.

15. The section 32 report in support of the NPSFM noted that:

*“giving effect to Te Mana o Te Wai involves engagement with tangata whenua and communities in a collaborative and informed process to identify the long-term vision, values and desired future states. This is made clear in clauses 1.3 and 3.2-3.4 of the NPSFM.”<sup>2</sup>*

16. It is submitted that the requirement to ‘engage’ was a deliberate decision. That is because it was obvious that the consequence of the implementing Te Mana o Te Wai and vision setting would be the need to make some hard choices with the potential for considerable disruption of some sectors or communities.

### *Community*

17. ‘Community’ is not defined in the RMA, NPSFM or National Planning Standards. It is submitted that the ordinary meaning is appropriate:<sup>3</sup>

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

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<sup>2</sup> Action for healthy waterways section 32 evaluation report at [7.2.3].

<sup>3</sup> Online Cambridge English Dictionary, ‘community’. Accessed 27 February 2023.

18. The submitters form a community as members of the same sector, but also are part of the geographical community within which they operate. It is further submitted that they are a particularly important part of the community to engage with in relation to the freshwater visions due to the extent of disruption they are likely to face as the visions are pursued. This is apparent from the evidence of Mr Cadena, Mr Paterson, Ms Hunter, Ms McGimpsey, Mr Glennie and the Farmer witnesses.
19. It is submitted that given the visions are required to be set at an FMU, part FMU or catchment level – the community that is engaged with needs to be at that same scale. This is supported by the fact that the visions must be informed by an understanding of the history and environmental pressures of the FMU, part FMU or catchment.<sup>4</sup>
20. It is important when interrogating the outcome of the Council’s consultation information to understand where participants are located and whether they are part of the FMU/rohe community. The people possessed of some of the best information in relation to the history and environmental pressures will be those who live and work in the area. Those people who have the greatest connection, and likely to be impacted the most must have a commensurate role in setting the direction and methods of travel. At the end of the day it is those same people who will need to get the job done and grapple with the hard choices.

*Have the ORC engaged with communities?*

21. The only answer is ‘no’. The Council has consulted on a subset of the requirements in the NPSFM – being the values. But that is it.
22. The evidence of Luke Kane, Logan Wallace, Emma Crutchley, Jo Hay, Claire Perkins and Kate Scott discusses the meetings that they participated in. It is apparent from that evidence that the process provided some information about the problems and sought some feedback on values. It did not seek input in relation to timeframes or options to achieve any of the values. There does not appear to have been discussions about the history of the catchments and how that may support or constrain the ability to achieve aspects of the visions.

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<sup>4</sup> NPSFM, cl 3.3(3)(b).

23. The Council did not provide information on opportunities or alternative solutions. Therefore, the Council has been unable to canvas the community's views on those. Having obtained input on the values within the catchment there has been no process of circling back to see whether the visions that Council produced following their public meetings reflected what the community wanted, meant, or aspires to.
24. This appears to contrast with the process undertaken with mana whenua through Papatipu Rūnanga consultancy services Aukaha (representing Kāi Tahu ki Otago) and Te Ao Mārama Inc (representing Ngāi Tahu ki Murihiku).<sup>5</sup> This is apparent from the evidence from those parties and the ORC. It would appear the process has been reasonably fruitful, albeit universal agreement has not been reached. That is of course not necessary.
25. The NPSFM provisions expect engagement to have occurred with communities and tangata whenua with respect to the visions. Therefore, the difference in approach is difficult to reconcile.<sup>6</sup>
26. In essence the first opportunity that the community has had to assess whether their input into the values process has been reflected in the provisions was notification of the PRPS and the formal submission process. There has certainly been no collaboration with the community in the drafting of the PRPS provisions.
27. Given this it is submitted that this hearing process holds particular importance in:
- (a) Seeking to rectify some of the significant deficiencies in the process;
  - (b) Rectifying the deficiencies in the substance of the provisions; and
  - (c) Ensuring that the provisions of the PRPS do not leave room for such deficiencies to arise again when the LWRP is developed.

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<sup>5</sup> Section 32 Evaluation Report. Consideration of alternatives, benefits and costs (Freshwater Parts). September 2022, at paragraph 34.

