

BEFORE THE HEARING COMMISSIONERS

UNDER the Resource Management Act of 1991

IN THE MATTER of "Proposed Plan Change 5A (Lindis: Integrated Water Management)" to the Regional Plan: Water

BETWEEN **OTAGO FISH and GAME COUNCIL**

AND **OTAGO REGIONAL COUNCIL**

LEGAL SUBMISSIONS ON BEHALF OF OTAGO FISH and GAME COUNCIL

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1. INTRODUCTION

- 1.1 These submissions for Otago Fish and Game Council ("Fish and Game") are in relation to Proposed Plan Change 5A (Lindis: Integrated water management to the Regional Plan: Water for Otago) ("**PC5A**").
- 1.2 Fish and Game is largely supportive of PC5A, and considers that with the further changes advanced by Fish and Game, it will be consistent with the wider Regional Plan: Water for Otago ("**the Plan**"), will give effect to the relevant statutory plans and will successfully redress the current over allocation of the Lindis Catchment to a point where, over an appropriate transitional timeframe, the health of the river is improved. The key focus for Fish and Game is the summer minimum flow.
- 1.3 Fish and Game's position on the terms of PC5A is based on an assessment of the "full package", in other words, the regime as whole has been assessed, for its holistic impact on the river (and users). When considering provision by provision, trade-offs have been made, but as a complete package, it is considered those trade-offs are appropriate and still give effect to the relevant legal requirements. However, if the full package is not implemented, Fish and Game will have to review the merits of any alternative regime as a whole.
- 1.4 The full package that Fish and Game supports is as follows:
 - (a) The winter minimum flow of 1600 litres per second (l/s);
 - (b) The primary allocation limit of 1000 l/s;
 - (c) The first block supplementary minimum flows of 2200 l/s (winter and spring);
 - (d) The first block supplementary minimum flow of 1600 l/s (summer and autumn);
 - (e) The first second block supplementary minimum flow of 2700 l/s (winter and spring);
 - (f) The second block supplementary minimum flow of 2100 l/s (summer and autumn);
 - (g) The supplementary block size of 500 l/s;

- (h) The treatment of connected groundwater as surface water;
 - (i) Setting maximum allocation limits for specified aquifers within the Bendigo-Tarras Basin (the Ardgour Valley, Bendigo, and Lower Tarras aquifers);
 - (j) Mapping the boundaries of the catchment for the purposes of the minimum flow;
- 1.5 The primary allocation limit of 1000 l/s is slightly higher than the default limit set by policy 6.4.2 of the Regional Plan: Water but if the minimum flow is raised to 1000l/s, Fish and Game can support this higher allocation.
- 1.6 The proposed supplementary flows are also more permissive than the default regime, and Fish and Game are conditionally supportive of this to enable water harvesting to occur to encourage irrigators to lessen their reliance on primary allocation from the Lindis. Fish and Game views this is a trade-off instead of higher minimum flows and a reduction in primary allocation.
- 1.7 Fish and Game consider the following changes are needed to the regime as notified, for the full package to work:
- (a) The proposed summer flow season being defined as 1 October to 30 April (rather than 31 May as notified); and
 - (b) A summer minimum flow of 1000 l/s (or higher) being adopted instead of the proposed 750 l/s.
- 1.8 Fish and Game's expert evidence establishes the grounds for the different minimum flow regime. In particular the flow of 1000l/s for the summer period is required to sustain a healthy and productive aquatic ecosystem, fish passage, and to remain connected in a meaningful way to the Clutha. That in turn will provide for recreational amenity including camping, swimming and angling and spawning/rearing facilities for the Clutha and Lake Dunstan. Furthermore and in particular:
- (a) There is no certainty as to connection of flow in all seasons at 750 l/s

- (b) There is documented high fish mortality at low flows due to disconnection and drying *and production?*
- (c) A flow of 750l/s at the flow recorder will result in much lower flows upstream and downstream of this point.
- (d) These flows, upstream and downstream of the recorder will result in limited or no fish passage
- (e) There is a lack of suitable habitat for fish given the variance in flows in the lower river
- (f) There are available alternative sources of water

1.9 Fish and Game also seek that "Birddiv" be added to Schedule 1A of the Plan to recognise the importance of the lower Links to indigenous waterfowl and wading birds.

1.10 The key legal tests and evidential matters for you to consider in my submission, are;

- (a) The need to give effect to the requirement to maintain and enhance overall water quality and quantity for the Lindis in accordance with the National Policy Statement Freshwater Management 2014 ("NPS FM");
- (b) Whether the proposed summer minimum flow regime as set out in Schedule 2A PC5A would meet the purpose of sustainable management in Part 2 of the Resource Management Act 1991 ("**the Act**") and the Regional council's functions under section 30 of the Act;
- (c) Whether the proposed summer minimum flow regime gives effect to, or as the case may be, has appropriate regard to other higher order instruments including the Operative and Proposed Otago Regional Policy Statements ("**pRPS**") and ("**ORPS**"), the NPS Renewable Electricity Generation 2011 ("**NPS RE**");
- (d) Whether the proposed summer minimum flow regime is in accordance with the 'parent plan' (the Regional Plan: Water for Otago) ("**Regional Plan**"); and

1.11 When considering the above matters, it is submitted you are also required to assess the adequacy of assessment of the summer

minimum flow regime in accordance with section 32 of the Act, and when considering changes the PC5A as notified, consider what information is relevant to a further evaluation under section 32AA.

