

**IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE**

CIV-2024-412-41

UNDER	the Resource Management Act 1991
IN THE MATTER	of an appeal of the freshwater planning instrument parts of the Proposed Otago Regional Policy Statement pursuant to section 299 of the RMA and Clause 56, Part 4 of Schedule 1 of the RMA
BETWEEN	OCEANA GOLD (NEW ZEALAND) LIMITED Appellant
AND	OTAGO REGIONAL COUNCIL Respondent

SUBMISSIONS ON BEHALF OF OCEANA GOLD (NEW ZEALAND) LIMITED
Dated 18 December 2024

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MAY IT PLEASE THE COURT

INTRODUCTION

1. Oceana Gold (New Zealand) Limited (**OceanaGold** or **the Appellant**) appealed against provisions of the freshwater planning instrument parts (**FPI**) of the Proposed Otago Regional Policy Statement (**PORPS**)¹. Whilst the majority of the Appellant's appeal points were resolved through mediations², there is one remaining point relating to an objective, LF-WAI-O1 "Te Mana o te Wai" which is the subject of these submissions.
2. The decision version of LF-WAI-O1 that is the subject of this appeal is³:

LF-WAI-O1 – Te Mana o te Wai

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

...

3. The Appellant contends the decision on LF-WAI-O1 contains material errors of law and that LF-WAI-O1 should be reworded by this Court to read:

LF-WAI-O1 – Te Mana o te Wai

Otago's *water bodies* and their health and well-being are protected, and ~~restored~~ improved where they are *degraded*,

¹ As set out in paragraphs 32, 33 and 37 of these submissions and page 1 of the Notice of Appeal by OceanaGold on page 3,905 of the Common bundle, OceanaGold filed a submission and further submission on LF-WAI-O1, presented evidence on this at the hearing and has scope to appeal this objective.

² See *Otago Fish and Game Council and Central South Island Fish and Game Council v Otago Regional Council* [2024] NZHC 3523 where the consent orders from those mediations were granted.

³ Decisions version (track-change) of PORPS, page 3,503 of the Common bundle.

so that the mauri of those water bodies is protected, and the management of *land* and *water* recognises and reflects that:

...

4. The Appellant's case is that:

- a. The Freshwater Hearings Panel (**FHP**) erred in failing to give effect to the National Policy Statement for Freshwater Management (2020) (**NPS-FM**) as required by section 61 and 62 of the Resource Management Act 1991 (**RMA**).
- b. the FHP erred in reaching a conclusion on LF-WAI-O1 which was inconsistent with the evidence before it.

5. In these submissions we:

- a. Provide background to the preparation of the PORPS and explain why this appeal is direct to the High Court on a question of law;
- b. Outline the law regarding appeals on questions of law;
- c. Discuss the provision being appealed, the submissions that addressed that provision, the evidence the FHP heard on the provision, and the FHP's discussion and findings which led to this decision;
- d. Discuss the relevant provisions of the NPS-FM, and in particular policy 5 which is central to the Appellant's argument;

- e. Discuss the requirements for preparation of a Regional Policy Statement (**RPS**) and the need to “give effect to” an NPS; and
- f. Consider clause 3.1(2)(a) of the NPS-FM and discuss why the appealed wording of LF-WAI-O1 cannot be adopted as a “more stringent measure”.
- g. Explain why the errors of law are material and why it is appropriate for this Court to substitute its decision for that of the FHP and make an order amending LF-WAI-O1.

PREPARATION OF THE PORPS AND BACKGROUND TO THE APPEAL

- 6. The appeal relates to an objective in the PORPS and it is prudent to give some background to the PORPS.
- 7. The Otago Regional Council (**ORC**) notified the PORPS on 26 June 2021 as a freshwater planning instrument under section 80A(2) of the RMA⁴. The implication of this was that the entire PORPS was to be processed under sub-part 4, of Schedule 1 of the RMA. Sub-part 4 had been inserted in 2020 as a more expeditious method for FPIs to be processed. Where a regional council accepts the recommendations of the FHP on a FPI, a submitter can only appeal to the High Court on a question of law⁵.

⁴ Section 80A of the RMA was subsequently amended by section 805(4) of the (now repealed) Natural and Built Environment Act 2023. The version of section 80A that was relevant to the ORC’s decision to notify the entire PORPS as a freshwater planning instrument was the version that was in effect on 26 June 2021. Nothing turns on this point for the purposes of this appeal.

⁵ Clause 56, Part 4 of Schedule 1 of the RMA.

In contrast, under the standard Schedule 1 process for non-FPIs, there is an ability to appeal to the Environment Court for a reconsideration on the merits, followed by the ability to appeal to the High Court on a question of law.

