

BEFORE THE FRESHWATER HEARING PANEL

UNDER THE

Resource Management Act 1991

AND

IN THE MATTER

of the Proposed Otago Regional Policy Statement 2021:
Freshwater Planning Instrument

CLOSING SUBMISSIONS FOR THE OTAGO REGIONAL COUNCIL

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CLOSING SUBMISSIONS FOR THE OTAGO REGIONAL COUNCIL

May it Please the Panel:

Introduction

1. For convenience these submissions follow the order of the freshwater provisions in the Proposed Otago Regional Policy Statement (“the **RPS**”). In addition, the Otago Regional Council’s (“the **ORC**”) overarching legal submission is restated, and process matters are dealt with.
2. This breaks down as follows:
 - 2.1. The overarching ORC legal submission.
 - 2.2. LF-WAI-O1 – Te Mana o te Wai:
 - 2.2.1. Mauri
 - 2.2.2. The 6 principles of Te Mana o te Wai
 - 2.3. LF-WAI-P1 – Prioritisation
 - 2.3.1. The importance of the hierarchy of obligations
 - 2.3.2. Balance
 - 2.3.3. The hierarchy of obligations – conceptually
 - 2.3.4. The second priority
 - 2.4. Proposed LF-WAI-P3A – Integrated Catchment Management
 - 2.5. LF-FW-O1A – Visions set for each FMU and rohe
 - 2.5.1. A region-wide objective
 - 2.5.2. Fish passage and the meaning of “river”
 - 2.5.3. “Natural”, “naturally”, baselines and a pre-human state
 - 2.6. LF-FW-P7A – Water Allocation and use

- 2.7. LF-FW-P9 – Protecting Natural Wetlands
 - 2.7.1. At notification
 - 2.7.2. The 2022 NPSFM amendments
 - 2.7.3. The NPSIB
 - 2.7.4. The implications of the NPSIB
 - 2.7.5. The policy gap
 - 2.7.6. Criticism
 - 2.7.6.1. OGL
 - 2.7.6.2. Horticulture NZ
 - 2.7.6.3. OWRUG
 - 2.7.6.4. A change to address criticism
 - 2.7.7. Scope and delay
- 2.8. Process matters
 - 2.8.1. Engage vs consult
 - 2.8.2. The interface with other national policy statements – *POL v EDS*
 - 2.8.3. Integrating the FPI and the non-FPI

The overarching ORC legal submission

- 3. The National Policy Statement for Freshwater Management 2020 (“the **NPSFM**”) sets out a very prescriptive regime, most of which is expressly to occur at the regional plan level.
- 4. The narrow role of the RPS can be summarised:
 - 4.1. the RPS is to adopt an objective describing how the management of freshwater in the region will give effect to Te Mana o te Wai.
 - 4.2. The long-term visions are to be included in the RPS as

objectives.

- 4.3. The RPS may add to Part 3 of the NPSFM, but not in a way that is inconsistent with those provisions.
- 4.4. The RPS may adopt more stringent measures.
5. The nature of the regime, especially the National Objectives Framework in the NPSFM (“the **NOF**”), is such that prioritising the allocation of water and similar matters cannot be pre-empted in the RPS and can only occur after stepping through the NOF.
6. That’s because each step in the NOF informs the subsequent step.
7. For each FMU or part FMU the relevant values, environmental outcomes, attributes and their baseline states, target attribute states and flows and levels must be dealt with in order before matters such as allocation and priority can be determined.
8. The NOF steps are all regional plan matters.
9. Essentially, the RPS sets the visions, and the NOF is then implemented at regional plan level to achieve those visions and the policies and objective of the NPSFM.

LF-WAI-O1 – Te Mana o te Wai

Mauri

10. The meaning of mauri has been explored with a number of witnesses.
11. A definition beyond “life-force” is elusive. Equally difficult, how to identify the mauri of a particular waterbody, and whether it is intact or degraded.
12. Clause 1.3(1) of the NPSFM provides that Te Mana o te Wai protects the mauri of the wai.
13. Mauri is not defined in the NPSFM.
14. There is no other relevant reference to mauri in the NPSFM.
15. The plain meaning of clause 1.3 of the NPSFM is that Te Mana o te Wai is to be given effect to, in order to protect the mauri of the wai.

16. This is consistent with the observations of the Environment Court in *Aratiatia Livestock Limited v Southland Regional Council*¹ at [60]:

“Having defined Te Mana o te Wai,⁸² the NPS-FM records that upholding Te Mana o te Wai acknowledges and protects the mauri of the water.⁸³ Thus, acknowledgement and protection of mauri is an outcome of upholding Te Mana o te Wai. The mauri of water is, therefore, expressly linked with its use”.

[Emphasis added.]

The 6 principles of Te Mana o te Wai

17. Clause 1.3(3) of the NPSFM states:

“Te Mana o te Wai encompasses 6 principles relating to the roles of tangata whenua and other New Zealanders in the management of freshwater, and these principles inform this National Policy Statement and its implementation.”

[Emphasis added.]

18. These principles tend to be overlooked when interpreting other aspects of Te Mana o te Wai, such as ‘balance’ and the hierarchy of obligations.
19. The first three principles relate to tangata whenua and, notably, include sustainable use of freshwater for the benefit of present and future generations.
20. The fourth principle is the: *“responsibility of those with authority for making decisions about freshwater to do so in a way that prioritises the health and well-being of freshwater now and into the future”*.
21. The responsibility referred to in the fourth principle lies with this Panel for the RPS.
22. The fifth and sixth principles apply to all New Zealanders, the obligations of sustainable management and responsibility to care for freshwater in providing for the health of the nation.
23. Each principle is focussed on the water.

¹ [2019] NZEnvC 208; note the comments refer to the NPSFM 2014

24. The principles reinforce the proposition that Te Mana o te Wai is water centric, and findings on balance and the hierarchy of obligations should reflect that.

