

Proposed Otago Regional Policy Statement Hearing – Freshwater Hearing

Speaking notes of Murray Brass for the Director-General of Conservation Tumuaki Ahurei

1. These notes are intended to assist the Panel by responding to matters raised in the hearing so far which are not already covered in my Evidence in Chief of 28 June 2023 (EiC).
2. I have not summarised my EiC, but I remain available to answer questions on any aspect of my EiC, or of my supplementary evidence addressing the implications of the NPSIB of 18 August 2023.

Role of National Direction

3. Some submitters appear to be treating the NPSFM and NPSIB as creating limits on what councils can do – e.g. protection of wetlands which are not ‘natural inland wetlands’ as defined in the NPSFM, or managing the biodiversity effects of renewable electricity generation and electricity transmission.
4. I simply note that this is not my understanding, as Part 2 requirements and s30 and 31 functions apply regardless of whether or not a matter is directly covered by national direction. More specifically, both the NPSFM and NPSIB specify that their Implementation sections are non-exhaustive and do not limit a local authority’s functions and duties under the Act in relation to freshwater / indigenous biodiversity (clause 3.1(1) and (2) in both cases).

Te Mana o te Wai and ‘balance’

5. There has been significant discussion on whether the three limbs to the hierarchy of obligations for Te Mana o te Wai, as set out in clause 1.3(5) of the NPSFM, are to be read as a sequential hierarchy or are to be balanced so that they operate together in some way.
6. My clear understanding is that Te Mana o te Wai requires that the three priorities be prioritised in sequence, as outlined in Ms Boyd’s opening statement and the evidence of Mr Farrell and Ms McIntyre. I agree with other submitters that clause 1.3(1) of the NPSFM refers to “*restoring and preserving the balance between the water, the wider environment, and the community*”, but that clause is silent on how these elements are to be balanced. I consider that the ‘how’ is expressly set out in clause 1.3(5) which should be read in its plain meaning of “first...”, “second...” and “third..”, i.e. as a sequence.

Transition framework

7. There have been some suggestions of adding either a specified transition framework or a transition process into the pORPS. I agree that there will need to be a period of transition from the current state through to the achievement of freshwater visions - this is implicit in the setting of timeframes for those visions, and is explicitly provided for in NPSFM clause 3.11(6)(a) regarding interim target attribute states. However, the appropriate timing and staging of transition will need to take account of a wide range of technical information, and will depend on the detail of freshwater values, environmental outcomes, target attribute states etc, which are yet to be determined. I therefore consider that developing a transition framework can only meaningfully be done as part of the Land and Water Plan process.

Timeframes for Freshwater Visions

8. In my EIC I recommended that timeframes for freshwater visions should be no longer than 2040. I confirm that I retain this view.
9. There has been significant discussion at the hearing about the term 'ambitious but reasonable' as used in NPSFM clause 3.3(2). I point out that this clause does not operate in isolation, but is subject to the fundamental concept of Te Mana o te Wai and the NPSFM Objective and Policies. It is therefore not a case of simply setting those visions and their timeframes at a level that resource users consider they could achieve in an ambitious but reasonable way. Rather, the visions and timeframes need to be determined in the wider context of the NPSFM.
10. The DOC technical evidence makes it clear that under current land use in Otago, many freshwater species are threatened with extinction and there is ongoing loss of freshwater values. I therefore consider that setting timeframes based on what is comfortably achievable for those current land uses would not give effect to Te Mana o te Wai or the NPSFM Objective and Policies.

Structure of Freshwater Visions

11. I confirm that I still support the proposed structure as per the s42A Report, including the region-wide objective.
12. My reading of NPSFM 3.3(2) on its face is that long-term visions may be set at the FMU, part of FMU, or catchment level – this drafting is not mandatory nor restrictive. If the intent was that long-term visions could only be set at one of those three levels, it would have been easy

for the drafting to say that – indeed, the subsequent sub-clauses (3) and (4) are both drafted as “must...”. I therefore remain comfortable that a region-wide vision is an available approach.

13. I also note the evidence of Mr McKinlay, Dr Dunn and Dr Richardson on the freshwater values of Otago. I consider it is clear from that evidence that Otago has particular and significant freshwater values, and that some of these values would warrant a consistent approach across the region. I therefore remain comfortable that a region-wide vision is justified as an appropriate way to achieve the purpose of the Act in the Otago RPS.
14. That said, I consider that the approach recommended in Ms Boyd’s opening statement adequately resolves any argument on this point, by structuring LF-FW-O1A as an objective which is then specifically imported into each FMU/rohe-specific vision. Although it would be possible to simply repeat the region-wide elements within each FMU/rohe-specific vision, I consider that this would be inefficient and unnecessary, and would run the risk of reducing the clarity of the visions, especially the distinction between elements which are common across the region and those which are more location-specific.
15. My understanding of the reason for opposing a region-wide vision based on Ms Perkins’ appearance at the hearing (other than a claimed legal technicality) is that having an objective set for the entire region rather than at a lower level makes it more difficult to alter in the future. Although I am not sure that this is actually the case (the same process is required regardless of the level a vision is set at), I disagree with the intent. Given the need for the RPS to give effect to the Objective of the NPSFM and to Te Mana o te Wai, it is a fundamental requirement that the objectives set in the RPS are indeed long-term, and that they will be committed to and implemented. I do not consider that structuring the RPS so as to make it easier to move away from those objectives is appropriate.