<sup>6</sup> It is noted that the Ministry of Environment Guidance notes the following with respect to engagement: "*Councils are required to engage with communities, too. Not all parts of the community with interests in freshwater have equal opportunities to engage; they may lack access to resources and experts. Councils should be mindful of these inequities in engagement with both tangata whenua and communities, and endeavour to provide engagement opportunities and an even playing field, as far as possible.*"

*Do the visions reflect the Community's input?*

28. The evidence filed by the submitters describes the input that was provided by the community during the consultation process that was undertaken. It is clear from the evidence that the visions that have been produced do not cover the field. The missing piece of the puzzle is typically in relation to the values ascribed to resource use and the ability for the water bodies to contribute a thriving and prosperous community.
29. These omissions appear to be a consequence of the approach the Council have chosen to take which Ms Boyd summarised orally during the non-freshwater hearing as 'protect the environment and the rest follows'.<sup>7</sup> With respect, that is not what sustainable management requires and not what the Act requires of an RPS<sup>8</sup>.
30. It is submitted that the evidence demonstrates that only some of the aspirations of the community have been incorporated into the visions. Those aspects that relate to natural environmental health and human use values like recreation. Whilst the other values, such as human use values associated with resource use, production and thriving communities have largely been omitted, or are limited to the production of food. This means that the visions not only fail to reflect the values of the community, but they also fail to fully respond to the objective of the NPSFM, give effect to Te Mana o Te Wai and achieve the purpose of the Act.

*Do the visions satisfy the requirements of the NPSFM?*

31. Unfortunately, the answer to this question is also 'no'.
32. Clause 3.3. expects more of freshwater visions than vague statements. It places a mandatory obligation to set 'goals' that are ambitious but reasonable and identify timeframes for achieving those goals that are both ambitious and reasonable. There are multiple layers to the assessment requirement.

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<sup>7</sup> pORPS Hearing Week 8, Day 2 - 2 May 2023. From 1:36:28, in response to question from Commissioner Cubitt "If you get environment right, the natural environment and the natural and physical resources that comprise that environment then the uses available to whatever people want to do with it."

<sup>8</sup> Refer Section 59



33. It is widely understood that good goals need to possess the following characteristics: They need to be SMART – that is, specific, measurable, achievable, relevant and timebound. It is submitted that the visions fall well short of this as they lack specificity to know what needs to be measured and therefore whether they can be achieved within the specified time.
34. With respect to the timeframes, it is apparent from the consultation material that times have simply be chosen to reflect short term, medium term and long-term (up to 2050). I assume this is because the Government’s essential freshwater package (of which the NPSFM is one part) speaks of degraded water being restored within a generation). However, no such direction exists in the NPSFM itself. Therefore, there is no time constraint for achieving the visions placed upon the Council by the NPSFM.<sup>9</sup> It is the NPSFM that must be given effect in this process, not the terms of wider government policy that has not been incorporated into any statutory document.
35. Regardless, what constitutes an ambitious but reasonable end point, in an ambitious and reasonable timeframe can only be determined through an evaluation of what the visions require and how it can be achieved. Currently the best information available to the panel is the evidence presented by the Submitters, particularly that of Mr Cadena, Patterson, Glennie, Dicey, Sheehan, Anderson and Ms Hunter.
36. Counsel has been unable to identify where council has undertaken the analysis required by sub-clause (4) of NPSFM Clause 3.3. Any distinction between catchment timeframes is based on the Council’s science programme dividing catchments into 4 categories from complex to simple. These categorisations do not appear to have anything to do with the change required in the catchment itself, but rather a reflection of how much work the Council need to do to understand them.<sup>10</sup> Further to that the information provided by Council as Submitter<sup>11</sup> indicates that in relation to at least some of the catchments the visions will not be met simply by virtue of the natural environmental lag associated with water quality improvement. In these circumstances the community is being set up to fail.

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<sup>9</sup> Clause 3.3(2)(c) includes an ‘example’ timeframe of 30 years, but that cannot be interpreted as a directive that all visions must sit within this timeframe.

<sup>10</sup> Section 32 evaluation report FPI version for renotification at page 32-33.

<sup>11</sup> Evidence of Tomas James Dyer dated 28 June 2023

37. As a result of this it is effectively impossible to deduce from the information available whether the visions or timeframes are ambitious but reasonable. It is entirely possible that in some cases they are too ambitious and in others not enough.