LF-WAI-P1 - Prioritisation

The importance of the hierarchy of obligations

25. The Panel put a question to Fonterra’s counsel concerning whether clause 3.7(1)(b) of the NPSFM is the only place where there is a requirement to apply the hierarchy of obligations. That clause requires the hierarchy to be applied at each step of the NOF process.
26. Clause 3.2(2)(c) of the NPSFM also applies, requiring that the hierarchy of obligations must be applied when:
- 26.1. developing long-term visions;
 - 26.2. implementing the NOF; and
 - 26.3. developing objectives, policies, methods, and criteria for any purpose under subpart 3 relating to natural inland wetlands, rivers, fish passage, primary contact sites, and water allocation.
27. And the sole objective in clause 2.1 of the NPSFM is to ensure that natural and physical resources are managed in a way that applies the hierarchy of obligations.
28. The hierarchy of obligations is at the heart of the NPSFM.

Balance

29. Clause 1.3(1) of the NPSFM provides:

“Te Mana o te Wai is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.”

[Emphasis added.]

30. The implications of the word “balance” have been the subject of

submission and planning evidence.²

31. The balance referred to in clause 1.3(1) is to be “*restored and preserved*”. The preceding words make it clear in that proper balance has water as fundamentally important, with its health to be protected which in turn protects the health and well-being of the wider environment.
32. This is consistent with the hierarchy of obligations and does not require it to be read down to be anything other than a hierarchy with three priorities, ordered first, second and third.
33. This is also consistent with the 6 principles of Te Mana o te Wai, especially the fourth principle.
34. During the hearing the Panel Chair drew attention to paragraph 23 of Ms Hunter’s evidence, which reads:

“I think the latter part of this explanation is important. It is appropriate to recognise that Te Mana o te Wai is about achieving a balance between the different priorities. The three priorities are all “acceptable” outcomes, and, in my view, that is why they each need to be given priority. The ranking ensures that in making decisions the advancing of a lower order priority cannot be pursued in a way that means a higher order priority is no longer being met. That is not the same as saying that a higher order priority can be pursued without consideration of lower order priorities. Were that to happen there would be no ‘balance’.”

[Emphasis added.]
35. The underlined words express the position very well.
36. All three priorities are just that, priorities.
37. In implementing the NOF, and managing natural and physical resources more generally, the objective is to achieve all three priorities. Each one of them is a priority. That is the objective in clause 2.1 of the NPSFM.
38. The ranking means that achieving a lower order priority cannot prevent a higher order priority from being achieved.
39. This is the balance that is to be restored and preserved.

² For example the submissions of counsel for OWRUG and OGL

40. Keeping Ms Hunter's words in mind, will assist in considering the hierarchy of obligations.

The hierarchy of obligations - conceptually

41. As noted above, each of the three priorities is something which the NPSFM seeks to achieve.
42. Submissions have tended to focus on whether a particular activity falls within one or other priority.
43. Mostly, it has been submitted that activities (such as farming animals for food, growing fruit and vegetables, making wine and generating electricity) support human health needs one way or another and are therefore priority two activities.
44. That's the wrong way to approach the hierarchy.
45. The hierarchy is not about what level of priority activities have. It's about the impact of activities on the priorities.
46. This is evident from the objective of the NPSFM in clause 2.1 which is to: *"ensure that natural and physical resources are managed in a way that prioritises ..."*.
47. Resources are managed to achieve the three priorities.
48. Or, faced with a constraint, resources are managed to ensure that the first priority is achieved before the second, and the second before the third.
49. Put differently, in situations of constraint the third priority is limited or sacrificed before the second, and the second before the first.
50. Primarily, this is to be achieved at the regional plan level.
51. The planning (management of natural and physical resources) to be undertaken is for all three priorities.
52. The NOF is how we establish what each priority means in an FMU or part FMU.
53. This is evident from the values in Appendix 1 of the NPSFM which are relevant to all three priorities. The values listed are ecosystem health,

human contact, threatened species, mahinga kai, natural form and character, drinking water supply, wai tapu, transport and Tauranga waka, fishing, hydro-electric power generation, animal drinking water, irrigation, cultivation and production of food and beverages, and commercial and industrial use.

54. These values then flow to environmental outcomes, attributes and their baseline states, target attribute states and flows and levels.
55. By implementing the NOF we determine, for example, what is required in a FMU or part FMU to achieve waterbody and ecosystem health. Or water sufficient to drink. Or for irrigation or industry. Or to satisfy an element of cultural or social wellbeing.
56. Where the hierarchy bites is when there is a resource limit or conflict. The purpose of the hierarchy is that in those instances the health of the water comes first, human health needs second, social, economic and cultural wellbeing third.
57. There is no requirement to treat one activity more favourably because it relates to a higher priority unless a limit or conflict exists.
58. Put differently, once a priority is provided for, there is no need to give it further priority.
59. And, within the bounds of the NOF, there is freedom as to how priorities are achieved.
60. For example, it is entirely legitimate to favour a town drinking water supply over a proposal to bottle water and sell it to the townspeople. So long as sufficient drinking water is provided for, the water bottling proposal need not be given any special priority.
61. The NOF turns the abstract priorities into plan provisions which are to achieve the three priorities, or in some cases will limit lower priorities to ensure higher priorities are first achieved.
62. At the consent level it is the effects of the proposed activity on the priorities that must be considered. In doing so the position is as Ms Hunter described: *“the advancing of a lower order priority cannot be pursued in a way that means a higher order priority is no longer being met”*.

63. This leaves the issue of what the second priority means.

The second priority

64. Under Te Mana o te Wai it is the water which is of fundamental importance.

65. The concept is water centric.

66. In LF-WAI-P1 the RPS seeks to give greater direction that the second priority is about the water itself being healthy for humans. That means healthy to touch, healthy to swallow and healthy to take food from.

67. This view is consistent with the water centric nature of Te Mana o te Wai.

68. During the hearing it was put to me and others that if priority 2 has the meaning above, then the second priority is redundant, because healthy water will meet both priority 1 and priority 2.

69. That is not the case.

70. Quality and quantity sufficient for healthy water bodies and ecosystems is not the same as the quality and quantity needed for human health.

