

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

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

**CIV-2024-412-41**

**UNDER** the Resource Management Act 1991

**IN THE MATTER** of an appeal of the freshwater planning  
instrument parts of the Proposed Otago  
Regional Policy Statement pursuant to  
section 299 of the RMA

**BETWEEN** **OCEANA GOLD (NEW ZEALAND)  
LIMITED**  
Appellant

**AND** **OTAGO REGIONAL COUNCIL**  
Respondent

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**SUBMISSIONS IN REPLY ON BEHALF OF OCEANA GOLD (NEW  
ZEALAND) LIMITED**  
Dated 21 February 2025

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## MAY IT PLEASE THE COURT:

### Introduction and Summary

1. In these submissions Oceana Gold (New Zealand) Limited (**OGNZL** or **the Appellant**) responds to the matters raised by the Respondent - Otago Regional Council (**ORC**), Kai Tahu and the Royal Forest and Bird Protection Society of New Zealand Incorporated (**Forest and Bird**). Kai Tahu's submissions are neutral on the relief sought by OceanaGold, whilst ORC and Forest Bird (collectively the **Opposing Submissions**) oppose OceanaGold's relief.
2. Before responding to particular points raised by the other parties, some general observations on the Opposing Submissions can be made. OceanaGold submits that a key difference between its submissions and the Opposing Submissions is the meaning of "restore" and "improve". OceanaGold submits "restore" and "improve" have different meanings and are not synonyms in the context of the objective under appeal and it is important to use the correct word in LF-WAI-O1.
3. Forest and Bird submits that restoration provides for improvements across a spectrum, with "small 'improvements'" possible as a subset of restoration<sup>1</sup>, whilst improvement only entails that something get better<sup>2</sup>. However Forest and Bird then

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<sup>1</sup> Forest and Bird submissions at para [27].

<sup>2</sup> Forest and Bird submissions at para [27].

concedes that restoration may be a more ambitious aim<sup>3</sup>. OceanaGold disagrees that the term “restoration” is understood to occur along a spectrum which includes “small improvements” at one end of the spectrum. This is actually describing “improvement” not restoration. If the wording is to capture this full range of improvements then “improve” is the more appropriate word to capture this. OceanaGold submits that on any reasonable interpretation “restore” means more than “improve” and means to put back to a former state. That outcome is not just ambitious, but in the real world creates an unrealistic expectation that all degraded water bodies can be returned to something approaching a natural state<sup>4</sup>.

4. ORC submits that when used in this objective “restore” and “improve” are essentially interchangeable terms<sup>5</sup>. OceanaGold disagrees. The use of “restore” instead of “improve” will produce different expectations as to the intended outcome for every degraded waterbody, and the development of the national objectives framework (**NOF**) will have regard to this objective. It is important that the correct word is used.
5. Secondly, before looking to broader considerations of integrated management and ecosystem, it is important to focus on the wording in the chapeau. The opening words of LF-WAI-O1 identify

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<sup>3</sup> Forest and Bird submissions at para [34].

<sup>4</sup> Forest and Bird submissions at para [27] quoting from the freshwater Hearings Panel decision Common Bundle at page 3,199.

<sup>5</sup> ORC submissions at para [63].

what the objective is about. They refer to Otago's water bodies and their health and well-being and the objective describes what must be done if they are degraded. Objective LF-WAI-O1 is not directed at the broader considerations of implementing Te Mana o te Wai<sup>6</sup>. Its focus in the first part of the chapeau is on describing what action needs to be taken in relation to degraded water bodies across the region. The objective's identification of degraded water bodies brings policy 5 of the NPS-FM clearly into play, and in our submission the objective must give effect to policy 5. Policy 5 says that degraded water bodies are to be "improved", not "restored". While a broader consideration of Te Mana o te Wai may provide context, it is not necessary to enable an answer to the legal question of whether a provision in a subordinate planning document that requires degraded water bodies to be restored is giving effect to a national policy that unequivocally directs that freshwater be managed in a way that ensures the health and well-being of degraded water bodies is improved.

6. Thirdly, it cannot be correct to say that because a policy in another part of the PORPS gives effect to policy 5 of the NPS-FM (in this case LF-LS-P21 and LF-LS-P7) objective LF-WAI-O1 does not need to do so<sup>7</sup>. LF-WAI-O1 refers to what needs to happen to Otago's water bodies (degraded and not degraded) and this makes policy 5 directly relevant. Giving effect to a NPS in a RPS

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<sup>6</sup> Compared with Forest and Bird submissions at para [26].

