

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE

NO. CIV-2024-412-41

UNDER	the Resource Management Act 1991
IN THE MATTER OF	an appeal under section 299 and clause 56 of Schedule 1 of the Act
AND	OCEANA GOLD (NEW ZEALAND) LIMITED Appellant
AND	OTAGO REGIONAL COUNCIL Respondent

LEGAL SUBMISSIONS FOR THE ROYAL FOREST AND BIRD

PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED

14 February 2025

Royal Forest and Bird Protection Society of New Zealand

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MAY IT PLEASE THE COURT

Introduction and summary of submissions

1. Forest & Bird supports the Otago Regional Council (ORC) in defending its decision from the appeal by Oceana Gold Ltd (OGL).
2. The key issue is whether it was an error of law for ORC to use the word “restored” in LF-WAI-O1 - Te Mana o te Wai. OGL argues that ORC erred in:
 - (a) failing to give effect to Policy 5 of the National Policy Statement for Freshwater Management 2020 (NPSFM), which provides for the improvement, not restoration, where freshwater is degraded; and
 - (b) reaching a conclusion on LF-WAI-O1, which was inconsistent with the evidence.
3. In relation to the failure to give effect to Policy 5 of the NPSFM, Forest & Bird considers that there is no error of law. The focus of LF-WAI-O1 - Te Mana o te Wai is not just about degraded water bodies and freshwater ecosystems. LF-WAI-O1 is titled “Te mana o te wai”. The short point is that an objective about “Te Mana o te Wai” is about far more than degraded water bodies and freshwater ecosystems. When viewed through the lens of Te Mana o te Wai, there is no error in the objective providing for restoration instead of improvement. Policy 5 is given effect to by LF-LS-21, which now provides that degraded water bodies and freshwater ecosystems are improved.
4. In relation to the allegation that the Freshwater Hearing Panel’s decision (the decision) was inconsistent with the evidence. Challenges of this nature face a very high hurdle. OGL has selectively referred to various pieces of evidence, mainly planning and cultural evidence. However, OGL has not pointed to an inconsistency between the evidence and the decision about the use of the word “restored”, as opposed to “improved.” Indeed, the evidence, particularly from Edward Ellison, supports the decision. OGL has failed to meet the very high hurdle for establishing an error of law and appears to be seeking to relitigate factual findings.
5. Forest & Bird also says that if there was an error, it was not material.

6. Forest & Bird takes no issue with the way in which the OGL submissions, have set out the background of the appeal and the law regarding appeals limited to questions of law.¹ These are generally accepted and not repeated.

KEY PROVISIONS

RPS provisions

7. The starting point is the challenged provision. Objective “LF-WAI-O1 Te Mana o te Wai”, as amended by the Freshwater Hearings Panel, provides:

Objective LF-WAI-O1 – Te Mana o te Wai

~~The mauri of~~ Otago’s water bodies and their health and well-being ~~is~~ are protected, and restored where ~~it is~~ they are degraded, so that the mauri of those water bodies is protected, and the management of land and water recognises and reflects that:

- (1) water is the foundation and source of all life – na te wai ko te hauora o ngā mea katoa,
- (2) there is an integral kinship relationship between water and Kāi Tahu whānui, and this relationship endures through time, connecting past, present and future,
- (3) each water body has a unique whakapapa and characteristics,
- (4) fresh water, and land, and coastal water have a connectedness that supports and perpetuates life, ~~and~~
- (4A) protecting the health and well-being of water protects the wider environment,
- (5) Kāi Tahu exercise rakatirataka, manaakitaka and their kaitiakitaka duty of care and attention over wai and all the life it supports., and
- (6) all people and communities have a responsibility to exercise stewardship, care, and respect in the management of fresh water.

