IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2022] NZEnvC 101

IN THE MATTER	of the Resource Management Act 1991
AND	of a notice of motion under s149T(2) to decide proposed Plan Change 8 to the Regional Plan: Waste for Otago (referred to the Environment Court by the Minister for the Environment under s142(2)(b) of the Act)
BETWEEN	OTAGO REGIONAL COUNCIL
	(ENV-2020-CHC-128)
	Applicant

Court:	Environment Judge P A Steven Environment Commissioner J A Hodges
Hearing:	In Christchurch and by audio visual link on 24 and 25 March 2022
Appearances:	L F de Latour and T Wadworth for Otago Regional Council P Williams for Director-General of Conservation B Watts for Queenstown Lakes District Council B Matheson and B Gresson for Willowridge Developments Ltd R Ashton for Remarkables Park Ltd R Bowman for Friends of Lake Hayes Society Inc
Last case event:	Closing submissions lodged 1 April 2022
Date of Decision:	14 June 2022
Date of Issue:	14 June 2022

DECISION OF THE ENVIRONMENT COURT

A: Amend Plan Change 8 as set out in 'Annexure 1: Final Plan Change 8 Parts A, G and H Provisions' attached to and forming part of this decision.

B: Pursuant to s149U(6) and cl 10(1) to (3) of Schedule 1 of the Resource Management Act 1991, the court makes the decisions shown in the record of decisions attached as 'Annexure 2: Final Plan Change 8 Parts A, G and H decisions on submissions'.

REASONS

Introduction

[1] The Regional Plan: Water for Otago ('RPW') was notified in 1998 and made operative on 1 January 2004, predating all versions of the National Policy Statement for Freshwater Management ('NPS-FM'). It has not been subject to a full review since it was notified.

[2] The entirety of the RPW is intended to be reviewed in the preparation of a new Land and Water Regional Plan ('PLWRP') which is to be notified by 31 December 2023.[1] Plan Change 8 ('PC8') introduced a range of new provisions and amendments to the RPW to strengthen its management of discharges, including diffuse rural discharges which were finalised in Environment Court decision *Re Otago Regional Council*[2] dated 13 January 2022.

[3] This second decision on PC8 addresses the following additional parts of PC8 not addressed in the first:

Part A: Discharge policies (Urban topics);

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[1] Letter from Hon David Parker (Minister for the Environment) to Hon Marian Hobbs and Councillors (Chair and Councillors of ORC) regarding Section 24A Report: Investigation of Freshwater Management and Allocation Functions at Otago Regional Council under section 24A of the Resource Management Act 1991, included in Ms Boyd's Statement of Evidence ('SOE') dated 17 December 2021, Appendix B.

[2] *Re Otago Regional Council* [2022] NZEnvC 6.

Part G: Earthworks for residential development;

Part H: Nationally or regionally important infrastructure.

[4] We note at this juncture, that the final form of provisions of Part A and Part H were not in dispute.

[5] Ms F Boyd, a planning consultant giving evidence on behalf of the Otago Regional Council ('the Regional Council'), described the purpose of PC8 as:[3]

> … to improve the management of specific activities likely to be adversely affecting water quality in Otago while a new land and water regional plan is prepared that gives full effect to the NPS-FM 2020. For the Urban topics, this includes policy direction for managing discharges of stormwater and wastewater, the management of earthworks for residential development, and a minor amendment to a policy managing adverse effects on wetlands.

[6] By way of background, Ms Boyd stated:

> Water quality is degraded in some parts of Otago, particularly in terms of bacterial contamination (*E.coli*) and sediment. Of the 78 monitored sites in Otago, 46 do not meet the national objectives framework bottom line for *E.coli* and 40 do not meet the national bottom line for suspended fine sediment.

[7] The Minister for the Environment had directed that PC8 be referred to the Environment Court under s142(2)(b) of the Resource Management Act 1991 (the RMA' or 'the Act') to give a decision on the provisions and matters raised in submissions.

[8] PC8 was notified as part of an omnibus plan change (with PC1) by the Environmental Protection Authority on 6 July 2020. A total of 96 submissions and 12 further submissions were made to these changes. Of these, 82 submitters requested to be heard, with the majority wanting to present a joint case.

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[3] Boyd, SOE dated 17 December 2021 at [11].

[9] Mediation took place on the urban topics, and for Parts A and H an agreement was reached by all the parties. For convenience we address the agreed provisions in Parts A and H before turning to dispute over provisions in Part G.

Resource management issues that PC8 is seeking to address

[10] The significant resource management issues that Parts A (and G) seek to address relate to:[4]

(a) the degraded water quality in some parts of Otago, particularly due to sedimentation arising from earthworks, but also discharges associated with reticulated stormwater and wastewater systems;
(b) the inadequacy of the current planning framework in terms of giving effect to the objectives and policies of the NPS-FM 2020; and
(c) the need to avoid undue delay to improving practices as a result of uncertainty in the regulatory environment.

Part A – Discharge policies (Urban topics)

[11] Part A contains:

(a) new and amended policies for managing discharges of stormwater and wastewater (by amendments to existing Policies 7.C.5 and 7.C.6, and new Policy 7.C.12);
(b) changes to policies for other rural discharges (by amendments to existing Policy 7.D.5 and new Policy 7.D.6).

Wastewater

[12] Part A introduces a new Policy 7.C.12[5] to reduce the adverse effects of

[4] Boyd, SOE dated 17 December 2021 at [42].
[5] Parties agreed at mediation to separate this policy into two: Policies 7.C.12 and 7.C.13.

discharges of human sewage from reticulated wastewater systems by implementing a series of actions; the intent being to provide stronger and clearer direction for decision-making on resource consent applications for wastewater discharges.

[13] Chapter 12 of the RPW contains the rules managing discharges. Section 12.A of the RPW contains a series of rules managing discharges of human sewage from different sources:

(a) discharges of human sewage from long-drop toilets and onsite wastewater treatment systems are permitted with conditions under Rules 12.A.1.1 to 12.A.1.4; and
(b) discharges of human sewage from other sources, and those which do not meet the conditions of the permitted activity rules, require resource consent as a discretionary activity under Rule 12.A.2.1.

[14] The policy direction proposed in Part A for wastewater discharges will apply to resource consent applications made under Rule 12.A.2.1, which includes any discharges of human sewage from a community wastewater system.

[15] As for stormwater discharges, there are a range of other policies in Chapter 7 that will also apply to applications involving wastewater discharges. Ms Boyd referred to these in her evidence (at paragraph [167]) although we need not refer to them here in this decision.

[16] As a result of mediation on Part A, agreement was reached between parties in relation to further amendments which were helpfully explained by Ms Boyd in her evidence.

[17] Before expanding on that, we note that submissions had been lodged to the PC8 by persons who did not later join as s274 parties. Accordingly, the position agreed at mediation was not a reflection of the position of all submitters. However, we address the submissions made by submitters who did not join as parties further in this decision.

Policy 7.C.5 (discharges from new or extended stormwater reticulation systems)

[18] Policy 7.C.5 applies to the discharge from any new stormwater reticulation system or any extension to an existing stormwater reticulation system. A group of 10 submitters[6] had supported this policy, although a further 7 had sought that it be strengthened.

[19] Central Otago Environment Society ('COES') considered that regulatory limits should be specified in relation to both stormwater and sediment discharges and that existing stormwater discharge systems should be progressively upgraded to meet these limits.[7] The submitter did not provide the specific limits.

[20] Similarly, Otago Fish and Game Council and the Central South Island Fish and Game Council ('Fish and Game') sought minimum ecosystem health thresholds for stormwater systems but did not specify what these were.[8] Fish and Game also considered the policy should be strengthened further and sought the following amendments:[9]

> ~~Minimise~~ Avoid the adverse environmental effects of
>
> …
>
> (d) Measures to filter, attenuate or prevent runoff being discharged during rain events.

[21] The Royal Forest and Bird Protection Society of New Zealand Inc ('Forest and Bird') considered that relying on minimisation was uncertain as it may be interpreted with respect to the feasibility for an activity to minimise rather than taking actions to avoid, remedy or mitigate adverse effects.[10] The following

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[6] 80011.05 Friends of Lake Hayes, 80013.01 SDHB, 80016.01 Horticulture NZ, 80019.05 L and A Bush, 80027.03 Matthew Sole, 80038.01 Horticulture NZ, 80038.03 Ravensdown, 80055.02 DOC, 80059.01 Kāi Tahu ki Otago, 80090.03 Federated Farmers.

[7] 80028.01 COES.

[8] 80080.08 Fish and Game.

[9] 80080.09 Fish and Game.

[10] 80082.01 Forest and Bird.

amendments were sought to the policy:[11]

> Avoid significant ~~Minimise the~~ adverse environmental effects and avoid where practicable, or minimize other adverse effects of discharges with respect to discharges from any new storm water reticulation system, or any extension to an existing storm water reticulation system by requiring:
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> …
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> (c) Measures to avoid, remedy and mitigate and minimise the presence of debris, sediments and nutrients runoff, including the ~~The~~ use of techniques to trap debris, sediments and nutrients present in runoff.

[22] In its submission Ngāi Tahu ki Murihiku stated that contamination of water bodies with wastes or wastewater can be considered culturally offensive regardless of prior treatment. The submitter supported discharging to land in preference to discharging to water in order to protect the mauri of the water body. This would recognise and give effect to Te Mana o te Wai. As relief, the submitter sought the following clause be added:[12]

> (d) The use of discharge to land options as a preference wherever practicable.

The parties' agreed position

[23] In response to the submissions by Forest and Bird and Fish and Game on the chapeau of the policy, parties agreed that there may be uncertainty about the extent of minimisation required and that it would assist implementation to instead require significant adverse effects to be avoided, and other adverse effects minimised.

[24] Ms Boyd agreed with this amendment. She considers that it gives better effect to Te Mana o te Wai by prioritising the health and well-being of water bodies and freshwater ecosystems. While she recognises that "avoidance" is a "high bar" to meet, in her opinion this is appropriate due to the need to give effect to Te mana

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[11] 80082.01 Forest and Bird.

[12] 80078.01 Ngāi Tahu ki Murihiku.

o te Wai. However, because the policy only applies to new systems or extensions to systems, the opportunity exists to design systems to meet the desired outcomes at the outset.

[25] While the parties agreed in principle that the additional clause sought by Fish and Game was appropriate, they preferred alternative wording to account for the likelihood that it would not always be possible to implement measures to filter, attenuate, or prevent run-off being discharged during rain events.

[26] They further agreed that some available techniques to trap debris, sediments and nutrients present in run-off may not be appropriate in all circumstances and agreed that clause (c) would be clarified by including "appropriate techniques".

[27] They also agreed that the new clause (d) should require consideration of appropriate measures to reduce and/or attenuate stormwater being discharged from rain events.

[28] In her evidence, Ms Boyd considers that the amended wording of this policy acknowledges the practical considerations required when designing stormwater systems while still ensuring that reducing or attenuating higher flows is a matter considered during design.

[29] Finally, parties recognised that wastewater discharges to water are culturally offensive to Kāi Tahu and agreed, in principle, with the new clause (e) sought by Ngāi Tahu ki Murihiku.

[30] Parties agreed on alternative wording of this clause to emphasise again that any consideration must be of appropriate measures and clarify that the reason for preferring discharges to land is to address adverse effects on Kāi Tahu cultural and spiritual beliefs, values and uses.

[31] While supporting all amendments agreed by the parties, in preparing her

evidence, Ms Boyd identified the need for additional minor grammatical corrections to clause (e) as follows:

(a) replacing "measures for discharge to land" with "measures for discharging to land"; and
(b) replacing "direct discharge to water" with "discharging directly to water".

Consequential amendments

[32] Under s149U(6) of the RMA, the court must apply clause 10(1) to (3) of Schedule 1 as if it were a local authority. Clause 10(2)(b) provides for a decision on provisions and submissions to include matters relating to any consequential alterations necessary arising from the submissions and any other matter relevant to the plan change arising from submissions. We agree that the grammatical corrections to clause (e) can be made as a consequential amendment.

[33] As a further consequential amendment, Fish and Game had also sought the following amendment to the principal reasons:[13]

> This policy is adopted to reduce the potential for ~~contaminants to be present in~~ adverse effects to arise from new stormwater discharges.

[34] When considering all agreed amendments to this policy, the parties also agreed to this minor amendment. They agreed that it was appropriate to recognise that the intent of the policy is to reduce the potential for adverse effects arising from contaminants to be present, rather than reducing the potential for contaminants to be present.

[35] We agree that this is an appropriate amendment.

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[13] 80080.10 Fish and Game.

Policy 7.C.6 (discharges from existing stormwater reticulation systems)

[36] Policy 7.C.6 applies to the discharge from any existing stormwater reticulation systems.

