

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

OPENING SUBMISSIONS FOR THE OTAGO REGIONAL COUNCIL

Dated 28 August 2023

ROSS DOWLING MARQUET GRIFFIN
SOLICITORS
DUNEDIN

Telephone: (03) 477 8046
Facsimile: (03) 477 6998
PO Box 1144, DX YP80015

Solicitor: S J Anderson

OPENING SUBMISSIONS FOR THE OTAGO REGIONAL COUNCIL

May it Please the Panel:

Introduction

1. These submissions address:
 - 1.1. The scope of this hearing
 - 1.2. The Supreme Court judgment in *Port Otago v EDS*
 - 1.3. The RMA and higher order instruments
 - 1.4. The limits of the ORC's regional policy-making role under the NPSFM
 - 1.5. The long-term visions
 - 1.6. The hierarchy of obligations
 - 1.7. Other matters

The scope of this hearing

2. The proposed Otago Regional Policy Statement ("the **pORPS**") started its life as a single freshwater planning instrument.
3. As a result of the High Court's declarations in *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Incorporated* [2022] NZHC 1777 that part of the pORPS comprising a freshwater planning instrument ("the **FPI**") was separately notified and is the subject matter of this hearing.
4. The content of the FPI has been determined using the test set out in that judgment.
5. Accordingly, the FPI comprises the provisions of the pORPS which:

- 5.1. give effect to provisions of the National Policy Statement for Freshwater Management 2020 (“the **NPSFM**”) which; or
 - 5.2. themselves,
- directly relate to the maintenance or enhancement of the quality or quantity of freshwater.
6. As a result of this narrow test of what comprises a freshwater planning instrument, the content of the FPI is itself limited in scope. In summary, the provisions of the FPI:
 - 6.1. identify freshwater demand exceeding capacity, declining water quality and pressures on lakes from tourism and population growth as significant resource management issues for Otago;¹
 - 6.2. identify the loss and degradation of water resources and the effects of land and water use on freshwater habitats and the diversity and abundance of mahika kai as issues of significance to iwi authorities in Otago;²
 - 6.3. map Otago’s freshwater management units (“**FMUs**”) and rohe;³
 - 6.4. state objectives:
 - 6.4.1. for how freshwater management will give effect to Te Mana o te Wai in Otago;⁴
 - 6.4.2. describing the long-term visions for freshwater in Otago;⁵
 - 6.4.3. for the protection and restoration of Otago’s natural wetlands;⁶
 - 6.5. state policies regarding:
 - 6.5.1. how the hierarchy of obligations in clause 1.3(5) of the

¹ SRMR-I5, I6 and I9

² RMIA-WAI-I2 and I3

³ LF-VM-P5 and MAP1

⁴ LF-WAI-O1

⁵ LF-VM-O1A, O2, O3, O4, O5 and O6

⁶ LF-FW-O9

- NPSFM will be given effect to in Otago;⁷
- 6.5.2. the relationship between FMUs and rohe;⁸
 - 6.5.3. what environmental outcomes, attribute states and environmental flows and levels must achieve;⁹
 - 6.5.4. efficient water allocation and use;¹⁰
 - 6.5.5. the protection of natural wetlands;¹¹
 - 6.5.6. the restoration of natural wetlands;¹²
 - 6.5.7. minimising the adverse effects of stormwater discharges to freshwater;¹³
 - 6.5.8. minimising the adverse effects of discharges containing animal effluent, sewage and industrial and trade waste to freshwater;¹⁴
 - 6.5.9. minimising soil erosion;¹⁵
 - 6.5.10. managing land use to maintain or improve the health and well-being of water bodies;¹⁶
- 6.6. contain methods concerning these objectives and policies, and requirements of the NPSFM and the Act.¹⁷

Test captures the essence of the NPSFM

7. The High Court test captures the essence of the NPSFM. The freshwater management regime is underpinned by two key propositions. The quality and quantity of freshwater is to be:

⁷ LF-WAI-P1

⁸ LF-VM-P6

⁹ LF-FW-P7

¹⁰ LF-FW-P7A

¹¹ LF-FW-P9

¹² LF-FW-P10

¹³ LF-FW-P15

¹⁴ LF-FW-P16

¹⁵ LF-LS-P18

¹⁶ LF-LS-P21

¹⁷ LF-FW-M6, M7 and M8; LF-LS-M11

- 7.1. maintained; or
 - 7.2. enhanced.
8. When considering the FPI there cannot be a policy setting allowing freshwater quality or quantity to worsen.