8. The Council's decision that the entire PORPS was a FPI was challenged and a declaration on the matter was sought in the High Court. The High Court determined that the entire PORPS was not a FPI, and that as a consequence the Council had to decide which parts of the PORPS related to freshwater, as set out in the judgement, and renotify those parts so that they could be processed separately from the non-freshwater provisions of the PORPS⁶. The PORPS was therefore split into two parts; the non-freshwater parts and the FPI parts.
9. The Council determined that LF-WAI-O1 was to be included in the FPI part of the PORPS in accordance with the High Court's determination. There is no dispute on that point.
10. The FPI parts, including LF-WAI-O1, were notified on 30 September 2022. The submission period closed on 29 November 2022. The FPI parts were subject to the process under Part 4 of Schedule 1 of the RMA.
11. The Hearings Panel appointed to hear the non-freshwater planning parts had the same membership as the FHP. Two

⁶ *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand* [2022] NZHC 1777.

separate hearings were held and separate decisions were issued.

The ORC accepted the recommendations of both the FHP and the non-FHP.

12. Ultimately a single, operative Otago RPS will be produced, and therefore the appendices to the decisions reproduce the RPS in its entirety with the FPI parts highlighted in blue.

13. Five appeals were filed in the High Court in relation to the FPI parts, and 19 appeals were filed in the Environment Court in relation to the non-FPI parts. At the date of these submissions the Environment Court appeals are being mediated.

14. The parties to the High Court appeals met in August 2024 and were able to resolve the majority of the appeal points. Consent orders on those matters agreed at mediation were made in November 2024⁷.

APPEALS TO THE HIGH COURT

15. As mentioned earlier, appeals on the FPI parts could only be made to the High Court on a question of law.

16. *New Zealand Transport Agency v Architectural Centre Inc*⁸ was a High Court appeal of a decision by a Board of Inquiry on a proposal of national significance under Part 6AA of the RMA pursuant to section 149V RMA. Although it did not concern a FPI

⁷ *Otago Fish and Game Council and Central South Island Fish and Game Council v Otago Regional Council* [2024] NZHC 3523.

⁸ [2015] NZRMA 375 (HC).

it is analogous in that in both instances an appeal from the first instance decision is direct to the High Court on a question of law.

The High Court said⁹:

[12] It is not the role of the High Court to conduct a rehearing of the application to the Board or to undertake an “on the merits” consideration of whether the Board’s conclusion was correct. Nor is it the role of the High Court to determine whether or not the Project would be the best outcome to address the congestion problem at the Basin Reserve.

17. The High Court went on to cite with approval the oft-cited passages from the Supreme Court in *Bryson v Three Foot Six Ltd* including para 24¹⁰:

[24] Appealable questions of law may nevertheless arise from the reasoning of the Court on the way to its ultimate conclusion. If the Court were, for example, to misinterpret the requirements of s 6 — to misdirect itself on the section, which incorporates the legal concept of contract of service — that would certainly be an error of law which could be corrected on appeal, either by the Court of Appeal or by this Court ...

18. 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*¹¹ as follows:

- (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 insupportable”.
- (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

⁹ *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZRMA 375 (HC) at [12].

¹⁰ *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 (SC) at [24].

¹¹ [2021] NZHC 1201, [2021] 3 NZLR 882 (HC) at [60].

contradictory of the determination” or “the true and only reasonable conclusion contradicts the determination”.
(footnotes omitted)

NATIONAL POLICY STATEMENTS

19. National Policy Statements (**NPS**) are the highest form of national direction under the RMA. Their purpose is to state objectives and policies for matters of national significance that are relevant to achieving sustainable management (the purpose of the RMA)¹². Currently there are eight NPSs in force¹³. They sit at the top of the three-tiered management system under the RMA – national, then regional, then district – moving from the general to the more specific¹⁴. The Court of Appeal in *Muaūpoko Tribal Authority Inc* said¹⁵:

The effect is that, as one goes down the hierarchy of documents, greater specificity is provided both as to content and locality — the general becomes increasingly specific. The RMA envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to s 5 and to pt 2 of the RMA more generally.

20. While NPS are the highest form of direction under the RMA, and have the effect of directing much of the content of subordinate planning documents such as RPSs, they are not immutable. They

¹² Sections 45(1) and 45A(1) RMA.

¹³ New Zealand Coastal Policy Statement 2010, National Policy Statement on Freshwater Management 2020, National Policy Statement on Urban Development 2020, National Policy Statement on Renewable Electricity Generation 2011, National Policy Statement on Electricity Transmission 2008, National Policy Statement for Highly Productive Land 2022, National Policy Statement for Indigenous Biodiversity 2023, and National Policy Statement for Greenhouse Gas Emissions from Industrial Process 2023.

¹⁴ *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 (SC) at [14], and *Muaūpoko Tribal Authority Inc v Minister for the Environment* [2023] NZCA 641, [2024] NZRMA 285 (CA) at [27].

¹⁵ *Muaūpoko Tribal Authority Inc v Minister for the Environment* [2023] NZCA 641, [2024] NZRMA 285 (CA) at [28] citing *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 (SC).

are subject to change, and in reality represent a national view of how the sustainable management purpose of the RMA should be worked out in specific contexts at a point in time. At the date of these submissions most of the operative NPS are under review and are expected to change to one degree or another in the term of the current government.