*What does ambitious but/and reasonable mean?*

38. The phrase 'ambitious but/and reasonable' is new. Clause 3.3(2)(b) elaborates by noting '*that it is difficult to achieve, but not impossible*'. You could put it another way 'hard but doable'.
39. The plain English definitions provide further illumination:<sup>12</sup>
- (a) Reasonable – 'fair and sensible, as much as is appropriate, moderate. Synonyms include – fair, realistic, practicable, feasible.
  - (b) Ambitious – intended to satisfy high aspirations, and therefore difficult to achieve. Synonyms include demanding, challenging, tough.
40. It is submitted that in being ambitious the goals required by clause 3.3 need to be stretch goals. Something that is not immediately attainable, but the requirement for them to be reasonable must also mean that they can be sustained by the community and achievable. That must be the case if the purpose of the Act is to be served by these provisions.
41. To be able to determine whether a vision is ambitious but/and reasonable it is necessary to be able to assess what change is required so that the methods for implementing that change can be identified and analysed. In my view, achieving the vision cannot be an exercise in hitting and hoping. We must be able to point to a solution (at least conceptually) and know we can implement it within the required timeframe. If that is not the case the vision is ambitious and impossible, which is inconsistent with clause 3.3.(2).
42. It is apparent from the evidence filed by Mr Cardena that timing is important. And this is possibly why clause 3.3 requires both the goal and the timeframe to be tested

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<sup>12</sup> Oxford Languages Dictionary 2023, accessed 23 August 2023

for ambitiousness and reasonableness. An ambitious goal may be unreasonable if it needs to be achieved in 10 years, but reasonable if a 20-year timeframe is given.

*How do we fix it?*

43. It is tempting to say that the only option is to go back to the beginning and start again. But, that serves no-one. Least of all the submitters who crave nothing more than for progress to be made and certainty moving forward. Given that, the submitters are seeking a suite of provisions that:
  - (a) Amend the visions to recognise the importance of 'resource use' as a matter to be pursued in order to give effect to Te Mana o Te Wai and the 3 priorities.
  - (b) will support an iterative process for the visions that allows for the evolution as further information comes to the fore. This appears to have been intended (albeit not well articulated in the text) of the NPSFM.<sup>13</sup>
  - (c) Provide clear direction with respect to the methods that need to be deployed to implement the visions.
  
44. This is achieved via the amendments and proposed directive process provisions set out in the evidence of Ms Perkins. The purpose of these provisions is to provide Council with clear direction about the evaluative exercise that needs to be undertaken as it engages with communities and tangata whenua on the more detailed Land and Water Plan Framework. This will plug the gaps that mean the current visions do not present as goals and enable the assessment of whether the visions are ambitious but reasonable to take place and timeframes to be tweaked if necessary.
  
45. If the changes that are sought by the submitters are not incorporated then we are left in a position of having visions set in the PRPS, to which a subsequent Plan must give effect that are in breach of the NPSFM obligations, and therefore unable to achieve the purpose of the Act. That is an untenable situation for everyone.

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<sup>13</sup> Guidance on the National Objectives Framework of the NPS-FM. Updated 2023. At page 39 'Best Practice'.

## Does the RPS faithfully reflect the fundamental concept of Te Mana o Te Wai?

46. The contrast between the NPSFM and PRPS descriptions of Te Mana o Te Wai is evident.
47. Te Mana o Te Wai in the NPSFM is a concept that refers to water as fundamentally important to the wider environment. It protects mauri and restores the balance between water, environment and community:

### 1.3 Fundamental concept

#### *Concept*

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

48. It is a multi-faceted concept that includes consideration of *both* use and protection.<sup>14</sup> It is submitted that reducing Te Mana o Te Wai to a strict hierarchy of obligations is an oversimplification that fails to satisfy the Council's important integrated management obligations,<sup>15</sup> and the purpose of the Act.
49. Te Mana o Te Wai in the PRPS has a different focal point. Rather than focusing on the health of the water within the wider environment, there is a focus on protecting the mauri of water bodies *and* their health and well-being and restoring it where it is degraded.

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The mauri of Otago's water bodies and their health and well-being is protected, and restored where it is *degraded*, and the management of *land* and *water* recognises and reflects that...

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<sup>14</sup> Action for healthy waterways section 32 evaluation report, at 7.2.3.

<sup>15</sup> It is noted that Clause 3.5 of the NPSFM identifies an integrated approach is required by Te Mana o Te Wai.