The Supreme Court judgment in *Port Otago v EDS*

9. Last Thursday the Supreme Court gave its judgment in *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112.
10. The Court held that:
- 10.1. the avoidance policies and the ports policy in the NZCPS are all directive;
 - 10.2. one does not override the other; and
 - 10.3. there is thus potential for conflict between those policies.
11. The Court concluded that reconciliation of any potential conflict between the avoidance policies and the port policy should be addressed at the regional policy statement and plan level so far as possible, and not left entirely for the resource consent process.
12. The Court held that in considering a particular project to give effect to the port policy the decision-maker would need to be satisfied that:
- 12.1. the work is required (and not merely desirable) for the safe and efficient operation of the ports;
 - 12.2. if the work is required, all options for dealing with these safety or efficiency needs have been evaluated and, where possible, the option chosen should not breach the avoidance policies;
 - 12.3. where a breach of the avoidance policies is unable to be averted, any breach is only to the extent required to provide for the safe and efficient operation of the ports.
13. If the decision-maker is satisfied as above, then resource consent may, but will not necessarily, be granted.

14. In deciding whether to grant resource consent all relevant factors would have to be considered in a structured analysis, designed to decide which of the directive policies should prevail, or the extent to which a policy should prevail, in the particular case.

Meaning of avoid – material harm

15. The Court’s discussion of the meaning of avoidance is of particular interest.
16. The Court cited its prior judgments in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593, *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] 1 NZLR 673 and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 and held:

*“All of the above means that the avoidance policies in the NZCPS must be interpreted in light of what is sought to be protected including the relevant values and areas and, when considering any development, whether measures can be put in place to avoid material harm to those values and areas.”*¹⁸

[my emphasis]

17. Earlier in its judgment the court summarised its earlier decision in *Trans-Tasman Resources* that:

“...decision-makers must either be satisfied there will be no material harm or alternatively be satisfied that conditions can be imposed that mean:

(i) material harm will be avoided;

(ii) any harm will be mitigated so that the harm is no longer material; or

*(iii) any harm will be remedied within a reasonable timeframe so that, taking into account the whole period harm subsists, overall the harm is not material...”*¹⁹

18. It seems that for an avoidance policy to be breached, the harm to the values protected must now be material.

¹⁸ At paragraph [68]

¹⁹ At paragraph [66]

19. It remains to be seen whether this is a significant shift from the concept of minor or transitory effects in *King Salmon*. ‘Material’ has a range of meanings ranging from ‘more than de minimis’ to ‘major’.

Impact on the FPI

20. I don’t think this has any impact on the FPI.
21. The National Policy Statement for Renewable Electricity Generation 2011 (“**NPSREG**”) is the only obvious source of potentially conflicting national policy direction.

22. But the preamble of the NPSREG states:

“This national policy statement does not apply to the allocation and prioritisation of freshwater as these are matters for regional councils to address in a catchment or regional context and may be subject to the development of national guidance in the future.”

[my emphasis]

23. In any event the National Objectives Framework (“**NOF**”) in Subpart 2 of Part 3 of the NPSFM expressly contemplates renewable electricity generation and provides the means to resolve any conflict.

The RMA and higher order instruments

24. Safeguarding the life supporting capacity of water and ecosystems is part of the sustainable management purpose of the Resource Management Act 1991 (“the **RMA**”).²⁰
25. Functions of the ORC under the Act which are of particular relevance to freshwater include:
- 25.1. controlling the use of land for the purpose of the maintenance and enhancement of the quality of water in water bodies; the maintenance of the quantity of water in water bodies; and the maintenance and enhancement ecosystems in water bodies;²¹

²⁰ Section 5

²¹ Section 30(1)(c)(ii), (iii) and (iv)