REQUIREMENTS FOR PREPARATION OF A REGIONAL POLICY STATEMENT

21. The requirements for the preparation and change of a RPS are set out in sub-part 3, Part 5 of the RMA. There must at all times be a RPS in force in the region¹⁶.

22. Under the RMA¹⁷:

- (1) A regional council must prepare and change its regional policy statement in accordance with—
 - (a) its functions under section 30; and
 - (b) the provisions of Part 2; and
 - (c) its obligation (if any) to prepare an evaluation report in accordance with section 32; and
 - (d) its obligation to have particular regard to an evaluation report prepared in accordance with section 32; and
 - (da) a national policy statement, a New Zealand coastal policy statement, and a national planning standard; and
 - (e) any regulations.

23. Section 61(2) also stipulates other matters that the regional council shall have regard to and 61(2A) lists the matters to be taken into account¹⁸.

¹⁶ Section 60(1) RMA.

¹⁷ Section 61(1) RMA.

¹⁸ Section 61(2) RMA lists management plans and strategies prepared under other Act, entries on the New Zealand Heritage List/Rārangī Kōrero, certain regulations relating to fisheries, the extent to which the RPS needs to be consistent with adjacent council's RPSs, the extent to which the RPS need to be consistent with regulations under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, and emissions reduction plans or national

24. Section 62(1) specifies what a RPS must state or include. For example, it must state the significant resource management issues for the region. Importantly for this case, section 62(3) says:

A regional policy statement must not be inconsistent with any water conservation order and **must give effect to a national policy statement**, a New Zealand coastal policy statement, or a national planning standard.

(emphasis added)

25. As the Supreme Court noted in *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* “give effect to” simply means to implement¹⁹. It is a “strong directive” which creates a “firm obligation”²⁰. The Supreme Court also noted that it will depend on what must be given effect to²¹:

[80] ... The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.

26. The Supreme Court then went on to note that although there is some flexibility for regional councils in the way they implement the NZCPS objectives and policies, that scope is not infinite and

adaptation plans under the Climate Change Response Act 2002. Under section 61(2A), the council must take into account any relevant planning document recognised by an iwi authority that has been lodged with the council, and recognise and provide for and take into account certain matters where there is a planning document prepared by a customary marine title group under section 85 of the Marine and Coastal Area (Takutai Moana) Act 2011.

¹⁹ *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 (SC) at [77].

²⁰ *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 (SC) at [77] followed in *Muaūpoko Tribal Authority Inc v Minister for the Environment* [2023] NZCA 641, [2024] NZRMA 285 (CA) at [25].

²¹ *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 (SC) at [80].

“giving effect” to the NZCPS “*is intended to constrain decision makers*”²².

27. In this present case the directive word in policy 5 of the NPS-FM is “ensures”. “Ensure” is defined as²³:

Make certain that (something) will occur or be so.

28. We submit that “ensure” is directive and therefore in giving effect to policy 5, the FHP was constrained.

DECISION BEING APPEALED AGAINST

29. The notified version of LF-WAI-O1 said:

LF-WAI-O1 – Te Mana o te Wai

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: ...

30. The explanation LF-WAI-E1 says²⁴:

Kaitiakitaka encompasses a high duty to uphold and maintain the mauri (*life-force*) of the wai. If the mauri is degraded it has an impact not only on the mana of the wai but also on the kinship relationship and on mana whenua.

31. The section 32 report said that “*Objective LF-WAI-O1 sets out the Kai Tahu expression of Te Mana o Te Wai in Otago*”²⁵. The section 32 report then went on to conclude in respect of the land and freshwater chapter²⁶:

418. Since then [the 2019 PORPS] , a new NPSFM has come into force with significantly strengthened environmental

²² *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 (SC) at [91].

²³ Concise Oxford Dictionary (12th edition 2011)

²⁴ Decision version (track change) of the PORPS, page 3,503 of the Common bundle.

²⁵ Section 32 report at para 376, page 196 of the Common bundle.

²⁶ Section 32 report at paras 418 and 419, page 209 of the Common bundle.

bottom lines for freshwater resources and clear direction that their health and well-being is to be the first priority in decision-making. The NPSFM 2020 must be given effect (i.e. implemented) by the PORPS 2021 so it is not possible for the PORPS 2021 to adopt less stringent provisions than the NPSFM....

419. The suite of policies proposed is considered to fully implement the NPSFM. While the outcomes sought by the PORPS 2021 are relatively directive, there remain choices to be made through the development of the LWRP about the methods and timeframes adopted to achieve the outcomes which the community will be involved with....

32. The Appellant submitted that LF-WAI-O1 be amended to give effect to the NPS-FM to say *“The mauri of Otago’s water bodies and their health and well-being is protected, and restored improved where it is degraded...”* and this was *“so that there is improved consistency with ‘Te mana of te Wai’* as set out in the NPSFM²⁷.