50. As notified, there is no mention of the wider environment at all.
51. We note that the most recent s 42A report has recommended including reference to the wider environment, in response to submissions from OWRUG and Fonterra.<sup>16</sup>
52. Although this is a welcome addition, by recommending the inclusion of that provision at subclause (4A) it diminishes the central importance that the health and wellbeing of the wider environment has in the NPSFM. In the Submitters view these concepts are interrelated, equally important and necessary in order to achieve integrated management.
53. This must be the case as the NPSFM is a resource management document and therefore subservient to the purpose of the Act. Sustainable management requires management that enables people and communities to provide for their wellbeing. In order to serve the purpose of the Act the concept of Te Mana o Te Wai cannot simply focus on one aspect of the environment. Nor can the Council.
54. The Regional Council's functions start with the integrated management of natural and physical resources. Clause 3.5 of the NPSFM recognises this noting that local authorities need adopt an integrated approach as required by Te Mana o Te Wai. Clause 3.5(1) prescribes the matters that must be addressed including:
- (a) The interconnectedness of the whole environment;
  - (b) the interactions between *inter alia* freshwater and land;
  - (c) manage freshwater and land use and development;
  - (d) co-ordinate and sequence regional or urban growth.
55. It is abundantly clear that the NPSFM does not anticipate a 'protect the water and the rest will follow approach'. It requires integrated management across all matters. Te Mana o Te Wai requires the same if we are to 'restore the balance between water, the wider environment and the community'.

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<sup>16</sup> FPI043.051 OWRUG, FPI019.003 Fonterra. Section 42A report, 2 June 2023, at paragraph 761.

56. The fundamental concept does not refer to 'restoring the health of the water' alone. It is submitted that restoration is also intended to be integrated – taking into account the range of factors that need to be managed and protected. Like it or not, there is a certain circularity, or inter-reliance to it. This is confirmed in the section 32 Report in support of the NPSFM with notes:

*The assessment of efficiency in Table 9 below draws on the base assumption that the concept of Te Mana o Te Wai focusses on ensuring (and in some instances restoring) the balance between the health and wellbeing of waterbodies and freshwater ecosystems, the health needs of people and other community needs, informed by a hierarchy of obligations. It is a multifaceted concept that includes consideration of both use and protection values and outcomes."<sup>17</sup>*

57. The philosophical approach taken by the PRPS – being to ensure the water is protected and everything else will follow does not reflect the purpose of Act, the concept of integrated management or the nature of Te Mana o Te Wai. This matter was also traversed by my colleague Mr Page in opening submissions for the non-freshwater part of the PRPS. I refer the panel back to those submissions at para [70]-[75].
58. The use of 'restored' in the PRPS also creates uncertainty as to the point in time that restoration is required to and ignores some of the irreversible changes that have occurred, such as introduction of pest species. Or, the establishment of significant infrastructure that alters the hydrological functioning of some catchments. In contrast 'restoring' in the NPSFM is about the 'balance' between water, environment, and community. It is submitted that this balance is not an absolute concept – but a policy one. A matter for the Community. Hence the obligation to engage with the community and tangata whenua in determining how Te Mana o Te Wai will be given effect and to set the visions.
59. The section 32 evaluation report does not reflect any engagement with the community with respect to LF-WAI-O1 at all. On the face of it the Council have not engaged with the community on this matter at all.<sup>18</sup>

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<sup>17</sup> Action for healthy waterways – Section 32 evaluation report at [7.2.3]

<sup>18</sup> Section 32 evaluation report FPI version for renotification at Page 31.

*The place of mauri*

60. The PRPS objective contains a subtle but significant difference from the NPS in relation to Mauri. In the NPS the protection of Mauri is an outcome, in the PRPS it is the objective. It is submitted that this creates a number of challenges in applying and understanding the implications of the PRPS framework.

(a) Mauri is not defined<sup>19</sup>.

(i) In the context of the NPSFM it appears twice. In the fundamental concept, as an outcome of Te Mana o Te Wai and in respect of the compulsory Mahika kai value in appendix 1A. Appendix 1A sets out what the consequence of intact Mauri is.

*“customary resources are available for use, customary practices are able to be exercised to the extent desired and tikanga and preferred methods are able to be practised.”*

In effect the NPSFM sets out the standards (through the national bottom lines) that result in Mauri being achieved. Ultimately, these are biophysical criteria.

(ii) In the PRPS there are many references to mauri. The different contexts result in the potential for a range of interpretations. Throughout the significant resource management issues mauri appears to be synonymous with life supporting capacity. Through the environmental management perspectives and values of Kai Tahu there is a spiritual dimension introduced, relating more to the metaphysical life force, as opposed to the biophysical life supporting capacity. This metaphysical element does not appear to have ascribed to it criteria that can be measured.