- 25.2. controlling the taking, use, damming, and diversion of water, and controlling of the quantity, level, and flow of water in any water body;²² and
- 25.3. controlling discharges of contaminants into water and discharges of water into water.²³
26. In achieving the purpose of the Act, and carrying out its functions under the Act, the ORC must give effect to the NPSFM.
27. The NPSFM is part of the Essential Freshwater Reforms introduced by the government in 2020.
28. Other elements include:
 - 28.1. National Environmental Standards for Freshwater 2020.
 - 28.2. Stock Exclusion Regulations 2020.
 - 28.3. Measurement and Reporting of Water Takes Amendment Regulations 2020.
 - 28.4. Amendments to the RMA to provide for the freshwater planning process and regulation making powers for freshwater farm plans and reporting of fertiliser sales.
29. The key higher order instrument for the FPI is the NPSFM.

The limits of the ORC's regional policy-making role under the NPSFM

30. The NPSFM is very prescriptive both as to what must be achieved, and how.
31. It's almost a paint by numbers regime, with most of the 'painting' to occur at the regional plan level.
32. Although Part 3 of the NPSFM is expressed to be a "...*non-exhaustive list of the things that local authorities must do...*", the list provides a self-

²² Section 30(1)(e)

²³ Section 30(1)(f)

contained regime which does not cry out for additions.²⁴

33. The regime in Part 3 is mandatory. Although the list is non-exhaustive, all things on the list must be done.
34. It follows that regional policy direction cannot be contrary to or inconsistent with Part 3 of the NPSFM.

Part 3 regional plan level matters

35. Mostly the NPSFM is to be implemented at the regional plan level.
36. Regional plan level mandatory requirements are set out in the NOF, and in Subpart 3 of Part 3 of the NPSFM, which sets out other specific requirements.
37. Briefly the NOF requires:
 - 37.1. the identification of FMU values;
 - 37.2. environmental outcomes for each value;
 - 37.3. identifying the attributes of each value and their baseline states;
 - 37.4. setting target attribute states and timeframes for achieving them;
 - 37.5. setting limits to achieve target attribute states as regional plan rules;
 - 37.6. preparing action plans²⁵;
 - 37.7. imposing conditions on resource consents;²⁶
 - 37.8. setting environmental flows and levels;
 - 37.9. identifying take limits;
 - 37.10. monitoring;
 - 37.11. assessing trends; and, if necessary

²⁴ Clause 3.1(1) NPSFM

²⁵ Strictly, this is outside the regional plan, although an action plan may be appended to a regional plan: clause 3.15 NPSFM

²⁶ Also not, strictly, a regional plan matter

- 37.12. responding to degradation.²⁷
- 38. And Subpart 3 requires:
 - 38.1. A specified policy on natural inland wetlands;
 - 38.2. A specified policy on rivers;
 - 38.3. Mapping and monitoring;
 - 38.4. An objective for fish passage;
 - 38.5. Monitoring of primary contact sites;
 - 38.6. Criteria for deciding water take transfer applications and how to allocate water efficiently;
 - 38.7. Operation and maintenance of a freshwater accounting system;
 - 38.8. Annual publishing of data;
 - 38.9. Limited exceptions from national bottom lines for attributes when setting of target attribute states for:
 - 38.9.1. large hydro-electric schemes.
 - 38.9.2. waterbodies effected by naturally occurring processes.
 - 38.9.3. specified vegetable growing areas.

A regional policy 'gloss' on Part 3 matters?

- 39. It is tempting to think that the FPI can offer region specific policy guidance on these steps, especially how the regional plan should respond to competing demands for water resources.
- 40. And to some extent it can.
- 41. But the scope to do so is limited.
- 42. Subpart 3 sets out specific provisions which must be included in regional plans and otherwise sets out specific requirements not amenable to a

²⁷ Subpart 2 of Part 3 NPSFM

policy 'gloss'.