71. Ms Boyd gives the example of bacterial contamination.

72. A simpler example is water quantity, where ecosystem health may dictate that a certain volume of water remains in a water body, while a sufficient quantity of drinking water requires that a lower volume remain. In that contest, the water body must win. Hence the second priority is needed.

73. If priority 2 is extended to include food, then it becomes very difficult to distinguish priority 2 from priority 3.

74. For example, how do we distinguish between the water used for domestic cherries and the water used for export cherries. Or does the generosity element manaakitanga mean feeding the world is part of priority 2?

75. Is there a distinction between water for crops and water for stock?

76. If grapes are food and a health need, is wine a health need too?

77. If not, are other unhealthy foods and beverages not human health needs?

78. If so, how do we distinguish?
79. Perhaps by the level of processing? If so what level of processing is acceptable?
80. If using water for food is in priority 2, then why would using water for electricity for health needs such as warmth and medical devices not be?
81. Is it a question of how many steps removed from the water something is? Or the proportion used for relevant health needs?
82. Why would the drafter of priority 2 not add the words “and food” if that was intended?
83. The simplest and most obvious meaning is that priority 2 is water sufficient for human health needs related to the water itself ie harvest from it, touch it, drink it.
84. That is the meaning which should be adopted.

Proposed LF-WAI-P3A – Integrated Catchment Management

85. Counsel for Beef + Lamb New Zealand Limited and Deer Industry New Zealand submit that a directive process policy is required to address integrated catchment management.
86. The proposed new policy is:³

“LF-WAI-P3A – Integrated Catchment Management

(1) When developing and implementing planning instruments to give effect to the objectives and policies in this policy statement through integrated management of land and freshwater, Otago Regional Council must actively engage with local communities and tangata whenua, at the rohe and catchment level,

(2) Provide for integrated management at a catchment level by supporting the establishment of Integrated Catchment Management Groups that incorporate Otago Regional Council with local community and tangata whenua representatives, and

³ Paragraph 94 of Dr Somerville KC and Ms Luisetti’s submissions

(3) *Progress and implement integrated management of catchments through the preparation of Catchment Action Plans by the Integrated Catchment Groups, in accordance with clause 3.15 of the NPSFM that:*

(a) *develop visions, identify values and environmental outcomes for Otago's catchments and the methods to achieve those outcomes, including as required by the NOF process,*

(b) *develop and implement actions that may be adapted over time with trigger points where additional regulatory and/or non-regulatory intervention is required,*

(c) *make recommendations on amendments that may be required to the provisions of this policy statement, including the visions and timeframes in the parent FMU, and any other changes necessary to achieve integrated catchment management pursuant to clauses 3.2(2) and 3.5(2) of the NPSFM*

(d) *at a local catchment level, encourage community initiatives to maintain or improve the health and well-being of waterbodies and their freshwater ecosystems, to meet the health needs of people, and enable the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.”*

[My emphasis.]

87. Sub-clause (3) requires that the catchment action plans be prepared under clause 3.15 of the NPSFM. That means that they would be and have the standing of action plans under the NPSFM.
88. The RPS already contains methods (LF-FWM8 and LF-FW-M8AA) for action plans including catchment action plans.
89. Method LF-FW-M8AA relates to catchment action plans. This is expressed as something the ORC “may” do. Indeed, as noted in submissions for Beef + Lamb New Zealand Limited and Deer Industry New Zealand the ORC is presently running an Integrated Catchment Management Program which contemplates catchment groups and action plans, albeit these are not action plans in the NPSFM sense.
90. The NPSFM contains detailed provisions concerning action plans. Clause 3.12 sets out the circumstances in which regional councils may in some

circumstances and must in other circumstances prepare action plans to achieve target attribute states or environmental outcomes. See also clauses 3.15, 3.20, 3.25 and 3.26.

91. The proposed policy is not needed.
92. Action plans in the NPSFM sense may be prepared under clause 3.15 for whole FMUs, part FMUs or more than one FMU.
93. The RPS sets visions at the FMU and rohe (part-FMU) levels.
94. It is difficult to see why there would be a policy requiring action plans at the catchment level. If that is to occur, then it should be after the NOF has shown it to be necessary for the catchment or catchments concerned. This may well be where the NOF and the ORC's present work leads, but it is something that should be made mandatory.
95. The visions under the NPSFM are the job of this RPS. The values and environmental outcomes are for the regional plan that follows.
96. Yet the proposed catchment action plans are expressly to develop visions and identify values and environmental outcomes.
97. This is at odds with the visions in the RPS (it pre-supposes they are wrong or inadequate) and the role of the regional plan to follow.
98. Action plans in the NPSFM sense are methods by which visions, environmental outcomes and their target attribute states are to be achieved. The proposed policy has this back to front.
99. Under the proposed policy the action plans are to be prepared by the catchment groups..
100. The ORC council cannot delegate its power in this way. While it may work with others, participate in groups and use other tools of community consultation and engagement, it is regional councils which must prepare the action plans.
101. A policy directing NPSFM action plans for the development of new visions and environmental outcomes, at a catchment level, by catchment groups rather than the ORC, is at odds with the NOF, and the visions in this RPS.

LF-FW-O1A – Visions set for each FMU and rohe

A region-wide objective

102. Ms Boyd proposes that common elements in the long-term visions form a new region-wide objective LF-FW-O1A.
103. Under clause 3.3(2)(a) of the NPSFM long-term visions may be set at FMU, part of an FMU, or catchment level.
104. Long-term visions may not be set on a region-wide basis. Presumably this reflects that communities and tangata whenua are to have the opportunity to express different visions for different FMUs, part FMUs or catchments.
105. In this instance though there is some commonality between the visions.
106. Not duplicating the common elements of the visions is good drafting practice.
107. It is a matter of form rather than substance.
108. However, it must be clear that the common visions have been set for each FMU or rohe. Otherwise, there is risk of breaching the NPSFM, albeit in a technical sense.
109. To that end Ms McIntyre has proposed adding to the introductory words of each vision: “*and in addition to the matters in LF-FW-O1A*”.
110. I suggest that the title of LF-FW-O1A be changed to: “*Visions set for each FMU and rohe*”.
111. And that the introductory words to LF-FW-O1a be amended: “*In each all FMUs and rohe ...*”