[37] Of the submissions made to Policy 7.C.6, eight supported the notified provision,[14] including Southern District Health Board ('SDHB') whose submission noted that it was aware of a number of existing urban localities in Otago that need to improve the way they manage stormwater to effectively address the risks to human health from existing stormwater reticulation systems.[15]

[38] Dunedin City Council ('DCC') submitted that the policy would not meet the outcome sought by the Regional Council and would benefit from improved clarity and sought amendments to provide clarity regarding the policy's intent.[16] DCC asked:

(a) what a "progressive" upgrade involves;
(b) how "minimise the volume of sewage" would be determined;
(c) when and how the policy would be applied to require stormwater upgrades that specifically address sewage overflows;
(d) whether there is a target or timeframe for reducing overflows; and
(e) how the Regional Council would "require" the implementation of Policy 7.C.6 given there are no proposed changes to rules, including those that permit stormwater discharges that do not contain human sewage.

[39] Additionally, DCC considered that common terminology should be used to support conversations around improvements and change and that the policy

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[14] 80011.06 Friends of Lake Hayes, 80013.02 SDHB, 80016.02 Horticulture NZ, 80019.06 L and A Bush, 80027.04 Matthew Sole, 80038.02 Ravensdown, 80059.02 Kāi Tahu ki Otago, 80090.04 Federated Farmers.
[15] 80013 SDHB (p 3).
[16] 80018.03 DCC.

would benefit from clarifying whether overflows includes both dry and wet weather overflows.[17] The submitter did not state the specific amendments it was seeking to the policy.

[40] Ngāi Tahu ki Murihiku submitted that the policy should recognise and give effect to Te Mana o te Wai and support cultural health by emphasising the avoidance of direct discharges of wastes and wastewater to water and discharge to land as a first preference.[18]

[41] The Director-General of Conservation submitted that clause (b) of Policy 7.C.6 needed to be strengthened to give effect to Policy 23(4) of the New Zealand Coastal Policy Statement because of cross-contamination with sewage systems. The submitter sought the following amendments:[19]

> (b) ~~Promoting~~ Requiring the progressive upgrading …; and
>
> …
>
> (iv) Reducing contaminant and sediment loadings at source through contaminant treatment and by controls on land use activities; and
>
> (v) Requiring integrated management of catchments and stormwater networks; and
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> (vi) Promoting design options that reduce flows into stormwater reticulation systems at source.

[42] Alongside the Director-General of Conservation, Māori Point Vineyard Ltd and B P Marsh also sought to replace "promoting" with "require' or "requiring" in clause (b).[20]

[43] Forest and Bird broadly supported the policy although it sought the

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[17] 80018.03 DCC.
[18] 80078.02 Ngāi Tahu ki Murihiku.
[19] 80055.03 DOC.
[20] 80004.02 Maori Point Vineyard, 80022.03 B P Marsh.

following amendments:[21]

> Progressively ~~R~~reduce the adverse environmental effects and avoid increasing cumulative adverse effects from existing stormwater reticulation systems by:
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> …
>
> (b) Promoting the progressive upgrading of the quality of water discharged from existing stormwater reticulation systems, including through:
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> …
>
> (iii) Measures to prevent the presence of debris, sediments and nutrients in runoff through the use of techniques to trap debris, sediments and nutrients present in runoff~~.~~; and
>
> (iv) Measures to filter reduce or prevent runoff being discharged during rain events.

[44] COES considered that regulatory limits should be specified in relation to both stormwater and sediment discharges and that existing stormwater discharge systems are progressively upgraded to meet these limits.[22] The submitter did not specify the limits it was seeking.

[45] Following mediation, parties agreed to the following changes to this policy:

(a) that the chapeau be retained as notified as it recognised the more limited ability to manage adverse effects where infrastructure already exists;

(b) to amend clause (a) so that it is clear that the requirement is to implement appropriate measures to progressively reduce sewage entering the stormwater reticulation system. This provides some flexibility for situation-specific measures to be implemented, while still retaining the overall goal (to reduce sewage in stormwater reticulation systems). It also addresses the concern raised in DCC's submission about whether the notified wording was referring to wet

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[21] 80082.02 Forest and Bird.

[22] 80028.01 COES.

or dry weather overflows (or both);

(c) to amend clause (b) by adding "requiring consideration of appropriate measures". This addresses the concern of parties that the wording needs to be strengthened while recognising the need to consider the practical constraints on upgrading existing infrastructure;

(d) to delete clause (b)(i) and to retain (b)(ii) and (iii) as notified but renumbered as (i) and (ii); and

(e) to include two additional sub-clauses related to reducing and/or attenuating stormwater being discharged during rain events and preferring discharges to land.

[46] Ms Boyd recommended the same grammatical corrections as for Policy 7.C.5 referred to above.

Policy 7.C.12 and New Policy 7.C.13

[47] As notified, Policy 7.C.12 applied to all discharges of human sewage from reticulated wastewater systems and did not differentiate between new and existing systems.

[48] Of the submissions made to this policy, five sought to retain the policy as notified,[23] including SDHB which submitted that:[24]

(a) the policy mitigates health risks of improperly designed, maintained and operated wastewater systems;

(b) the policy mitigates the public health risks of sewage overflows into stormwater systems;

(c) the policy should ensure dry weather overflows are the exception rather than a "likelihood";

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[23] 80011.07 Friends of Lake Hayes, 80016.03 Horticulture NZ, 80019.07 L and A Bush, 80027.05 Matthew Sole, 80055.04 DOC; 80013 SDHB (p 3).

[24] 80013 SDHB (p 3).

(d) it supported the preference for discharges to land, recognising the predominance of municipal and industrial treated wastewater discharges to water in Otago at this time; and

(e) it supported having regard to any adverse effects on cultural values.

[49] DCC considered Policy 7.C.12 to be uncertain and ambiguous and sought that it be amended, although no specific amendments were requested.

[50] Ngāi Tahu ki Murihiku submitted that the policy should recognise and give effect to Te Mana o te Wai and support cultural health by emphasising the avoidance of direct discharges of wastes and wastewater to water and discharge to land as a first preference.

[51] Forest and Bird supported Policy 7.C.12 in part but considered that the required industry standards needed to be specified due to potential variation in those standards. The submitter also sought to require contingency measures that clearly apply to both sewage and stormwater facilities and for new systems to be designed to avoid, rather than reduce, adverse effects.

[52] Federated Farmers submitted that this policy would have significant cost repercussions for councils, and consequently water users and ratepayers, and that guidance may be required as to what are recognised industry standards. ,The submission stated that the requirement in clause (a) could be met for new systems but there would be practical difficulties with existing systems complying with industry standards and sought the following amendments:[25]

(a) ~~Requiring~~ Ensuring reticulated wastewater systems ~~to be~~ are designed, operated, maintained and monitored in accordance with recognised industry standards; and

[53] The submission also questioned how clause (b) would be implemented in

[25] 80090.05 Federated Farmers.

relation to existing systems or whether existing systems were excluded from the requirement. The submitter sought the following amendments:[26]

> (b) Requiring the implementation of reasonable measures to:
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> …

[54] SDHB supported the policy in part and sought to retain clauses (a), (b)(i), (c) and (d) as notified. The submitter sought to amend clause (b)(ii) as follows:

> (ii) ~~Minimise the likelihood of~~ Eliminate as far as practicable dry weather overflows occurring; and

[55] Kāi Tahu ki Otago submitted that discharges of sewage to water (whether treated or not) are culturally offensive to Kāi Tahu and in the longer term mana whenua continue to seek stronger direction in rules to avoid discharges of sewage to water. The submitter supported the policy as an interim measure but sought amendments to clause (d) for consistency with other provisions in PC8:[27]

> (d) Having particular regard to any adverse effects on ~~cultural values~~ Kāi Tahu cultural and spiritual beliefs, values and uses.

[56] As a result of mediation, parties agreed that different approaches should be taken for new and existing systems in the same way as Policies 7.C.5 and 7.C.6 for stormwater.

[57] Agreement was reached to amend Policy 7.C.12 to focus on discharges from existing reticulated wastewater systems and introduce new Policy 7.C.13 for discharges from new reticulated wastewater systems.

[58] For Policy 7.C.12, parties agreed to:

> (a) amend the chapeau of Policy 7.C.12 to limit its application to existing

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[26] 80090.05 Federated Farmers.
[27] 80059.03 Kāi Tahu ki Otago.

reticulated wastewater systems and extensions to those systems as extensions are generally only of the collection infrastructure and continue to convey wastewater to the main treatment plant;

(b) make structural amendments to improve readability;

(c) make consequential amendments to clause (b) to recognise that for existing systems, it will not be possible to require them to be designed in accordance with recognised industry standards but the systems should still be operated, maintained and monitored in accordance with those standards;

(d) include a new clause (c) promoting the progressive upgrading of existing systems, to recognise that opportunities to improve systems should be encouraged when they arise;

(e) make minor amendments to clause (d) to clarify that measures to be implemented must be appropriate, recognising that different systems will have different constraints; and

(f) make consequential grammatical corrections to sub-clauses (i) and (ii).

[59] Ms Boyd advised that the submission by Forest and Bird had sought to include an additional clause relating to contingency measures, and although parties agreed this was appropriate given the use of wastewater overflows in some systems in Otago, they agreed to simplify the clause as sought by Forest and Bird to improve implementation.

[60] Parties agreed that clause (d) as notified was inconsistent with other wording adopted in PC8 related to Kāi Tahu values, including Policies 7.C.5 and 7.C.6, and agreed to replace it with "[r]ecognising and providing for the relationship of Kāi Tahu with the water body, and having particular regard to any adverse effects on Kāi Tahu cultural and spiritual beliefs, values, and uses".

[61] They further considered that stronger direction in relation to adverse effects was appropriate in the chapeau of new Policy 7.C.13 as there is more opportunity to consider effects management when designing new systems. The submission by

Ngāi Tahu ki Murihiku highlighted the cultural offense caused by discharges of human sewage to water.

[62] Parties agreed that, for new discharges and to give effect to Te Mana o te Wai and the NPS-FM 2020, adverse effects should be avoided in the first instance and otherwise minimised. This was considered to set a higher bar than for existing systems where there can be more constraints on the ability to manage effects.

[63] Amendments to clauses (a), (b), (c), and (d) mirror clauses (a), (b), (d), and (e) in Policy 7.C.12 which have been explained above, along with the supporting reasons.

[64] In her evidence, Ms Boyd explains that the RPW policies for managing stormwater and wastewater discharges have not been the subject of substantive review since the RPW was made operative in 2004. Accordingly, they fail to give effect to any of the versions of the NPS-FM. Current management of these discharges falls well short of mana whenua aspirations, as is evident in the submissions of Kāi Tahu Ki Otago and Ngāi Tahu ki Murihiku.

[65] The agreed changes clarify and strengthen the policy direction in the RPW for discharges of stormwater and wastewater by providing clarity to the requirements of the policies for infrastructure providers in order to reduce uncertainty and improve implementation, while recognising that there are different approaches required for new and existing systems.

[66] Ms Boyd further agrees that the Part A amendments give better effect to Te Mana o te Wai by strengthening expectations for acceptable levels of adverse effects, particularly in relation to new reticulated stormwater and wastewater systems. In her opinion, the changes agreed are to explicitly outline a preference for discharges to land over water, in response to the submissions of Kai Tahu ki Otago and Ngāi Tahu ki Murihiku.

Our decision

[67] We concur with Ms Boyd's assessment in relation to all changes to Part A of PC8 and duly make a decision approving these amendments as summarised above. However, we are also required to include a record of all submissions made under ss 149E and 149F, and not only those made by persons who joined the court process as a party under s274.

[68] A decision on submissions does not require the court to give a decision that addresses each submission individually[28] and decisions on submissions and reasons may address submissions by grouping them according to provisions or matters to which they relate.

[69] Ms Boyd's evidence of 18 February 2022 attached as Appendix 2, contains her recommended decisions on submissions for Part A. The court has considered and agrees with these recommendations and adopts those as the court's decision on the same.

[70] For the most part, matters raised in the submissions were addressed by the outcome agreed by parties to the mediation, along with the evidence of Ms Boyd who explains the reasons for, and provides her support to, the amendments.

[71] We will make our formal order in respect of the Part A provisions at the end of this decision.

[72] We now turn to consider the outcome agreed in relation to Part H.

Part H: Nationally or regionally important infrastructure

[73] Part H seeks to replace "regionally important infrastructure" with "regionally significant infrastructure" in Policy 10.4.2. This policy is important for

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[28] RMA, Schedule 1, cl 10(3).

considering applications for resource consent under a number of rules in section 13 of the RPW because whether or not an activity is "regionally important infrastructure" determines the approach to managing adverse effects.

[74] An explanation of the notified amendment and its intent is included in the Statement of Evidence of Ms Boyd dated 17 December 2021 at paragraphs [211] to [215].

[75] There were six submissions on Policy 10.4.2, with four seeking to retain the policy as notified.[29] The other two submitters seek amendments to what is defined as "regionally significant infrastructure" as follows:

(a) DCC considers provision needs to be made for Smooth Hill landfill to align with the Dunedin 2GP,[30] and
(b) Forest and Bird seeks to stipulate Otago's existing regionally significant infrastructure.[31]

[76] Policy 10.4.2 sits within Chapter 10 of the RPW which sets out the objectives and policies for Otago's wetlands. Policy 10.4.2 requires avoiding the adverse effects of activities on a Regionally Significant Wetland or a Regionally Significant Wetland Value, but to allow for remediation or mitigation only if the activity:

(a) is lawfully established; or
(b) is nationally or regionally important infrastructure and has specific locational constraints; or
(c) has the purpose of maintaining or enhancing a Regionally Significant Wetland or a Regionally Significant Wetland Value.