43. Each step in the NOF is informed or constrained by the preceding step or steps, or by the NPSFM itself:
 - 43.1. take limits are to achieve environmental flows and levels;²⁸
 - 43.2. environmental flows and levels must be set to achieve relevant environmental outcomes and long-term visions;²⁹
 - 43.3. limits on resource use in regional rules, action plans and conditions on resource consents are to achieve target attribute states or otherwise support environmental outcomes;³⁰
 - 43.4. target attribute states must achieve the relevant environmental outcomes, and long-term vision;³¹
 - 43.5. attributes for the compulsory values in Appendix 1A are listed in Appendices 2A and 2B;³² and other attributes must be specific and where practicable able to be assessed numerically;³³
 - 43.6. the baseline of an attribute is a matter of fact;
 - 43.7. the environmental outcomes for each value must, when achieved, fulfil the relevant long-term visions and the objective of the NPSFM;³⁴ and
 - 43.8. Compulsory values that apply to every FMU are listed in Appendix 1A; other values listed in Appendix 1B must be considered.³⁵
44. It is obvious that the limits, flows and levels, rules, action plans and consent conditions are to be arrived at by stepping through the framework. How this is to happen is set out in very specific terms.
45. In doing so the ORC is required engage with tangata whenua and

²⁸ Clause 3.17(1) NPSFM

²⁹ Clause 3.16(2) NPSFM

³⁰ Clause 3.12 NPSFM

³¹ Clause 3.11(7) NPSFM

³² Clause 3.10(1)

³³ Clause 3.10(2) and definition of attribute in clause 1.4(1)

³⁴ Clause 3.9(5)(b) NPSFM

³⁵ Clause 3.9(1) and (2)

communities at each step of the NOF process.³⁶

46. The outcomes of that engagement cannot be pre-empted.
47. The regional policy statement cannot therefore pre-empt specific allocation or other outcomes, which must be arrived at by stepping through the NOF at the regional plan level.

The NOF itself provides for social, economic and cultural wellbeing

48. Stepping through the NOF is not solely about maintaining and enhancing the quality and quantity of freshwater.
49. For each FMU the compulsory values in Appendix 1A of the NPSFM apply:
 - 49.1. ecosystem health;
 - 49.2. human contact;
 - 49.3. threatened species; and
 - 49.4. mahinga kai.
50. But regional councils must also consider whether the values in Appendix 1B of the NPSFM apply to an FMU or part FMU.
51. Those values are:
 - 51.1. natural form and character;
 - 51.2. drinking water supply;
 - 51.3. wai tapu;
 - 51.4. transport and Tauranga waka;
 - 51.5. hydro-electric power generation;
 - 51.6. animal drinking water;
 - 51.7. irrigation, cultivation, and production of food and beverages; and
 - 51.8. industrial use.

³⁶ Clauses 3.2(2)(a) and (b), 3.4 and 3.7(1)(a) NPSFM.

52. In other words, as part of the NOF regional councils must identify values relevant to social, economic and cultural wellbeing (“**wellbeing values**”).
53. Each of these wellbeing values then must have its own environmental outcome identified, which must be included as an objective in the regional plan.
54. Where practicable, attributes must be identified for the wellbeing values. Baseline and target attribute states must be identified and set.
55. The prescriptive nature of the NOF does not operate to prevent wellbeing values from being recognised and provided for. To the contrary, doing so is an integral (and mandatory) part of the NOF.
56. However, this does mean that at the regional policy level it is not possible to ‘pick the winners’ in any way which is contrary to or cuts across the NOF process.
57. Furthermore, it must be noted that target attribute states cannot be below baseline, and where the same attribute provides for more than one value, it is the most stringent target attribute state applying to those values that must be achieved.³⁷
58. The quality and quantity of freshwater must be maintained, and enhanced where target attribute states require that.

What is the role of a regional policy statement?

59. Paragraph 43 above illustrates that the eventual outcomes of the NOF all flow from the objective of the NPSFM (the Te Mana o te Wai hierarchy of obligations) and the long-term visions.
60. It is the long-term visions that must be developed and included as objectives in a regional policy statement.³⁸
61. Primarily, it is through the long-term visions that a regional policy statement influences freshwater management.
62. Those visions then inform the NOF, which in a very specific way will lead to regional plan level limits, flows and levels, rules, action plans and

³⁷ Clause 3.12(4) NPSFM

³⁸ Clause 3.3 NPSFM

consent conditions.