(b) There are no standards set to allow communities to assess whether mauri (as a metaphysical concept) is provided for. The structure of the NPS provision

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<sup>19</sup> It is noted that in the Partially Operative RPS Mauri is defined as follows – “life supporting capacity. This definition, while not replicating the term ‘Mauri’, achieves the essence of this concept”.

means that if the health and well-being of a waterbody is achieved then mauri follows. The change in the PRPS provision opens the door to metaphysical matters being the arbiter, because if it is not captured in the 'health and wellbeing of the water body' it must be something different. The PRPS states that mauri can only be defined by mana whenua,<sup>20</sup> therefore the current drafting has the potential of laying the obligation to determine whether Te Mana o Te Wai is achieved at the feet of mana whenua.

61. It is submitted this would be inconsistent with clause 3.2(1) of the NPSFM. It would also be inconsistent with the Court's conclusions in *Aratiatia Livestock Limited v. Southland Regional Council* Decision No [2020] NZEnvC 93 that Te Mana o Te Wai is a water centric concept that benefits all New Zealanders.<sup>21</sup>
62. The Environment Court's decision in *Aratiatia vs Southland Regional Council* also assists with respect to the place of Mauri within the concept of Te Mana o Te Wai. Whilst the comments of the Court were in relation to the 2014 NPSFM the structure of Te Mana o Te Wai remains fundamentally the same. The Court noted that "*by upholding Te Mana o Te Wai the mauri of the water is acknowledged and protected.*"<sup>22</sup>
63. There are also unique challenges created if mauri is to import a metaphysical element, absent any biophysical aspects. The RMA is concerned with the management of natural and physical resources. Therefore, biophysical effects are necessary in order for any metaphysical effects to arise. This requirement enables objective, measurable parameters to be relied upon to determine effects and for parties to be able to provide probative evidence in support of their views<sup>23</sup>. This evidence can of course include the application of matauranga. But, to put it another way - if an activity does not give rise to adverse effects on the physical environment it is difficult to see how adverse effects arise in the metaphysical sphere.

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<sup>20</sup> LF-WAI-E1

<sup>21</sup> *Aratiatia Livestock Limited v Southland Regional Council* [2020] NZEnvC 93, at [6].

<sup>22</sup> *Aratiatia Livestock Limited v. Southland Regional Council* 2019 NZEnvC 208 at [21].

<sup>23</sup> *Trustees of the Opihi Whanaungakore v. Whakatane District Council* Decision No. [2016] NZEnvC 035 at [57]-[58]



## Is a region wide objective lawful?

64. The section 42A report made some significant amendments to the freshwater visions, condensing common themes from the individual freshwater visions into one freshwater objective for the Region.
65. It is submitted that this approach is unlawful.
66. The NPSFM is clear that freshwater visions must be set at an FMU, part FMU or catchment level. Clause 3.3(2) does not provide for a region wide vision. This interpretation is consistent with the Ministry for the Environment's guidance which specifically notes that a region wide vision cannot be set.<sup>24</sup>
67. Therefore, the provision promoted in the section 42A report cannot be a Vision. Only those parts that remain applicable to the individual FMU's or rohe's can form part of the visions. Clearly, that would result in substantively deficient visions.
68. Having one region-wide provision clearly runs contrary to the intention of NPSFM Clause 3.3. A region-wide vision cannot account for the specific environmental pressures and histories that exist within the various FMU's and rohe. It is likely to lead to the identification of extremely coarse freshwater limits that equally do not take account of the complexity and nuance with different catchments. It does not allow for an appropriate assessment of what is ambitious but reasonable within a catchment.
69. A single region wide objective also risks undermining the framework that follows from the NPSFM Visions. For example, the Certified Freshwater Farm Plans. These plans require reference to catchment context, which will almost certainly include incorporation or reference to the Visions. To have meaning within a catchment context the Visions need to set at the appropriate scale.
70. It is submitted that the change must be abandoned, and comprehensive FMU/catchment visions need to be reinstated in order for the PRPS to give effect to the NPSFM.

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<sup>24</sup> Guidance on the National Objectives Framework of the NPS-FM. Ministry for the Environment. Updated April 2023. At page 38.

## Rebuttal Evidence of Mr Farrell

71. Counsel wishes to make some comment about the rebuttal evidence of Mr Farrell, particularly that part of his evidence addressing Te Mana o Te Wai and the freshwater priorities. His evidence strays into matters of statutory interpretation that are worthy of comment.