Fish passage and the meaning of “river”

112. The recommended text of LF-FW-O1A(3) is: “*indigenous species migrate easily within and between catchments*”.
113. Mr Taylor gave evidence that the DCC’s stormwater network includes many piped watercourses, sometimes divided by open watercourses, with drop structures that are a barrier to fish passage. He states that these

piped watercourses are classified as rivers under the RMA.⁴

114. At the request of the panel counsel for the DCC filed a memorandum dated 13 September 2023 on the issue of whether piped urban watercourses are rivers for the purpose of the RMA.
115. In context of the objective above it is immaterial whether an impediment to fish migration is in a river (as defined in the Act) or not. Either way it impacts freshwater ecology and is contrary to the objective set out above.
116. Mr Taylor's concerns need to be considered in that context, and not premised upon whether the watercourses he refers to will fall within the definition of river or not.
117. For completeness, a piped watercourse will never be a river for RMA purposes, because the river definition requires flowing fresh water, and the water definition excludes water in pipes. A modified watercourse which is open is a river, but an artificial watercourse is not.

“Natural”, “naturally”, baselines and a pre-human state

118. LF-FW-O1A(4) provides: *“the natural form, function and character of water bodies reflects their natural characteristics and natural behaviours to the greatest extent practicable”*.
119. On the first day of the hearing the Panel raised the meaning of “natural” and “naturally”.
120. A point well made by Ms Craw in in her oral evidence for Waka Kotahi on the third day of the hearing is that many water bodies in Otago are highly modified.
121. “Natural” generally means something which is not made or caused by humans.
122. “Naturally” has a corresponding meaning ie without human intervention.
123. In the resource management context natural (for example a natural landscape) does not necessarily mean free of human intervention.
124. In the NPSFM there is a definition of “naturally occurring process” which

⁴ At paragraph 28 of his statement dated 28 June 2023

provides: “**naturally occurring process** means a process that occurs, or would occur, in the absence of human activity”.

125. This definition is used in context of assessing deteriorating trends (clause 3.19), as an exception to national bottom lines (clause 3.32) and whether something is degraded or degrading (clause 1.4). These contexts are not relevant, they are all to exclude natural changes when assessing human impact.
126. In context of determining whether a river is naturally soft-bottomed or naturally hard-bottomed in clause 3.25 “naturally” is defined to mean: “...its state before the arrival of humans in New Zealand”.
127. The use of that definition with application solely in clause 3.25 suggests that other uses of “natural” or “naturally” should not have this meaning in the NPSFM context.
128. The NOF also provides guidance in the NPSFM context.
129. Natural form and character is an Appendix 1B value which must be considered for each FMU or part FMU and if present have an environmental outcome and if practicable attributes identified and their baseline states and target attribute states set.
130. Importantly, baseline state for an attribute is defined in clause 1.4 to mean the best of the state when the attribute is identified, the date the relevant objective (ie this one) was set, or 7 September 2017. In practical terms the status quo.
131. From the description of natural form and character in Appendix 1B (page 41, not repeated here) it appears that a pre-human state is not contemplated. There is reference to “characteristics valued by the community” and “the relative dominance” of indigenous flora and fauna.
132. What matters the most is the context in which the word is used ie this part of the vision in the RPS.
133. In her reply report (at paragraph 56) Ms Boyd summarises her recommendation to include “to the greatest extent practicable”: “... *this recognises that there are practical constraints on the ability for water bodies to reflect their natural form and function (i.e. due to modification). However, the fact that water bodies have been modified should not, alone,*

be a reason not to pursue opportunities to improve their form and function where these exist and can be practically achieved’.

134. As it stands the objective does not contemplate a natural as in “pre-human” state but does contemplate movement in that direction if practicable.
135. What this means for each FMU is a matter that will be determined as part of the NOF, natural form and character being an Appendix 1B value. Where attributes are identified, a target attribute state will be set, which cannot be less than the status quo.

LF-FW-P7A – Water Allocation and use

136. Counsel for Strath Clyde Water and others⁵ argues that the ORC’s submissions do not identify a provision in the NPSFM which more specific provision for water allocation would offend against, referencing paragraphs 30 to 65 of the ORC’s opening submissions.
137. The paragraphs referenced identify all or near all of the NOF provisions in the NPSFM. And that is the point. The NOF provides a detailed process, at the end of which water allocation provisions will be made such that the relevant long-term visions and the policies and objective of the NPSFM are achieved.
138. It is premature to specify now that priority will be given to the lowest water use per hectare or the greatest economic return and employment per volume of water used or similar.⁶
139. Such uses may well be favoured, but that cannot be known until the NOF process of establishing the relevant values, environmental outcomes, attribute states, baseline states and target attribute states such as to achieve the long-term visions and the objective of the NPSFM has been completed.
140. The Panel Chair questioned Mr Johnson about what legal basis there is to emphasise efficiency above all else.
141. Clause 3.28 of the NPSFM requires regional plans to include criteria for:

⁵ At paragraph 11

⁶ See also page 4 of the McArthur Ridge submission for submitters’ the proposed policy wording

“deciding how to improve and maximise the efficient allocation of water (which includes economic, technical, and dynamic efficiency).”

142. And to include methods to encourage the efficient use of water.
143. Efficiency is clearly important, but in terms of clause 3.28 it is not limited to economic benefit, and it is something to be maximised and encouraged.
144. Efficiency is not emphasised above all else, and whether particular characteristics of efficient use (for example, the most dollars for the fewest litres) should prevail cannot be pre-determined at the RPS level.
145. Nor can this be done on a region-wide basis. Different FMUs and part FMUs have different visions which will inform the NOF and are likely to result in different priorities.
146. Ms Limmer has subsequently filed a memorandum containing Mr Johnson’s proposed amendments to LF-FW-P7, which now propose that the criteria apply to named catchments or FMUs, or generically reference over-allocated catchments.
147. This illustrates the problem of prioritising these specific factors at the RPS level. Which FMUs or catchments the policy would apply to is presently unknown. It cannot therefore be known whether these criteria would achieve the relevant long-term visions, nor what community and tangata whenua engagement at each stage of the NOF will reveal.
148. Water efficiency criteria are for the regional plan, in accordance with clause 3.28 and the NOF.