8. Objective LF-WAI-O1 – Te Mana o te Wai is broader than managing degraded freshwater. It is titled “Te Mana o te Wai” and describes how the management of freshwater in the region is to be addressed as required by Clause 3.2(3) of the NPSFM.
9. Policy LF-LS-P21 – “Land use and fresh water” is also relevant. Following the decision of the High Court on *Otago Fish and Game Council v Otago Regional Council*,² this provides:

¹ Submissions on behalf of OGL at [6]-[31]

² [2024] NZHC 3523

LF–LS–P21 – Land use and fresh water

The health and well-being of water bodies and freshwater ecosystems is maintained, and where degraded improved, to meet environmental outcomes set for Freshwater Management Units and/or rohe by:

- (1) reducing or otherwise maintaining the adverse effects of direct and indirect discharges of contaminants to water from the use and development of land,
- (2) managing land uses that may have adverse effects on the flow of water in surface water bodies or the recharge of groundwater,
- (3) recognising the drylands nature of some of Otago and the resulting low water availability, and
- (4) maintaining or, where degraded, enhancing the habitat and biodiversity values of riparian margins.

10. As amended by the High Court’s decision, “LF–LS–P21 – Land use and fresh water” gives effect to Policy 5 of the NPSFM.

NPSFM provisions

11. Te Mana o te Wai is the fundamental concept of the NPSFM. It safeguards the mauri of the wai. It is about restoring and preserving the balance between the water, the wider environment, and the community. Its principles include the roles of tangata whenua and other New Zealanders in the management of freshwater:

1.3 Fundamental concept – Te Mana o te Wai

- (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.
- (2) Te Mana o te Wai is relevant to all freshwater management and not just to the specific aspects of freshwater management referred to in this National Policy Statement.

Framework

- (3) Te Mana o te Wai encompasses 6 principles relating to the roles of tangata whenua and other New Zealanders in the management of freshwater, and these principles inform this National Policy Statement and its implementation.
- (4) The 6 principles are:
 - (a) Mana whakahaere: the power, authority, and obligations of tangata whenua to make decisions that maintain, protect, and sustain the health and well-being of, and their relationship with, freshwater

- (b) Kaitiakitanga: the obligations of tangata whenua to preserve, restore, enhance, and sustainably use freshwater for the benefit of present and future generations
 - (c) Manaakitanga: the process by which tangata whenua show respect, generosity, and care for freshwater and for others
 - (d) Governance: the responsibility of those with authority for making decisions about freshwater to do so in a way that prioritises the health and well-being of freshwater now and into the future
 - (e) Stewardship: the obligations of all New Zealanders to manage freshwater in a way that ensures it sustains present and future generations
 - (f) Care and respect: the responsibility of all New Zealanders to care for freshwater in providing for the health of the nation.
- (5) There is a hierarchy of obligations in Te Mana o te Wai that prioritises:
- (a) first, the health and well-being of water bodies and freshwater ecosystems
 - (b) second, the health needs of people (such as drinking water)
 - (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

12. The NPSFM has a single objective, which reflects the hierarchy of obligations within Te Mana o te Wai:

2.2 Objective

The objective of this National Policy Statement is to ensure that natural and physical resources are managed in a way that prioritises:

- (a) first, the health and well-being of water bodies and freshwater ecosystems
- (b) second, the health needs of people (such as drinking water)
- (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

13. The NPSFM contains fifteen policies that implement the one objective.

Relevant policies that provide for the protection, restoration and improvement of various freshwater values include:

Policy 1: Freshwater is managed in a way that gives effect to Te Mana o te Wai.

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

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

Policy 7: The loss of river extent and values is avoided to the extent practicable.

Policy 8: The significant values of outstanding water bodies are protected.

Policy 9: The habitats of indigenous freshwater species are protected.

Policy 10: The habitat of trout and salmon is protected, insofar as this is consistent with Policy 9.

Policy 11: Freshwater is allocated and used efficiently, all existing over-allocation is phased out, and future over-allocation is avoided.

14. Part 3 of the NPSFM concerns implementation, by setting out a non-exhaustive range of matters that regional councils must undertake in order to give effect to the NPSFM's objectives and policies. Clause 3.2(3) of the NPSFM relevantly provides:

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

15. Part 3 of the NPSFM also requires regional councils to adopt an integrated approach.³ This requires, among other things, councils recognise interactions between freshwater, land, water bodies, ecosystems, and receiving environments.⁴

16. NPSFM Clause 3.5(2) also requires every regional council to make or change its RPS to the extent needed to provide for the integrated management of:

- a. The use and development of land on freshwater; and
- b. The use and development of land and freshwater on receiving environments.

