

Before the Freshwater Hearings Panel

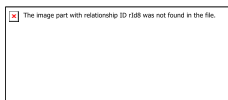
In the matter of the Resource Management Act 1991

And

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

Legal submissions on behalf of Queenstown Lakes District Council

30 August 2023



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1 Introduction

- 1.1 Queenstown Lakes District Council (**QLDC**) is one of the five territorial authorities in the Otago Region. QLDC and Dunedin City Council are the only two territorial authorities with submissions on the Proposed Otago Regional Plan's Freshwater Planning Instrument. Perhaps not coincidentally, they are the two main providers of municipal water supply, wastewater and stormwater services in the Region.
- 1.2 QLDC benefits immensely from and relies heavily on the beauty of its natural environment, including its many stunning lakes and rivers. It is also a district with a small resident population of ratepayers, but a disproportionate demand for municipal services due to high visitor numbers, and has a strong growth profile.
- 1.3 The health of the district's water bodies is crucial to all aspects of the district's wellbeing. QLDC is fully supportive of the work that ORC, takata whenua and the community have put into developing long-term visions for each of the freshwater management units within the district. QLDC considers that these visions are consistent with the NPSFM's "fundamental concept" – Te Mana o te Wai.
- 1.4 QLDC is broadly supportive of the Freshwater Planning instrument as advanced by Otago Regional Council (**ORC**) in its section 42A report, subject to submissions on a few particular points:
 - (a) ORC's policy LF-WAI-P1 is too narrowly focused on ingestion and immersive activities, thereby failing to prioritise other ways in which freshwater is vital to the health needs of people, as required by the NPSFM¹'s objective; and
 - (b) ORC's policy LF-FW-P7A is inconsistent with the NPSFM's objective because it does not implement that objective's differentiation between the second tier priority ("the health needs of people") and the third tier priorities ("the ability of people and communities to provide for their social, economic, and cultural well-being").

2 Evidence

- 2.1 QLDC has provided the Panel with a statement of evidence from Simon Mason, the Infrastructure Operations Manager at QLDC.
- 2.2 Mr Mason's evidence describes the freshwater-related infrastructure that QLDC provides for the people of its district: water supply, wastewater management and stormwater management.

¹ National Policy Statement for Freshwater Management 2020.

- 2.3 Mr Mason’s evidence explains that from perspective of an essential infrastructure provider, it is critical that the policy framework provides a viable consenting pathway and allows consents to be granted for a sufficient term to justify the debt the community incurs financing such projects.
- 2.4 Mr Mason will be joining the hearing remotely today to answer any questions the Panel may have.

3 Legal Framework

- 3.1 As set out in s 80A(2) of the RMA:

A **freshwater planning instrument** means—

- (a) a proposed regional plan or regional policy statement for the purpose of giving effect to any national policy statement for freshwater management:
- (b) a proposed regional plan or regional policy statement that relates to freshwater (other than for the purpose described in paragraph (a)):

- 3.2 Section 61 of the RMA sets out the considerations that must guide the formulation of a regional policy statement. Relevantly, a regional council must prepare and change its regional policy statement “in accordance with”:²

- (a) Its functions under section 30;
- (b) The provisions of Part 2; and
- (c) A national policy statement.

- 3.3 As ORC’s opening legal submissions described, the NPSFM itself is very prescriptive about how a regional council must go about preparing its policy statement and plan in accordance with the NPSFM.

The hierarchy of obligations

- 3.4 Part 1.3 of the NPSFM describes its fundamental concept: Te Mana o te Wai. Paragraph (5) explains:

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.

² RMA, ss 61(1)(a), (b) and (e).

3.5 Part 2.1 of the NPSFM states its single objective in the same terms:

The objective of this National Policy Statement is to ensure that natural and physical resources are managed in a way 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.

3.6 Part 3.2(2) of the NPSFM refers to the above as “the hierarchy of obligations” and directs the ORC to apply it when developing policies about water allocation:

Every regional council must give effect to Te Mana o te Wai, and in doing so must:

...

- (c) **apply the hierarchy of obligations**, as set out in clause 1.3(5):
 - (i) when developing long-term visions under clause 3.3; and
 - (ii) when implementing the NOF under subpart 2; and
 - (iii) **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;**

3.7 The hierarchy of obligations must also be applied to the formulation of the national objectives framework,³ when that occurs.

Other obligations

3.8 QLDC has had the benefit of reading Dunedin City Council’s submissions in advance, and supports the submissions Dunedin City Council will present regarding the need for the Freshwater Planning Instrument to be “in accordance with” not just the NPSFM, but also the NPSUD⁴ under s 61 of the RMA. This obligates local authorities to provide “infrastructure-ready” development capacity for housing. One aspect of being infrastructure-ready is having sufficient water supply.

3.9 Dunedin City Council’s submissions also highlight the obligations on local authorities under the Local Government Act 2002 and the Water Services Act

³ Part 3.7(1)(b).

⁴ National Policy Statement for Urban Development 2020, part 3.2

2021 to supply sufficient water of drinking water quality standard to each “point of supply”.⁵

- 3.10 ORC’s opening submissions note the Supreme Court’s recent decision in *Port Otago Ltd v Environmental Defence Society Incorporated*.⁶ This case directs us to focus on whether the regional policy statement needs to provide guidance in the event that water supply obligations under the NPS UD and these other statutory requirements conflict with the NPSFM’s hierarchy of obligations.