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[29] 80016.13 Horticulture NZ, 80055.28 DOC, 80082.29 Kāi Tahu ki Otago, 80090.51 Federated Farmers.
[30] 80018.08 DCC.
[31] 80082.29 Forest and Bird.

[77] Chapter 13 contains rules for uses of lakes or river beds or Regionally Significant Wetlands, including:

(a) 13.1: The use of a structure;
(b) 13.2: The erection or placement of a structure;
(c) 13.3: The repair, maintenance, extension, alteration, placement or reconstruction of a structure;
(d) 13.4: Demolition or removal of a structure;
(e) 13.5: Alteration of the bed of a lake or river, or of a Regionally Significant Wetland;
(f) 13.6: The introduction or planting of vegetation; and
(g) 13.7: The removal of vegetation.

[78] Many of these Chapter 13 rules require resource consent to be obtained, in which event Policy 10.4.2 becomes relevant to those applications; essentially determining whether effects must be avoided or whether remediation or mitigation is an option.

[79] Ms Boyd notes that currently Policy 10.4.2 uses the term "nationally or regionally important infrastructure" while the Partially Operative Otago Regional Policy Statement 2019 ('PORPS 2019') uses the term "nationally and regionally significant infrastructure" and provides a list of infrastructure meeting that definition.

[80] More relevantly, the proposed Otago Regional Policy Statement 2021 ('PORPS 2021') defines the terms "nationally significant" and "regionally significant" infrastructure separately.

[81] In order to remove debate through the resource consent process about whether "important" and "significant" are synonymous, and whether the RPW provisions should be interpreted with reference to the listed infrastructure in the regional policy statements, the Regional Council considered that consistency should be achieved with the regional policy statements.

[82] To achieve this, the parties agreed that the language in Policy 10.4.2 should be amended to substitute the word 'important' with 'significant' and although changes were sought in original submissions, the agreed outcome at mediation was that no amendments should be made to the notified version of this policy.

[83] Appendix 8 of Ms Boyd's evidence of 18 February 2022 contains her recommended decisions on submissions to Part H. There were two submissions that sought specific amendments included in this summary of submissions that are not considered to be within the scope of PC8 and which sought only a minor change to the existing wording, in order to align with the terminology of the PORPS 2019 and PORPS 2021.

[84] The court has considered the recommendations and concurs with the same. We will record our decision confirming the wording of this policy at the end of this decision.

Part G – Earthworks for residential development

[85] Part G is where the contest lies. This part proposes to introduce a new policy and two new land use and discharge rules (referred to by the Regional Council as hybrid rules) in relation to earthworks associated with residential development throughout the Otago region, along with a definition of earthworks.

[86] Agreement was reached by all parties in relation to most of these provisions, except in relation to:

(a) whether the rules should apply in the Queenstown Lakes district; and
(b) as to the amendment made to the definition of earthworks where a legal challenge was raised by one of the Submitters (on scope grounds).

[87] These unresolved issues are decided by the court in this decision.

Background to the Part G earthworks provisions

[88] By letter dated 16 May 2019, the Hon David Parker, Minister for the Environment, engaged Professor Peter Skelton, CNZM, to investigate whether the Regional Council was adequately carrying out its functions under s30(1) of the RMA in relation to freshwater management and allocation of resources.

[89] Professor Skelton identified water quality as one set of challenges, which he stated "… requires the management of nutrient discharges, sediment and other water contaminants that arise from human activity"[32] (our emphasis).

[90] He further stated that the operative RPW focuses on controlling contaminant and sediment discharges, rather than regulating or managing land use activities themselves. He identified "land environments (farm systems, irrigation, nutrient modelling, soil quality, sediment generation/transport)" as a high priority gap.

[91] In line with Professor Skelton's recommendations, the Minister made recommendations to the Regional Council under s24A RMA, including (relevantly) that the Regional Council puts in place an interim framework by 31 December 2025 pending completion of a comprehensive overhaul of the Regional Council planning framework.

Issues with current RPW provisions

[92] In her evidence, Ms Boyd expanded on the findings of Professor Skelton, and elaborated on gaps in the RPW in relation to earthworks associated with residential development[33] which are restricted to discharges rather than land uses

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[32] Professor Peter Skelton *Freshwater Management and Allocation Functions at Otago Regional Council: report to the Minister for the Environment* (Ministry for the Environment, Wellington, 1 October 2019).
[33] Noting that Part A contains new and amended policies for managing discharges of stormwater and wastewater.

and discharges in an integrated way.

[93] Earthworks are managed by the general provisions in Rule 12.C of the RPW which include:

(a) Rule 12.C.0.3 which prohibits the discharge of sediment from disturbed land to water in any lake, river, or Regionally Significant Wetland, or any drain or water race that flows to those water bodies, or the coastal marine area where no measure is taken to mitigate sediment run-off;
(b) Rule 12.C.1.1 which permits the discharge of contaminants (including sediment) to water or land where it may enter water, subject to conditions;
(c) Rules 12.C.2.1 and 12.C.2.2 which require resource consents as a restricted discretionary activity for short-term discharges that do not comply with permitted activity rule standards; and
(d) Rule 12.C.3.2 which requires resource consent as a discretionary activity for discharges not otherwise managed by the rules above.

[94] The permitted activity standards contain narrative water quality standards, which largely mirror those in s70(1)(c) to (g) RMA. Ms Boyd explained that these rules pose practical difficulties from a compliance perspective as the need for a resource consent for the discharge can only be determined when the discharge occurs. Only then is it apparent whether standards have been met.

[95] Ms Boyd referred to the objective of the NPS-FM 2020, which requires the health and well-being of the water bodies and freshwater ecosystems to be the first priority in decision-making on freshwater management, which she considered is unlikely to be delivered by the RPW in its current form.

[96] She also referred to Policy 1 of the NPS-FM 2020, which requires freshwater to be managed in a way that gives effect to Te Mana o te Wai, noting that the RPW does not acknowledge Te Mana o te Wai. She considers that the

RPW's general philosophy is unlikely to give effect to Policy 1, given the need to prioritise the health and well-being of water bodies and freshwater ecosystems.

[97] Policy 3 of the NPS-FM 2020 was also of particular relevance to Ms Boyd's assessment as this requires that freshwater be managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments. In her opinion, the RPW provisions do not give effect to this policy because the rules only consider the effects of the use and development of land to a very limited extent.[34]

Overview of PC8 changes

[98] PC8 includes amendments to existing provisions and introduces new provisions for improving management of sediment loss from earthworks for residential development to overcome some of the shortcomings with the RPW. The rules in PC8 are intended to apply to both the land use and discharge components of residential earthworks.[35]

[99] As notified, PC8 included:

(a) new Policy 7.D.10;
(b) new Rule 14.5.1.1 (land use and associated sediment discharge – permitted);
(c) new Rule 14.5.2.1 (land use and associated sediment discharge – restricted discretionary); and
(d) a new definition of "earthworks".

[100] Policy 7.D.10 as agreed by the parties requires avoiding the loss or discharge of sediment from earthworks or, where avoidance is not achievable, implementing

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[34] Boyd, SOE dated 17 December 2021 at [53], and referring to Chapter 14 of the RPW which contains rules for land uses other than in lakes or river beds. The rules manage the following activities: bore construction, drilling, defences against water, and structures.
[35] Boyd, SOE dated 17 December 2021 at [208].

best practice guidelines for minimising sediment loss. The policy will inform decision-making on resource consent applications to undertake earthworks from residential development under Rule 14.5.2.1, in addition to the general water quality policies in Section 7.B of the RPW.

[101] Rule 14.5.1.1 permits the use of land for, and associated discharge of sediment from, earthworks for residential development subject to conditions. Earthworks activities that do not meet the conditions of Rule 14.5.1.1 are restricted discretionary activities under new Rule 14.5.2.1.

[102] To assist with interpretation, Part G also introduces a definition of "earthworks" as required by the National Planning Standards (Planning Standards).

PC8 objectives

[103] The (unchallenged) objectives of the RPW are relevant to our consideration of the PC8 provisions, as this is an amending proposal in terms of s32(3)(b)(i) and (ii). Relevant objectives are:

(a) 7.A.1 – to maintain water quality in Otago's lakes, rivers, wetlands, and groundwater but enhance water quality where it is degraded;
(b) 7.A.2 – to enable the discharge of water or contaminants to water or land, in a way that maintains water quality and supports natural and human use values, including Kāi Tahu values; and
(c) 7.A.3 – to have individuals and communities manage their discharges to reduce adverse effects, including cumulative effects, on water quality.

Matters in dispute

[104] As a result of mediation, parties had agreed on a range of amendments to Policy 7.D.10, Rule 14.5.1.1, and Rule 14.5.2.1, as well as including a new definition

of "residential development".

[105] However, not all submitters agreed on whether the rules should apply in the Queenstown Lakes district. Opposition to that proposal was initially raised by:

(a) RCL Henley Downs ('RCL');
(b) Remarkables Park Ltd ('Remarkables Park');
(c) Vivian and Espie Ltd;
(d) Willowridge Developments Ltd ('Willowridge'); and
(e) Queenstown Lakes District Council ('QLDC').

[106] By the time of the hearing, QLDC had reserved its position, although Remarkables Park and Willowridge (the Submitters) continued to actively oppose the application of the PC8 rules within the district where an earthworks consent had been granted under the QLDC plan.

[107] As discussed further, their position was later refined.

The hearing

The Regional Council

[108] Helpfully, the Regional Council presented a joint case with Kāi Tahu ki Otago and Ngāi Tahu ki Murihiku calling evidence from the following witnesses:

(a) Ms R Ozanne, an environmental resource scientist at the Regional Council whose evidence related to water quality of rivers and lakes in Otago;
(b) Dr S Thomas, a coastal scientist at the Regional Council whose evidence related to water quality of estuaries in Otago;
(c) Mr E Ellison (Kāi Tahu ki Otago), who gave cultural evidence in relation to Kāi Tahu whakapapa and status, and the relationship with freshwater in Otago;

(d) Mr D Whaanga (Kāi Tahu ki Otago), who gave cultural evidence in relation to the relationship of Ngāi Tahu ki Murihiku with the lands and waters of Te Mata-au and the Catlins;

(e) Mr J Davis (Kāi Tahu ki Otago and Ngāi Tahu ki Murihiku) who gave cultural evidence in relation to impacts on wai māori from land and water use, in particular degradation of Waiwhakaata Lake Hayes and the importance of a united ki uta ki tai approach;

(f) Ms M Heather, acting team leader of compliance monitoring with the Regional Council who gave evidence in relation to challenges with the previous RPW provisions, workability of urban provisions, and addressed alleged duplication of the earthwork controls from a compliance officer's perspective;

(g) Ms K Strauss, team leader consents with the Regional Council, who gave evidence in relation to the workability of the urban provisions and the alleged duplication relating to the consenting of earthworks from the perspective of a council's consent planner; and

(h) Ms F Boyd, a planner employed as an associate with a planning consultancy, Incite, who gave planning evidence in relation to Parts A, G and H of PC8.

Director-General of Conservation/Dunedin City Council/Friends of Lake Hayes Society

[109] In addition to the Regional Council's witnesses, evidence was given by the following witnesses who supported the agreed position on PC8:

(a) Mr M Brass, for the Director-General of Conservation/Tumuaki Ahurei. Mr Brass is employed by the Department of Conservation Te Atawhai as a senior RMA planner;

(b) Ms Z Moffat who is the planning manager in 3 Waters at DCC; and

(c) Mr R Bowman who is secretary of the Friends of Lake Hayes Society Inc.

The Submitters

[110] Mr Ashton presented legal submissions for Remarkables Park on the scope issue associated with the definition of residential development, while the Submitters' substantive challenge was led by Mr Matheson with evidence being given by:

(a) Ms C Hunter, planning consultant;
(b) Mr Q McIntyre, environmental consultant; and
(c) Ms A Devlin, general manager – planning and development of Willowridge.

[111] QLDC was represented by Mr Watts who presented legal submissions, for the most part confined to an explanation of the consenting process for an earthworks proposal under the Queenstown Lakes Proposed District Plan ('PDP').

Need for the changes

[112] We heard evidence that 40 river monitoring sites across Otago (including within Queenstown Lakes district) did not meet the NPS-FM 2020 bottom line for suspended fine sediment.[36]

[113] The memorandum of Friends of Lake Hayes, which Mr Bowman spoke to, describes adverse effects associated with sediment discharges into Lake Hayes.

[114] Without saying any more about the evidence we received, it suffices that we note our unequivocal agreement that there is a need for improvements to be made in relation to management of discharges of suspended sediment associated with development, particularly in light of the evidence of the Friends of Lake Hayes.