2. BACKGROUND

- 2.1 Fish and Game is the statutory manager of sports fish and gamebirds under section 26Q of the Conservation Act 1987.
- 2.2 Fish and Game's participation is pursuant to Fish and Game's functions, responsibilities, and powers to manage sports fish and game nationally and regionally in accordance with sections 26Q, 26R, and 26S of the Conservation Act.
- 2.3 To this end, Fish and Game seeks to ensure the maintenance and enhancement of the spectrum of recreational angling opportunity within Otago. That objective relies on adequate levels of protection across the Lindis catchment.

3. VALUES OF THE LINDIS RIVER

- 3.1 The Lindis is recognised for both its scenic, recreational and biodiversity values, and is recognised in Schedule 1A of the Water Plan as having a high degree of naturalness.
- 3.2 The ORC acknowledges the Lindis River is severely over allocated, with a total primary allocation of 3.600 m³/s, which is comprised mainly of deemed permits (mining privileges).¹ Mining privileges have existed for over 100 years, establishing an allocation regime which, it is agreed, was based upon little understanding of hydrology and instream ecological values.
- 3.3 The historical over allocation of the Lindis, primarily through mining privileges is now being addressed through the reallocation of water. The historic lack of any environmental safeguards on Central Otago rivers where water was allocated by mining privileges was initially addressed through the introduction of the Resource Management Act

¹ Management Flows for aquatic ecosystems of the Lindis River; Executive Summary

1991. That signalled, with a 30 year lead in time, a rebalancing between private irrigation water and the public river in line with the requirements of Part II of the Act. The 30-year timeframe was introduced to allow abstractors the ability to adjust to the likelihood of reduced water availability and to consider alternative sources. However it is only recently that a serious shift to consideration of alternatives has occurred in the Lindis catchment.

- 3.4 Therefore, this plan change and the subsequent phase out of deemed permits in 2021 offer a once-only chance to restore a meaningful flow to a river that has suffered from over allocation. The 2021 end date for deemed permits is well known and the need to reallocate water to meet the RMA's environmental requirements is business as usual.
- 3.5 Plan Change 5A presents an opportunity to manage the Lindis for its natural values, back to a level that provides life supporting capacity while allowing continuing access to the water resource for the local community and its future needs.
- 3.6 Fish and Game acknowledges that the long history of over allocation in the Lindis will take some time to be remedied, and the timeframe set for transitioning from deemed permits to resource consents, involving alternative sources of water, needs to be set fairly and take into account what the transition means for existing abstractors. Para 40 of Mr Gabrielsson's evidence identifies the drying reaches of the Lindis, those drying reaches are currently being exacerbated due to over allocation from abstraction.

4. **COMPLIANCE WITH NPS FM 2041**

- 4.1 For the preparation and change of a regional plan, the Environment Court's decision in *Day v Manawatu – Wanganui Regional Council* [2012] NZEnvC 182 is of assistance as to what matters must be considered;

"[1-13] Drawn from the Act, we set out a working summary of the matters to be taken into account in assessing and approving Regional Policy Statements and Regional Plans:

...

Regional Plans

1. *The purpose of a regional plan is to assist a regional council to carry out its functions in order to achieve the purpose of the Act (s63).*

2. *When preparing its Regional plan the regional council must give effect to any national policy statement or New Zealand Coastal Policy Statement (s67(3)).*

3. *The regional plan must not be inconsistent with any other regional plan for the region or a water conservation order or a determination of the Chief Executive of the Ministry of Fisheries about aquaculture permits (s67(4)).*

4. *When preparing its regional plan the regional council shall:*

(a) have regard to any proposed regional policy' statement in the region (s66(2));

(b) give effect to any operative regional policy statement (s67(3)(c));

(c) have regard to the extent to which the plan needs to be consistent with the regional policy statements and plans or proposed regional policy statements and plans of adjacent regional councils (s66(2)(d)),

5. *A regional plan must also record how it has allocated a natural resource under s30(1)(fa) or (fb) and (4), if it has done so (s67(4)).*

6. *When preparing its regional plan the regional council shall also:*

have regard to the Crown's interests in land of the Crown in the CMA (s66(2)(b))

have regard to any management plans and strategies under other Acts and to any relevant entry in the Historic Places Register and to various fisheries regulations (s66(2)(c));

take into account any relevant planning document recognised by an iwi authority (s66(2A)(a)); and

not have regard to trade competition (s66(3)).

7. *A regional council must prepare a regional plan in accordance with its functions under s30, the provisions of Part 2, any direction given by the Minister for the Environment, and its duty under s32 and any regulations (s66).*

8. *A regional plan must also state its objectives, policies to implement the objectives and the rules (if any) (s67(1)) and may (s67(2)) state other matters.*

9. *The rules (if any) are for the purpose of carrying out its functions (other than those in s30(1)(a) and (b)) and achieving the objectives and implementing the policies of the plan (s67(1)(c) and s68(1)).*

10. In making a rule the regional council shall have regard to the actual or potential effect on the environment of activities (s68(3))²

4.2 The Court then went on to say, that;

"Every decision made under the RMA must be guided by the provisions of Part 2 of that Act, which contains its purpose and principles".³

4.3 That reasoning must now however be read in light of the Supreme Court's decision in *Environmental Defence Society v New Zealand King Salmon Limited* when considering a plan change in the context of higher order instruments. The Supreme Court (referring to the Environment Court in *Clevedon Cares v Manukau City Council*) states that 'give effect to' simply means 'implement'⁴. That determination provides that 'to give effect to' is a strong directive creating a firm obligation on those subject to it.