63. There are three other ways in which a regional policy statement may properly guide freshwater management.
- 63.1. A regional policy statement must adopt an objective describing how the management of freshwater in the region will give effect to Te Mana o te Wai.³⁹ This objective relates to the broader concept of Te Mana o te Wai in clause 1.3 of the NPSFM, not just the hierarchy of obligations in clause 1.3(5).
- 63.2. The matters in Part 3 are mandatory, but not exhaustive, and do not limit giving effect to the objective and policies of the NPSFM and performing functions and duties under the RMA.⁴⁰ It follows that a regional policy statement may add to Part 3 matters; but not in a way that is contrary to or inconsistent with them.
- 63.3. A regional policy statement may adopt more stringent measures than required by the NPSFM. This is expressly permitted by the NPSFM.⁴¹
64. From these three factors, it would clearly be appropriate for the FPI to add to or adopt more restrictive provisions than those in Part 3 of the NPSFM to give effect to the broader concept of Te Mana o te Wai in Otago, to give effect to the objective and policies of the NPSFM, or to perform functions and duties under the RMA.
65. But the primary means for the FPI to guide freshwater management is through the long-term visions.

The long-term visions

66. The long-term visions are to set ambitious and reasonable goals, and timeframes for achieving them. They are to reflect what the community and tangata whenua want, after engagement with the community and tangata whenua. They must be informed by an understanding of the

³⁹ Clause 3.2(3) NPSFM

⁴⁰ Clause 3.1 NPSFM

⁴¹ Clause 3.1(2)(a) NPSFM

history of, and environmental pressures on, the relevant FMU, part FMU or catchment.⁴²

67. In developing the long-term visions the ORC must apply the hierarchy of obligations in clause 1.3(5) of the NPSFM.⁴³
68. The long-term visions are required to be included as objectives in the regional policy statement.⁴⁴
69. As a result, the long-term visions are subject to the further process of public notification, submission and hearing under the freshwater planning process.

What is an ambitious and reasonable timeframe?

70. Clause 3.3(2) of the NPSFM provides:

“Long-term visions:

(a) may be set at FMU, part of an FMU, or catchment level; and

(b) must set goals that are ambitious but reasonable (that is, difficult to achieve but not impossible); and

(c) identify a timeframe to achieve those goals that is both ambitious and reasonable (for example, 30 years after the commencement date).”

[emphasis added]

71. Ms Boyd’s additional evidence this morning will cover the background to the NPSFM and the concept of change within a generation as a starting point for long-term vision timeframes.
72. This is borne out by the underlined example in (c) above – 30 years. The example provides an indication of the timeframe that should be considered.
73. As to what “ambitious” and “reasonable” mean, the underlined words in (b) above give the best answer. “Difficult” and “not impossible” respectively.

⁴² Clause 3.3(2) and (3) NPSFM

⁴³ Clause 3.2(2)(c)(i) NPSFM

⁴⁴ Clause 3.3(1) NPSFM

74. At first glance the use of “but” in (b) and “and” in (c) is puzzling. Especially if applying traditional rules of interpretation where a difference in wording is presumed to mean a difference in meaning.
75. In this instance I don’t think there is any practical difference.
76. When considering the timeframes, the Panel should satisfy itself that achieving the timeframe is both:
- 76.1. difficult; and
- 76.2. not impossible.
77. Factors relevant to that consideration will be factors which relate to the relevant goal, the things which must happen to achieve the goal, and how much time is required for those things to happen.
78. An obvious example is nutrient lag time; the time it takes for excess nutrients to flush out of soil and groundwater.
79. Another relevant factor is the extent and nature of any change to the activities undertaken in the FMU. And how long that will take.
80. The timeframes will necessarily be imperfect. It is a generational change. The best information must be used, but imperfect information does not justify delay.⁴⁵
81. In the NOF long term target attribute states must have interim target attribute states not exceeding 10 years.⁴⁶
82. Regional policy statement provisions (including the timeframes for the goals in long-term visions) must themselves be reviewed at intervals not exceeding ten years and may be reviewed at any time.⁴⁷

Failings in the development of the long-term visions?

83. Some submitter evidence suggests that the long-term visions do not reflect what the community wants.⁴⁸

⁴⁵ Clause 1.6 NPSFM

⁴⁶ Clause 3.11(6) NPSFM

⁴⁷ Section 79 RMA

⁴⁸ For example: Emma Crutchley for OWRUG, Federated Farmers, Dairy NZ, paras 87-96 and Joanna Hay for OWRUG, Federated Farmers, Dairy NZ, paras 72-77.