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[36] Ozanne, SOE dated 11 February 2022 at [41].

Focus of the hearing

[115] The hearing focused on the Submitters' concerns as to duplication of the rules with those in the PDP.

[116] Witnesses for the Submitters addressed the implications of having to obtain land use under the PDP and from the Regional Council, under PC8, which would also issue a discharge permit for any sediment laden discharge.

[117] We heard that the earthworks rules in Chapter 25 of the PDP had been recently inserted into the PDP following mediation on appeals to decisions on the PDP and that the Regional Council had been a signatory to the consent order presented to the Environment Court. The Chapter 25 provisions were designed to provide for district-wide regulation in circumstances where the matter was not adequately addressed in the RPW; to bridge a gap in the RPW.

[118] Ms Hunter's evidence in particular contained a comparison of the permitted activity site standards which apply to all earthwork activities within the Queenstown Lakes district with the land use requirements of rules under PC8. In her opinion, the PC8 provisions effectively mimic those in the PDP.

[119] However, she considers that the PDP provisions are more comprehensive and go beyond the management of land use-based effects relating more to amenity and land stability issues, while addressing the potential effects of associated discharges into nearby waterways.[37]

[120] Ms Boyd, Ms Hunter and Mr Brass were all agreed that the PC8 and Chapter 25 provisions are not consistent.[38] They were agreed as to the differences between the two sets of permitted activity standards:

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[37] Hunter, SOE dated 25 February 2022 at [32].
[38] JWS Planning at [17] to [19].

(a) the Chapter 25 standards apply a slope threshold of 10 degrees or greater alongside an area threshold whereas PC8 only applies an area threshold;

(b) the Chapter 25 standards apply to "a contiguous area of land" whereas the PC8 standards apply to a "landholding";

(c) the Chapter 25 standards restrict earthworks within 10 m of a water body to a volume of 5 m^3 per consecutive 12-month period or 10 m^3 depending on whether 25.5.19.1 or 25.5.19.2 applies, whereas PC8 requires resource consent for any earthworks within 10 m of a water body;

(d) the Chapter 25 standards require erosion and sediment control measures to be implemented and maintained during earthworks (excluding in the coastal marine area), whereas PC8 requires:

(i) exposed earth is to be stabilised upon completion of the earthworks to minimise erosion and avoid slope failure;

(ii) that soil or debris is not placed where it can enter a water body, drain, race, or the coastal marine area; and

(iii) that earthworks do not result in flooding, erosion, land instability, subsidence or property damage at or beyond the boundary of the property where the earthworks occur.

(e) the Chapter 25 standards provide a permitted activity pathway for earthworks where there are contaminated or potentially contaminated soils, whereas any earthworks on contaminated or potentially contaminated soils requires resource consent under PC8; and

(f) the Chapter 25 standards require erosion and sediment control measures to be implemented and maintained during earthworks to minimise the amount of sediment exiting on the site, entering water bodies, and stormwater, whereas the PC8 standards are focused on the visual and physical effects on water bodies as set out in s70(1).

[121] Ms Hunter also noted a comparison of the matters over which discretion is reserved where a restricted discretionary activity consent is required under each

plan, which was acknowledged by witnesses for the Regional Council and the Director-General of Conservation. Our attention was drawn to the following clauses in the PDP which address:

(a) 25.8.6.1 The effectiveness of sediment control techniques to ensure sediment run-off does not leave the development site or enter water bodies;
(b) 25.8.6.2 Whether and to what extent any groundwater is likely to be affected, and mitigation measures are proposed to address likely effects;
(c) 25.8.6.3 The effects of earthworks on the natural character, ecosystem services and biodiversity values of wetlands, lakes and rivers and their margins; and
(d) 25.8.6.4 The effects on significant natural areas.

[122] Along with Ms Boyd and Mr Brass, Ms Hunter agreed that the PC8 matter regarding Kāi Tahu cultural and spiritual beliefs, values, and uses is broader than the Chapter 25 matter regarding cultural, heritage, and archaeological sites.[39]

[123] However, Ms Hunter concluded that there is no need for the additional controls in PC8 and stated:

> From a planning perspective, I do not consider that those rules, in their current form, are necessary, given the scope of the QLDC rules. In that regard I do not agree with the planning evidence from the ORC that there is a "gap" in the QLDC rules that needs to be filled by PPC 8.
>
> I conclude that the residential earthworks rules are not the most appropriate way of achieving the desired objective, when measured against the criteria in s 32, RMA, primarily because of the inefficiencies caused by this duplication.

[124] She further questioned the rationale for limiting the rules to residential

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[39] JWS Planning at [26].

development, stating that:

> In my opinion there is also no effects-based rationale as to why the plan change is limited to earthworks from residential activities. This is not an effective planning mechanism as sedimentation effects are clearly not only derived from earthworks for residential development. It seems inconsistent to me that the same site could be potentially developed for a large scale commercial or industrial activity without a regional council consent for earthworks, but this would likely result in similar outcomes in terms of potential for sediment discharges to occur.

Relief sought by the Submitters

[125] In its original submission, Remarkables Park sought relief, expressed in the alternative, that (relevantly):

(a) Rule 14.5.1 be amended such that earthworks already granted by QLDC are deemed to be a permitted activity; or

(b) Rule 14.5.2.1 be amended as follows:
Except as provided by Rule 14.5.1.1 or where Queenstown Lakes District Council has granted resource consent for the use or works, the use of land, and the associated discharge of sediment into water or onto or into land where it may enter water, for earthworks for residential development is a *restricted discretionary* activity.
…

[126] Willowridge was a further submitter to the original submission of Remarkables Park and supported that relief.

[127] By the close of the case for the Submitters, four iterations of an alternative permitted activity rule had been proposed. The latest (and preferred) version of the rule was introduced in closing submissions of counsel, and we refer to this further on. For present purposes it suffices to note that the alternative permitted activity rule would only apply where a resource consent had been issued under newly inserted Chapter 25 of the PDP.

[128] We heard evidence that not all land within the district was subject to the rules in Chapter 25 and that land presently excluded some parts of the district, including land owned by Remarkables Park. The Submitters accordingly acknowledged that their alternative rule should not apply unless an earthworks consent had been issued specifically under Chapter 25 provisions.

Summary of Submitters' case

[129] In summary, the case for the Submitters is that:

(a) the proposed alternative rule is a valid permitted activity rule under the RMA; and
(b) the rule better gives effect to the NPS-FM 2020 and concepts of Te Mana o te Wai and Ki uta ki tai, and to the PORPS 2019; and
(c) it is more effective and efficient than PC8 in terms of s32.

Overview of the Regional Council's case for PC8

[130] The Regional Council contends that the rules proposed by PC8:

(a) are within the Regional Council's functions under s30;
(b) are needed in order to give effect to Te Mana o te Wai and the obligations under the NPS-FM 2020 and having regard to the provisions of the PORPS 2021 which clearly signals a shift towards the integrated management of land use and discharges associated with earthworks activities; and in terms of s32, are the most appropriate for achieving the objectives of PC8, taking account of the other reasonably practicable options and the efficiency and effectiveness assessment.

[131] Ms Boyd explained the rationale for focusing on earthworks associated with

residential development:[40]

> Future management of earthworks will be considered through the development of the new land and water regional plan and that plan may not seek to distinguish between earthworks for different purposes. In the interim period, it is important that as Otago's urban areas continue to grow, any sedimentation is managed as effectively as possible.

Director-General of Conservation's position

[132] The Director-General of Conservation was represented by Ms Williams, and supported the provisions in PC8, which were considered to provide an appropriate interim regime pending preparation of a new planning framework, and in particular the PLWRP.

[133] The Director-General of Conservation supported application of PC8 throughout the region, including in the Queenstown Lakes district. Counsel presented submissions that complemented the case for the Regional Council.

[134] Mr Brass gave evidence supporting PC8 along with the Regional Council's opposition to the alternative permitted activity rule proposed by the Submitters.

QLDC's position

[135] In opening, counsel for QLDC explained the rationale for the submission filed by QLDC to PC8. When notified, QLDC had concerns:

(a) as to whether, in light of s75(4) RMA, PC8 would necessitate a variation to the just-settled PDP earthworks rules (in Chapter 25);
(b) as to the potential for inconsistency between conditions imposed on earthworks consents by QLDC and the Regional Council; and
(c) about minimising the potential inefficient costs faced by those

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[40] Boyd, SOE dated 17 December 2021 at [193] to [203].

undertaking earthworks in the district, if fees are to be paid to both QLDC and the Regional Council.

[136] Counsel explained that following mediation, dialogue had continued between the Regional Council and QLDC, with the result that QLDC was satisfied that the first of their concerns was no longer an issue.

[137] As to the second of these, counsel referred to a memorandum of understanding ('MOU') entered into by the two councils which was only finalised on 18 March 2022. A copy was produced to the court at the commencement of the hearing. In summary, the MOU supports streamlining the processing and monitoring of resource consents for earthworks for residential development.

[138] Counsel explained that the objective of the streamlined process outlined in the MOU is to ensure that the councils work together effectively, in terms of consenting and compliance functions, through appropriate alignment of the processes and resulting consent conditions.

[139] A two-stage process has been agreed, the first of which can commence immediately and involves:

(a) regular meetings between the councils' consents teams, and compliance monitoring teams;
(b) reviewing processes and systems for each consent authority, advising the other when an earthworks consent is applied for that may require consent from the other authority; and
(c) reviewing processes and procedures for undertaking joint site inspections, and where appropriate, sharing information with the other council.

[140] The second stage is to commence once PC8 becomes operative and involves the councils reviewing:

(a) the alignment of consent conditions when consents are being processed (including the further development of standard conditions where appropriate), or where a consent has already been issued by one consent authority, alignment with that consent where appropriate;
(b) the process by which Erosion Management Plans and Erosion and Sediment Control Plans are reviewed and certified by the consent authorities; and
(c) information on earthworks application forms and 'how to' information that refers to the consent requirements of the other consent authority.

[141] Counsel explained in broad terms the scope of the provisions in Chapter 25 of the PDP, particularly in relation to the effects of sediment-laden discharges into water on water quality and other cultural or heritage effects.

[142] We were told that in relation to development within the Lake Hayes catchment, the PDP has a policy (Policy 24.2.4.2) to "[r]estrict the subdivision, development and use of land" unless it can contribute to water quality improvement in the catchment commensurate with the scale of development proposed.

[143] From QLDC's perspective, although not actively opposing PC8, it considered that there was no need for these provisions where Chapter 25 of the PDP was being applied. As explained in closing submissions, QLDC's approach to managing the effects of earthworks on water quality has been to employ the PDP to do all it can to control the land uses that might lead to discharges through implementation of Chapter 25 provisions. Counsel accepted that QLDC cannot authorise discharges of contaminants under s15 RMA, although he submitted that Chapter 25 of the PDP is appropriate and gives effect to:

(a) Clause 3.5 of the NPS-FM 2020, Policy 3.5 in particular; and

(b) Method 2.1 of PORPS 2019;

– which require (in summary), co-operation between the councils in the integrated management of the effects of land use and development on freshwater.

[144] While we broadly agree with counsel, we do not accept that there is no need for PC8, particularly when considering the Regional Council's statutory functions and its obligations under the NPS-FM 2020 for reasons addressed further on in this decision.

[145] However, we do agree with counsel that the MOU will in large measure resolve the issues raised by the Submitters in relation to duplication and inefficiencies of the two regimes operating together. That said, we are obliged to evaluate the merits of the Submitters' competing proposal.

Submitters' alternative rule

[146] As noted earlier, four iterations of the alternative permitted activity rule that would apply within the Queenstown Lakes district in place of PC8 provisions were presented to the court during the hearing. The differences between the various versions reflect the Submitters' attempts to cure problems identified with the Submitters' original form of relief over the course of the hearing.

[147] The latest version warrants setting out in full:

> **Permitted Activity Rule 14.5.1.1A**
>
> The use of land, and the associated discharge of sediment into water or onto or into land where it may enter water, for earthworks for residential development where it is undertaken in general accordance with an existing resource consent granted by the Queenstown Lakes District Council under Chapter 25 of the Proposed Queenstown Lakes District Plan is a permitted activity providing:
>
> a. the consent has not lapsed, been surrendered or expired; and
>
> b. the Erosion and Sediment Control Plan (ESCP) prepared by a Suitably

Qualified and Experienced person for the Chapter 25 consent[41] has been submitted to and certified by the Otago Regional Council as including the following matters in (i)-(v) and being likely to achieve the outcome in (viii):

i. the works and area the consent relates to;

ii. the location of any surface water bodies on or adjacent to the site, the land areas to be subject to cut or fill activities, the extent of that cut or fill, property boundaries and other important features (including sensitive environmental receptors and contaminated sites);

iii. before and after contour lines and detail sufficient to show direction of water flow during and post the completion of the earthworks;

iv. the type and location of all erosion and sediment control measures, including, but not limited to:

1. specific erosion and sediment control works (including locations, dimensions, capacity);
2. supporting calculations and design drawings;
3. details of construction methods;
4. clean and dirty water drainage paths;
5. location of nominated discharge points;
6. site exit points and controls.

v. details relating to the management and rehabilitation of exposed areas;

vi. monitoring and maintenance requirements; and

vii. response strategy for managing significant rain events;

viii. how the standards in (d)-(j) will be met, including[42] by any discharge from the site;

c. the earthworks activity is carried out in accordance with the certified ESCP. Any proposed amendment to the ESCP after certification by the [Otago Regional Council] will require re-certification by the [Otago Regional Council] proper to that amendment taking effect.

d. earthworks do not occur within 10 m of a water body, a drain, a water race, ~~or the coastal marine area~~[43] (excluding earthworks for riparian planting);

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[41] To specify that the ESCP must be for the correlating Chapter 25 consent and prepared by a SQEP.