- (a) Mr Farrell's position relies on Mauri being prioritised in the objective of the NPSFM. That is not how the objective is articulated and not how the fundamental concept is expressed. The fundamental concept seeks to ensure that the health and wellbeing of the water is protected and in doing so mauri is protected. It is a consequence of achieving health and wellbeing of waterbodies.
- (b) That is consistent with the Court's findings in *Aratiatia*, that Te Mana o Te Wai is a water centric concept. This finding goes against Mr Farrell's assertion that the NPSFM has orchestrated a paradigm shift between 'western' and 'eastern' paradigms. The NPSFM is a creature of the RMA. Its purpose remains unchanged and is agnostic to cultural paradigms. It continues to require management of the environment and provision for people to achieve their well-beings.
- (c) Mr Farrell's strict interpretation of the priority regime ignores the complexity of the fundamental concept of Te Mana o Te Wai, which seeks to restore balance between water, the wider environment (including people) and the community. This implies a reciprocity between the various facets, rather than a strict hierarchy. This is articulated in the section 32 report for the NPSFM which stated:

*The Objective does this by prioritising freshwater health and well-being, rather than seeking a desired state (e.g. maintained, enhanced, protected). To some this would appear a departure from the common policy approach. To others it will be a welcome foundation to support complex discussions with communities.*

*As the single NPS-FM 2020 objective it carries a lot of responsibility (and weighting). However, the RMA is not a 'no effects' statute, it manages effects and activities. Clear health and well-being outcomes – across the biophysical; human health; and social, economic, and cultural dimensions – are sharply*

*focused on prioritising competing interests (which may constrain growth), which allows flexibility in keeping with the effects-based regime of the RMA. This does not anticipate blunt or strict prioritisation, which could be misdirected in achieving sustainable management."*<sup>25</sup>

- (d) This position has been more recently confirmed by the Government when discussing the amendments to the wetland definitions where the section 32 stated:

*"The intent of the NPS-FM objective is not that the first priority (clause 2.1(1)(a)) be read as a bottom line with the goal of achieving a pristine or 'pre-human' water quality state. Rather, it is to shift the way we think about managing freshwater and guide implementation of the NOF process prescribed in the NPS-FM.9 The NPS-FM objective is clear in what it prioritises but is flexible in its approach, which is consistent with the RMA effects-based approach to sustainable management."*

- (e) Mr Farrell's approach to Tier 2 matters demonstrates the problems created by strict interpretation. If his rationale is applied then food produced in water, such as aquaculture is afforded a higher status than land-based food production.
- (f) On Mr Farrell's interpretation it is difficult to see how the health of people can actually be provided for. In effect it would see our communities hydrated, but starving and unsanitary if necessary to protect water. This characterisation may seem flippant, but it highlights the fact that in a modern society it is impossible to draw such stark lines between the services and sectors that we need to create a healthy and well-functioning society. The fundamental concept of Te Mana o Te Wai acknowledges this in seeking to restore balance between water, the wider environment and the community. It is against that background that the objective and priority regime need to be interpreted. If not, it is submitted that the purpose of the Act is undermined.
- (g) At paragraph 48 Mr Farrell suggests that the RPS directs that mauri, and health and wellbeing of bodies are prioritised over the costs to the current and

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<sup>25</sup> Ministry for the Environment. Action for Healthy Waterways Section 32 Evaluation page 24. See also Ministry for the Environment. 2022. Amendments to the NES-F and NPS-FM: Section 32 report. Wellington: Ministry for the Environment, Page 26

next generation. I do not know where the basis for that assertion exists. It does not reflect the purpose of the Act which requires enablement of people and communities to provide for their social, economic and cultural wellbeing whilst, sustaining the potential for future generations to do the same. The purpose of the Act does not say undermine the social, economic and cultural wellbeing of current generations for the benefit of future generations. I appreciate that the purpose of the Act requires us to manage resources in a way that is all things to all people in all generations, but that is the task. It is submitted that this obligation is recognised in the NPSFM through the process required to set the Freshwater Visions. The obligation for those to have regard to history, environmental pressures and to set goals that are ambitious but reasonable is another way of saying that the visions must support the current generation whilst also enabling the future generations to do the same. To do as Mr Farrell would suggest would surely fail a section 32 analysis.