84. The process and results of engagement with community and tangata whenua are set out in the Section 32 Evaluation Report.⁴⁹
85. It is what the community and tangata whenua as a whole want which is to reflect in the long-term visions.
86. To some extent this must be a fiction. There can be no one vision wanted by all the community and all tangata whenua.
87. Therefore, after engagement with the community and tangata whenua the ORC must decide on the final visions.
88. This is clearly contemplated by the NPSFM, because in doing so the ORC is required to apply the hierarchy of obligations in clause 1.3(5) of the NPSFM.⁵⁰ The ORC must also achieve the objective of the NPSFM, give effect to the policies of the NPSFM, and cannot adopt long-term visions contrary to or inconsistent with the mandatory provisions of Part 3.
89. Perhaps more importantly, because the visions are required to be objectives in the FPI, the Hearing Panel can test the long-term visions against the community and tangata whenua engagement, the submissions and evidence in the freshwater planning process, the mandatory provisions of Part 3, the hierarchy of obligations and the NPSFM policies to ensure that the long-term visions will achieve the objective of the NPSFM in Otago.
90. In other words, the freshwater planning process cures any perceived failings in the community and tangata whenua engagement or failure to reflect in the proposed long-term visions what the community and tangata whenua want.

Revisiting “ambitious and reasonable” timeframes in the regional plan?

91. Long-term visions must identify a timeframe to achieve their goals.
92. The timeframe must be *“ambitious and reasonable (for example, 30 years after the commencement date”*.⁵¹
93. In her evidence Ms Perkins recommends a new policy LF-FW-P7B which

⁴⁹ Section 32 Evaluation Report dated September 2022 at pages 8 to 17, and Appendices 3 to 7

⁵⁰ Clause 3.2(2)(c)(i) NPSFM.

⁵¹ Clause 3.3(2)(c) NPSFM

provides among other things:

“Recognise that achieving the freshwater visions is likely to result in significant changes in land use activities and/or infrastructure by:

a. At the time of setting of environmental outcomes, attribute states, environmental flows and levels identify: ...

iv. The timeframe required to manage the costs of those changes in a way that can be sustained by the community that is ambitious but reasonable, and whether the dates in the visions need to be extended or brought forward in the Land and Water Plan.

94. This approach is unlawful.
95. Clause 3.3 of the NPSFM applies. The long-term visions and their timeframes must be in the RPS.
96. Regional plans must give effect to a regional policy statement. There is a hierarchy of documents. Plans cannot change or override superior documents.
97. If at some future point the ORC seeks to change the long-term visions, then it must notify a change or variation to the FPI.

The hierarchy of obligations

98. Clause 1.3(5) of the NPSFM creates a hierarchy of obligations.
99. This is clear from the words used in clause 1.3(5) (emphasis added):

*“There is a **hierarchy** of **obligations** in Te Mana o te Wai that **prioritises**:*

*(a) **first**, the health and well-being of water bodies and freshwater ecosystems*

*(b) **second**, the health needs of people (such as drinking water)*

*(c) **third**, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.”*
100. The words used are clear and unambiguous as to a hierarchy being

created.

101. If these were matters to be merely considered or balanced, then different words would have been used.
102. The hierarchy is of fundamental importance to the NPSFM.
103. It is restated as the sole objective of the NPSFM.⁵²
104. The hierarchy is referred to frequently in the NPSFM as something which must be applied in different contexts.⁵³
105. The words are clear. The ORC (and this Panel) should give them their plain and ordinary meaning.

What are human health needs?

106. The second priority in the hierarchy is the health needs of people.
107. Clearly drinking water is one of them. It is the example given.
108. In the FPI WAI-P1 provides that health needs are those arising from ingestion of water and food harvested from water and contact with water.
109. This is a narrow view of human health needs. There are reasons for this.
110. The wording in limb (b) or the hierarchy is “such as drinking water”. This means things of the same nature as drinking water.
111. If a broader meaning was intended, words could have been used to say so (eg such as food and drinking water).
112. The concept of Te Mana o te Wai is water centric.
113. Fundamentally (the first limb) it is about the health of the water.
114. The second limb is about the impact the health of the water then has on human health. That impact is from drinking the water, eating food harvested from the water, or being in contact with the water.