[42] As not all standards expressly relate to discharge.

[43] Not relevant because the Queenstown Lakes District does not contain any coastal marine area.

and

e. exposed earth is stabilised upon completion of the earthworks to minimise erosion and avoid slope failure; and

f. earthworks do not occur on contaminated or potentially contaminated land; and

g. soil or debris from earthworks is not placed where it can enter a water body, a drain, a race ~~or the coastal marine area~~; and

h. earthworks do not result in flooding, erosion, land instability, subsidence or property damage at or beyond the boundary of the property where the earthworks occur; and

i. the discharge of sediment does not result in any of the following effects in receiving waters, after reasonable mixing:

   i. the production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials; or

   ii. any change in the colour or visual clarity; or

   iii. any emission of objectionable odour; or

   iv. the rendering of fresh water unsuitable for consumption by farm animals; or

j. the discharge of sediment does not result in an ~~significant~~[44] adverse effects on aquatic life, mahika kai, and drinking water supplies as set out in Schedule 1B;

K. a refundable certification and monitoring deposit of $1500 is paid to Otago Regional Council.

Where an activity complies with Rule 14.5.1.1A then Rule 14.5.1.1 does not apply.[45]

[148] Our decision focuses on this latest version without describing earlier versions, although we note that changes made to the third version produced by Ms Hunter are tracked. In summary, this latest version includes the additional requirements that:

(a) the Erosion and Sediment Control Plan ('ESCP') must be prepared by the Suitably Qualified and Experienced person ('SQEP') who

[44] Deleted to achieve a higher standard that better gives effect to Te Mana o te Wai.

[45] This clarifies the relationship between the two permitted activity rules in PC8.

prepared the documents for the Chapter 25 consent;

(b) in addition to the requirement that the ESCP is to be certified as including identified information about the earthworks proposal, it must contain information that enables the Regional Council to certify that the sediment control measures are "likely to achieve" outcomes specified in other limbs of the rule, and notably sub-clause (i) which is modelled on the requirements of s70 of the Act.

The Regional Council's involvement under the rule

[149] As to how the rule would operate, in summary, Ms Hunter gave evidence that the rule would leave the Regional Council with a discretion to determine whether the ESCP approved through the Chapter 25 consent process (by QLDC) is adequate in addressing sediment control measures and limits to sediment-laden discharges through the proposed certification regime.

[150] The structure of the rule requires that the Regional Council certifies that the ESCP includes certain matters specified in the rule, and that they are likely to achieve outcomes also specified in the rule. The matters that are required to be met in order for the Regional Council to certify the ESCP include whether or not the plan demonstrates that the standards in paras (d) – (j) will be met, including by any discharge from the site.

[151] Counsel notes that of these standards, (i) essentially describes outcomes the same as those set out in s70 of the Act, these being (more or less) the same as those set out in the existing permitted activity rule proposed under PC8. The exception is that to be permitted under PC8, earthworks must also be less than 2,500 m^2.

[152] Accordingly, counsel submits that if these matters are sufficiently certain to be a permitted activity under the proposed rule in PC8, they must also be sufficiently certain to be able to be certified under the alternative rule proposed by the Submitters.

[153] The Submitters' alternative rule proposes that the ESCP submitted to the Regional Council for certification must be prepared by a SQEP and that it must be applicable to the Chapter 25 consent. It also provides that any subsequent amendments to the ESCP must be recertified by the Regional Council and if that does not occur then the activity would cease to be permitted under that rule.

[154] Ms Hunter's evidence was that the Regional Council could require a discharge consent under the RPW if certification of the ESCP is refused.

The Regional Council's opposition

[155] The Regional Council maintained its opposition to all versions of the Submitters' alternative rule, including the latest, for reasons including that:

(a) the certification framework requires that the officers considering the ESCP exercise an arbitral function in relation to whether the sediment control measures in the ESCP are "likely to achieve" outcomes specified in (b)(viii) of the rule, particularly in relation to s70 matters, which is ultra vires the Regional Council's rule-making powers;

(b) concerns as to how the Regional Council could certify elements of the ESCP without an assessment of effects that would ordinarily accompany a resource consent application, given that the rule is intended to operate as a permitted activity rule which does not require an application to be made;

(c) factoring in the Regional Council's role as explained by the Submitters, the rule achieves little if any transactional efficiency in the operation of the rule as proposed by the Submitters compared to PC8; and

(d) there is no apparent lawful mechanism for recovery of the Regional Council's costs in implementing the rule.

Statutory considerations

[156] When considering any matter referred to it, the Environment Court must:

(a) have regard to the Minister's reasons for making a direction in relation to the matter; and
(b) consider any information provided to it by the EPA under s149G; and
(c) act in accordance with s149U(6).

[157] Section 149U(6) provides:

> If considering a matter that is … a change to a regional plan, the court–
> (a) must apply clause 10(1) to (3) of Schedule 1 as if it were a local authority; and
> (b) may exercise the powers under section 293; and
> (c) must apply sections 66 to 70, 77A, and 77D as if it were a regional council.

[158] Pursuant to s66, the plan change must be prepared in accordance with:

(a) the regional council's functions under s30;
(b) the provisions of Part 2; and
(c) any national policy statement and national planning standards, among other requirements.

[159] Relevantly, a regional plan:

(a) must give effect to any national policy statement and regional policy statement (s67(3) RMA); and
(b) may include rules for the purpose of carrying out its functions under the Act and also for achieving the objectives and policies of the plan, pursuant to s68(1).

Matters for the court to consider

Minister's reasons

[160] We make mention of this earlier, although it warrants noting that the Minister's recommendations followed an investigation by Professor Skelton of the Regional Council's freshwater management and allocation functions. Professor Skelton had found that the Council's instruments are not fit for purpose, and ought to be replaced by regional plans and an RPS that gives effect to the NPS-FM. PC8 is one of a number of interim measures that address some of the more problematic gaps in the current framework in relation to water quality pending that broader response.

The Regional Council's functions s30(1)

[161] Our consideration of the matters raised by the Submitters requires consideration of the Regional Council's functions under the Act. It is worth setting out the relevant RMA provisions. RMA s30(1) sets out the functions of regional councils as including:

> …
> (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:

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

…

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

…

[162] RMA s31(1) sets out the functions of district councils as including:

…

(a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:

…

(b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—

(i) the avoidance or mitigation of natural hazards; and

(iia) the prevention or mitigation of any adverse effects of the development, subdivision, or use of contaminated land:

(iii) the maintenance of indigenous biological diversity:

[163] There was no dispute between the parties that the earthworks/discharge rules are within the Regional Council's functions under s30(1)(c), and similarly, that the Chapter 25 provisions are within the QLDC's functions in terms of s31. There was also agreement that only a regional council has scope to grant consent for the discharge to water (or to land where it may enter water).[46]

Overlapping functions – ss 30 and 31

[164] However, in opposing duplication of the earthworks rules in PC8, in opening submissions for the Submitters, counsel referred to the decision in

[46] JWS Planning dated 8 March 2022 at [12].

Winstone Aggregates v Matamata-Piako District Council.[47] That case was concerned with a proposal for rules in the district plan in relation to odour that sought to replicate existing provisions in a regional plan.

[165] In support of the relief being sought by the Submitters, counsel emphasised the following statements of the court:

> … We think it is wrong in principle for two governments to be regulating the same thing. There will be almost inevitable consequences in cost, duplication, potential inconsistency, blurred accountability and so on. Such a situation should have no place in a contemporary integrated resource management process, particularly given the provisions of s30 and s31 RMA.

[166] Counsel identified two important factual differences between that case and PC8 that supported the same approach here:

(a) in *Winstone*, the district council had overstepped its role in regulation of odour/particulate discharges, as the appropriate regulator of discharges was the regional council. In comparison the Chapter 25 rules fall squarely within QLDC's statutory function of controlling the actual or potential effects of the use, development or protection of land for the purposes of the maintenance and enhancement of the quality of water in water bodies; and

(b) the Chapter 25 rules are 'first in time' and the court has no jurisdiction to amend the same. Any duplication of these provisions within the RPW would have inevitable consequences in terms of cost, potential inconsistency, and blurred accountability which should be avoided.

[167] In essence, the Submitters contended that it is the Regional Council that has (in a sense) overstepped the mark on this occasion given the provisions in

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[47] *Winstone Aggregates v Matamata-Piako District Council* (2004) 11 ELRNZ 48 at [68].

Chapter 25 of the PDP which are earlier in time.

[168] However, in response to this, the Regional Council emphasised the differing functions of the Regional Council in relation to water quality matters, together with the importance of the managing of natural resources occurring in accordance with ki uta ki tai (connectedness and integrated management), which necessarily requires an integrated approach by the Regional Council to its functions under s30(1)(c)(ii).

[169] Counsel also referred to the seminal decision on the overlap of controls between regional councils and district councils, being the Court of Appeal decision in *Canterbury Regional Council v Banks Peninsula District Council.*[48] This authority had been referred to in submissions for the Director-General of Conservation as well.

[170] The case involved a proceeding where the Court made a declaration, which is applicable to the circumstances before us here. The Court held:

> A regional council may, to the extent allowed under section 68 of the Resource Management Act, include in a regional plan rules which prohibit, regulate or allow activities for the purpose of carrying out its functions under section 30(1)(c) to (h). A territorial authority may, to the extent allowed under section 76, include in a district plan rules which prohibit, regulate or allow activities for the purpose of carrying out its functions under section 31. Neither a regional council nor a territorial authority has power to make rules for purposes falling within the functions of the other, except to the extent that they fall within its own functions and for the purpose of carrying out its own functions. To that extent only, both have overlapping rule making powers, but the powers of a territorial authority are also subject to section 75(2).

[171] We agree that the Chapter 25 rules are appropriate and fall squarely within QLDC's function, although the PC8 rules are also within the Regional Council's s30(1) RMA functions. However, to the extent that there are overlapping

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[48] *Canterbury Regional Council v Banks Peninsula District Council* [1995] 3 NZLR 189.

functions and rule-making powers (in relation to earthworks) as emphasised in that decision, the powers of QLDC are subject to s75(2) RMA.

[172] The cases cited to us by the Submitters, including the *Winstone* case, do not preclude the possibility of two rule regimes applying to manage adverse effects consistent with each council's functions. We agree with the planning witnesses that although there are differences in the two rule regimes, these are not such that s75(4) would be triggered in the event that PC8 is confirmed.

[173] It is not unusual for there to be overlapping provisions in regional and district plans in the management of sediment from residential earthworks. We were referred to many other examples of that by witnesses for the Director-General of Conservation and the Regional Council.

[174] In the end, despite the similarities in the rule standards and matters of discretion, we accept the evidence of Ms Strauss for the Regional Council who stated:

> …the focus of the PC8 provisions is focussed on water quality, whereas the PDP (and the provisions of other district plans) are wider and do not specifically focus on water quality. As such, in my opinion, district and regional provisions complement each other.
>
> … the conditions of consent granted by ORC on its earthworks resource consents are predominantly focussed on water quality.
>
> … management plan conditions (such as Environmental Management Plan (**EMP**), Erosion and Sediment Control Plan (**ESCP**)) are generally common to both the ORC and QLDC consents, the focus of the ORC conditions is on monitoring water quality, often through other specific conditions that identify the type of monitoring and testing required as well as the levels that cannot be breached….
>
> QLDC conditions in relation to management plans often include a wider range of matters to be addressed, including (amongst others) noise, vibration, hours of operation, damage to roads due to construction activity, cultural heritage,

vegetation clearance, and waste management.

[175] We further refer to the evidence of Ms Heather who had referred to specific instances where potential effects were avoided by Regional Council consents and stated:[49]

> 76 QLDC's Guide for Environmental Management Plans outlines discharge criteria. This includes a limit of *"<50 mg/L Total Suspended Solids (TSS); unless specified otherwise by resource consent conditions or agreed with QLDC*". This limit of 50 mg/L TSS may not be appropriate for every receiving environment or water body.
>
> …
>
> 78 …Whilst QLDC's consents often refer to guidance regarding discharge criteria, such guidance is not enforceable as QLDC is ultimately unable to authorise the discharge to water. …
>
> …
>
> 80 …Given its functions under the RMA, ORC has a far better understanding of cumulative effects on the receiving environment and water bodies and can tailor conditions to suit.
>
> 81 ORC can tailor conditions to suit the site, discharge and receiving environment. …
>
> …
>
> 83 …While QLDC's Compliance team is an effective team, they do not have immediate on-site pH, turbidity or clarity testing equipment at their disposal. This is an important role that ORC is filling.
>
> (footnote omitted)

NPS-FM 2020

[176] There was common ground that PC8 must give effect to the NPS-FM 2020, despite not being fully achieved by these interim measures as the Regional Council accepts.