LF-FW-P9 – Protecting Natural Wetlands

At notification

149. Before amendment in December 2022 the NPSFM 2022:
 - 149.1. defined “natural wetland” as a non-artificial, non-geothermal wetland that does not have more than 50% exotic pasture;
 - 149.2. defined “natural inland wetland” as a natural wetland outside the coastal marine area;
 - 149.3. in clause 3.22 set out a policy to protect natural inland wetlands

for inclusion in regional plans, with an exception and effects management hierarchy for specified infrastructure.

150. The RPS as originally notified in June 2021:
 - 150.1. adopted the definition of “natural wetland” from the NPSFM;
 - 150.2. in LF-FW-P9 largely set out the policy in clause 3.22 of the NPSFM; but
 - 150.3. applied the provisions to natural wetlands (ie including the coastal marine area);
 - 150.4. provided that the effects of a specified infrastructure activity on indigenous biodiversity would be managed by applying ECO–P3 or ECO–P6 in the RPS.

The 2022 NPSFM amendments

151. In December 2022 amendments to the NPSFM adopted a new definition of the term “natural inland wetland”. This definition amalgamated the previous definitions of “natural wetland” and “natural inland wetland” (the latter excluding the coastal marine area).
152. The new definition provides that 50% exotic pasture cover is to be determined “*as identified in the National List of Exotic Pasture Species using the Pasture Exclusion Assessment Methodology*”.
153. The 2022 amendments to the NPSFM also introduced further exemptions to the policy in clause 3.22 for urban development, quarrying, mineral extraction, landfills and cleanfills, and added mandatory principles for aquatic offsetting and compensation.
154. In the non-freshwater hearing Ms Boyd lodged a fourth supplementary statement dated 24 February 2023. In that statement Ms Boyd addressed the implications of the 2022 amendments to the NPSFM.
155. Ms Boyd noted that the RPS intentionally used the broader definition “natural wetland”, including the coastal marine area, even where the NPSFM applied only to natural inland wetlands.
156. Ms Boyd recommended that the RPS continue to use the term “natural wetland” and define it to have the same meaning as the new NPSFM

“natural inland wetland” definition, except that the coastal marine area would not be excluded.

157. The “natural wetland” definition included the new pasture exemption wording as in the NPSFM.
158. Recommendations for freshwater provisions were left for her section 42A report on the freshwater planning instrument.
159. In that section 42A report Ms Boyd recommended⁷ no longer setting out the policy in clause 3.22 of the NPSFM in LF-FW-P9 and instead providing that:
 - 159.1. natural wetlands (ie including the coastal marine area) would be protected by implementing clause 3.22 of the NPSFM;
 - 159.2. in the coastal environment the NZCPS will also apply; and
 - 159.3. for effects on indigenous biodiversity the effects management hierarchy (in relation to indigenous biodiversity) [defined to mean the effects management hierarchy in ECO-P6]⁸ would apply.

The NPSIB

160. The NPSIB came into force on 4 August 2023.
161. Under clause 1.3(1) of the NPSIB it applies to indigenous biodiversity in the terrestrial environment.
162. The terrestrial environment is defined in clause 1.6 of the NPSIB and excludes: *“land covered by water, water bodies and freshwater ecosystems (as those terms are used in the National Policy Statement for Freshwater Management 2020) and the coastal marine area”*
163. Under clause 1.3(2) of the NPSIB the following are brought within scope, even if outside the terrestrial environment:⁹
 - 163.1. specified highly mobile fauna;

⁷ At paragraph 1454

⁸ This defined term recommended for inclusion in the section 42A report of Ms Hardiman dated 4 May 2022 in the non-freshwater process

⁹ There are other irrelevant additions for geothermal ecosystems and regional biodiversity strategies

- 163.2. provisions relating to promoting restoration and increasing indigenous vegetation cover extend to include natural inland wetlands;
- 163.3. if an SNA (significant natural area) contains a natural inland wetland, the wetland may be treated as part of the SNA it is located in.
164. Under clause 1.4 of the NPSIB if there is conflict with NPSFM provisions, then the NPSFM prevails.

The implications of the NPSIB

165. The implications of the NPSIB were addressed by Ms Boyd in a further witness statement dated 11 August 2023.
166. In that evidence Ms Boyd notes July 2023 reporting to the ORC on work to implement the 2022 pasture exclusion changes with two issues arising. There will be significant delay in identifying natural inland wetland areas and it appears that large areas previously included as natural inland wetlands will now be excluded.¹⁰
167. Ms Boyd noted a further issue in that clause 3.21(2)(d) of the NPSIB (which applies to natural inland wetlands under clause 1.3(2)(c)) relates to restoration of degraded natural inland wetlands, but that degradation may well exclude the wetland from being a “natural inland wetland” in the first place. Although I suggest that to give the clause meaning it’d be read as including a degraded former natural inland wetland or similar.
168. Ms Boyd notes the objective and relevant policies in the NPSFM in the RPS¹¹.
- 168.1. The objective of the NPSFM, first prioritising the health of waterbodies and freshwater ecosystems applies to all wetlands.
- 168.2. Policy 5 of the NPSFM requires that the health and well-being of water bodies (including wetlands) and freshwater ecosystems is maintained or, if degraded, improved.
- 168.3. Policy 9 requires protecting the habitats of indigenous freshwater

¹⁰ At paragraphs 65 to 68

¹¹ At paragraph 75 to 76

species, some of which will be within natural inland wetlands and/or other wetlands.