⁵² Clause 2.1 NPSFM

⁵³ See Clause 3.2(1)(c)(i)-(iii): when developing long-term visions under clause 3.3, when implementing the NOF under subpart 2, when 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

115. While the concept also includes the broader environment, that is the third limb.
116. Human health needs associated with electricity and food are met by selling into and buying on national and international markets. The economic systems to meet those needs are complex and an activity which feeds into those systems may or may not result in any relevant impact on human health. The connection is too tenuous. These things are properly within the third limb.

Other matters

A co-ordinated three waters strategy for Dunedin

117. In his evidence Mr Taylor proposes additions to LF-VM-O4 and O5:⁵⁴
- “three waters Regionally Significant Infrastructure within Dunedin City has been progressively upgraded as part of a coordinated strategy to align with the Objectives of the [Taiari or Dunedin and Coast, as applicable] FMU.”*
118. And amendment to LF-FW-P15(2)(ab) as follows:⁵⁵
- “(ab) integrated catchment management plans for management of stormwater in urban areas **and within Dunedin City the integrated catchment management plans are supported by a coordinated strategy for three waters Regionally Significant Infrastructure.**”*
119. And LF-FW-P16(1):⁵⁶
- “(1) phasing out existing discharges containing sewage or industrial and trade waste directly to water to the greatest extent possible **practicable, and for the Dunedin City three waters Regionally Significant Infrastructure, requiring this be supported by a coordinated strategy to align with the Objectives of the relevant FMU.**”*
120. And LF-FW-P16(2)(f):⁵⁷
- “that **discharges from existing Regionally Significant Infrastructure***

⁵⁴ Taylor, paragraph 37

⁵⁵ Taylor, paragraph 61

⁵⁶ Taylor, paragraph 72

⁵⁷ Taylor, paragraph 84

within Dunedin City are progressively improved through the implementation of a coordinated strategy for three waters Regionally Significant Infrastructure and any **other** discharges do not prevent water bodies from meeting any applicable water quality standards set for FMUs and/or rohe,”

121. And a new method LF-FW-M11:⁵⁸

“The owner of the Dunedin City three waters Regionally Significant Infrastructure prepares a coordinated strategy that outlines progressive improvements necessary to achieve the objectives of this regional policy statement.”

122. Under these changes the long-term visions for Taiari and Dunedin and Coast would in part be developed by the owner of Dunedin City three waters infrastructure. That owner may or may not remain Dunedin City Council.

123. Those parts of the long-term visions would be in a separate “co-ordinated strategy” and not in the FPI.

124. Those parts would remain to be determined in future. At the time the FPI becomes operative, that part of the vision would be unknown.

125. Under the NPSFM the ORC must develop the long-term visions and include them in the FPI.⁵⁹

126. It would be contrary to the NPSFM and unlawful to leave development of part of the long-term visions for future development by a third party for inclusion in a separate strategy document of that third party.

127. Further, it is doubtful that there is power to require Dunedin City Council or a future owner of Dunedin City Council three waters infrastructure to prepare a co-ordinated strategy of the nature proposed.

128. In the non-freshwater pORPS hearings the ORC has filed a memorandum dated 21 July 2023 on the lawfulness of requiring territorial authorities to resource, including by funding, Kai Tahu participation in resource management processes.

⁵⁸ Taylor, paragraph 89

⁵⁹ Clause 3.3 NPSFM

129. Applying the same reasoning, requiring Dunedin City Council (or any future owner) to prepare such a strategy absent any statutory mandate would be ultra vires.
130. The issues which Dunedin City Council seeks to address in the provisions outlined above are more appropriately addressed by submissions and evidence on the content of the relevant long-term visions (without carving part out for DCC to decide for itself in future) and in the regional plan process to follow.
131. Please note that I am not submitting that a co-ordinated strategy for Dunedin City's three waters infrastructure is not desirable. But it is something for Dunedin City Council to do of its own volition, outside of the FPI. And which should be informed by the FPI, and the regional plan; not the other way around.