[177] We note that PC8 was publicly notified at a time when the NPS-FM 2014

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[49] Heather, SOE dated 11 February 2022 at [76]-[83].

(amended in 2017) was in force. NPS-FM 2020 came in to force on 3 September 2020. As has been noted in earlier related decisions, this instrument requires that "[e]very local authority must give effect to this National Policy Statement as soon as reasonably practicable".

[178] In accordance with s80A the Regional Council must notify a freshwater planning instrument, where that instrument has the purpose of giving effect to the NPS-FM 2020, by 31 December 2024.

[179] The consequences of the introduction of the NPS-FM 2020 'mid process' was addressed in the Environment Court decision on PC7.[50] As to the significance of that we concur with the following passage from that decision in the context of PC8:

> The plan change objective is to facilitate an efficient and effective transition from the operative freshwater planning framework to a new integrated regional planning framework and in that way the plan change *is* giving effect to the *concept* and therefore to the NPS-FM. In short, we agree with Ms McIntyre (Ngā Rūnanga) that giving effect to Te Mana o te Wai includes allowing time for its implementation through the appropriate planning instruments. This approach accords with the scheme of the Act, which envisages a cascade of planning documents, each intended to give effect to s 5, and to pt 2 more generally: per Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd.*
>
> (footnotes omitted)

[180] As in PC7, parties here were agreed that the NPS-FM 2020 and Te Mana o Te Wai represents a paradigm shift in the way in which freshwater management must be approached by the Regional Council, in respect of which the Regional Council is tasked with approaching environmental management in accordance with the fundamental concept of integrated management (ki uta ki tai). This concept was usefully explained in *Aratiatia Livestock Ltd v Southland Regional*

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[50] *Re Otago Regional Council* [2021] NZEnvC 164 at [91].

Council.[51]

[181] Part 3 of the NPS-FM 2020 sets out "a non-exhaustive" list of things that local authorities must do to give effect to Objective 2.1 and policies in Part 2 which includes Policy 3, amongst other policies. Policies 1, 2 and 3 are particularly relevant and are:

> Policy 1: Freshwater is managed in a way that gives effect to Te Mana o te Wai.
>
> Policy 2: Tangata whenua are actively involved in freshwater management (including decision-making processes), and Māori freshwater values are identified and provided for.
>
> Policy 3: Freshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments.

[182] On implementation, relevantly, clause 3.2(2) states that:

> Every regional council must give effect to Te Mana o te Wai, and in doing so, must:
>
> …
>
> (e) adopt an integrated approach, ki uta ki tai, to the management of freshwater
>
> …

[183] This is expanded upon in clause 3.5(1) (a)-(c) which (relevantly) explains the concept of integrated management in the following terms:

> (a) recognise the interconnectedness of the whole environment, from the mountains and lakes, down the rivers to hāpua (lagoons), wahapū (estuaries) and to the seas; and
>
> (b) recognise interactions between freshwater, land, water bodies, ecosystems, and receiving environments; and
>
> (c) manage freshwater, and land use and development, in catchments in an integrated and sustainable way to avoid, remedy, or mitigate adverse effects,

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[51] *Aratiatia Livestock Ltd v Southland Regional Council* [2019] NZEnvC 208 at [42].

> including cumulative effects, on the health and well-being of water bodies, freshwater ecosystems, and receiving environments; and
>
> …

[184] By clause 3.5(2), a regional council must make or change its regional policy statement to the extent needed to provide for the integrated management of the effects of:

(a) the use and development of land on freshwater; and
(b) the use and development of land and freshwater on receiving environments.

[185] By clause 3.2(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".

[186] However, for the Submitters, Ms Hunter gave evidence that having the Regional Council and QLDC work together in the management of earthworks, represents an integrated approach to managing water quality. She considers that the relevant NPS-FM 2020 policies are able to be jointly given effect to by the two councils whereby:

(a) the Chapter 25 rules would continue to regulate the land use activities associated with earthworks; and
(b) PC8 would be confined to the regulation of associated s15 discharges in circumstances where a land use consent had been issued by QLDC for the earthworks component in terms of Chapter 25.

[187] For the Submitters, counsel also described the NPS-FM as encouraging integrated management as between local authorities while imposing direct obligations on territorial authorities in respect of the management of land use to achieve water quality outcomes. Counsel put to the court that the alternative permitted activity rule *better* gives effect to the NPS-FM 2020.

[188] He questioned whether this instrument requires the imposition of land use controls by the Regional Council, contending that the integrated approach to land use and water quality could be achieved by a shared and co-operative approach of the two councils instead.

[189] We disagree with that contention. We refer back to our reference to Ms Boyd's discussion of the more relevant policies in the NPS-FM 2020, and notably Policy 3. This is that "[f]reshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments".

[190] By s67(3) RMA, a regional plan *must* give effect to a national policy statement and a regional policy statement. The direction to "give effect to" the relevant NPS-FM 2020 provisions, and particularly Policies 1-3 are not lawfully achieved in the manner contended for by the Submitters.

[191] By Policy 3 in particular, the Regional Council must be able to consider the land use and discharge components of earthworks activities in order to integrate the management of water bodies and their catchments. That is integral to the concept of ki uta ki tai. We note that we had received evidence of the importance of understanding this fundamental concept specifically in the context of water quality issues, including from Mr Ellison who attached the evidence he gave to court at hearings on PC8 primary provisions.

[192] The evidence of Mr Ellison explained the interconnectedness of environmental systems while noting that the interconnected nature of whenua, wai Māori and moana means that land-based activities have a direct consequence of rivers, lakes and the coastal environment.[52]

[193] We consider that integrated management understood in this way must be

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[52] Ellison, SOE dated 11 February 2022 Annexure 1.

given effect to by the regional plan provisions.

Relevant provisions of Otago Regional Policy Statements

[194] We first consider the argument for the Submitters in relation to the relevance of the PORPS 2019 which, in broad terms, is similar to the position it took in relation to the NPS-FM 2020:

(a) that in terms of the PORPS 2019, regional councils are directed to manage land use in certain situations, although they are not required to impose land use controls on earthworks to manage sedimentation;
(b) in contrast, territorial authorities within the region are directed to include provisions to manage the discharge of dust, silt, and sediment associated with earthworks and land use, to implement stated policies as they relate to their areas of responsibility;[53] and
(c) PC8 is inconsistent with the direction in the PORPS 2019 whereas the Submitters' preferred provisions, in conjunction with the Chapter 25 rules, better give effect to it.

[195] We note that prior to the notification of PC8, and as earlier noted, the RPW did not manage the land use component of earthworks, meaning that these activities are able to be undertaken as permitted activities under s9 of the RMA.[54]

[196] Ms Boyd, Ms Hunter and Mr Brass had agreed at expert conferencing that "… the partially operative Otago Regional Policy Statement 2019 directs territorial authorities to undertake that function".[55]

[197] In her evidence, Ms Boyd explained that "[h]istorically, the Council has taken the view that controls on earthworks should be restricted to district plans (as

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[53] Method 4.1.5.
[54] Boyd, SOE dated 17 December 2021 at [61].
[55] JWS Planning at [30].

a 'one-stop shop' approach), with the [Regional Council] limiting its intervention to the control of the discharge of sediment to water".

[198] We accept that there is clearly a lack of policy direction in the PORPS 2019 for the integrated approach to the management of land use and water quality by the Regional Council compared to that taken in the PORPS 2021. We note that PORPS 2019 only addresses the role of the district council in this particular context and states that:

> City and district plans will set objectives, policies and methods to implement policies in the RPS as they relate to the City or District Council areas of responsibility … by including provisions to manage the discharge of dust, and silt and sediment associated with earthworks and land use;
>
> (emphasis added)

[199] As earlier observed, Professor Skelton's report had highlighted the importance of the Regional Council prioritising an overhaul of the entire planning framework for the Otago region including the then current RPS (the PORPS 2019). This was a key part of a programme of work to put in place a fit for purpose freshwater management planning regime that gives effect to all relevant national instruments.

[200] We further note that this report had prompted notification of the PORPS 2021 on 28 June 2021.[56] Accordingly, we are not persuaded by the Submitters' arguments in favour of their relief based upon the PORPS 2019, given its identified flaws and pending replacement which we now consider.

PORPS 2021

[201] The PORPS 2021 is still under appeal, and is not yet at the stage where it is to be given effect to, although it is still an instrument to which we must have

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[56] Boyd, SOE dated 17 December 2021 at [117].

regard, by s66(2)(a) of the Act.

[202] We agree with the evidence of Ms Boyd that it should be given some weight in making a decision on PC8 despite being at a relatively early stage, in preference to the PORPS 2019.

[203] In contrast to the PORPS 2019, provisions are intended to give effect to the NPS-FM 2020. The PORPS 2021 contains policies of particular relevance to PC8, and notably:

(a) LF-WAI–P3(4) relating to the integrated approach to the management of the effects of the use and development of and the health and well-being of fresh water; and
(b) LF–LS–P18(1) relating to the minimisation of soil erosion, and the associated risk of sedimentation in water bodies, resulting from land use activities; and
(c) notably, LF-LS-M11(1)(d) which requires that the Regional Council's PLWRP manages uses that may affect the ability of environmental outcomes for water to be achieved by requiring earthworks activities to implement effective sediment and erosion control practices and setbacks from water bodies to reduce the risk of sediment loss to water.

[204] We agree that while PC8 does not give full effect to the PORPS 2021, it brings the RPW more in line with the new regional and national policy direction for managing freshwater, pending a full review of the RPW.

Statutory tests applying to duplication of/inconsistency between plan provisions

[205] The policy planners agreed that s32 of the Act will be relevant to the assessment of the proposed rules where there is duplication and/or inconsistency between the plans in relation to rules where there are overlapping functions as

arises here.

[206] However, we find that of the issues raised by the Submitters' perspective the only legitimate concern has to do with the overlapping nature of the plan provisions, leading to questions around efficiency of the rules, as opposed to inconsistencies in terms of s75(4)(b).[57]

[207] Ms Strauss, Ms Heather and Mr McIntyre had agreed on some areas where improvements could be made by the Regional Council in the consenting process in that:[58]

> ORC specifies within conditions what is to be included in the EMP (limited to erosion and sediment controls as they pertain to effects on water quality) whereas QLDC conditions reference the QLDC Guidelines for Environmental Management Plans (Guidelines). The Guidelines extend beyond the scope of what ORC EMPs require as QLDC has to manage all effects associated with the earthworks, including noise, vibrations, vegetation, i.e. all environmental elements and amenity effects.
>
> … there are benefits to having specific guidance for customers.
>
> … it is beneficial for customers in particular to have flexibility in the final implementation and revision of measures, after consent has been granted, that can help to drive efficiencies. QLDC's approach currently provides this flexibility by referencing the Guidelines when specifying EMP requirements whilst ORC is explicit in their conditions of what is required, thereby potentially necessitating a Section 127 application to allow for changes to the EMP and ESCP.
>
> … while ORC compliance staff have some discretion, they are limited by explicit conditions. QLDC's approach relies on SQEPs to formulate alternative solutions during implementation of the consent without the necessity for a s127 variation. For robustness, these solutions are usually peer-reviewed by another SQEP on the QLDC Supplier Panel.

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[57] See JWS Planning.
[58] JWS Regulatory Planning at [12].

[208] They agreed that there is merit to the QLDC approach in providing some flexibility in the final implementation of ESCP measures, and considered that a similar approach may be considered by the Regional Council during the PC8 implementation process.

[209] With regard to conditions requiring environmental induction, they also agreed that defining details to be included in an environmental induction as part of the consent condition is beneficial.[59] They note that QLDC currently achieves this by referring to their Guidelines. For higher risk sites, a SQEP is expected to carry out the induction for key staff. They note that the Regional Council currently does not provide any significant guidance, and that this could well be part of a future work programme for implementation of PC8 provisions.

[210] With regard to the "effectiveness and requirements of as-built confirmation conditions" they agreed that both QLDC and the Regional Council have as-built-type conditions for erosion and sediment controls, but QLDC requires a SQEP to check and confirm correct installation of controls on high-risk sites as determined by the Guidelines.[60]

[211] We find that the QLDC approach may have benefits and consider that consistency would be beneficial and easily achieved by the Regional Council under PC8 provisions without any drafting changes.

[212] QLDC has a definition of what a SQEP is whereas PC8 does not. Ms Strauss, Ms Heather and Mr McIntyre agreed that a definition that specifies the type of qualification and experience required is useful to increase the quality of the EMP and ESCPs as well as the implementation of control measures to ensure ongoing environmental performance.[61]

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[59] JWS Regulatory Planning at [14].
[60] JWS Regulatory Planning at [16].
[61] JWS Regulatory Planning at [18].