4.4 That obligation means that subject to the three exceptions of invalidity, incompleteness or uncertainty, a decision maker on a Plan is **not** required to have recourse to part 2, or undertake a "balancing" interpretation when considering the higher order instrument(s) at issue.⁵

4.5 Since its operation in 2014, the NPS FM has begun to be rigorously tested and upheld by the Environment Court. The Environment Court's decision in *Ngati Kahungunu Iwi Authority v Hawkes Bay Regional Council* [2015] NZEnvC 50 provided important considerations for interpreting the objectives of the NPS FM; ultimately upholding its higher order objectives as being 'unequivocal' (without recourse to a Part 2 interpretation of those provisions)⁶.

² *Day v Manawatu – Wanganui Regional Council* [2012] NZEnvC 182 at para [1-13]

³ *Ibid*, at [1-14]

⁴ *Environmental Defence Society v New Zealand King Salmon Limited* [2014] NZSC 38, at para [77]

⁵ *Ibid* at [90]

⁶ *Ngati Kahungunu Iwi Authority v Hawkes Bay Regional Council* [2015] NZEnvC 50 at [59] referring to Objective A1 in particular

- 4.6 Whilst the decision on *Ngati Kahungunu* largely focused on Objectives of the NPS FM on overall water quality⁷ that reasoning is equally applicable to the provisions on overall water quantity, and in particular provisions on allocation and flows.
- 4.7 The evidence of Mr Wilson at paras 32-41 helpfully sets out the relevant provisions of the NPS FM with respect to water quality and flow.
- 4.8 For the assistance of the Commissioners, those provisions are as follows; Objective B1, Objective B2, Policy B1, Policy B2, Policy B3, Policy CA1, and Policy CA2.
- 4.9 In particular, the higher order objectives are important;

Objective B1- "safeguard the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of fresh water, in sustainably managing the taking, using, damming, or diverting of fresh water".

...

"Policy B1 – "By every regional council making or changing regional plans to the extent needed to ensure the plans establish freshwater objectives in accordance with Policies CA1-CA4 and set environmental flows and/or levels for all freshwater management units in its region (except ponds and naturally ephemeral water bodies) to give effect to the objectives in this national policy statement, having regard to at least the following:

- a) the reasonably foreseeable impacts of climate change;*
- b) the connection between water bodies; and*
- c) the connections between freshwater bodies and coastal water".*

...

Objective B2- "to avoid any further over-allocation of fresh water and phase out existing over-allocation"

⁷ Referring to Objectives A1 and A2, NPS FM 2014

- 4.10 Both of those Objectives provide an absolute standard with respect to maintenance and enhancement of in stream ecology and ecological flows, and policy B1 of the NPS explicitly requires that the environmental flow set "give effect to the objectives in this national policy statement". The increased dry periods which exist for the Lindis and occur as a result of over allocation signal that Objective B1 is not being complied with due to the adverse effects on fish species in those drying reaches⁸.
- 4.11 Amending the current notified summer flow for the Lindis in Schedule 2 from 750 l/s to 1000 l/s, as submitted by Fish and Game will mean that PC5A will be safeguarding the life supporting capacity of the river and phasing out over allocation and therefore in accordance with the Objectives of the NPS FM.
- 4.12 Any interpretation other than a directive one for Objective ^BA2 in particular would be inconsistent with the absolute nature of a regional council's functions under section 30 of the RMA.

5. REGARD TO THE PROPOSED NES ECOLOGICAL FLOWS

- 5.1 In addition to the overarching general provisions of the NPS FM as set out above, the proposed NES Ecological Flows 2008 is of assistance to the Commissioners in making decisions on the qualitative values for flow setting water quantity. This proposed standard is intended to develop a nationally consistent approach to establishing environmental flows and water levels. While it has no formal status, it is a detailed, technical document that has the support and endorsement of many experts in this field, and is an authoritative resource.

⁸ Referring to documented high fish mortality in the evidence of Mr Gabrielsson, at para 14; *"Comparisons with other studies show that the mortality rates experienced by juvenile trout in the Lindis, as a result of water abstraction and loss of fish passage, are at least two times higher than what would be expected under natural conditions"*.

- 5.2 The guidance in the proposed NES has been well traversed in the evidence of Mr Wilson at paras 42-50. Mr Wilson in particular concludes at para 52, that the requisite baseline scientific and modelling information to inform flow-setting under the proposed NES has not been undertaken in the formulation of PC5A provisions.
- 5.3 I submit that although there is no legal weigh for a proposed NES under section 66 of the Act, the practical weighting which should be afforded to the proposed NES is that 'regard should be had to it'. The Board of Inquiry⁹ adopted the same approach in its determination of the proposal Tukituki Catchment Proposal where it stated (with respect to the NES);

"the Board decided that this document should receive some weight because it is directly relevant to one of the issues to be decided by the Board and can be taken as representing at least a preliminary view at a national level".¹⁰

- 5.4 Having considered that the Board of Inquiry found the proposed NES 'helpful' and that it believed the decisions it reached were 'consistent' with it¹¹; the Commissioners should also be minded so as to compare the PC5A provisions with the provisions of the proposed NES.
- 5.5 On that basis, Table 3 of the proposed NES which lists the technical methods that should be used to assess ecological flow requirements should be taken into account in setting the provisions of PC5A, and in particular Schedule 2.
- 5.6 The adequacy of that underlying assessment is also likely to be relevant regarding the adequacy of the ORC's Section 32 analysis, including section 32(1)(c) which requires that the analysis;

⁹ Although the decision of the Board was appealed to the High Court, the board's consideration of the NES in its decision was not at issue before the appellate court.