17. The scope of the NPSFM goes beyond freshwater per se and regulates other physical and geomorphological characteristics affected by water. A "national objectives framework" (NOF) is set out in subpart 2 of part 3. It requires, among other matters, regional councils to identify freshwater management units (FMU) in their regions, identify "values" for each unit, and set environmental outcomes for each value and include them as objectives in regional plans.⁵

18. The values that must be identified in the NOF process include "compulsory values" that apply to every freshwater management unit.⁶ The compulsory

³ NPSFM Clause 3.5(1) CB 19

⁴ NPSFM Clause 3.5(1)(b) CB 19

⁵ NPSFM Clause 3.7(2) CB 20

⁶ NPSFM Clause 3.9(1) CB 21

values are listed in NPSFM Appendix 1A and relevantly include “ecosystem health”:

1 Ecosystem health

This refers to the extent to which an FMU or part of an FMU supports an ecosystem appropriate to the type of water body (for example, river, lake wetland, or aquifer).

There are 5 biophysical components that contribute to freshwater ecosystem health, and it is necessary that all of them are managed. They are:

Water quality – the physical and chemical characteristics of the water, such as temperature, dissolved oxygen, pH, suspended sediment, nutrient and toxicants

Water quantity – the extent and variability in the level or flow of water

***Habitat* – the physical form, structure, and extent of the water body, its bed, banks and margins; its riparian vegetation; and its connections to the floodplain and to groundwater**

Aquatic life – the abundance and diversity of biota including microbes, invertebrates, plants, fish and birds

Ecological processes – the interactions among biota and their physical and chemical environment such as primary production, decomposition, nutrient cycling and trophic connectivity.

In a healthy freshwater ecosystem, all 5 biophysical components are suitable **to sustain the indigenous aquatic life expected in the absence of human disturbance** or alteration (before providing for other values).

(emphasis)

19. Clause 3.22(4) also directs every regional council to make or change its regional plan to:

include objectives, policies, and methods that provide for and promote the restoration of natural inland wetlands in its region, with a particular focus on restoring the values of ecosystem health, indigenous biodiversity, hydrological functioning, Māori freshwater values, and amenity values.

20. For completeness, the NPSFM also defines “restoration” (in the context of natural inland wetlands) as:⁷

In relation to natural inland wetland, means active intervention and management, appropriate to the type and location of the wetland, aimed at restoring its ecosystem health, indigenous biodiversity, or hydrological functioning.

⁷ NPSFM clause 3.21(1) “Definitions relating to wetlands and rivers” CB 29

**THE CHALLENGE THAT THE DECISION FAILED TO GIVE EFFECT TO THE NPSFM,
INCLUDING POLICY 5**

21. As noted above, OGL claims that the decision failed to give effect to the NPSFM, particularly Policy 5. Forest & Bird says that the OGL focus on Policy 5 is unduly narrow, and Objective LF-WAI-O1 Te Mana o te Wai implements the fundamental concept of the NPSFM. The scope of LF-WAI-O1 is wider than degraded water bodies and freshwater ecosystems. When viewed in this context, it was open and legally accurate for the decision-maker to refer to “restore.” Contrary to OGL’s submissions, the use of the term “improve” in the context of LF-WAI-O1 may lead to the provision no longer giving effect to other wider NPSFM provisions traversed above.

**Objective LF-WAI-O1 – Te Mana o te Wai is of broader application than
degraded waterbodies and freshwater ecosystems**

22. Objective LF-WAI-O1 is titled “Te Mana o te Wai” and is the Otago RPS giving effect to the fundamental concept of the NPSFM and Policy 1. As noted above, such an objective is required by Clause 3.2(3) of the NPSFM. Accordingly, it is pitched at a necessarily broad level. As the Supreme Court observed in *King Salmon*, planning documents “move from the general to the specific in the sense that, viewed overall, they begin with objectives, then move to policies, then to methods and “rules”.⁸

23. The word “restore” is appropriate in giving effect to Te Mana o te Wai. Te Mana o te Wai is far broader than improving degraded water bodies and freshwater ecosystems. As described in the NPSFM, Te Mana o te Wai includes:⁹