[213] Ms Strauss, Ms Heather and Mr McIntyre agreed that there is partial duplication in conditions, especially in terms of wording and timeframes, for submitting certain documents to the consent authorities after consent is granted, although they note that this is intentional, as the Regional Council developed their conditions while considering the QLDC conditions in order to prevent confusion and allow for greater consistency. They generally agree that conditions in relation to water quality are enforceable by the Regional Council.[62]

[214] Ms Strauss, Ms Heather and Mr McIntyre agreed[63] that having two consents from different authorities with two different sets of conditions can be confusing for contractors and persons associated with implementing these consents. An example of this is the different discharge limits imposed on QLDC consents and Regional Council consents. Mr McIntyre noted that any complexity/confusion is usually offset by having a dedicated environmental manager (usually the SQEP or a capable project manager), but this does not always happen in practice.

[215] Again, we find that these matters should be relatively straightforward and capable of resolution by having the same requirements for supervision and a single SQEP acceptable to both councils without making any drafting changes to PC8. We agree with counsel for QLDC that these and other processing and monitoring inconsistencies and overlaps identified in the evidence are very likely to be resolved by implementation of measures described in the MOU.

[216] We say nothing more about these complaints for that reason, other than to note that areas of duplication and the costs of that in terms of consenting and monitoring were somewhat overstated by the Submitters in the court's view.

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[62] JWS Regulatory Planning at [10].
[63] JWS Regulatory Planning at [24].

Specific issues with the drafting of Submitters' permitted activity rule

Does the rule reserve an unlawful discretion?

[217] The first of the Regional Council's specific concerns, is that the rule purports to reserve an unlawful discretion in determining compliance with standards to be met in order to attract permitted activity status in the RPW. This follows from the stipulation that the ESCP measures are achieved outcomes specified in the body of the rule. These outcomes include those that (essentially) replicate stipulations for a permitted activity rule in terms of s70 of the Act.

[218] We agree with the Regional Council's concerns in this regard and find that as drafted the rule is ultra vires the Regional Council's powers specifically in the context of s70 and more generally, under the Council's wider s68 rule-making powers. There are two fundamental reasons for this finding.

[219] First, because the rule contemplates that the Regional Council will undertake an evaluation of measures included in an ESCP, reserving a discretion to refuse to certify the same if the officers are not satisfied that measures described in the plan will achieve the s70 based outcomes, or are otherwise not considered adequate in the management of sediment laden discharges.

[220] In this regard, we are mindful of the evidence from Mr McIntyre in relation to application of QLDC guidelines, which, in terms of the Chapter 25 rules, inform the contents of an ESCP. Under these guidelines, sites are categorised in terms of whether they are low, medium or high-risk sites.

[221] Mr McIntyre's evidence illustrates the problem that could arise with the rule with reference to his experience with a previous application that had been lodged with the Regional Council in respect of a site categorised under the guidelines as a high-risk site.

[222] The application related to a development proposed by his client,

Willowridge, where a Chapter 25 earthworks consent had been issued by QLDC, in circumstances where there could potentially be a discharge of sediment-laden water into the headwaters of Bullock Creek. An ESCP had been approved by QLDC.

[223] However, the officer processing a later application to the Regional Council was not satisfied with the adequacy of the sediment control measures outlined in the ESCP that had been approved by QLDC, given the sensitivity of Bullock Creek. The dispute related to the design of the sediment control measures intended to prevent the discharge of sediment into the creek.

[224] An impasse was reached between Willowridge and the Regional Council, and rather than tolerating further delay to the earthworks programme while the Regional Council consenting process continued, Willowridge elected to withdraw the application and pumped the water into a water truck for disposal elsewhere.

[225] We agree that this could happen under the Submitters' proposal. This results in the possibility of a challenge to the Regional Council's power to act in an arbitral capacity in this certification context.

[226] We are mindful that the Submitters' proposal is premised on the Chapter 25 resource consent process first being pursued through to a grant of consent by QLDC and subsequent ESCP certification by a SQEP *before* the Regional Council's certification process is invoked under the alternative rule proposed by the Submitters.

[227] However, if certification is refused by the Regional Council, a further resource consent will be required for a restricted discretionary activity consent in terms of the RPW. Timing could be an issue for the developer implementing an earthworks programme, as it clearly had been for Willowridge in the Bullock Creek example earlier referred to.

[228] Counsel for the Submitters acknowledged that an activity cannot be

classified as a permitted activity if classification as such is ultimately left to the discretion of the consent authority, citing the decision in *Twisted World Ltd v Wellington City Council*.[64] Counsel accepted that any such rule would be clearly invalid although the Submitters do not consider that the rule they propose reserves an unlawful discretion to the Regional Council.

[229] Counsel further submitted that it is the fact of certification that determines activity status and referred to another permitted activity rule that is said to include similar elements which had been the subject of an Environment Court decision of *Population and Public Health Unit of the Northland District Health Board v Northland Regional Council* that approved in principle a similar permitted activity rule.[65]

[230] The rule in question contained a requirement that an activity be undertaken in accordance with a risk assessment that had to have been carried out before the spray application activity authorised under the permitted activity rule could be undertaken. A further condition of permitted activity status was that a written approval could be obtained and provided to the Northland Regional Council as a condition of permitted activity status where other conditions were also complied with.

[231] Counsel for the Submitters made much of the fact that the person whose approval is being sought has a discretion whether or not to give that approval, yet that was not fatal to inclusion as a permitted activity standard. However, that submission overlooks that the standard simply requires that the approval be provided to the Northland Regional Council in order to attract permitted activity status, in which event s104(3)(a)(ii) would be triggered.

[232] That is not the same as the situation where a regional council is being required to make an evaluative judgement as to whether measures included in the

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[64] *Twisted World Ltd v Wellington City Council* NZEnvC Wellington W024/2002, 8 July 2002.
[65] *Population and Public Health Unit of the Northland District Health Board v Northland Regional Council* [2021] NZEnvC 96.

ESCP are sufficient to achieve specified outcomes expressed as activity standards in order that permitted activity status can apply to the proposal..

[233] We refer to and respectfully concur with and adopt comments made by the Court in *Re Canterbury Cricket Assoc Inc* in relation to the function of a management plan.[66] Although the comments were directed at management plans required by conditions of a resource consent, the court's comments are equally applicable in this situation.

[234] The court said of this matter:

> [125] Where management plans are proposed, as is the case here, it is imperative that conditions of consent identify the performance standards that are to be met and that the management plans identify how those standards are able to be achieved: *Board of Inquiry: MacKays to Peka Extension*. The Board comments that if this is done, then generally speaking management plan conditions are acceptable.
>
> [126] While a condition of consent may leave the certifying of detail to another person (typically a Council officer) using that person's skill and experience, the court cannot delegate the making of substantive decisions: *Royal Forest and Bird Protection Society Inc v Gisborne District Council*. See also *Turner v Allison* (1970) 4 NZTPA 104 at 128 where the Court of Appeal held judicial duties cannot be delegated.
>
> [127] The conditions proposed by the applicant effectively delegated parts of the decision-making on this application to the City Council. It appears that Canterbury Cricket and the City Council considered this an appropriate process because the City Council administers the Park and for events proposed for North Hagley Park the City Council requires management plans to be prepared before a permit to hold the event is issued.
>
> (footnotes omitted)

[235] We also refer to the Environment Court decision relied upon by the

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[66] *Re Canterbury Cricket Assoc Inc* [2013] NZEnvC 184.

Regional Council in opening submissions, *Day v Manawatu-Wanganui Regional Council,* which is apposite. [67] In that case the court was considering proposed rules regulating the use of land for farming activities developed as part of the development of the Horizons Regional Council's One Plan. There had been extensive argument between the parties regarding whether or not the farming activities being regulated should be classified as permitted activities or controlled activities.

[236] Although the court was satisfied the developer-permitted activity rule could be drafted, it declined to classify the activity as a permitted activity relying on several factors:

> We accept these reasons arising from all of the material – evidence, joint statements and submissions – for not supporting a *permitted* activity rule:
>
> - Rule 13-1 proposes a one farm consent to manage all contaminant vectors (not just N) based on a systems approach to farm management commended by the Parliamentary Commissioner for the Environment.
> - Managing N leaching (effectively) would require significantly more interaction between a local authority and farmer than a *permitted* activity would allow.
> - There is limited transactional efficiency given the consent needed for discharges of effluent (an activity caught by Rule 13-1 as ancillary to dairy farming).
> - The *permitted* activity rules proposed would only really work on a fixed and not a graduated step-down in N leaching.
> - A consent provides much greater certainty for a farmer than *permitted* activity status (which could be changed at any time).
> - Control of land use to achieve water quality outcomes *of the commons* is best achieved by a consent identifying the metes and bounds of the farming activity, with explicit conditions, available for inspection as a public record, and with monitoring (at the expense of the consent holder) and enforcement.

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[67] *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182 at [5-199].

- A *permitted* activity rule would allow some farmers to leach up to the relevant threshold number without any control on management practices (with undesirable results).
- Mr Hansen acknowledged the benefits that having better on-farm information would have for future plan change decisions. Fonterra considered a *controlled* activity regime would deliver that information directly to the Council, allowing them to check and verify it within a resource consent process and a better approach.
- Section 70 requires that before a rule that allows, as a permitted activity, a discharge of a contaminant into water, or onto land in circumstances where it may enter water, can be included in a regional plan, the Court must be satisfied that, after reasonable mixing, certain adverse effects are unlikely to arise. Those effects include, under s70(1)(g), … *any significant adverse effects on aquatic life*. There was no evidential basis on which we could conclude that the requirements of s70 would be met.
- The application of the OVERSEER model means there will be a level of discretion and uncertainty which is not appropriate for a *permitted* activity rule.
- It would not allow an iterative process between farmers and the Council, including the careful record keeping and auditing of the OVERSEER inputs and assumptions needed to ensure sound environmental outcomes.
- While the Council may have powers to impose a targeted rate under the legislation, that does not substitute for the direct recovery of the Council's actual and reasonable costs under the RMA from those parties carrying out an activity with actual and potential effects on the environment.

[237] We acknowledge that *Day* had been concerned with the use of the Overseer model which does not apply in the current context, although there were a range of other factors that are equally at play here.

Section 70 issues

[238] Section 70 is particularly problematic, and perhaps more so than other issues that the Regional Council identifies with the rule, as in terms of the requirements for a permitted activity rule for a discharge, s70 states that a regional council "… shall be satisfied than none of the … effects [in s70(1)(c)-(g)] are likely

to arise in the receiving waters, after reasonable mixing, as a result of the discharge …" *before* the rule is included in a regional plan.

[239] Accordingly, for a permitted activity rule to be lawfully included within a regional plan, the Regional Council would need to be satisfied that none of the effects identified in s70(1)(c)-(g) are likely to arise (after reasonable mixing), in relation to earthworks consented under the Chapter 25 rules – *before* the rule is included in the regional plan.

[240] We are mindful that the Regional Council's permitted activity rule in PC8 (Rule 14.5.1.1) also refers to these s70 outcomes although the rule will only apply to small-scale earthworks for residential development; that is, where the area of exposed earth is no more than 2,500m^2 in any consecutive 12-month period (in addition to achieving other conditions).

[241] As explained by the Regional Council, this area limit was considered to set an acceptable threshold beyond which a resource consent requirement would be triggered. The evidence of Ms Boyd addressed this limit and referred to permitted activity standards for earthworks in a number of other regional plans throughout the country, noting that the PC8 threshold was in line, if not more restrictive than, other plan provisions.

[242] We are satisfied that there is a sufficient evidential basis for the permitted activity Rule 14.5.1.1 proposed by the Regional Council in PC8, in terms of s70 in particular, and note that the Submitters' alternative rule would provide for earthworks as a permitted activity under the RPW regardless of the scale of the development, provided that a Chapter 25 earthworks consent had been granted by QLDC. However, we were not provided with an evidential basis to support this alternative permitted activity rule in the context of the s70 requirements for a rule in this regional plan.

[243] We do not accept that it is permissible to rely on the consenting process that is to be followed by QLDC in terms of a Chapter 25 consent, where it will be

required to impose conditions and certify the ESCP measures to get past the s70 requirements. Section 70 imposes the obligation on the Regional Council not QLDC.

[244] Moreover, we read s70 as requiring that the evidential basis for permitted activity status has to exist before the permitted activity rule is inserted into the regional plan and not during a later resource consent process.

Cost recovery not possible under the alternative rule

[245] A further concern of the Regional Council is that the costs incurred by the Regional Council in the implementation of the Submitters' alternative rule would have to be paid by ratepayers in the region, as there is no mechanism for recovery of implementation costs.

[246] The Submitters agree that the "user pays" principle ought to apply to the costs of regulatory administration of earthworks,[68] however, they assert that this can be addressed by a "refundable certification and monitoring deposit" of $1,500 being paid to the Regional Council when an ESCP is submitted for certification under their rule.