¹⁰ Decision of the Board of Inquiry in the Tukituki Catchment Proposal, at para [111]

¹¹ Ibid, at [715]

"(c) contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal".¹²

6. CONSISTENCY WITH THE PARENT DOCUMENT

- 6.1 A key thrust of the Regional Water Plan is its emphasis on the progressive implementation of the minimum flow regimes for streams and rivers throughout the region. The goal of these minimum flows is to restore and maintain the stream's aquatic ecosystem and natural character during periods of low flow. Furthermore, setting appropriate allocation limits and promoting water use efficiency are integral for ensuring reliable access to the water resource.
- 6.2 Policy B1 of the NPS FM requires that a regional plan change must establish for all freshwater management units to give effect to the objectives of the NPS itself (that requirement is in addition to the Regional Plan). The requirements of the NPS objectives have already been traversed in the preceding sections of these submissions; therefore the remaining requirement is to look at what NPS freshwater objectives also exist in the Regional Plan.
- 6.3 The Water Plan's core objective relevant to achieving objectives B1 and B²1 of the NPS FM is as follows;

"to retain flows in rivers sufficient to maintain their life-supporting capacity for aquatic ecosystems and their natural character"¹³.

- 6.4 As a means to achieve this objective, the Water Plan provides for the setting of management flows in Otago rivers.¹⁴ The Plan also states that the principle reason for adopting that objective is *"in recognition of the importance of river flows in sustaining aquatic life and the natural character of Otago's rivers, and to ensure that this role continues"*.

¹² Section 32(1)(c) Resource Management Act 1991

¹³ Policy 6.3.1 of the Regional Plan: Water for Otago (2004)

¹⁴ Policies 6.4.1 – 6.4.11 of the Regional Plan: Water for Otago (2004)

6.5 Although Policies 6.4.1- 6.4.11 are not specific to the Lindis, PC 5A must give effect to these policies. As covered comprehensively in the evidence of Mr Gabrielsson's, the impacts of over allocation from abstraction and resulting extreme low flow conditions have a corresponding adverse effect on fish survival¹⁵. That occurrence means that a summer low flow of 750 litres per second will not achieve Objective 6.3.1 of the Parent Plan, and objectives B1 and B2 of the NPS FM.

6.6 That consideration is also important in terms of the adequacy of the Regional Council's section 32 analysis in promulgating PC 5A, in particular examining whether;

*"the provisions in the proposal are the most appropriate way to achieve the objectives"*¹⁶.

7. IMPROVEMENT OF DEGRADED WATER BODIES

7.1 As it is generally accepted by the parties that the Lindis is a degraded water body to the point of being over-allocated (as defined in the NPS FM) there is a requirement for the ORC to implement plans which will restore the degraded waterbody.

7.2 There is a recent line of case law relevant to the NPSFM, on the issue of degradation and water quality, that is applicable to and helpful for the similar assessment of when a water body is degraded through over-allocation by abstraction in terms of quantity, as the principles applying to both types of degradation and over allocation are similar.

7.3 In the case of One Plan, Judge Thompson's division of the Environment Court noted:

¹⁵ Mr Gabrielsson makes conclusions on this at paras 12-14 of his evidence, concluding that water abstraction causes extreme low flows and loss of fish passage, which has been shown to result in the death of approximately 70% of the juvenile trout population

¹⁶ Referring section 32(2)(a)

[5-8] "We should immediately say also that we have little sympathy for the line of argument that we should defer taking decisive action in the field of improving water quality (or, at the very least halting its further decline) because ... the science is not sufficiently understood ... or that ... further analysis could give a more comprehensive process ... or similarly phrased excuses for maintaining more or less the status quo. We will never know all there is to know. But what we undoubtedly do know is that in many parts of the region the quality of the natural water is degraded to the point of being not potable for humans or stock, unsafe for contact recreation, and its aquatic ecosystems range between sub-optimal and imperilled. We also know what is causing that decline, and we know how to stop it, and reverse it. To fail to take available and appropriate steps within the terms of the legislation just cited would be inexcusable."¹⁷

- 7.4 The Environment Court in *Ngati Kahungunu* further discussed and confirmed that position at the following paragraphs¹⁸:

[29] "... It is a function of every regional council to control the use of land to maintain and enhance the quality of water in water bodies... and to control the discharges of contaminants into water... This function is not optional – it is something a regional council is required to do.

[69] "This [time lag for effects] lack of precise knowledge is not a reason to restrain from taking any step to try to maintain, and indeed improve the quality of the water in any *acquirer*... While maintaining water quality may be something of a moving target, the requirement is to strive for management practices that will prevent degradation, and to strive to ensure that quality is, at a minimum, maintained. That is a plain requirement of s30..."

[70] "If historical causes of water quality lead to decline later, and are causes which cannot be foreseen or controlled then that will

¹⁷ *Day v Manawatu-Wanganui Regional Council*, above, n2, at page 5-5 to 5-6

¹⁸ *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council*, above n 6

have to be dealt with at the time the quality decline is identified and its extent becomes known...."

[71] "The frequent use in the hierarchy of planning documents of terms such as enhancement, see eg s7 RMA, or improve, see eg Objective A2 of the NPSFM, inherently recognise that there will be situations where, from whatever cause, water or other aspects of the environment ... may be degraded to some degree from their pristine states".