33. Contact Energy Limited also submitted on the FPI and sought amendments *“to ensure that the objective gives effect to the NSPFM”* and suggested amending LF-WAI-O1 so that it would read *“The mauri of Otago’s water bodies and their health and well-being is protected, and the balance between the water, the wider environment, and the community is restored and preserved”* with the remainder of the objective deleted²⁸. OceanaGold made a further submission supporting the balancing of interests, however the further submission said *“OceanaGold prefers ‘improved’ instead of ‘restored’”*²⁹.

²⁷ OceanaGold submission at page 432 of the Common bundle.

²⁸ OceanaGold further submission at page 394 of the Common bundle.

²⁹ OceanaGold further submission at page 394 of the Common bundle.

34. Otago Fish and Game Council and Central South Island Fish and Game Council (**Fish and Game**), did not make a submission on LF-WAI-O1. Fish and Game further submitted on OWRUG's submission (FPI043.051) on LF-WAI-O1 which had also sought a change from "restored" to "improved"³⁰. However Fish and Game did not make a further submission on OceanaGold's submission³¹.

35. The section 42A report contains considerable discussion of the submissions on LF-WAI-O1³². The section 42A report says³³:

In my view, protecting the mauri of the wai is described as the outcome of applying the concept of Te Man o te Wai. I consider that the requirement in LF-WAI-O1 to protect the mauri of Otago's water bodies is therefore consistent with the NPSFM.

36. In response to Fonterra (FPI019.003) and OceanaGold's submission, the section 42A report writer said that 'restored' was used in relation to the mauri of water bodies as well as their health and well-being and that 'improve' was not an appropriate word to use in relation to mauri as it is something that is either intact or lost, and if it has been lost then restoration is required³⁴. No changes to the chapeau were recommended in the section 42A report³⁵, the opening statement of evidence for Felicity Boyd³⁶, or the reply report³⁷.

³⁰ Fish and Game further submission, page 492 of the Common bundle.

³¹ Fish and Game further submission, page 492 – 495 of the Common bundle.

³² Section 42A report, pages 861 – 869 of the Common bundle.

³³ Section 42A Report, paragraph 747 at page 865 of the Common bundle.

³⁴ Section 42A report, paragraph 756, pages 861 – 869 of the Common bundle.

³⁵ Section 42A report, paragraph 768, pages 868 of the Common bundle.

³⁶ Opening statement of evidence for Felicity Boyd dated 28 August 2023, paragraph 20 at page 2668 of the Common bundle and page 2,706 of the Common bundle.

³⁷ Reply Report, see paragraph 43 on page 1,097 of the Common bundle.

37. In her evidence, OceanaGold's planning witness Ms Hunter, observed that it may not always be practicable to restore the mauri of water bodies, especially during the term of the PORPS³⁸. In response to the section 42A report which says that mauri could not be improved, Ms Hunter referred to the section 42A report comments on LF-WAI-M1 which suggest that the mauri is not fixed in one state and can be incrementally improved or degraded.³⁹ In her evidence Ms Hunter said that diversion of water ways around mine impacted areas, storage and treatment of water may affect the mauri of the waterbody as the waterways are no longer in their natural form. However "*Restoration of the mauri (or a return to its "natural or original form") of such waterbodies could potentially have adverse effects on downstream water quality*" and this would not be an appropriate outcome⁴⁰.

38. Mr Ellison, in his evidence for Kāi Tahu says that "*The mauri of the water is a life-giving force that connects the environment, from the mountains to the sea*"⁴¹. He says "*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.*"⁴² His reference to "strong

³⁸ Evidence in chief of Claire Hunter dated 28 June 2023, paragraph 14, page 1,890 of the Common bundle.

³⁹ Evidence in chief of Claire Hunter dated 28 June 2023, paragraph 15, pages 1,890 – 1,891 of the Common bundle.

⁴⁰ Evidence in chief of Claire Hunter dated 28 June 2023, paragraph 16, page 1,891 of the Common bundle.

⁴¹ Evidence of Edward Ellison, dated 28 June 2023 at paragraph 21, page 2,297 of the Common bundle.

⁴² Evidence of Edward Ellison, dated 28 June 2023 at paragraph 21, pages 2,297 – 2,298 of the Common bundle.

mauri” supports the notion that mauri is not a binary concept as suggested in the section 42A report. Instead mauri can be improved to become stronger.

39. In its report, the FHP said⁴³:

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.

40. The FHP report goes on at paragraph 12 to refer to specific examples such as clause 3.31 dealing with large hydro-electric generation schemes and Appendices 6 and 7 which contain principles for aquatic offsetting and compensation⁴⁴. However the FHP erred in not referring to policy 5 in Part 2, clause 2.2 of the NPS-FM which contains clear direction on what is expected of regional councils when dealing with degraded water bodies⁴⁵.

41. The policies in Part 2, clause 2.2 of the NPS-FM implement the single objective of the NPS-FM in clause 2.1 which says⁴⁶:

(1) 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)

⁴³ Appendix 2; Report of the Freshwater Hearings Panel at paragraph 11, page 3,199 of the Common bundle.

⁴⁴ Appendix 2; Report of the Freshwater Hearings Panel at paragraph 12, page 3,199 of the Common bundle.

⁴⁵ NPS-FM, page 15 of the Common bundle.