- a. reference to the “fundamental importance of water”;
- b. that “protecting the health of freshwater protects the health and well-being of the wider environment”;

⁸ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited and others* [2014] NZSC 38 at [14]. See also [8]-[16] for an overview of the RMA’s scheme

⁹ NPSFM 1.3(1) CB 10

- c. protection of “the mauri of the wai”; and
 - d. “restoring and preserving the balance between the water, the wider environment, and the community.”
24. The decision notes the requirement to have a description of how Te Mana o te Wai will be given effect to in the region in Clause 3.2(3).¹⁰ The decision records that this requires a high-level description at the RPS level:¹¹
39. What that realisation takes one to is the conclusion that clause 3.2(3) of the NPSFM is requiring a high-level description only at RPS stage as to how the RPS will give effect to Te Mana o te Wai. That view is consistent with the fact that the NPSFM only expressly requires an RPS to address and provide for Visions as an objective – and as we will discuss later in the topic discussions those Visions are also set at a high level only.
25. In relation to mauri, the evidence of Edward Ellison draws a link between the protection of mauri and water quality. Mr Ellison said:¹²
- Waterbodies with a healthy or strong mauri are characterised by good quality waters that flow with energy and life, sustain healthy ecosystems, and support mahika kai and other cultural activities.
26. Improving degraded water bodies and freshwater ecosystems is part of Te Mana o te Wai, but only part. When the broader considerations of implementing Te Mana o te Wai are taken into account, the word “restore” is appropriate. There is no error in having an objective of “restoring” freshwater bodies or ecosystems where they are degraded, as a way of protecting mauri. LF–LS–P21 – Land use and fresh water is where Policy 5 of the NPSFM is given effect to.
27. Forest & Bird submits that “restore”, defined as “to return something or someone to an earlier good condition or position”,¹³ can occur across a spectrum. At one end of the spectrum small “improvements” may occur and on the other, there may be full restoration (including to an earlier state). “Improve”, on the other hand, only entails something “get better.”¹⁴ The term “restoration” anticipates greater choice in outcomes for freshwater and its related components. This is consistent with the

¹⁰ Appendix Two Report by the Freshwater Hearings Panel at [39] CB 3204

¹¹ Appendix Two Report by the Freshwater Hearings Panel at [39] CB 3204

¹² Evidence of Edward Ellison, dated 28 June 2023 at [21] CB 2297–2298

¹³ *The Cambridge Dictionary* (2025, online ed) “restore”

¹⁴ *The Cambridge Dictionary* (2025, online ed) “improve”

Freshwater Hearing Panel's decision, which noted that restoration meant closer to a natural state.¹⁵

28. The Freshwater Hearing Panel was tasked with determining the most appropriate terms to achieve multiple directives under the NPSFM when grappling with the best formulation of LF-WAI-O1 – Te Mana o te Wai. LF-WAI-O1 is a parent objective to an array of policies (such as LF-LS-P21). The concept of Te Mana o te Wai in itself is broad. Further, the drafting of LF-WAI-O1 caters for other related considerations which anticipate some form of “restoration” including:

- a. recognising the interconnectedness of the whole environment and interactions between freshwater, land, waterbodies, ecosystems, and receiving environments;¹⁶
- b. various implementation requirements that would occur down the track such as the NOF; and
- c. consistency with requirements concerning natural inland wetlands, including the “particular focus on **restoring** the values of ecosystem health, indigenous biodiversity, hydrological functioning, Māori freshwater values, and amenity values” of wetlands¹⁷ (emphasis).