Provision for non-diadromous galaxiids and Canterbury mudfish

16. In her supplementary evidence Ms Boyd has agreed with my EiC recommendation that LF-FW-O1A include specific reference to protection and restoration of non-diadromous galaxiids and Canterbury mudfish populations and habitat. However, for the sake of drafting simplicity, she has done this through an insertion into LF-FW-O1A(1) as it already includes reference to indigenous species.
17. In doing so, she has added wording that these populations “are plentiful enough to support mahika kai...”. My reading of this is that it may have inadvertently changed the meaning of

the clause – the previous drafting provided that ecosystems should support healthy populations of indigenous species in their own right. However, the change appears to read that healthy populations are supported only for their value as mahika kai.

18. This was not the intention of my EiC, and it would appear to be inconsistent with s6(c) of the RMA and with Te Mana o te Wai. This issue would not arise if non-diadromous galaxiids and Canterbury mudfish were addressed in a stand-alone clause as my EiC sought.
19. However, if the Panel wishes to retain the drafting approach recommended by Ms Boyd, I suggest that it would be more appropriately worded as follows:

“healthy freshwater and estuarine ecosystems support healthy populations of indigenous species (including non-diadromous galaxiids and Canterbury mudfish) ~~that are plentiful enough to support~~ and mahika kai ~~and~~ which is safe for consumption”.

Provisions managing natural wetlands

20. Ms Boyd’s opening statement (paras 145-154) addressed provisions for natural wetlands, and noted that discussions were occurring between planning witnesses regarding drafting of LF-FW-P9.
21. I was one of those witnesses. Drafting based on those discussions has now been proffered to the Panel by legal counsel for Fish and Game. I confirm that I support that drafting.
22. I consider that the proposed drafting responds to the requirements under the RMA, NPSFM and NPSIB to protect the freshwater and indigenous biodiversity values of all wetlands (noting the evidence of Mr McKinlay and Mr Couper that those values are not contained to areas captured by the ‘natural inland wetland’ definition, and the D-G’s submission points and evidence relating to ephemeral wetlands), while also not being unnecessarily restrictive on the ability of activities to occur provided that those values are maintained or enhanced.

Reliance on Freshwater Farm Plans / Catchment Management Plans / Catchment Groups

23. There has been substantial written and oral evidence from some submitters on the use of farm plans, catchment management plans and catchment groups. Ms Perkins for OWRUG has built on this, and proposed a new policy which would give preference to *“methods requiring the least additional regulatory intervention... where this will enable progress towards achieving the visions, by...”* (Perkins EiC para 77).

24. My experience is that there has been significant growth in the uptake of these measures in Otago, particularly catchment groups. I agree with the various witnesses that such measures are providing tangible improvements on the ground, and I certainly support ORC providing support for voluntary measures.
25. However, I consider it is important that non-regulatory measures be kept in perspective. I was involved in DOC's appearance at the 2020 hearing on Plan Change 7 to the Canterbury Land and Water Regional Plan, which addressed water quality management in a number of areas including the Ashburton Lakes, and I have read the subsequent report on Ashburton lakes¹ referred to in Ms Boyd's evidence. I am also currently involved in DOC's case on the Waikato Regional Plan Change 1 ('Healthy Rivers') which is considering similar measures as a means to achieve improvements.
26. From that experience it is clear to me that farm plans, catchment planning and catchment groups can be useful tools for achieving improvements (or reducing deterioration) in a general direction, but they have not been effective in achieving specific outcomes. In the Ashburton Lakes case, the farms involved were making positive changes and meeting farm plan requirements, but the overall impact of the measures was far short of what the water bodies needed. I consider that this is reflected in Ms Perkins' proposed drafting "*where this will enable progress towards...*", which applies to movement in a general direction rather than achievement of specific outcomes.
27. I therefore consider that it would be ineffective, and inconsistent with Te Mana o te Wai, to rely on non-regulatory measures and/or regulated freshwater farm plans. Rather, the Otago freshwater planning framework will need to set clear targets and limits, and regulatory requirements to ensure those targets are met. Non-regulatory measures and freshwater farm plans may help as delivery methods, but cannot be relied on to achieve the required targets and limits.

Murray Brass

5 September 2023

¹ Ōtūwharekai/Ashburton Lakes lessons learnt report: a case study examining ongoing deterioration of water quality in the Ōtūwharekai lakes. Wellington: Ministry for the Environment (2023)
https://environment.govt.nz/assets/publications/ME1763_LessonsLearnt_Final_24.5.pdf