[247] In support of this mechanism, the Submitters referred to a consent order made in *House Movers' Section of the New Zealand Heavy Haulage Assoc Inc v Horowhenua District Council*[69] as providing authority for imposing such a deposit.

[248] However, in closing submissions for the Regional Council, counsel rejected this proposal for reasons we agree with. This included grounds that the imposition of such a fee can only occur as a result of a separate statutory process, which has not yet occurred.

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[68] Closing legal submissions at [34].

[69] *House Movers' Section of the New Zealand Heavy Haulage Assoc Inc v Horowhenua District Council* ENV-2013-WLG-091, 20 March 2015.

[249] Counsel referred to s150(3) of the Local Government Act 2002 ('LGA') which provides that a fee under s150(1) must be prescribed in bylaws or through following a special consultative procedure under s82 LGA. A decision on PC8 to include such a provision cannot pre-empt that statutory process; it has to happen first.

[250] It is in any event unclear to the Regional Council (and to the court for that matter) what the phrase "refundable" is a reference to, and whether the reference to "deposit" means that an additional fee might later be charged. We assume that the Submitters simply adopted the wording of the condition under the consent order approved in the *Heavy Haulage* decision without any real consideration of the differing context in which it is to proposed to apply.

[251] It is also unclear whether s150 LGA is sufficient to enable the recovery of both the costs of certification of the ESCP, and associated monitoring functions of the Regional Council contemplated by the alternative rule.

[252] Section 150(1) LGA provides that "a local authority may prescribe fees or charges payable for a certificate, authority, approval, permit, or consent form, or inspection by, the local authority".

[253] It remains unclear to the Regional Council, and to the court, to what extent an "inspection" would encompass monitoring, as that term would normally apply when a council is monitoring a resource consent, or in this case, compliance with an ESCP.

[254] We note that in the evidence of Ms Hunter and in closing submissions, it had been said from the perspective of compliance monitoring, that the Regional Council would be given notice of earthworks activities that are intended to be undertaken, enabling a proactive approach to monitoring by the Regional Council, rather than needing to wait until complaints are received, which is the present situation under the RPW.

[255] However, we agree with the Regional Council's concerns in relation to the suggested mechanism for recovery of costs of the certification process and note that in relation to cost recovery for monitoring, the RMA precludes a council from establishing a fee for the monitoring of permitted activities other than where allowed by a national environmental standard.[70]

[256] That being so, the key benefits promoted by Ms Heather in terms of Regional Council compliance officers being able to proactively monitor high-risk sites would be unlikely to arise.

Conclusions on alternative permitted activity rule

[257] We find that the alternative rule proposed by the Submitters does not achieve the (settled) objectives of the RPW. Nor does it adequately give effect to the NPS-FM 2021, and particularly Policy 3.

[258] More importantly, the alternative rule is not transactionally more efficient than that proposed by PC8; in fact it is inefficient and fails to bring many benefits to the Submitters or other persons undertaking residential development within QLDC, other than in terms of gains in consenting and monitoring costs.

[259] We return to our consideration of the MOU produced to the court. We find that this evinces a genuine willingness on the part of the Regional Council and QLDC to work collaboratively and to align their approaches to erosion and sediment controls. We strongly endorse that approach.

[260] We also agree with the QLDC that full implementation of MOU-staged processes will appropriately address the Submitters' concerns regarding inefficiencies of having overlapping rules.

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[70] RMA, s36(1)(cc).

The slope standard

[261] If the court does not accept Rules 14.5.1.1A and 14.5.2A.1 proposed by the Submitters (which we do not), alternative relief is sought which includes a slope threshold in relation to earthworks in the Queenstown Lakes district in Rule 14.5.1.1(a)(ii). This appears to be an afterthought on the part of the Submitters, whose opening legal submissions did not refer to seeking a slope standard.

[262] We assume that it is part of the alternative relief sought that the PC8 rules are aligned with the Chapter 25 provisions. Although the court asked for clarification in closing submissions, we received no submissions on this issue.

[263] However, Ms Boyd had addressed the question of the slope threshold in her evidence because the Regional Council's understanding was that the Submitters would be seeking to pursue this as a change to the PC8 rules. Ms Boyd addressed the potential difficulties with implementation and the need to take a precautionary approach, particularly in light of Te Mana o te Wai.[71]

[264] The only evidence offered by the Submitters' experts in support of a slope standard are two paragraphs in Mr McIntyre's evidence[72] and three paragraphs in Ms Hunter's evidence.[73] Ms Hunter supported a slope threshold being included in Rule 14.5.1.1(a), as it ensures the regional rules are appropriately targeted to managing water quality effects by only applying to higher risk areas where the risk of sedimentation and water quality effects are more likely to occur.[74]

[265] In response to the technical difficulties and uncertainties raised by Ms Boyd in relation to slope thresholds, Ms Hunter considered this could be addressed by

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[71] Boyd, SOE dated 18 February 2022 at [145]-[170].
[72] McIntyre, SOE dated 25 February 2022 at [43]-[44].
[73] Hunter, SOE dated 25 February 2022 at [53]-[55].
[74] Hunter, SOE dated 25 February 2022 at [53]-[55].

including either a definition or explanation note regarding slope.[75] No such definition or explanation was proposed to the court.

[266] As Ms Boyd explained in responding to questions from Commissioner Hodges, whilst a slope threshold was considered in workshops during the development of PC8, ultimately the Regional Council considered that it was appropriate to provide a permitted activity pathway for those smaller earthworks activities (less than 2,500 m^2) but that a resource consent should be required for larger activities where there is a greater potential for adverse effects.[76]

[267] We agree with the Regional Council that there is not a sufficient evidential basis for inclusion of these slope thresholds and we decline to approve the same.

Scope challenge by Remarkables Park

[268] Remarkables Park submits that there is no scope to amend the definition of residential development to include visitor accommodation, which would bring it within the ambit of the residential earthworks provisions of PC8. This would amount to an expansion of the scope of the notified plan change.

[269] It accepts there was a submission (from Fish and Game) to expand PC8 to apply the earthworks rules to all activities, "commercial and industrial", although it submits that the submission was not "on" the plan change. As such, it submits that the submission cannot afford jurisdiction to include visitor accommodation within the definition of 'residential development'.

[270] The issue for the court is to determine what was meant by residential development in the notified plan change. There was no such definition in the notified PC8 or in the RPW. The definition was added as an outcome of the

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[75] Hunter, SOE dated 25 February 2022 at [54].
[76] NOE, p 167-168.

mediation process that was agreed to by parties except Remarkables Park.

[271] As to the applicable legal principles, we refer to and apply, the summary of the law as recently re-stated in the annexure to the Environment Court decision on PC7.

[272] In summary, when considering a plan change the Environment Court must apply cl 10(1)-(3) of Schedule 1 to the Act as if it were a local authority.[77] Schedule 1 provides that the local authority must give a decision on the provisions and matters raised in the submissions.

[273] The court's PC7 decision observes that the sections of the RMA that empower the Minister to call-in plans do not use the language used in Schedule 1 where a council promotes a change to a plan. Instead of the public making a submission that is "on" the plan change, they are now able to make a submission "about" the called-in plan change.

[274] However, we note that the court in PC7 considered that there is no difference in meaning between "on" and "about". Accordingly, the principles established by the Senior Court decisions that identify principles to be applied when establishing jurisdiction to grant relief, were held to apply in a called-in plan change.

[275] Accordingly, we apply the two-part test emanating from the High Court decision in *Clearwater Resort Ltd v Christchurch City Council*[78] referred to and applied in PC7. A submission is 'on' a plan change if:

(a) the submission addresses the extent to which the plan change would alter the status quo; and
(b) the submission does not cause the plan changed to be appreciably

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[77] RMA, s149U(6).
[78] *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

> amended without real opportunity for participation by those potentially affected.

[276] The first limb of the test is intended to act as a filter to ensure a direct connection between the amendment sought in the submission and the degree of alteration proposed by the notified plan change.

[277] As recorded in the PC7 decision, the s32 report is able to be referred to in defining the intended breadth of the change. If the submission raises matters that should have been addressed in the s32 report but which were not referred to, the matters are *unlikely* to fall within the ambit of the plan change. However, the s32 report does not operate as the test for determining scope.

[278] Remarkables Park contends that the s32 evaluation in this context is a key determinant of what is within the scope of PC8. Counsel refers to Ms Boyd's evidence of 17 December 2021, where she records the rationale for limiting the provisions to earthworks for residential development. Central to this was an analysis of building consent data that shows building consents, for residential buildings, make up the majority of building consents issued for buildings in every district of the region except Clutha.

[279] In closing, counsel referred to questions put to Ms Boyd in relation to the breakdown of building consents, where she stated that statistics New Zealand data contain two overarching categories for building consents; residential buildings and non-residential buildings. Within the residential building category there are a number of sub-categories which include dwellings, houses, townhouses, flats, retirement village units and apartments. The definition of 'houses' includes baches, cribs and chalets.

[280] Notably, Ms Boyd explained that 'non-residential' buildings include hotels, motels, and boarding houses. This latter category of buildings was not considered at the s32 evaluation stage. Accordingly, Remarkables Park submits that to include this now is outside the scope of the change as explained in the evaluation for

notification of PC8.

[281] Counsel submits that it would be impermissible to include this category of development within the definition of 'residential development' for the purpose of applying the provisions of PC8. In the alternative, the Submitters proposed a further drafting of the term 'residential development' that states:

> Residential development: Means the preparation of land for, and construction of, development infrastructure and buildings (including additions and alterations) for residential activities~~,~~ and includes ~~visitor accommodation and~~ retirement villages. It excludes camping grounds, motor parks, hotels, motels, backpackers' accommodation, bunkhouses, lodges and timeshares.

[282] The amended definition would capture residential development used (primarily) as such, whilst also applying to visitors' accommodation through Airbnb (for instance).

[283] After the close of the hearing we received a memorandum from counsel for the Regional Council stating that further consultation had occurred with parties to the mediation agreement, many of whom expressed support for the Submitters' alternative definition or would otherwise agree or abide by the court's decision,[79] although no response had been received from two.[80]

[284] We find that the extended definition originally agreed at mediation is not within scope, for reasons advanced by Remarkables Park, as summarised above, and agree that there are likely to have been many persons who would be disaffected by this change as there was nothing in the notified documents to hint at this as a potential outcome of the submission process, which could result in procedural

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[79] Director-General of Conservation; Kāi Tahu ki Otago; Ngāi Tahu ki Murihiku; Queenstown Lakes District Council; Dunedin City Council; Otago Fish and Game Council and Central South Island Fish and Game Council; Willowridge Developments Ltd; Vivian and Espie Ltd; RCL Henley Downs Ltd; and Friends of Lake Hayes Society Inc.

[80] Federated Farmers New Zealand – Otago and North Otago provinces; and Royal Forest and Bird Protection Society of New Zealand Inc.

unfairness.

[285] We find that the alternative proposed by the Submitters provides certainty as to the range of development to which PC8 applies. As the majority of parties who agreed to the mediated outcome are agreeable to the alternative (or will abide by the court's decision), we substitute this alternative definition for that which had been agreed through mediation.

Decisions on submissions

[286] There were a number of submitters seeking changes to Part G who were not involved in mediation. However, Appendix 2 to this decision sets out recommendations made by Ms Boyd on all submission points raised in all submissions. The court is broadly in agreement with those recommendations, and adopts them as reasons for decision on these submissions. However, this decision has addressed the outstanding issues on the contested provisions.

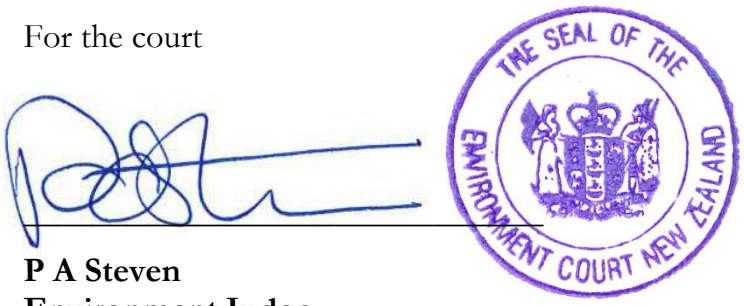
[287] We are satisfied that the recommended decisions broadly reflect the reasons for the court's decision in relation to the contested provisions, and this decision should be read alongside and prevail over reasons for the recommended decision in Appendix 2, in the event of any inconsistency. .

Outcome

[288] Pursuant to s149U(6) and cl 10(1)-(3) of Schedule 1 RMA, the court's decision on PC8 is to amend it as set out in the 'Annexure 1: Final Plan Change 8 Parts A, G and H Provisions' attached to and forming part of this decision.

[289] Pursuant to s149U(6) and cl 10(1) to (3) of Schedule 1 of the Resource Management Act 1991, the court makes the decisions shown in the record of decisions attached as 'Annexure 2: Final Plan Change 8 Parts A, G and H decisions on submissions'.

For the court



P A Steven
Environment Judge