29. Inherent in the requirement to give effect to Te Mana o te Wai is the concomitant requirement to cater for each component of “ecosystem health”. Ecosystem health is a broad concept. Ecosystem health is defined in the NPSFM as a compulsory value for all waterbodies and “habitat” is a key component. “Habitat” refers to the “physical form, structure, and extent of the water body, its bed, banks and margins; its riparian vegetation; and its connections to the floodplain and to groundwater”.¹⁸

30. Further, the direction to “restore” the likes of physical form, and connections to floodplains makes more sense than “improving” such components. OGL appears to argue that as NPSFM Policy 6 “promotes restoration” of natural inland

¹⁵ Report and recommendation of the non-freshwater and freshwater hearing panels to the Otago Regional Council March 2024 at [11] CB 3199

¹⁶ NPSFM 3.5(1)(a) and (b), which is reflected in LF-WAI-O1(4) “freshwater, land, and coastal water have a connectedness that supports and perpetuates life” CB 19

¹⁷ NPSFM 3.22(4) CB 32

¹⁸ NPSFM Appendix 1A CB 43

wetlands, which is not as directive a term as “ensure” in NPSFM Policy 5, means that it is erroneous to place “restore” in LF-WAI-O1.¹⁹

31. To the contrary, the use of the term “promote” does not mean that Policy 6 provides no direction and that it can be ignored. As set out above, Policy 6 is accompanied by implementation provisions in the NPSFM which direct regional plans (which contain provisions which must give effect to regional policy statements)²⁰ to include objectives, policies, and methods that “**provide for** and promote the restoration of natural inland wetlands in its region”(emphasis).²¹
32. Additionally, it would be unusual for NPSFM Policy 6 to use directive language such as “ensure” or “require” restoration of natural inland wetlands given that restoration would mostly be achieved by private individuals rather than by the Council. The High Court has previously commented on the use of verbs like “enable”, “encourage”, or “promote”:²²

[119] Many of the policies in the Regional Policy Statement are concerned with achieving positive outcomes rather than with controlling or restricting negative outcomes. Given that most positive outcomes will be achieved by private actors, rather than by the Council, it is only natural that these policies use verbs such as “enable”, “encourage”, or “promote” rather than a verb such as “require”. It would be odd, for example, if policy B2.8.2(3) was expressed to be: “Require intensive use and development of existing and new social facility sites.” I consider that there is some force in Mr Casey’s submission that, on the Environment Court’s approach, a negative direction would always be give more weight than a positive one.

33. OGL appears to argue that the direction to “restore” would be “trying to define the extent of improvement required pre-emptively”.²³ To the contrary, the level of restoration is not definitive under the NPSFM. The definition of “restoration” used in the context of wetland provisions under the NPSFM does not specify any prior state the wetland needs to be restored to, for example, the state before the arrival of humans in New Zealand.²⁴

¹⁹ Submissions on behalf of OGL at [51]

²⁰ Per section 67(3)(c) RMA, a regional plan must give effect to a regional policy statement

²¹ NPSFM 3.22(4) CB 32

²² *Southern Cross Healthcare Limited v Eden Epsom Residential Protection Society Incorporated* [2023] NZHC 948 at [119]

²³ Submissions on behalf of OGL at [50]

²⁴ NPSFM clause 3.21 “means active intervention and management, appropriate to the type and location of the wetland, aimed at restoring its ecosystem health, indigenous biodiversity, or hydrological functioning” CB 29 c.f. NPSFM clause 3.25 which concerns the monitoring of “naturally hard-bottomed” sites with “naturally” being defined as “its state before the arrival of humans in New Zealand” CB 35

34. To “restore” something may be a more ambitious aim than to “improve” it.

However, “restoration” is a general and flexible term and thus appropriately employed in the objective. The use of the term “restore” in the context of LF-WAI-O1:

- a. Is necessarily general, enabling flexibility for the myriad intended outcomes under the NPSFM, including what communities and tangata whenua may choose under the NOF. It allows the greater particularity to be achieved through the policies (such as LF-LS-21 addressed in the following sections);
- b. ensures LF-WAI-O1 remains consistent with other NPSFM provisions, including its objective 1, the fundamental concept of Te Mana o te Wai at clause 1.3, Policy 1, Policy 2 Policy 6, clauses 3.2, 3.5 and 3.22.

35. LF-WAI-O1 - Te Mana o te Wai is properly interpreted as implementing the fundamental concept of the NPSFM and, viewed alongside the other obligations within the NPSFM, it would not be appropriate to interpret it within the vacuum of Policy 5 of the NPSFM.