⁴⁶ NPS-FM, page 15 of the Common bundle.

(c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

42. That objective reflects the hierarchy of obligations in Te Mana o te Wai as set out in Part 1, clause 1.3(5) of the NPS-FM⁴⁷.

43. Policy 5 is unambiguous in directing what management approach a regional council is required to take when addressing a degraded water body. The requirement is that freshwater must be managed so that the health and well-being of degraded water bodies is **improved** (emphasis added). Policy 5 contrasts the management requirement for degraded water bodies with the requirement for all other water bodies. In other cases the management requirement is to maintain health and well-being, or to improve it, if that's what communities choose.

44. In its report, the FHP discussed how the concept of 'mauri' was not readily definable. This led the FHP to amend the chapeau⁴⁸:

48. In summary we are of the view that the subtle change in placement or use of the word 'mauri' between the NPSFM approach, where it does not need definition because the actions surrounding its use describe how it is protected, to the PORPS situation where it is the sole aim of the actions, is fraught and unhelpful. We consider a change in wording of the introductory wording to LF-WAI-O1 can achieve what we perceive its intention to be, without weakening the underlying protection approach to freshwater management which accords with the Te Mana o te Wai concept. That can be achieved by changing the opening wording in LF-WAI-O1 to state:

~~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

⁴⁷ NPS-FM, page 11 of the Common bundle.

⁴⁸ Appendix 2; Report of the Freshwater Hearings Panel at paragraphs 48 - 49, page 3,206 of the Common bundle.

is protected, and the management of land and water recognises and reflects that:

49. That sequencing more closely aligns with the approach utilised in clause 1.3(1) as to the concept of Te Mana o te Wai in the NPSFM, and does not require the difficult approach of attempting to define a well-nigh indefinable concept such as 'mauri'.

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.

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*"⁵⁰. 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

⁴⁹ *Otago Fish and Game Council and Central South Island Fish and Game Council v Otago Regional Council* [2024] NZHC 3523 at [61] and [64].

⁵⁰ *Otago Fish and Game Council and Central South Island Fish and Game Council v Otago Regional Council* [2024] NZHC 3523 at [61].

47.LF-WAI-AER2 (which was not appealed) says “*the mauri of Otago’s water bodies and the health and well-being of water bodies and freshwater system is protected, and restored where degraded*”⁵¹. The changes sought by the Appellant will ensure that the objective is consistent with anticipated environmental results in this section.

Restoration versus improvement

48. “Restoration” is defined as “*The action or process of restoring*”⁵² and “restore” is defined as “*bring back (a previous right, practice, or situation); reinstate. Return (something) to a former condition or position*”⁵³. This concept in LF-WAI-O1 of returning to a former state is problematic because this requires:

- a. identifying what former state is to be used as the reference point (pre-human, pre-European, pre-modern development?).
- b. an ability to describe that state in terms of water quantity and quality, and ecosystem health.

⁵¹ Decisions version (track change) of the PORPS, page 3,506 of the Common bundle.

⁵² Conise Oxford Dictionary (12th edition 2011).

⁵³ Conise Oxford Dictionary (12th edition 2011).

- c. a realistic ability to manage the water body so that over the life of the RPS (or sooner than that) it moves from the current state of the water body to that former state.

49. 'Restoration of water bodies' and 'improvement of water bodies' are not equivalent terms. They are not synonyms. Policy 5 which implements the Objective of the NPS-FM (which in turn reflects the hierarchy of obligations in Te Mana o te Wai) is clear in directing that the management requirement is to 'improve' not to 'restore'.

50. OceanaGold anticipates other parties may argue that an objective in the RPS that refers to "improvement" is deficient because there is a lack of definition about how much improvement is expected, and there is a risk that even the slightest improvement in a severely degraded water body could be argued as being consistent with this policy when sustainable management requires stronger action to be taken. We submit that such a concern overlooks the fact that this is an objective sitting within a RPS, and what sorts of improvements are required in different water bodies, how those improvements are going to be achieved, and over what timescales are matters that the Council is required to determine as it implements the National Objectives Framework (or **NOF**) process in the NPS-FM through the subordinate regional plan process. Trying to define the extent of improvement required pre-emptively in the RPS would be inappropriate and, we submit, is not the function of an objective, just as it is inappropriate to pre-

empt the outcome of the regional plan process that implements the NOF by establishing an objective in the RPS that requires degraded water bodies to be restored to an undefined former state. At each step of the NOF process the regional council must engage with communities and tangata whenua and apply the hierarchy of obligations⁵⁴. That is the more appropriate process for determining what constitute appropriate improvements rather than amending LF-WAI-O1 to include a standard of improvement. We submit that any request to insert additional wording around what improvement means would in fact be asking a single objective in the RPS to do the job of the entire NOF process.

51. The other NPS-FM policies do not require restoration. Policy 6 deals with natural inland wetlands, and whilst it “promotes restoration” that is not as directive a term as “ensure” which features in policy 5⁵⁵. What Policy 6 says is that the values of wetlands are to be *protected*. Protection is also the policy outcome sought for other values including the significant values of water bodies⁵⁶, habitats of indigenous fauna⁵⁷, and habitat of trout and salmon⁵⁸.