169. With respect to the issue Ms Boyd identified with clause 3.21(2)(d) of the NPSIB there has been no change to the RPS. This aspect is dealt with in LF-FW-P10 - Restoring Natural Wetlands, which is to give effect to policy 5 of the NPSFM. If the effect of the NPSIB is to partially prevent that with respect to natural inland wetlands, then there is a conflict and the NPSFM provision prevails under clause 1.4(3) of the NPSIB. (Note the RPS and NPSFM policies applies to all natural wetlands whereas the NPSIB policy applies only to natural inland wetlands.)

The policy gap

170. Ms Boyd notes a resulting “gap in the policy framework”.¹²
171. Seeking to fill this gap has been criticised, broadly to the effect that if the natural inland wetland definition change results in a narrowing of its application, then that must be taken as intentional, and it is not for us to change that national policy position.
172. The policy gap is not though the narrowing of coverage under the natural inland wetland definition in the NPSFM.
173. The policy gap is not in the NPSFM at all. The gap identified is that the RPS does not give effect to the objective and policies 5 and 9 of the NPSFM, which apply to all wetlands.
174. This has been the case since the original notification of the RPS. Considering the changed definition of “natural inland wetland” in context of the NPSIB has cast light on the gap, not created it.
175. To address this Ms Boyd proposed:
- 175.1. changing the definition of natural wetlands so that it captures all natural wetlands (ie no longer has the pasture exclusion)
 - 175.2. adopting the NPSFM definition of “natural inland wetland”
 - 175.3. amending LF-FW-P9 to:

¹² At paragraphs 77 and 78.

175.3.1. prevent activities resulting in irreversible damage to natural wetlands (ie all natural wetlands);

175.3.2. be clear that in the coastal environment the NZCPS also applies;

175.3.3. implement clause 3.22 of the NPSFM for natural inland wetlands; except

175.3.4. for effects on indigenous biodiversity the indigenous biodiversity effects management hierarchy will continue to apply.

176. The goal is for the RPS to give effect to the NPSFM objective and policies 5 and 9 in connection with wetlands which are outside of the definition of natural inland wetland, as the NPSFM requires.

Criticism

OGL

177. In an exchange with Ms Hunter the vires of the NPSIB effects management hierarchy applying to indigenous biodiversity in wetlands was queried.

178. Ms Hunter raised clause 1.4(3) of the NPSIB under which the NPSFM prevails if there is a conflict between it and the NPSIB.

179. Commissioner Cubitt raised clause 1.3 of the NPSIB under which the NPSIB applies to indigenous biodiversity in the terrestrial environment, with only limited exceptions.

180. The Panel Chair asked that I address the point in closing.

181. Counsel for OGL raised a similar point at paragraph 31 of his written submissions.

182. A feature of LF-FW-P9 since it was first notified has been that the effects of an activity on indigenous biodiversity in natural wetlands are to be managed by applying an indigenous biodiversity effects management hierarchy rather than that in the NPSFM.

183. As originally notified on 26 June 2021 LF-FW-P9(1)(b)(iv) of the RPS

provided: *“the effects of the activity on indigenous biodiversity are managed by applying either ECO–P3 or ECO–P6 (whichever is applicable),”*

184. LF-FW-P9 as notified did not adopt an NPSIB effects management hierarchy. The NPSIB had not then come into force.

185. The RPS intentionally applied its indigenous biodiversity effects management hierarchy to all biodiversity, whether terrestrial or aquatic.

186. This is the basis upon which the RPS was originally notified, and the basis upon which section 32 reporting occurred. See paragraph 387 of the May 2021 Section 32 Evaluation Report:

“Policy LF–FW–P9 largely mirrors clause 3.22(1) of the NPSFM, however there is a distinction in the way the effects management hierarchy outlined in the NPSFM is applied. The ECO chapter of the PORPS 2021 contains a biodiversity effects management hierarchy that is adopted to protect significant natural areas and indigenous species and ecosystems (in addition to other controls) and to maintain indigenous biodiversity outside those areas. That hierarchy is more stringent than the hierarchy included in the NPSFM and includes criteria for the use of biodiversity offsetting and biodiversity compensation that are also more stringent than the comparable definitions of aquatic offsetting and aquatic compensation in the NPSFM. The provisions in the ECO chapter of the PORPS 2021 are largely consistent with the PORPS 2019 and reflect Environment Court decisions on that RPS.”

[Emphasis added.]

187. Doing so was permissible because Clause 3.1(2) of the NPSFM expressly provides that nothing in Part 3 of the NPSFM:

“(a) prevents a local authority adopting more stringent measures than required by this National Policy Statement; or

(b) limits a local authority’s functions and duties under the Act in relation to freshwater.”

188. The ECO provisions adopted were both stricter, and also in line with existing provisions for indigenous biodiversity which had been litigated and confirmed as being in accordance with the ORC’s functions and

duties under the RMA. And section 6(c) of the RMA does not distinguish between terrestrial and aquatic biodiversity.

189. No issue of NPSIB provisions being applied in an ultra vires manner arose, because there was no NPSIB.

190. The reason for this approach is reiterated at paragraph 1033 of the section 42A report for the Land and Freshwater Chapter dated 4 May 2022 (updated 7 October 2022):

“The NPSFM contains an effects management hierarchy for specific activities. The pORPS contains an effects management hierarchy for indigenous biodiversity that is, in my opinion, considerably more stringent than the effects management hierarchy in the NPSFM. It was a deliberate decision during the drafting of this policy to ensure that effects on indigenous biodiversity were managed using the more stringent hierarchies set out in the ECO chapter than the NPSFM hierarchy. This is the reason that (iv) and (v) vary from the policy as set out in clause 3.22 of the NPSFM.”

[Emphasis added.]

191. Then, in the section 42A report for the freshwater hearing dated 2 June 2023 Ms Boyd describes submission in opposition to the indigenous biodiversity effects management hierarchy applying to natural wetlands and then comments at paragraph 1454:

“These submitters have also raised similar issues in the non-FPI part of the pORPS. As I have outlined in section 8.5.7.3 above, despite the amendments to the NSPFM 2022 which I consider increased the stringency of the effects management hierarchy in that document by the inclusion of Appendices 6 and 7 containing principles for aquatic offsetting and compensation, I agree with Ms Hardiman in her Reply report 10: ECO- Ecosystems and indigenous biodiversity that it remains less stringent than the pORPS hierarchy contained in ECO-P6. I do not consider there is justification for managing aquatic biodiversity less stringently than terrestrial biodiversity and so do not recommend accepting these submission points.”