36. When viewed in this broader context, there is no error of law as alleged by OGL.

THE CHALLENGE THAT THE DECISION IS INCONSISTENT WITH THE EVIDENCE

37. OGL appears to argue that their case is that “the FHP erred in reaching a conclusion on LF-WAI-O1 which was inconsistent with the evidence before it.”²⁵

38. OGL expands on this challenge later in their submissions:²⁶

- 45. We submit that the FHP’s wording of LF-WAI-O1 constitutes an error of law in that in arriving at that wording the FHP did not consider policy 5 of the NPS-FM – a clearly relevant policy in a NPS which must be given effect to - or consider whether its proposed wording was giving effect to the NPS-FM. The error is material because when the FHP re-ordered the words and shifted ‘mauri’ from the beginning to the middle of the chapeau it changed the emphasis. The amended wording means the requirement to protect and restore applies to degraded water bodies, rather than to mauri. This is not consistent with the evidence before the FHP.

39. The challenge that the decision is not consistent with the evidence is untenable.

²⁵ Submissions on behalf of OGL at [4b]

²⁶ Submissions on behalf of OGL at [45]

40. This kind of challenge that faces a very high hurdle. As OGL note in their submissions, the principles from *Bryson v Three Foot Six Ltd* were summarised by the *High Court in Tauranga Environmental Protection Society Inc v Tauranga City Council*:²⁷
- (a) Misinterpretation of a statutory provision obviously constitutes an error of law.
 - (b) Applying law that the decision-maker has correctly understood to the facts of an individual case is not a question of law. “Provided that the court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding court, unless it is clearly unsupportable”.
 - (c) But “[a]n ultimate conclusion of a fact-finding body can sometimes be so insupportable — so clearly untenable — as to amount to an error of law, because proper application of the law requires a different answer”. The three rare circumstances in which that “very high hurdle” would be cleared are where “there is no evidence to support the determination” or “the evidence is inconsistent with and contradictory of the determination” or “the true and only reasonable conclusion contradicts the determination”. (footnotes omitted)
41. The OGL challenge is that the “amended wording means the requirement to protect and restore applies to degraded water bodies, rather than to mauri.”
42. This argument requires that a distinction is drawn between the degradation of water bodies and the degradation of mauri.
43. These concepts cannot be separated in the way argued for by OGL. Mr. Ellison’s evidence noted above makes it clear that the concept of mauri is inextricably linked with good water quality and healthy ecosystems.
44. The objective is to restore and protect the health of degraded water bodies so that mauri is protected. Put another way, the protection of mauri is to be achieved through the restoration and protection of water bodies.
45. This outcome is entirely consistent with the evidence that mauri is linked to good quality water and healthy ecosystems.
46. For these reasons, it is submitted that the appeal point that the decision is inconsistent with the evidence fails to meet the very high hurdle for a challenge to an evidential finding.

²⁷ [2021] NZHC 1201, [2021] 3 NZLR 882 (HC) at [60]

THE ARGUMENT OF CONSISTENCY WITH LF-LS-P21

47. OGL argue that the outcome that they propose is consistent with changes made to LF-LS-P21 – Land use and fresh water:

46. OceanaGold submits that making the amendment to LF-WAI-O1 is also consistent with the changes sought on appeal, and recently made by consent order, to amend LF-LS-P21. Kai Tahu and Forest and Bird appealed the chapeau of LF-LS-P21 and said that if failed to give effect to Policy 5 of the NPS FM49. The High Court decision says “I agree an error has occurred”. It was ordered to amend LF-LS-P21 to read:

The health and well-being of water bodies and freshwater ecosystems is maintained, or if degraded, improved to meet environmental outcomes set for Freshwater Management Units and/or rohe by: ...

48. It is important to look at this change in context. LF-LS-P21 – “Land use and fresh water” is a policy about the health and well-being of water bodies and fresh water. The Freshwater Hearing Panel’s version provided:

LF-LS-P21 – Land use and fresh water

The health and well-being of water bodies and freshwater ecosystems is maintained to meet environmental outcomes set for Freshwater Management Units and/or rohe by:

- (1) reducing or otherwise maintaining the adverse effects of direct and indirect discharges of contaminants to water from the use and development of land,
- (2) managing land uses that may have adverse effects on the flow of water in surface water bodies or the recharge of groundwater,
- (3) recognising the drylands nature of some of Otago and the resulting low water availability, and
- (4) maintaining or, where degraded, enhancing the habitat and biodiversity values of riparian margins.