⁵⁴ Clause 3.7(1) NPS-FM

⁵⁵ *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 (SC) at [77] where “give effect to” in the NZCPS was held to be a “strong directive”.

⁵⁶ NPS-FM Policy 8, page 15 of the Common bundle.

⁵⁷ NPS-FM Policy 9, page 15 of the Common bundle.

⁵⁸ NPS-FM Policy 10, page 15 of the Common bundle.

NATIONAL POLICY STATEMENT FOR FRESHWATER MANAGEMENT

52. The first NPS for Freshwater Management came into force in 2014 and there have been several amendments since⁵⁹. The 2020 amendments changed the way Te Mana o te Wai was described and how it must be given effect to⁶⁰.

53. Part 2 of the NPS-FM contains the single Objective and supporting policies of the NPS-FM.

54. The Objective is⁶¹:

- (1) 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.

55. Policy 1 and 5 of the NPS-FM say⁶²:

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.

56. Part 3 of the NPS-FM is headed “Implementation” and says⁶³:

3.1 Overview of Part

⁵⁹ It was amended in 2017 and 2020. Amendments were made in 2023 to correct minor errors to Appendices 6 and 7 and then to quash clause 3.33 and Appendix 5. In 2024 the NPS-FM was amended further. These amendments made in 2023 and 2024 are not relevant to this appeal.

⁶⁰ <https://environment.govt.nz/assets/Publications/Files/essential-freshwater-te-mana-o-te-wai-factsheet.pdf>

⁶¹ NPS-FM, page 15 of the Common bundle.

⁶² NPS-FM, page 15 of the Common bundle.

⁶³ NPS-FM, page 17 of the Common bundle.

(1) This Part sets out a non-exhaustive list of things that local authorities must do to give effect to the objective and policies in Part 2 of this National Policy Statement, but nothing in this Part limits the general obligation under the Act to give effect to the objective and policies in Part 2 of this National Policy Statement.

(2) Nothing in this Part:

(a) prevents a local authority adopting more stringent measures than required by this National Policy Statement; or
(b) limits a local authority's functions and duties under the Act in relation to freshwater.

(3) In this Part:

(a) subpart 1 sets out how local authorities must implement this National Policy Statement, particularly in relation to giving effect to Te Mana o te Wai.

(b) subpart 2 sets out the National Objectives Framework for managing freshwater.

(c) subpart 3 sets out additional specific requirements on regional councils relating to freshwater management.

57. Clause 3.2(1) requires regional councils to engage with communities and tangata whenua to determine how Te Mana o te Wai applies to water bodies and freshwater ecosystems in the region⁶⁴. Clause 3.2(3) says⁶⁵:

(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.

58. We submit that the language of Policy 5 makes it clear that degraded water bodies must be managed so that their health and well-being are improved. The co-existence of Policy 1 and Policy 5 make it clear that the NPS-FM contemplates that improvement of degraded water body health and well-being and freshwater ecosystems (as opposed to their restoration to some former state) will give effect to Te Mana o te Wai.

⁶⁴ NPS-FM, page 17 of the Common bundle.

⁶⁵ NPS-FM, page 18 of the Common bundle.

59. The NOF process is all about the identification of important community values in freshwater management units, the setting of desired outcomes for those values, and the setting of target attribute states and other parameters that need to be met over time so that the environmental outcomes are achieved⁶⁶.

60. Within that detailed context, the wording of LF-WAI-O1 in the PORPS is both simplistic (in the sense that it suggests a 'one size fits all' outcome, contrary to the whole thrust of the NOF) and imprecise (in the sense that it requires restoration to an unknown and potentially unknowable state).

61. Further direction on responding to degradation of water bodies is found in clause 3.20 of the NPS-FM:

(1) If a regional council detects that an FMU or part of an FMU is degraded or degrading, it must, as soon as practicable, take action to halt or reverse the degradation (for example, by making or changing a regional plan, or preparing an action plan).

(2) Any action taken in response to a deteriorating trend must be proportionate to the likelihood and magnitude of the trend, the risk of adverse effects on the environment, and the risk of not achieving target attribute states.

(3) Every action plan prepared under this clause must include actions to identify the causes of the deterioration, methods to address those causes, and an evaluation of the effectiveness of the methods.

62. The requirement is to take action to halt or reverse the degradation. This is quite a different obligation than is contained in LF-WAI-O1.

⁶⁶ The requirements of the NOF process are summarised in clause 3.7 of the NPS-FM with detailed requirements for each step set out in subsequent clauses 3.8 – 3.20

MORE STRINGENT MEASURES

63. Part 3 of the NPS-FM deals with implementation. Clause 3.1

says⁶⁷:

(1) This Part sets out a non-exhaustive list of things that local authorities must do to give effect to the objective and policies in Part 2 of this National Policy Statement, but nothing in this Part limits the general obligation under the Act to give effect to the objective and policies in Part 2 of this National Policy Statement.