Priorities in LF-FW-P7A

132. Mr Taylor and Ms Styles give evidence that LF-FW-P7A should prioritise community water supply and renewable electricity generation schemes.⁶⁰
133. In considering this, it is important to have in mind that as the policy stands it is not about prioritising activities for the allocation of water. It is primarily about efficiency in the allocation and use of water.
134. Prioritising one activity over another for allocation would be a significant change of direction and in terms of the NPSFM is not something that should occur in the regional policy statement.
135. The primary reason for this is that limits and allocations are matters that will be arrived at after stepping through the NOF.
136. Importantly, the values to be identified and dealt with under the NOF include both drinking water supply and hydro-electric power generation.
137. It is not for a regional policy statement to gazump that process.

Priorities in LF-FW-P7A - Community water supply

138. It may be pointed out that "*the health needs of people (such as drinking water)*" is the second priority in the Te Mana o te Wai hierarchy of

⁶⁰ Taylor at 53 and Styles at 8.27

obligations.

139. In that sense Mr Taylor's addition may seem harmless. But the devil is in the definition of Community Water Supply he proposes:

“Regionally Significant Infrastructure that incorporates a reticulated water supply scheme that provides water treated to a potable standard that meets the health needs of the population being served and provides for their social, economic and cultural well-being, now and in the future including future urban growth provided for in accordance with the NPS-UD. For clarity this excludes a supply that provides for the commercial scale irrigation of rural land.”

140. It is not certain that all things falling within this definition will end up with a favoured allocation after application of the NOF and the hierarchy of priorities.

141. Nor is it clear why supplies that include irrigation are excluded from the definition, while supplies that include water for commercial and industrial uses are not.

142. The addition is unnecessary. The hierarchy of obligations must be applied in giving effect to the NOF. Necessarily the outcome must include sufficient drinking water (assuming priority 1 is met).

143. To the extent the addition is necessary to secure priority for a particular type of water supply scheme, that is for the NOF, not the FPI.

Priorities in LF-FW-P7A - Renewable electricity supply

144. As to giving priority to renewable electricity supply, Ms Styles correctly points out that renewable electricity generation is identified as a matter of national significance through the NPSREG.

145. However, as noted earlier in these submissions the NPSREG expressly provides that it does not apply to the allocation and prioritisation of freshwater.

146. In any event the NPSFM itself is clearly cognisant of, and deals with, the importance of renewable electricity generation in context of freshwater (ie hydro-electric power generation).

147. The values to be dealt with through the NOF expressly include hydro-electric power generation in Appendix 1B.
148. Large hydro-electric generation schemes are an exception to the requirement that target attribute states are set at or above national bottom lines.⁶¹
149. Clause 3.31 of the NPSFM lists those large schemes and provides that in implementing the NPSFM as it applies to an FMU or part of an FMU affected by a one of those schemes, a regional council must have regard to the importance of the scheme's:
- “(a) contribution to meeting New Zealand’s greenhouse gas emission targets; and*
- (b) contribution to maintaining the security of New Zealand’s electricity supply; and*
- (c) generation capacity, storage, and operational flexibility.”*
150. The NPSFM expressly recognises the importance of large schemes, and hydro-electric power generation more generally, and specifies how they are to be dealt with in via the NOF.
151. For reasons now traversed several times, pre-empting NOF outcomes in the FPI is not permissible.
152. That is not to say that there can be no provision in the FPI dealing with renewable electricity generation.
153. Ms Styles has given evidence in support of including the Deep Stream, Waipori and Paerau/Patearoa Schemes in LF-VM-O4 (the Taiari FMU long-term vision).⁶²
154. Whether to do so or not is a matter for the Panel.

⁶¹ Clause 3.11(4) NPSFM

⁶² Styles, 8.11 to 8.16

Witnesses

155. The ORC will call:

155.1. Jacqui Todd – significant resource management issues for the region FPI provisions;

155.2. James Adams – resource management issues of significance to iwi authorities in the region FPI provisions;

155.3. Felicity Boyd – the remainder of the FPI provisions.



S J Anderson/T M Sefton
Counsel for the Otago Regional Council
Dated: 28 August 2023