49. As noted in the OGL submissions, the words “or if degraded, improved” were inserted after the word “maintained” at the direction of the High Court.

50. There are important differences between LF-LS-P21—Land use and fresh water and LF-WAI-O1 - Te Mana o te Wai, which explain why there was an error in the former but not the latter.

51. LF-LS-P21 is narrower in its application. It relates to the health and well-being of waterbodies, which directly reflects NPSFM Policy 5. The amendment to LF-LS-P21 gives direct effect to Policy 5 of the NPSFM.

52. LF-WAI-O1 - Te Mana o te Wai has broader application, and the change from “restore” to “improve” is not appropriate in an objective whose role is to describe how Te Mana o te Wai will be given effect to in the Otago Region.

STRINGENCY

53. OGL argues that the provisions relating to stringency are engaged²⁸. Forest & Bird’s disagrees. The provisions regarding stringency are not engaged as LF-WAI-O1 - Te Mana o te Wai is seeking to give effect to Te Mana o te Wai. It is not seeking to be more stringent.

MATERIALITY, RELIEF AND COSTS

54. Forest & Bird’s position is that, even if it was an error, it is not material.

55. This position is supported by paragraph 11 of the Freshwater Hearing Panel’s decision, which refers to the fundamental concept of Te Mana o te Wai and notes that restoration is closer to a natural setting but that this is not an absolute requirement.²⁹

11. Our overall interpretation of the Te Mana o te Wai concept is that it envisages that waters may be in a degraded state, and if so they should be restored and protected in a state closer to the natural setting. However, that is not an absolute requirement, given that later provisions of the NPSFM recognise other community uses of natural and physical resources have occurred which can be beneficial to communities.

56. The references note “restore” as relating to waters being in a “state closer to the natural setting” and that this not being an “absolute requirement”. This makes it clear that the objective seeks to improve degraded water to a state which may be less pristine than a natural state.

57. Further, if the failure to address Policy 5 was an error, this has now been corrected in LF-LS-P21. LF-LS-P21 relates to the health and well-being of water bodies and freshwater ecosystems and provides they are to be improved where degraded.

²⁸ Submissions on behalf of OGL at [63]-[81]

²⁹ Report and recommendation of the non-freshwater and freshwater hearing panels to the Otago Regional Council March 2024 at [11] CB 3199

58. If there is a material error, this should be referred back. It is not an appropriate situation for the High Court, on appeal, to substitute the word “improve” for “restore” in LF-WAI-O1 - Te Mana o te Wai,
59. Many matters bear on how Te Mana o te Wai should be interpreted in Otago and how this should be expressed in LF-WAI-O1 - Te Mana o te Wai.³⁰ Policy 5 of the NPSFM is one, but only one, of those matters.
60. If the decision-makers erred, it is appropriate to refer the matter back for a proper assessment of how Te Mana o te Wai should be expressed in Otago.
61. If OGL are unsuccessful, Forest & Bird seeks costs.

CONCLUSION

62. OGL has taken an unduly narrow view of LF-WAI-O1 - Te Mana o te Wai. This view is reflected in the argument that the decision has somehow fallen into error because the objective does not parrot Policy 5 and refers to “restore” rather than “improve” when dealing with degraded water bodies and freshwater ecosystems.
63. This is unduly narrow because Te Mana o te Wai is multi-faceted and far broader than degraded water bodies and freshwater ecosystems.
64. Protecting the mauri of the wai is a critical element of Te Mana o te Wai. The decision concluded that properly expressed in Otago, this would include protecting the mauri of water bodies. In turn, this would be achieved by protecting Otago’s water bodies and restoring their health and well-being where they were degraded. This finding was available and consistent with the evidence.

DATED 14 February 2025

The image shows two handwritten signatures in blue ink. The signature on the left is 'Anderson' and the signature on the right is 'May Downing'.

Peter Anderson / May Downing

Counsel for the Royal Forest and Bird Protection Society of New Zealand Inc

³⁰ These are set out from paragraph 11 above.