(2) Nothing in this Part:

(a) prevents a local authority adopting more stringent measures than required by this National Policy Statement; or
(b) limits a local authority's functions and duties under the Act in relation to freshwater.

(3) In this Part:

(a) subpart 1 sets out how local authorities must implement this National Policy Statement, particularly in relation to giving effect to Te Mana o te Wai

(b) subpart 2 sets out the National Objectives Framework for managing freshwater

(c) subpart 3 sets out additional specific requirements on regional councils relating to freshwater management.

64. The Implementation section is in turn broken up into sub-parts, with sub-part 1 setting out how a regional council must engage with communities and tangata whenua to determine how Te Mana o te Wai applies, and how long-term vision for freshwater must be developed. Sub-part 2 describes the NOF process which includes identifying Freshwater Management Units (**FMUs**), identifying values, environmental outcomes for each value and attributes for each value in a FMU. Sub-part 3 includes specific direction for councils to include in plans, monitoring or determinations for councils to make.

65. We submit that the purpose of clause 3.1 is to make it clear that the **objective** and **policies** in Part 2 of the NPS must be given

⁶⁷ NPS-FM, page 17 of the Common bundle.

effect to. In giving effect to them, through the implementation set out in sub-parts 1 to 3 of Part 3, a local authority may impose a more stringent measure or method of implementation. However the local authority cannot adopt a more stringent objective or policy in substitution for those set out in Part 2 of the NPS-FM.

66. Clause 3.1(2)(a) says that nothing prevents a local authority from adopting “*more stringent measures*”.

67. This leads to three questions:

- a. First, what does “more stringent” mean?
- b. Secondly, is an objective in the policy statement a “measure”?; and
- c. Thirdly, even if LF-WAI-O1 is a more stringent measure, does it still need to give effect to policy 5 of the NPS-FM?

Stringent

68. Stringent or stringency is not defined in the RMA or associated planning documents. “Stringent” is defined in the dictionary as “(of regulations or requirements) *strict, precise and exacting*” therefore more stringent would mean stricter, more precise or more exacting. Section 43B of the RMA deals with situations where there are overlapping but conflicting requirements in a rule or resource consent on one hand and a national environmental standard on the other. Whether a rule/consent or national environmental standard prevails in part requires assessing which

provisions are more stringent and which provisions are more lenient. Section 43B(2) of the RMA defines “stringent” for the purposes of section 43B(1) as *“a rule is more stringent than a standard if it prohibits or restricts an activity that the standard permits or authorises”*.

69. The wording of LF-WAI-O1 is more stringent than Policy 5 of the NPS-FM as requiring restoration of a degraded waterbody rather than improvement is, in most instances, likely to be more onerous on most occasions. Restoring back to a former state will require more positive actions than improving the water body.

Measure

70. There is no caselaw around what constitutes a “more stringent measure”, for example does a “measure” mean a method aimed to achieve an objective and to implement the objective’s supporting policies, or does it mean something else?

71. In the context of an RPS the mandatory components are those set out in section 62(1). In our submission the best interpretation of a “measure” in this context is to equate it to the methods of implementation in Part 3 sub-parts 1 and 2 which would include a ‘method’ such as rules and non-regulatory methods, but would not extend to objectives and policies.

72. Other instruments of national direction have not used the term “measure”, and have focused on rules or resource consents being more stringent than a NES. For example:

- a. The National Environmental Standards for Plantation Forestry (**NES-PF**) regulation 6(1)(a) says “(1) *A rule in a plan may be more stringent than these regulations if the rule gives effect to (a) an objective developed to give effect to the National Policy Statement for Freshwater Management...*”.
- b. The Resource Management (National Environmental Standards for Freshwater) Regulations 2020 regulation 6(1) says “*A district rule, regional rule or resource consent may be more stringent than these regulations*”.

73. We submit that a more stringent measure is intended to mean a rule in a regional or district plan, or a standard to be complied with which requires stricter conditions to be met.

Can a more stringent measure override the NPS-FM?

74. Even if it was accepted that a stricter objective was a more stringent measure, clause 3.1 of the NPS-FM clearly states that nothing in Part 3 of the NPS-FM limits the requirement to give effect to the NPS-FM.

3.1 (1) This Part sets out a non-exhaustive list of things that local authorities must do to give effect to the objective and policies in Part 2 of this National Policy Statement, but nothing in this Part limits the general obligation under the Act to give effect to the objective and policies in Part 2 of this National Policy Statement.

75. That is of course in accordance with the general principle that secondary legislation does not override the empowering

legislation (i.e. the NPS-FM cannot remove the requirement in the RMA for a RPS to give effect to the NPS-FM)⁶⁸.

76. In the context of the NES-PF and whether a plan rule could be more stringent than the NES-PF, the High Court held in *Rayonier New Zealand Ltd v Canterbury Regional Council* that it was necessary to consider the relevant circumstances in that region⁶⁹:

In my view, this required the panel to be satisfied that there was good reason arising from the circumstances of the Canterbury region to impose greater restrictions on plantation forest activities that have the potential to cause sediment discharges than those that appear in the NES-PF.