[Emphasis added.]

192. At section 8.5.7.3 (paragraphs 1440 and 1441) Ms Boyd had outlined:

“As notified, LF-FW-P9 requires applying the effects management hierarchy set out in the ECO chapter of the pORPS for managing adverse effects on indigenous biodiversity and the hierarchy set out in the NPSFM for all other adverse effects. That was a deliberate choice because, at the time, I considered the 2020 version of the NPSFM effects management hierarchy to be less stringent than the ECO hierarchy primarily because it contained few restraints on the use of offsetting and compensation. I did not consider it was appropriate to manage freshwater indigenous biodiversity less stringently than other types of biodiversity. The 2022 amendments to the NPSFM amended this hierarchy and introduced two appendices containing principles for aquatic offsetting and compensation, which I have addressed in section 3.1.3.6 of this report.

To clarify the differences between these effects managements hierarchies, it has been recommended in response to submissions on the ECO chapter to amend the relevant references to either “effects management hierarchy (in relation to natural wetlands and rivers)” or “effects management hierarchy (in relation to indigenous biodiversity)”. Although the amendments to the NPSFM in December 2022 have increased the stringency of the effects management hierarchy in that document, I understand from Ms Hardiman’s Reply report 10: ECO – Ecosystems and indigenous biodiversity that the “effects management hierarchy (in relation to indigenous biodiversity)” is still more stringent. I do not consider it would be appropriate to manage aquatic biodiversity less stringently, particularly given the threat status of many of Otago’s freshwater species and that some are found only in Otago. I therefore consider this differentiation should still apply.”

[Emphasis added.]

193. Up until that point there was no vires issue.

194. The question then is what’s changed? The short answer is nothing relevant.

195. The NPSIB has come into force. If Mr Maclellan’s recommendations are adopted¹³ then the indigenous biodiversity effects management hierarchy

¹³ Evidence of Andrew Maclellan 8 September 2023 (non-freshwater process)

in the non-freshwater part of the RPS will be brought into line with that in the NPSIB.

196. But it will remain the case that the provisions referred to in LF-FW-P9 are RPS provisions.
197. The policy is not purporting to extend the application of the NPSIB, nor to resolve a conflict between the NPSIB and the NPSFM such that the former prevails over the latter.
198. LF-FW-P9A is doing what it has done since its inception, which is to say that for natural inland wetlands it is adopting more stringent measures for adverse effects on indigenous biodiversity than the NPSFM provides for.
199. This is expressly permitted by clause 3.1(2) of the NPSFM.

Horticulture New Zealand

200. The legal submissions of Horticulture New Zealand criticise Ms Boyd's approach at paragraphs 35 and 36:
201. Ms Boyd's recommendation to remove the pasture exclusion from the "natural wetland" is criticised, and it is submitted that we cannot selectively apply only those parts of the NPSFM and NPSIB seen as preferable nor ignore intentional changes to these instruments.
202. What this criticism ignores is that Ms Boyd also recommends adopting the NPSFM definition of "natural inland wetland" and applying the applicable NPSFM provisions to those wetlands.
203. The now broader natural wetland definition is used to give effect to policies 5 and 9 in the NPSFM.
204. Rather than selectively apply parts, or ignore changes, Ms Boyd explicitly adopts the changes and seeks to give effect to all parts of the NPSFM.

OWRUG

205. In her submissions from paragraph 72 to 100 counsel for OWRUG criticises the approach recommended by Ms Boyd.
206. There are two points I wish to address.

207. At paragraph 79 the OWRIG submissions cite the following passage from the section 32 report regarding the definition change in the NPSFM: *“is intended to exclude highly modified wetland landscapes now utilised for pasture from the regulations, so they can continue to be used for pastoral purposes”*
208. The passage is on page 30 of the report, which can be accessed here: <https://environment.govt.nz/assets/publications/Amendments-to-the-NES-F-and-NPS-FM-Section-32-report.pdf>
209. The context is Policy 6 of the NPSFM which is no further loss of natural inland wetlands, and the NES-F. The “regulations” referred to in the passage are the NES-F. The passage cited has nothing to do with policies 5 and 9, and wetlands which are not natural inland wetlands. The passage cited is irrelevant to the point Ms Boyd is dealing with.
210. At paragraphs 97 and 98 the OWRUG submissions point out that under clause 1.4(3) of the NPSIB the NPSFM must prevail where there is any conflict and submit that: *“The Council must give effect to the provisions of the NPSFM, which only refers to natural inland wetlands. The NPSFM approach is summarised succinctly at Policy 6 [text of policy 6]. The natural consequence of that is that the definitions of ‘natural wetland’ and the policy regime for their protection that follows must be removed from the PORPS.”*
211. I agree that the NPSFM must prevail. And that is what Ms Boyd is recommending. On Ms Boyd’s recommendation the amended NPSFM definition of “natural inland wetland” is incorporated in the RPS by reference, as are the relevant NPSFM provisions (clause 3.22(1) to (3)), save that the stricter ECO regime from elsewhere in the RPS is adopted for indigenous biodiversity, as it has been since notification and which is expressly permitted by the NPSFM at clause 3.1(2)(a).
212. Where I disagree is that this means the definition of “natural wetland” and associated policies must be removed. The NPSFM includes provisions which deal with all natural wetlands, and the definition is used in those contexts only.

A change to address criticism

213. After discussions with Mr Farrell, Mr Brass, Ms McIntyre and Ms Bartlett,

Ms Boyd now proposes in her reply report that the protection for natural wetlands changes from preventing irreversible damage to:¹⁴

“...managing activities to ensur [sic] they maintain or enhance the ecosystem health, indigenous biodiversity values, and hydrological functioning of natural wetlands”

214. This change may address criticism that the previously recommended wording was too strict.
215. Regardless, if Ms Boyd’s recommendation is accepted by the Panel, then the failure of the RPS as notified to deal with wetlands which are not “natural inland wetlands” in terms of the objective and policies 5 and 9 of the NPSFM would be rectified by including the provision above.