[73] "What we can predict, and can, and should be planning for, by way of objectives and policies is the effect of current anthropogenic activities affecting waterbodies".

[74] "...Having a sub- optimal present is not an excuse for failing to strive for an optimal (or at least closer to optimal) future.

[77] "...not being able to remedy the poor practices of the past... is not a good reason to allow the same errors to be made in the future...technology and best practice needs to be developed to maintain and, where degraded, enhance the environment to ensure that the sustainability principles of the RMA are fulfilled".

[78] "...the possibility of an objective of maintenance or enhancement being partly unfulfilled is not an excuse for not trying at all".

7.5 In the *Sustainable Matata v Bay of Plenty Regional Council* Judge Smith further confirmed this position:¹⁹

[373] "We conclude that the [river] is over-allocated because the regional documents provide a clear direction towards reduction of contaminants and enhancement. Further, the [river], through its interaction with the Tarawera River, is contributing to the reduction of health and mauri of that river. These compulsory values would seem to put the [river] clearly in the frame of the directives of the Freshwater Policy Statement for maintenance and enhancement..."

¹⁹ *Sustainable Matata v Bay of Plenty Regional Council* [2015] NZEnvC 90

[375] "...Further, there are the Regional Council's functions as set out in s30 RMA, the most relevant parts for current purposes, we set out here...This section indicates towards maintenance or improvement of all water bodies".

[377] "...This raises the issue of cumulative effects and long term effects. Once we consider the primary objective to safeguard the life supporting capacity we conclude that maintenance at least must be assumed. Adding to an existing background level albeit degraded, will not achieve maintenance".

[378] "By increasing the level of contamination of the [river], there is the potential for the overall input from this source to the Tarawera River to increase and therefore to have a negative impact on the river".

[381] "If the suggestion is that the Freshwater Policy Statement provides some permit to drive to the bottom line, or a licence to pollute, then that concept is entirely rejected by the Court".

- 7.6 Maintaining and enhancing amenity values and the quality of the environment generally feeds directly into the section 5 requirement of the Act; that people's cultural, social and economic wellbeing be enabled. The recreation, leisure and even businesses of people recreating are all reliant on the maintenance and enhancement of healthy water bodies.
- 7.7 The fact that enhancement of an environment degraded by historical actions is consistent with the purpose of the Act was made by the Court in *J F Investments Limited v Queenstown Lakes District Council*²⁰.

[28] "...The RMA does not regard the present Environment – being the sum of all environments – as the best of all possible New Zealands. Section 7 (f)'s reference to enhancement of the quality of the environment requires that improvements may be made in appropriate circumstances. That is consistent with purpose of the Act which requires remedying of the adverse effect

²⁰ *J F Investments Limited v Queenstown Lakes District Council* C 48/2006 at [28]

of activities, including past effects (of past activities). For example air and water quality were in the past regarded as public goods, people could pollute water nearly (subject to the common law of nuisance) as much as they wished. It is clearly contemplated by section 7 (f) together with sections 5 (2)(a) to (c) of the RMA that improvements to air and water quality may be very desirable ends of resource management. The same applies to degraded land and related natural resources".

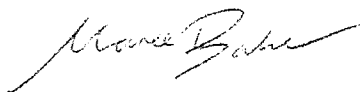
- 7.8 Fish and Game therefore seeks that PC5A should be amended, in particular schedule 2, so that its provisions ensure **enhancement** and remedies the over allocated status of the river, in accordance with those principles in section 7. That outcome is not only justified, but required.

8. EVIDENCE

- 8.1 *Niall Watson* is the Chief Executive for Otago Fish and Game, and will provide a brief history of the river and Fish and Game's statutory duties in respect of it.
- 8.2 *Jens Rekker* sets the scene in terms of the hydrology of the river and concludes that based upon the recognised and accepted values of the Lindis for its fish passage, fishery, recreation, cultural and ecological aspects, the proposed management flow regime in PC5A should be increased.
- 8.3 *Morgan Trotter* considers the effects of low flow and what are considered to be 'drought-like' conditions on the Lindis on juvenile trout mortality. In particular, studies show that while a minimum flow of 1000 l/s is far from ideal from an ecological point of view it would lead to improvement in the Lindis for fish habitat and survival. That is compared to a 750 l/s low flow regime which would still result in algal blooms and high levels of fish mortality/ predation.
- 8.4 *Rasmus Gabrielsson* considers the impacts of water abstraction and extreme low flow conditions on fish survival, the hydrological impacts from losses of surface flows to groundwater, the adequacy of the proposed minimum flow in PC5A and the consequences of water quality in the Lindis for instream life. Mr Gabrielsson concludes that

the proposed minimum flow regime in PC5A does not adequately provide for the flow requirements of fish and their invertebrate food resources, and that an optimum minimum flow of 1.25m³/s (measured at the Ardgour Road flow recorder) would ensure all of the lower Lindis River achieves the minimum level of habitat retention recommended by physical habitat modelling.

