

Before the Freshwater Hearings Panel convened by the Chief Freshwater Commissioner

In the matter of the Proposed Otago Regional Policy Statement 2021

Memorandum on behalf of Otago Fish and Game Council

13 April 2022

Solicitors

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May it please the Chair

- 1 This memorandum of counsel is filed on behalf of Otago Fish and Game Council (**Fish and Game**) in response to the Respondent's memorandum dated 15 March 2022 regarding the timetabling of Justice Nation's decision and the second minute and directions of the Hearings Panel dated 18 March 2022 (**Minute 2**).
- 2 In accordance with Minute 2, the parties are to provide input on the following matters raised by the Hearings Panel by 13 April 2022:
 - (a) whether the Hearings Panel should proceed with hearings, or adjourn proceedings until the High Court Declaration issues;
 - (b) if hearings proceed on what restricted based might hearing proceed - eg on identified chapters, topics, submissions points or provisions that are unquestionably freshwater issues; and
 - (c) whether a second panel of identical membership should be appointed to the Hearings Panel to make decisions about matters which are not freshwater issues under the traditional Schedule 1 processes.
- 3 Fish and Game are primarily interested in the freshwater provisions of the Proposed RPS (**PRPS**).
- 4 Fish and Game agrees with the Panel's statement at [22] that the hearing should not be continued without regard to the proceeding in the High Court. Fish and Game has therefore considered whether the hearing could proceed in the meantime on some sort of restricted basis.
- 5 From Counsel's recent experiences in the Queenstown Lakes District Plan Review, it is respectfully noted that:
 - (a) It can be highly inefficient, and result in significant duplication of effort, to proceed on a 'chapter by chapter' rather than 'topic by topic' basis;
 - (b) Even proceeding on a topic by topic basis could result in the need for multiple appearances and preparation of multiple briefs, that inevitably results in duplication, and without doubt increases the costs of participation for submitters. The extent of that duplication of effort and need for multiple appearances will be dependent on how the topics are defined.
 - (c) If a restricted hearing proceeds in the absence of the High Court decision it is possible that evidence preparation and appearances will ultimately not match up with what the High Court determines. This

again could result in inefficiencies and duplication of effort for the Parties and the Panel, and consequently increased costs;

- (d) If the hearing is to proceed on a topic by topic basis, topics need to be carefully identified at the outset to include specific provisions and submission points that may span across multiple chapters, where topics are vertically integrated through the PRPS.
 - (e) For these reasons, if there is to be an initial exercise of tabulating topics and corresponding provisions and submission points then that exercise critical to the process before any further steps are taken, including preparation of the 42A report and evidence. That should require identification of where all provisions fit into all topics identified through the whole of the PRPS, not just by separating out clear freshwater matters.
- 6 Fish and Game also considers that regardless of the implications of the High Court decision, that it would be preferable to follow the general sequence indicated in section 32 of the RMA, whereby objectives are considered and determined before related policies, rules and other provisions. This is the approach being undertaken by Her Honour Judge Borthwick's division of the Environment Court on the proposed Southland Water and Land Plan appeals. A copy of Her Honour's minute confirming that approach from paragraph [13] is attached.
- 7 Taking into account this approach, and the desire to avoid potential duplication or waste of effort arising from what the High Court might decide, Fish and Game consider that the preferred course of action would be for the first round of evidence, hearing and interim decision, to be solely on purely freshwater Issues and Objectives, on a similar basis to that undertaken in the proposed Southland Water and Land Plan.
- 8 If as a matter of principle this approach was agreed, it would be necessary for the parties to contribute to identification of those overarching freshwater issues and objectives. As a starter, to illustrate how this might play out, Fish and Game would suggest that the overarching freshwater issues and objectives could include the following:
- (a) SRMR-15 – Freshwater demand exceeds capacity in some places
 - (b) SRMR-16 – Declining water quality has adverse effects on the environment, our communities, and the economy
 - (c) SRMR-19 – Otago lakes are subject to pressures from tourism and population growth