Scope and delay

216. Counsel for OGL submitted that Ms Boyd has gone beyond the scope of evidence on the implications of the NPSIB for freshwater issues, that her concern relates to the 2022 amendment to the NPSFM, and that it should not be considered by the Panel given the lateness of the recommendation.¹⁵
217. Ms Boyd’s evidence on this topic was lodged well before the hearing, and all parties have had the opportunity to respond, including at this hearing. There can be no prejudice to any party.
218. Counsel for OGL also submits that the Kai Tahu submission footnoted in Ms Boyd’s evidence does not provide a basis for the recommendation made. Ms Boyd in fact relies on the submissions of Kai Tahu and Royal Forest & Bird Protection Society of NZ.¹⁶ But in any event this Panel is not constrained by the scope of submissions made.¹⁷
219. The matter is clearly relevant, can be, and should be decided by the Panel.

¹⁴ At paragraph 140 of her reply report. She also adds reference for indigenous biodiversity to the new non-freshwater policy recommended by Mr Maclennan for renewable electricity generation and electricity transmission.

¹⁵ At paragraph 41 of his submissions.

¹⁶ At paragraphs 83 to 87 of her evidence

¹⁷ Clause 49(2) of Part 4 Schedule 1 RMA.

Process matters

Engage vs consult

220. It has been submitted that the requirement to “engage” in the NPSFM imposes a higher standard than to “consult”.¹⁸
221. The words have very similar meanings.
222. “Consult” in a dictionary sense means to seek from the person consulted information, opinion, and advice. That core meaning remains when ‘consult’ is used in a legal context, with the addition of procedural overlays (such as under section 82 of the Local Government Act 2002).
223. “Engage” has a slightly different dictionary meaning of “involve or participate or cooperate with” (and other meanings which are not relevant). I have not found any legal procedural overlay to engagement.
224. The engagement requirement must be read in the context in which it is used.
225. Under the NPSFM regional councils must engage with communities and tangata whenua:
- 225.1. to determine how Te Mana o te Wai is applied in the region: clause 3.2(1);
 - 225.2. to identify long-term visions: clause 3.2(2)(b) and 3.3(3)(a); and
 - 225.3. at each stage of the NPF process; clause 3.7(1)(a).
226. Under clause 3.15(5) regional councils must consult with communities and tangata whenua before preparing or amending action plans. Incidentally, in an exchange during the hearing there was reference to consultation with the community not being required on action plans. That is not correct.
227. It is very difficult to see the use of the word “engage” as significant.
228. However, from context it seems clear that the obligation of engagement in the NPSFM arises at the outset. Communities and tangata whenua are

¹⁸ OWRUG written legal submissions 28 August 2023 at paragraphs 8 to 27

involved in shaping proposals, rather than responding to proposals already formulated by the regional council.

229. The same appears to apply also to consultation before preparing action plans.
230. The Section 32 Evaluation Report appears consistent with this approach.¹⁹
231. In any case, I repeat my opening submission that the freshwater planning process cures any perceived failings in the community and tangata whenua engagement.

The interface with other national policy statements – *POL v EDS*

232. At different times during the hearing the prospect of conflict between the NPSFM and the NPSUD, NPSHPL, NPSREG and NPSET has been raised.
233. As a result of the Supreme Court's judgment in *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 if there is such a conflict it may be that some resolution is required in the RPS.
234. The Panel's minute 9 allowed submitters until 15 September 2023 to make any such submission and until 29 September 2023 for the ORC to respond.
235. Counsel for Manawa has filed a memorandum. Dunedin City Council submissions touched on this point.
236. There may be memoranda yet to be uploaded to the hearing website.
237. I intend to respond to all submissions on this topic together, within the time allowed.

Integrating the FPI and the non-FPI

238. Separate processes are being followed to prepare a single regional policy statement.
239. The result must be an integrated and internally consistent regional policy

¹⁹ Section 32 Evaluation Report dated September 2022 at pages 8 to 17, and Appendices 3 to 7

statement.

240. Neither instrument need be prepared without regard for the other.
241. Each is a proposed regional policy statement to which regard may be had in the hearing of the other.
242. Doing so is essential if integrated management is to be achieved in terms of section 59 of the Act.
243. All of the evidence in the non-freshwater hearing has been introduced in evidence in this hearing.²⁰
244. To integrate the two instruments the ORC proposes the following process:
- 244.1. This Panel makes its recommendations to the ORC on the freshwater planning instrument part of the RPS under clause 49 of Part 4 of Schedule 1 of the RMA.
- 244.2. That is the end of the freshwater hearing.
- 244.3. The non-freshwater Panel would then set a timetable for:
- 244.3.1. The ORC to file a memorandum and any relevant planning or other evidence as to the impact of the freshwater recommendations on the non-freshwater planning instrument parts of the RPS; then
- 244.3.2. Each submitter to do likewise; then
- 244.3.3. The ORC to reply; and
- 244.3.4. With leave reserved for any party to seek that the non-freshwater hearing be reconvened in person for submissions and/or evidence on any substantive non-freshwater planning instrument matter arising from the freshwater planning instrument recommendations (albeit this is not expected).
- 244.4. The non-freshwater Panel would then make its recommendations to the ORC.

²⁰ Section 42A Hearing Report 2 June 2023, Appendix 5: Material from the non-FPI part of the pORPS

245. The same approach was proposed in the ORC's submissions dated 1 May 2023 in the Land and Freshwater part of the non-freshwater hearing, and in the ORC's closing submissions in the non-freshwater hearing. To my knowledge no opposition has been expressed.
246. I will file a memorandum with the non-freshwater Panel making the same suggestion, but after first hearing and taking account of this Panel's questions and/or comments in this hearing.



S J Anderson/T M Sefton
Counsel for the Otago Regional Council
Dated: 18 September 2023