77. The High Court went on to say⁷⁰:

There is no reference to any evidence justifying greater stringency in the Canterbury region and the absence of this is, in my view, fatal. The panel could not recommend that greater stringency was justified for sediment discharges from plantation forestry in Canterbury in the absence of such evidence.

78. Because the stringency assessment is a departure from the usual planning document hierarchy “*greater care is required to be taken by a decision-maker when assessing stringency*” and the duty to give reasons was widened⁷¹.

79. In the present case no reasoning is given in the FHP’s report and no evidence is quoted as a justification for a more stringent measure being imposed in Otago than applies nationally via the NPS-FM.

⁶⁸ <https://www.lac.org.nz/guidelines/legislation-guidelines-2021-edition/issues-particularly-relevant-to-empowering-secondary-legislation-2/chapter-15/> accessed 10 December 2024.

⁶⁹ *Rayonier New Zealand Ltd v Canterbury Regional Council* [2024] NZHC 1478 (HC) at [138].

⁷⁰ *Rayonier New Zealand Ltd v Canterbury Regional Council* [2024] NZHC 1478 (HC) at [145].

⁷¹ *Rayonier New Zealand Ltd v Canterbury Regional Council* [2024] NZHC 1478 (HC) at [168].

80. It needs to be remembered that in the present case the FHP's decision version of LF-WAI-O1 effectively disregards Policy 5 of the NPS-FM and says "in Otago there is something different from other regions which requires degraded water to be managed differently". Even if it was lawful for the PORPS to take that approach (which OceanaGold says it is not) there would need to be compelling evidence-based reasons. No such reasons are given, and the FHP failed to take into account the OceanaGold planning evidence of Ms Hunter that explained why the adopted approach was impractical. Further, the FHP appears to have relied on the planning evidence of Ms Boyd to the effect that mauri is either present or absent, and the idea of improvement in mauri is meaningless. That evidence is wrong in fact, inconsistent with other evidence before the FHP⁷², and inconsistent with other decisions of the Courts⁷³.

MATERIALITY AND RELIEF SOUGHT

81. We submit that the error is material. It amounts to the difference between the RPS giving effect to the NPS-FM and not giving effect to the NPS-FM. Furthermore, an objective to ensure that degraded water bodies are restored, rather than improved, creates a different, more uncertain but also more onerous obligation.

⁷² Evidence in chief of Claire Hunter dated 28 June 2023, paragraph 16, page 1,891 of the Common bundle, and evidence of Edward Ellison, dated 28 June 2023 at paragraph 21, page 2,297- 2,298 of the Common bundle

⁷³ Such as *Te Rūnanga o Ngāti Awa v BOPRC* [2019] NZEnvC 196.

82. It is also important that the RPS gives effect to the NPS-FM as lower order documents such as the pending Otago Land and Water Regional Plan and District Plans must in turn “give effect to” the RPS⁷⁴. This means that an error in LF-WAI-O1 will be perpetuated through multiple planning documents and lead to further inconsistencies with the NPS-FM throughout the region.

83. The High Court can substitute its own decision for that of the Environment Court in appropriate circumstances⁷⁵. If satisfied there has been an error of law, the High Court’s powers under Rule 20.19 of the High Court Rules 2016 are wide⁷⁶. Rule 20.19(1)(a) says that the High Court may make any decision it thinks should have been made. This is an appropriate occasion for the High Court to substitute its decision for the FHP’s decision as the appeal seeks a simple one-word substitution which can be accommodated without needing further amendments. This will then ensure the RPS gives effect to the NPS-FM.

84. The Appellants submit that the error of law was material and that the High Court should substitute its own decision and amend the wording of LF-WAI-O1 to say:

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

⁷⁴ Section 67(3)(c) RMA for regional plans and section 75(3)(c) RMA for district plans.

⁷⁵ *Landrover Owners Club (Otago) Inc v Dunedin City Council* (1998) 4 ELRNZ 252 (HC)).

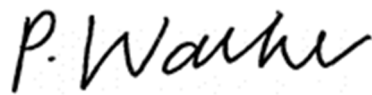
⁷⁶ *Otago Fish and Game Council and Central South Island Fish and Game Council v Otago Regional Council* [2024] NZHC 3523 at [18].

85. The Appellant also seeks costs.

CONCLUSION

86. We submit that the FHP made an error in law in recommending changes to LF-WAI-O1. In re-ordering where the word “mauri” appears, LF-WAI-O1 means that water bodies must be restored if they are degraded. This is uncertain (because the state to which a water body must be restored is unknown), pre-empts the NOF process, and does not give effect to policy 5 of the NPS-FM which directs that freshwater is to be managed to ensure that the health and well-being of degraded water bodies is improved.

DATED this 18th day of December 2024

A handwritten signature in black ink, appearing to read "P. Walker". The signature is written in a cursive, flowing style.

Stephen Christensen/Pip Walker

Counsel for Oceana Gold (New Zealand) Limited