- 8.5 *Paul Van Klink* provides evidence of braided river bird surveys conducted on the Lower Lindis, and in particular, the effects of a low river flow on braided river bird presence. Mr Van Klink determines that the lower reaches of the Lindis are classed as a braided river, and that the presence of all of the bird species recorded declined with the reduction of water flow in the Lindis River. If water flow were continuous in the lower Lindis, Mr Van Klink concludes that the Lindis would support more braided river birdlife- including many endemic species.
- 8.6 *Peter Wilson* evaluates the expert evidence and assesses it in accordance with planning framework. On that basis he confirms that the proposed summer minimum flow of 750 l/s fails to meet the sustainable management purpose of the RMA, the NPS FM, the operative and proposed RPS, and the objectives and policies of the Water Plan, due to the adverse effects that occur on in stream ecology and fish habitats in drying reaches of the Lindis. Mr Wilson confirms that the proposed flows are too low to maintain continuity of fish passage or life supporting capacity throughout the Lindis River. The increased flow regime proposed by Fish and Game will assist to reverse historical over allocation and to restore the life supporting capacity of the lower fishery and ecosystem.



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Counsel for Fish and Game

Appendix 1.

Statutory provisions

5 Purpose

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—

(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

S 6 Matters of national importance

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

(a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:

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

(c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

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

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

(f) the protection of historic heritage from inappropriate subdivision, use, and development:

(g) the protection of protected customary rights.

S 7 Other matters

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 have particular regard to—

(a) kaitiakitanga:

(aa) the ethic of stewardship:

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

(ba) the efficiency of the end use of energy:

(c) the maintenance and enhancement of amenity values:

(d) intrinsic values of ecosystems:

(e) [Repealed]

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

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

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

(i) the effects of climate change:

(j) the benefits to be derived from the use and development of renewable energy.

S 8 Treaty of Waitangi

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).

S 30 Functions of regional councils under this Act

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

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

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

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

(i) soil conservation:

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

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

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

(iv) the avoidance or mitigation of natural hazards:

(v) the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:

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

(d) in respect of any coastal marine area in the region, the control (in conjunction with the Minister of Conservation) of—

(i) land and associated natural and physical resources:

(ii) the occupation of space in, and the extraction of sand, shingle, shell, or other natural material from, the coastal marine area, to the extent that it is within the common marine and coastal area:

(iii) the taking, use, damming, and diversion of water:

(iv) discharges of contaminants into or onto land, air, or water and discharges of water into water:

(iva) the dumping and incineration of waste or other matter and the dumping of ships, aircraft, and offshore installations:

(v) any actual or potential effects of the use, development, or protection of land, including the avoidance or mitigation of natural hazards and the prevention or

mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:

(vi) the emission of noise and the mitigation of the effects of noise:

(vii) activities in relation to the surface of water:

(e) the control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—

(i) the setting of any maximum or minimum levels or flows of water:

(ii) the control of the range, or rate of change, of levels or flows of water:

(iii) the control of the taking or use of geothermal energy:

(f) the control of discharges of contaminants into or onto land, air, or water and discharges of water into water:

(fa) if appropriate, the establishment of rules in a regional plan to allocate any of the following:

(i) the taking or use of water (other than open coastal water):

(ii) the taking or use of heat or energy from water (other than open coastal water):

(iii) the taking or use of heat or energy from the material surrounding geothermal water:

(iv) the capacity of air or water to assimilate a discharge of a contaminant:

(fb) if appropriate, and in conjunction with the Minister of Conservation,—

(i) the establishment of rules in a regional coastal plan to allocate the taking or use of heat or energy from open coastal water:

(ii) the establishment of a rule in a regional coastal plan to allocate space in a coastal marine area under Part 7A:

(g) in relation to any bed of a water body, the control of the introduction or planting of any plant in, on, or under that land, for the purpose of—

(i) soil conservation:

(ii) the maintenance and enhancement of the quality of water in that water body:

(iii) the maintenance of the quantity of water in that water body:

(iv) the avoidance or mitigation of natural hazards:

(ga) the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity:

(gb) the strategic integration of infrastructure with land use through objectives, policies, and methods:

(h) any other functions specified in this Act.

(2) A regional council and the Minister of Conservation must not perform the functions specified in subsection (1)(d)(i), (ii), and (vii) to control the taking, allocation or enhancement of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act 1996.

(3) However, a regional council and the Minister of Conservation may perform the functions specified in subsection (1)(d) to control aquaculture activities for the purpose of avoiding, remedying, or mitigating the effects of aquaculture activities on fishing and fisheries resources.

(4) A rule to allocate a natural resource established by a regional council in a plan under subsection (1)(fa) or (fb) may allocate the resource in any way, subject to the following:

(a) the rule may not, during the term of an existing resource consent, allocate the amount of a resource that has already been allocated to the consent; and

(b) nothing in paragraph (a) affects section 68(7); and

(c) the rule may allocate the resource in anticipation of the expiry of existing consents; and

(d) in allocating the resource in anticipation of the expiry of existing consents, the rule may—

(i) allocate all of the resource used for an activity to the same type of activity; or

(ii) allocate some of the resource used for an activity to the same type of activity and the rest of the resource to any other type of activity or no type of activity; and

(e) the rule may allocate the resource among competing types of activities; and

(f) the rule may allocate water, or heat or energy from water, as long as the allocation does not affect the activities authorised by section 14(3)(b) to (e)

32 Requirements for preparing and publishing evaluation reports

(1) An evaluation report required under this Act must—

(a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and

(b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—

(i) identifying other reasonably practicable options for achieving the objectives; and

(ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and

(iii) summarising the reasons for deciding on the provisions; and

(c) contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.