### **National Policy Statement for Indigenous Biodiversity**

72. First, I note that Counsel has no substantive quibble with the submissions of Ms Sefton regarding the legal obligations and framework this panel has to work with in responding to the newly operative NPSIB.
73. However, there are numerous issues that arise from Ms Boyd's proposed changes, the genesis of which are legal interpretation matters.
74. I note that Ms Boyd concludes that the PRPS gives effect to the NPSIB.<sup>26</sup> That is the question that needed addressing. However, the supplementary evidence has gone on to discuss a different matter arising from an alleged gap created by the NPSFM definition of 'natural inland wetlands'.
75. Ms Boyd identifies what she considers a 'gap' in the NPS's created by the NPSFM definition of 'natural inland wetland', which is also relied upon in the NPSIB. Ms Boyd appears to second guess the wisdom of the 2023 amendments to the natural inland wetland definition in the NPSFM. With respect, that is going beyond the brief. In essence, the supplementary evidence is suggesting that the provisions are not implementing the objectives of the NPSIB or NPSFM. Be that as it may, what is

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<sup>26</sup> Supplementary Evidence of Ms Boyd at [77].

required is to give effect to the NPSIB and NPSFM as they are, not how we might wish them to be.

76. At paragraph [69] Ms Boyd discusses the application of NPSIB clause 3.21(2)(d) and expresses concern about how it operates in light of the pasture exclusion in the 'natural inland wetland' definition. She expresses a concern that the objectives of the NPS's cannot be achieved if only 'natural inland wetlands' are managed by the provisions.
77. The provisions of the NPSIB (and NPSFM) need to be interpreted and applied in a manner that achieves their purpose and maintains the integrity and consistency of the documents. The definitions and provisions particularise what is required in order to achieve the objectives with an increasing level of specificity.
78. It is noted that the Government elected not to amend the policies applicable to wetlands when it amended the definition. This must be on the basis that it concluded that the amended definition continued to achieve the desired outcome and implement the objectives and policies to the extent required.
79. The section 32 report in support of the amended definitions noted that the pasture exclusion part of the definition "*is intended to exclude highly modified wetland landscapes now utilised for pasture from the regulations, so they can continue to be used for pastoral purposes*".<sup>27</sup>
80. It is submitted that the 50% pasture exclusion is a demarcation between where an area is considered to be worthy of protection. Essentially a threshold where the pendulum swings away from requiring protection and towards other uses. This approach is perhaps a demonstration of how to manage in accordance with the hierarchy of obligations. Therefore, NPSIB Clause 3.21(2)(d) is directed at those wetlands that are sitting just above the 50% threshold, as opposed to those below that threshold.
81. It is worth noting that the amendments to the definition of natural inland wetland were made by the Government as a result of extensive work to address issues that arose with the original definition. Ms Hunter traverses this in her supplementary

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<sup>27</sup> Ministry for the Environment. 2022. Amendments to the NES-F and NPS-FM: Section 32 report. Wellington: Ministry for the Environment.

evidence for Oceana Gold. It is clear that the intent of the changes is that wetlands with more than 50% pasture are not captured by either framework (except where highly mobile fauna areas are identified), and including them is not necessary to give effect to either NPS.

*Scope for addressing wetlands in the NPSIB*

82. The NPSFM applies to all freshwater (including groundwater) and is applicable to wetlands.<sup>28</sup>
83. In contrast the NPSIB applies to terrestrial environments excluding land covered by water, water bodies and freshwater ecosystems.<sup>29</sup> Generally, it does not apply to wetlands, though there are exceptions in respect of:<sup>30</sup>
- (a) Specified highly mobile fauna;
  - (b) promoting restoration and increasing indigenous vegetation cover in natural inland wetlands;
  - (c) Regional biodiversity strategies; and
  - (d) SNAs (significant natural areas) containing natural inland wetland.
84. Parts (b) and (d) only apply to **natural inland wetlands**.
85. The only situations where the policy regime may allow for application of the NPSIB to the **natural wetland** definition Ms Boyd has put forward are with respect to highly mobile fauna and regional biodiversity strategies.
86. Regional biodiversity strategies are discussed at cl 3.23 of the NPSIB. Their development requires collaboration with territorial authorities, tangata whenua, communities, and other stakeholders. The NPSIB allows for 10 years for this purpose.<sup>31</sup> This is not that forum.

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<sup>28</sup> NPSFM, cl 1.5(1). It mentions 'wetland' 65 times.

<sup>29</sup> NPSIB, cl 1.6, 'terrestrial environment'.

<sup>30</sup> NPSIB, cl 1.3(2).

<sup>31</sup> Clause 4.3.