- (d) RMIA–WAI–I1 – The loss and degradation of water resources through drainage, abstraction, pollution, and damming has resulted in material and cultural deprivation for Kāi Tahu ki Otago
 - (e) RMIA–WAI–I2 – Current water management does not adequately address Kāi Tahu cultural values and interests
 - (f) RMIA–WAI–I3 – The effects of land and water use activities on freshwater habitats have resulted in adverse effects on the diversity and abundance of mahika kai resources and harvesting activity
 - (g) RMIA–WAI–I4 – Effective participation of Kāi Tahu in freshwater management is hampered by poor recognition of mātauraka
 - (h) RMIA–WAI–I5 – Poor integration of water management, across agencies and across a catchment, hinders effective and holistic freshwater management
 - (i) Objective LF-WAI-O1 – Te Mana o te Wai
 - (j) LF-FW Objectives: LF-FWO8 Freshwater, LF-FW-O9 – Natural Wetlands, LF-FW-O10 Natural Character
 - (k) Specific new Issues and Objectives sought by parties that fall into the above category.
- 9 It will be noted that the above list does not include the site/FMU specific Objectives LF-VM-O2 Clutha Mata-au FMU vision, LF-VM-O3-North Otago FMU vision, LF-VM-O4-Taieri FMU vision. LF-VM-O5-Dunedin and Coast FMU vision, LF-VM-O6 – Catlins vision, as these could be considered to sit "under" the above more overarching objectives.
- 10 With the above in mind, Fish and Game respectfully records its position as follows:
- (a) Fish and Game's first preference is for the hearing timetable to be suspended until such time as the High Court decision issues;
 - (b) However Fish and Game is mindful that it is also desirable for there to be minimal delay, and therefore as a compromise, suggest that the hearing could proceed to an interim decision on a restricted basis, similar to that undertaken in the proposed Southland Water and Land Plan, starting with the overarching and purely freshwater related issues and objectives. It is considered it would be efficient and effective for there to be interim direction or determination of those overarching freshwater matters first.

- (c) Following the outcome of the above, unless contrary to the High Court decision, other clear "freshwater only" topics may then be identified and put back on track with a revised evidence and hearing schedule, all informed by the interim decision or direction on the overarching freshwater issues and objectives;
- (d) Fish and Game's preference is that the case management and hearing structure be such that it minimises the need for multiple appearances by the parties; and
- (e) Fish and Game agree with the suggestion that a second panel of identical membership to the Freshwater Commission panel could be appointed by the Respondent, to follow the standard Schedule 1 processes on the yet-to-be-determined non freshwater provisions, to ensure good decision making fulsome integration across the PRPS.
- (f) And with respect to any details as to timetabling, Fish and Game had the opportunity to consider the draft timetable that was socialised by counsel for the ORC, and note as follows, if there are to be timetabling directions:
 - (i) Fish and Game's planner Mr Farrell is out of range until 20 May, as he and his whanau take part each year in the cultural harvest of tītī (mutton birds) over a period of weeks (located on remote islands near Rakiura);
 - (ii) Fish and Game also consider that allowing for a good period of time for parties' experts to engage informally with the 42A report writers after receipt of the section 42A report, would be beneficial in terms of enabling a better understanding of the report and potentially resolving some differences. Parties have tried to engage up front with the section 42A report writers, but it is understood they do not have the capacity at this stage of the process, but after their report is submitted they should have capacity to engage.
 - (iii) Accordingly, if there is a direction for the 42A report to be published by 27 April 2022, Fish and Game seek that the date for parties to provide evidence is chief be **3 June 2022**.

Dated this 13th day of April 2022

Maree Baker-Galloway

Maree Baker-Galloway/Rosie Hill
Counsel for Otago Fish and Game Council