(2) An assessment under subsection (1)(b)(ii) must—

(a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—

(i) economic growth that are anticipated to be provided or reduced; and

(ii) employment that are anticipated to be provided or reduced; and

(b) if practicable, quantify the benefits and costs referred to in paragraph (a); and

(c) assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

(3) If the proposal (an **amending proposal**) will amend a standard, statement, regulation, plan, or change that is already proposed or that already exists (an **existing proposal**), the examination under subsection (1)(b) must relate to—

(a) the provisions and objectives of the amending proposal; and

(b) the objectives of the existing proposal to the extent that those objectives—

(i) are relevant to the objectives of the amending proposal; and

(ii) would remain if the amending proposal were to take effect.

(4) If the proposal will impose a greater prohibition or restriction on an activity to which a national environmental standard applies than the existing prohibitions or restrictions in that standard, the evaluation report must examine whether the prohibition or restriction is justified in the circumstances of each region or district in which the prohibition or restriction would have effect.

(5) The person who must have particular regard to the evaluation report must make the report available for public inspection—

(a) as soon as practicable after the proposal is made (in the case of a standard or regulation); or

(b) at the same time as the proposal is publicly notified.

(6) In this section,—

objectives means,—

(a) for a proposal that contains or states objectives, those objectives:

(b) for all other proposals, the purpose of the proposal

proposal means a proposed standard, statement, regulation, plan, or change for which an evaluation report must be prepared under this Act

provisions means,—

(a) for a proposed plan or change, the policies, rules, or other methods that implement, or give effect to, the objectives of the proposed plan or change:

(b) for all other proposals, the policies or provisions of the proposal that implement, or give effect to, the objectives of the proposal.

63 Purpose of regional plans

(1) The purpose of the preparation, implementation, and administration of regional plans is to assist a regional council to carry out any of its functions in order to achieve the purpose of this Act.

(2) Without limiting subsection (1), the purpose of the preparation, implementation, and administration of regional coastal plans is to assist a regional council, in conjunction with the Minister of Conservation, to achieve the purpose of this Act in relation to the coastal marine area of that region.

65 Preparation and change of other regional plans

(1) A regional council may prepare a regional plan for the whole or part of its region for any function specified in section 30(1)(c), (ca), (e), (f), (fa), (fb), (g), or (ga).

(1A) A regional council given a direction under section 25A(1) must—

- (a) prepare a regional plan that implements the direction; or
- (b) prepare a change to its regional plan in a way that implements the direction; or
- (c) prepare a variation to its regional plan in a way that implements the direction.

(2) A plan must be prepared in accordance with Schedule 1.

(3) Without limiting the power of a regional council to prepare a regional plan at any time, a regional council shall consider the desirability of preparing a regional plan whenever any of the following circumstances or considerations arise or are likely to arise:

- (a) any significant conflict between the use, development, or protection of natural and physical resources or the avoidance or mitigation of such conflict:
- (b) any significant need or demand for the protection of natural and physical resources or of any site, feature, place, or area of regional significance:
- (c) any threat from natural hazards or any actual or potential adverse effects of the storage, use, disposal, or transportation of hazardous substances which may be avoided or mitigated:
- (d) any foreseeable demand for or on natural and physical resources:
- (e) any significant concerns of tangata whenua for their cultural heritage in relation to natural and physical resources:
- (f) the restoration or enhancement of any natural and physical resources in a deteriorated state or the avoidance or mitigation of any such deterioration:
- (g) the implementation of a national policy statement or New Zealand coastal policy statement:
- (h) any use of land or water that has actual or potential adverse effects on soil conservation or air quality or water quality:
- (i) any other significant issue relating to any function of the regional council under this Act.

(4) Any person may request a regional council to prepare or change a regional plan in the manner set out in Schedule 1.

(5) A regional plan may be changed by the regional council in the manner set out in Schedule 1.

(6) A regional council must amend a proposed regional plan or regional plan to give effect to a regional policy statement, if—

(a) the statement contains a provision to which the plan does not give effect; and

(b) one of the following occurs:

(i) the statement is reviewed under section 79 and not changed or replaced; or

(ii) the statement is reviewed under section 79 and is changed or replaced and the change or replacement becomes operative; or

(iii) the statement is changed or varied and becomes operative.

(7) A local authority must comply with subsection (6)—

(a) within the time specified in the statement, if a time is specified; or

(b) as soon as reasonably practicable, in any other case.

S 66 Matters to be considered by regional council (plans)

(1) A regional council must prepare and change any regional plan in accordance with—

(a) its functions under section 30; and

(b) the provisions of Part 2; and

(c) a direction given under section 25A(1); and

(d) its obligation (if any) to prepare an evaluation report in accordance with section 32; and

(e) its obligation to have particular regard to an evaluation report prepared in accordance with section 32; and

(f) any regulations.

(2) In addition to the requirements of section 67(3) and (4), when preparing or changing any regional plan, the regional council shall have regard to—

(a) any proposed regional policy statement in respect of the region; and

(b) the Crown's interests in the coastal marine area; and

(c) any—

(i) management plans and strategies prepared under other Acts; and

(ii) [Repealed]

(iia) relevant entry on the New Zealand Heritage List/Rārangi Kōrero required by the Heritage New Zealand Pouhere Taonga Act 2014; and

(iii) regulations relating to ensuring sustainability, or the conservation, management, or sustainability of fisheries resources (including regulations or bylaws relating to taiapure, mahinga mataitai, or other non-commercial Maori customary fishing); and

(iv) [Repealed]

to the extent that their content has a bearing on resource management issues of the region; and

(d) the extent to which the regional plan needs to be consistent with the regional policy statements and plans, or proposed regional policy statements and proposed plans, of adjacent regional councils; and

(e) to the extent to which the regional plan needs to be consistent with regulations made under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012; and

(2A) When a regional council is preparing or changing a regional plan, it must deal with the following documents, if they are lodged with the council, in the manner specified, to the extent that their content has a bearing on the resource management issues of the region:

(a) the council must take into account any relevant planning document recognised by an iwi authority; and

(b) in relation to a planning document prepared by a customary marine title group under section 85 of the Marine and Coastal Area (Takutai Moana) Act 2011, the council must, in accordance with section 93 of that Act,—

(i) recognise and provide for the matters in that document, to the extent that they relate to the relevant customary marine title area; and

(ii) take into account the matters in that document, to the extent that they relate to a part of the common marine and coastal area outside the customary marine title area of the relevant group.