*Specified highly mobile fauna*

87. Specified highly mobile fauna are covered by the NPSIB, whether or not they use areas outside the terrestrial environment (such as wetlands) for part of their life cycle.<sup>32</sup>
88. Highly mobile fauna areas must be outside an SNA and are identified under clause 3.20 of the NPSIB as an area used intermittently by specified highly mobile fauna.<sup>33</sup>
89. Policy 15 of the NPSIB directs that:

**Policy 15:** Areas outside SNAs that support specified highly mobile fauna are identified and managed to maintain their populations across their natural range, and information and awareness of highly mobile fauna is improved.
90. The areas that support these specified highly mobile faunae must clearly be identified before they are managed to *maintain* populations.
91. Some wetlands areas beyond those that qualify as natural inland wetlands could be identified as highly mobile fauna areas under clause 3.20. However, the NPSIB does not require or anticipate the blanket *protection* of all wetlands for this purpose. In fact, the contrary it appears to have deliberately required a robust identification process.
92. There is no scope in the NPSIB to manage adverse effects of an activity on indigenous biodiversity in the context of a wetland unless the wetland is identified as a specified highly mobile fauna area in accordance with cl 3.20.
93. Ms Boyd recommendations go beyond the intended scope of the NPSIB in seeking to protect broader class of wetlands. For example, at LF-FW-P9:

**LF-FW-P9 – Protecting *natural wetlands***

Protect *natural wetlands* by:

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<sup>32</sup> Clause 1.3(2)(b).

<sup>33</sup> Clause 1.6, '**highly mobile fauna areas**'. Specified highly mobile fauna means the Threatened or At Risk species of highly mobile fauna that are identified in Appendix 2 of the NPSIB.

(1) preventing activities that will, or are likely to, result in irreversible damage to a *natural wetland*; and

(2) for *natural inland wetlands*, implementing clause 3.22(1) to (3) of the NPSFM, except that:

(4a) in the coastal environment, *natural wetlands* must also be managed in accordance with the NZCPS, and

(2b) when managing the adverse *effects* of an activity on *indigenous biodiversity*, the *effects management hierarchy (in relation to indigenous biodiversity)* applies instead of the *effects management hierarchy (in relation to natural wetlands and rivers)*.

#### *Identification under clause 3.20*

94. Clause 3.20 of the NPSIB discusses the identification of highly mobile fauna areas. The Clause directs that:

(1) Where information about areas used by specified highly mobile fauna is available, every regional council must record areas outside SNAs that are highly mobile fauna areas, by working together with tangata whenua (in the manner required by clause 3.3), any potentially affected landowners, territorial authorities in its region, and the Department of Conservation.

(2) If it will help manage adverse effects on specified highly mobile fauna, regional councils must include in their regional policy statements (where practicable) a map and description of each highly mobile fauna area in the region.

(3) Local authorities must include objectives, policies, or methods in their policy statements and plans for managing the adverse effects of new subdivision, use, and development on highly mobile fauna areas, in order to maintain viable populations of specified highly mobile fauna across their natural range.

(4) Local authorities must provide information to their communities about:

(a) highly mobile fauna and their habitats; and

(b) best practice techniques for managing adverse effects on any specified highly mobile fauna and their habitats in their regions and districts.



95. Nothing in this regime provides for the 'protection' or 'restoration' of highly mobile fauna areas, nor does it specifically create a carve out for natural wetlands (particularly as opposed to natural inland wetlands). It is merely a regime to manage adverse effects on these areas and maintain viable populations of highly mobile fauna.
96. The approach taken by Ms Boyd constitutes overreach in direct contravention of the deliberate changes to the NPSFM definition of natural inland wetland. If the NPSIB was intended to apply to wetlands generally then it would have said so. On the contrary it explicitly states that it does not apply to water bodies and freshwater ecosystems except for in specific circumstances, and those relate only to natural inland wetlands within SNA's and areas identified for highly mobile fauna.
97. In such circumstances the NPSFM must prevail. In this respect we draw the Panel's attention to clause 2

#### **1.4 Relationship with other national directions and iwi participation legislation**

(3) If there is a conflict between the provisions of this National Policy Statement and the National Policy Statement for Freshwater Management 2020 or the Resource Management (National Environmental Standards for Freshwater) Regulations 2020, the latter prevail.

98. The Council must give effect to the provisions of the NPSFM, which only refers to **natural inland wetlands**. The NPSFM approach is summarised succinctly at Policy 6:

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

99. The natural consequence of that is that the definitions of 'natural wetland' and the policy regime for their protection that follows must be removed from the PORPS.
100. The national direction is clear and the ORC must give effect to it.