<sup>7</sup> Forest and Bird submissions at para [26] and [51] and ORC submissions at paras [65] and [73].

requires an integrated all-of-document approach. It is not enough to point to one policy in the PORPS that gives effect to policy 5 when an objective in another part of the same document fails to do so. At best such an outcome would make interpretation and application of the document confusing and difficult. We go further, and submit it is an error of law.

7. LF-WAI-P4 – Giving effect to *Te Mana o te Wai* provides:

All persons exercising functions and powers under this RPS and all persons who use, develop or protect resources to which this RPS applies must recognise that LF-WAI-O1, LF-WAI-P1, LF-WAI-P2 and LF-WAI-P3 are fundamental to upholding *Te Mana o te Wai*, and must be given effect to when making decisions affecting *fresh water*, including when interpreting and applying the provisions of the LF chapter.

8. Because of the importance of LF-WAI-O1 and because it is fundamental to upholding LF-WAI-O1, it needs to correctly reflect the policies of the NPS-FM. Policy LF-LS-P21, LF-LS-P7 as well as all the other provisions in the LF-VM, LF-FW and LF-LS must give effect to the LF-WAI provisions<sup>8</sup>. The agreed amendments to LF-LS-P21 which have now been issued by consent refer to improving degraded water bodies. LF-WAI-O1 needs to be amended to refer to “improve” to ensure consistency between the parent objective and policy LF-LS-P21.

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<sup>8</sup> Section 42A report, section 8.3.2 at para [717].

## Submissions by ORC

9. In its submissions the ORC has referred to the references to “restore” in Te Mana o te Wai (as found in clause 1.3 of the NPSFM)<sup>9</sup>.

a. In (1) it says “... *Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community*”.

b. Secondly, in (4)(b) the principle of Kaitiakitanga and “*the obligations of tangata whenua to preserve, restore, enhance and sustainability use freshwater for the benefit of present and future generations*”.

10. Neither of these references specifically refer to degraded water bodies. Te Mana o te Wai is about restoring an appropriate balance between the competing needs of the waterbody, the wider environment and the community. Te Mana o te Wai is not about restoring degraded water bodies *per se*, although it is accepted that for some degraded water bodies this may be the right outcome.

11. ORC submits that the words restore and improve are interchangeable in this context<sup>10</sup>. OceanaGold disagrees. OceanaGold’s submits that these words have different meanings, both in terms of dictionary meanings and in the everyday use of

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<sup>9</sup> ORC submissions at para [41].

<sup>10</sup> ORC submissions at para [63].

the words. As set out in paragraph 48 of the OceanaGold submissions, “restoration” is defined as “*the action or process of restoring*”<sup>11</sup> and “restore” is defined as “*bring back (a previous right, practice, or situation); reinstate. Return (something) to a former condition or position*”<sup>12</sup>. “Improve” is defined as “*make or become better*”<sup>13</sup>. OceanaGold submits that at a basic level “restoration” is a different and more demanding outcome than “improvement”. While improvement of a degraded water body may include restoring it to a former state, treating the terms as interchangeable is not appropriate. If the objective requires restoration, an action that meaningfully improves the condition of the water body but is unable to restore it to its former state will not meet the outcome the objective seeks.

12. ORC disagrees that “restored” is more stringent than “improved” because implementation of the NOF in the subordinate regional plan will determine the restoration or improvement required<sup>14</sup>. Whilst OceanaGold agrees that the implementation of the NOF is the place where the detailed outcomes for different water bodies should be determined, that process and giving effect to the other policies in the LF chapter will all need to give effect to LF-WAI-O1. Therefore it is important that this objective is correctly giving effect to policy 5 of the NPS-FM.

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<sup>11</sup> Conise Oxford Dictionary (12th edition 2011).

<sup>12</sup> Conise Oxford Dictionary (12th edition 2011).

<sup>13</sup> Conise Oxford Dictionary (12th edition 2011).

<sup>14</sup> ORC submissions at para [62].

13. In relation to the submission on stringency<sup>15</sup>, OceanaGold submits that when clause 3.1(2) of the NPS-FM, which is found in Part3: Implementation, says that a local authority may adopt more stringent measures, it does not mean the objectives and policies in a RPS can be more stringent. The objectives and policies of the NPS-FM have been set. Instead it is in the implementation of the NPS-FM that the local authority may be more stringent in than what has been set out in the NPS<sup>16</sup>.