(3) In preparing or changing any regional plan, a regional council must not have regard to trade competition or the effects of trade competition.

67 Contents of regional plans

(1) A regional plan must state—

(a) the objectives for the region; and

(b) the policies to implement the objectives; and

(c) the rules (if any) to implement the policies.

(2) A regional plan may state—

(a) the issues that the plan seeks to address; and

(b) the methods, other than rules, for implementing the policies for the region; and

(c) the principal reasons for adopting the policies and methods; and

(d) the environmental results expected from the policies and methods; and

(e) the procedures for monitoring the efficiency and effectiveness of the policies and methods; and

(f) the processes for dealing with issues—

(i) that cross local authority boundaries; or

(ii) that arise between territorial authorities; or

(iii) that arise between regions; and

(g) the information to be included with an application for a resource consent; and

(h) any other information required for the purpose of the regional council's functions, powers, and duties under this Act.

(3) A regional plan must give effect to—

- (a) any national policy statement; and
- (b) any New Zealand coastal policy statement; and
- (c) any regional policy statement.

(4) A regional plan must not be inconsistent with—

- (a) a water conservation order; or
- (b) any other regional plan for the region; or
- (c) [Repealed]

(5) A regional plan must record how a regional council has allocated a natural resource under section 30(1)(fa) or (fb) and (4), if the council has done so.

(6) A regional plan may incorporate material by reference under Part 3 of Schedule 1.

Appendix 2

1. The NPS Renewable Energy Generation:

- 1.1 This NPS provides for two matters of national significance, being first the development, operation, maintenance and upgrading of new and existing renewable energy infrastructure; and second the benefits of such renewable generation.
- 1.2 The NPS RE has a single objective, which is to be achieved through eight policy sections. The objective seeks (inter alia) to recognise the national significance of renewable electricity generation activities by providing for the development and operation, of new renewable electricity generation activities, as a contribution toward the Government's national target for renewable electricity generation.
- 1.3 The Environment Court case *Whitewater New Zealand Inc v Pioneer Generation Ltd*²¹ is of assistance in this regard as it considered the NPS RE in the context of an amendment to the Kawarau Water Conservation Order, where Judge Jackson noted the following (emphasis added);

*"While only "regard" is to be given to a national policy statement in accordance with sections 199 and 212, as opposed to "particular regard" to the purpose of a water conservation order, I must give due weight to the **strongly worded requirement in Policy A** which is that "decision-makers shall recognise and provide for the national significance of renewable electricity generation activities, including the national, regional and local benefits relevant to renewable electricity generation activities". The Minister must recognise the national significance of the benefits of renewable generation activities. That policy suggests decision-makers should simply assume these benefits and do not require proof of them"*²².

- 1.4 That interpretation of policy A of the NPS RE as being 'strongly worded' is equally applicable in the current context of a Plan Change,

²¹ *Whitewater New Zealand Inc v Pioneer Generation Ltd* [2013] NZEnvC 131

²² *Ibid*, at para [177]

and arguably means that policy can be afforded even more weight for the following reasons;

- (a) The current context requires that the NPS RE be given effect to; that is a much higher legal weighting than Judge Jackson's regard to be had in *Whitewater inc*; and
- (b) In light of King Salmon, the 'strongly worded requirement in policy A' would likely take on an even stronger meaning in consideration of the Supreme Court's rulings on the interpretations to be afforded to unqualified or absolute provisions in national planning instruments.

- 1.5 Policy A of the NPS RE is set out below for the Commissioners' assistance;

"POLICY A

Decision-makers shall recognise and provide for the national significance of renewable electricity generation activities, including the national, regional and local benefits relevant to renewable electricity generation activities. These benefits include, but are not limited to:

- a) maintaining or increasing electricity generation capacity while avoiding, reducing or displacing greenhouse gas emissions;*
- b) maintaining or increasing security of electricity supply at local, regional and national levels by diversifying the type and/or location of electricity generation;*
- c) using renewable natural resources rather than finite resources;*
- d) the reversibility of the adverse effects on the environment of some renewable electricity generation technologies;*
- e) avoiding reliance on imported fuels for the purposes of generating electricity".*

- 1.6 And more specifically, for the current context, Policy E2 of the NPS RE provides;

"POLICY E2

Regional policy statements and regional and district plans shall include objectives, policies, and methods (including rules within plans) to

provide for the development, operation, maintenance, and upgrading of new and existing hydro-electricity generation activities to the extent applicable to the region or district".

- 1.7 In order to give effect (or implement) the above objectives and policies of the NPS RE, the Commissioners should consider the effects of the proposed summer minimum flow rates on renewable energy activity, and in particular on hydro-electricity generation.