### **Submissions by Forest and Bird**

14. In response to Forest and Bird's submission that the "*OGL focus on Policy 5 is unduly narrow*" as "*the scope of LF-WAI-O1 is wider than degraded water bodies and freshwater ecosystems*"<sup>17</sup>, we refer to the chapeau of LF-WAI-O1:

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

15. As mentioned above in relation to ORC's submissions, the first part of this chapeau is only focussing on Otago's water bodies. Consideration of the broader ecosystems comes later, and first the words as they appear in the chapeau need to be interpreted. While OceanaGold agrees that LF-WAI-O1 when considered in its entirety including the chapeau and 6 paragraphs encapsulates the broad scope of Te Mana o te Wai, this does not mean that the

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<sup>15</sup> ORC submissions at paras [59 – 64].

<sup>16</sup> Compare with ORC submissions at paras [59 – 64].

<sup>17</sup> Forest and Bird submissions at para [21].



chapeau somehow has licence to depart from what the NPS-FM requires. Both ORC and Forest and Bird say that LF-LS-P21 gives effect to policy 5 of the NPS-FM<sup>18</sup>. There is an implicit suggestion that because that policy has given effect to 5 of the NPS-FM, the wording of LF-WAI-O1 does not matter in this regard. As mentioned earlier, OceanaGold submits that approach cannot be correct.

16. Forest and Bird submits it not an error to have an objective of “restoring” freshwater bodies or ecosystems<sup>19</sup>. However that is not what the decisions version of the PORPS says, there is no reference to ecosystems in that opening chapeau – it only refers to water bodies.

17. Forest and Bird submits that to “restore” a water body may be more ambitious than to “improve” it<sup>20</sup>. We submit the fact that it may be more ambitious means that it is incorrect to characterise it as being more flexible. Instead, the requirement to restore sets a higher and potentially unachievable bar. We submit this is the very reason that the NPS-FM’s focus is on restoring balance, and why it does not direct that degraded water bodies must necessarily be restored.

18. Forest and Bird submit that because LF-WAI-O1 is giving effect to Te Mana o te Wai, it is not seeking to be more stringent<sup>21</sup>.

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<sup>18</sup> Forest and Bird submissions at para [10] and ORC submissions at paras [72 and 73]

<sup>19</sup> Forest and Bird submissions at para [26].

<sup>20</sup> Forest and Bird submissions at para [34].

<sup>21</sup> Forest and Bird submissions at para [53]

OceanaGold disagrees. LF-WAI-O1 deals with degraded water bodies, the same subject as policy 5, but does not give effect to it. We submit this is a material error of law.

19. Forest & Bird submits that policy 5 of the NPS-FM is a 'vacuum'<sup>22</sup>.

In our submission policy 5 is not correctly characterised in that way. It is clear on its face, and directs how degraded (and non-degraded) water bodies must be managed. It is one of 15 policies that implement the NPS-FM's objectives. It sits alongside, and is not inconsistent with, policy 1 which requires freshwater to be managed in a way that gives effect to Te Mana o te Wai.

### **Submissions by Kai Tahu**

20. Kai Tahu have adopted a neutral stance to ensure that any amendments to LF-WAI-O1 do not diminish the central role of mauri.

21. In its submissions Kai Tahu confirms that amendment sought by OceanaGold would not alter the centrality of mauri to LF-WAI-O1<sup>23</sup>.

### **Conclusion**

22. Policy 5 is one of 15 policies that implement the single objective of the NPS-FM and which expand on what Te Mana o te Wai

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<sup>22</sup> Forest and Bird submissions at para [35]

<sup>23</sup> Kai Tahu submissions at para [26].

requires. Objective LF-WAI-O1 of the PORPS deals with the same subject matter as policy 5 of the NPS-FM.

23. Policy 5 of the NPS-FM clearly states that water bodies are to be improved where they are degraded. OceanaGold submits that this is a materially different requirement from a requirement to restore degraded water bodies as set out in the decisions version of LF-WAI-O1.

24. The decisions version of LF-WAI-O1 does not give effect to the NPS-FM by failing to follow what policy 5 requires.

25. This creates an error of law, which is material and should be amended by this Court so that LF-WAI-O1 reads:

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

**DATED** this 21<sup>st</sup> day of February 2025

A handwritten signature in black ink, appearing to read 'P. Walker', is written over a light grey dotted rectangular background.

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Stephen Christensen/Pip Walker

Counsel for Oceana Gold (New Zealand ) Limited