4 Support for the general direction of the Freshwater Planning Instrument

- 4.1 The health of freshwater bodies is crucial to the health of the community and all aspects the district’s wellbeing.
- 4.2 As noted above, QLDC is generally supportive of the way the Freshwater Planning Instrument has been drafted to implement the NPSFM, including the development of the long-term visions for QLDC’s freshwater management units.

5 Support for achievable policy framework for improving community infrastructure

- 5.1 While QLDC is supportive of the aspirations of the NPSFM and the district’s long-term vision, as the body responsible (for however long) for the district’s water supply, stormwater and wastewater infrastructure QLDC also supports the elements of the Freshwater Planning Instrument that recognise there are practical limits on what is achievable and how soon upgrades can be afforded or implemented.
- 5.2 Mr Mason’s evidence underscores the challenges facing a district with a sensitive environment, a small base of ratepayers and extensive infrastructure needs.
- 5.3 Part 3.3 of the NPSFM governs the development of long-term visions for freshwater management units. It requires that the goals set must be “ambitious but reasonable”. QLDC is supportive of the policy framework in ORC’s s 42A report and seeks that the policy framework remain aligned with that formulation, particularly as regards policies LF-FW-P15 (stormwater) and LF-FW-P16 (wastewater).
- 5.4 In relation to policy LF-FW-P16 (wastewater) QLDC appreciates, but is opposed to, Kai Tahu’s submissions that seek to remove any latitude whatsoever for discharges to water. QLDC of course accepts that the policy framework should favour other modes of wastewater disposal, and this is borne out in practice: reference to Table 1 in Ms Boyd’s opening statement of evidence shows that all of QLDC’s wastewater treatment plants discharge to land. This has been a deliberate shift by QLDC, motivated by Kai Tahu’s concerns.
- 5.5 However, QLDC submits that the costs and benefits of disposal methods need to remain open to consideration. For example, there may be cases in which land

⁵ Local Government Act 2002, s 130(2); Water Service Act 2021, s 25.

⁶ *Port Otago Ltd v Environmental Defence Society Incorporated* [2023] NZSC 112.

disposal leads to greater adverse effects, or has low environmental benefits relative to high opportunity costs (where greater environmental benefits might be achieved by investing elsewhere).

5.6 With reference to the s 42A report's proposed text, QLDC therefore submits that policy LF-FW-P16 should:

- (a) in relation to paragraph (1), retain the words "to the greatest extent possible" (or even better "practicable", as sought by Dunedin City Council); and
- (b) in relation to paragraph (2)(a), retain some latitude for the merits of disposal to water to be evaluated relative to other types of disposal, rather than stipulating an absolute policy directive.

6 "The health needs of people" – comparing the hierarchy of obligations to policy LF-WAI-P1

6.1 QLDC's lodged a further submission⁷ in support of Dunedin City Council's submission on policy LF-WAI-P1. ORC's s 42A report proposed:

LF-WAI-P1 – Prioritisation

In all ~~decision-making affecting management~~ of fresh water in Otago, prioritise:

- (1) first, the health and well-being of water bodies and freshwater ecosystems, (te hauora o te wai) and the contribution of this to the health and well-being of the environment (te hauora o te taiao), ~~and together with~~ the exercise of mana whenua to uphold these,
- (2) second, health ~~and well-being~~ needs of people, (te hauora o te tangata); interacting with water through ingestion (such as drinking water and consuming ~~harvested~~ resources harvested from the water body) and immersive activities (such as ~~harvesting resources and bathing~~ primary contact), and
- (3) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

6.2 As a wide-ranging policy giving effect to te Mana o te Wai, LF-WAI-P1 is required to "apply the hierarchy of obligations" by part 3.2(2)(c) of the NPSFM.

6.3 James Taylor's evidence for Dunedin City Council illustrates how prioritising "the health needs of people" extends beyond ingestion and immersive activities:⁸

DCC's Community Water Supply provides for the health of people by provision of drinking water, water for cleaning, heating and cooling households, institutions and workplaces. It also provides for people's health through the firefighting water network which maintains

⁷ FPI001.030

⁸ At para 13.

sufficient storage, pressure, and transmission of essential firefighting water – and which is a key driver of the entire water system capacity requirement.

- 6.4 QLDC concurs and adds that another major way in which water supply is used for people’s health is by enabling sewage to be hygienically conveyed away to wastewater management facilities. This prevents diseases such as cholera from outbreaking. While wastewater conveyance is not very dependent on water quality, it is dependent on sufficient water quantity being allocated.
- 6.5 In QLDC’s submission, the rebuttal evidence of Ben Farrell for Fish and Game⁹ takes too narrow an approach to freshwater management prioritising “the health needs of people”. He states:¹⁰
- Apart from supplying drinking water, I cannot think of any activity that takes water away from the waterbody and has a direct human health need.
- 6.6 It is submitted that this is incorrect: there are a number of essential activities take water away from waterbodies to directly address human health needs. QLDC also does not accept the gloss of “directness” that Mr Farrell adds to the prioritisation of “the health needs of people” when managing freshwater resources.
- 6.7 Of course there must a point at which water uses drop from the second tier of “the health needs of people” into the third tier of providing for people’s social, cultural and economic well-being. However in QLDC’s submission the types of uses discussed by Mr Taylor in his evidence comfortably sit in the second tier alongside drinking water and immersive activities.

7 Second and third tier priorities – comparing the hierarchy of obligations to LF-FW-P7A of the PORPS

- 7.1 QLDC’s lodged a further submission¹¹ in support of Dunedin City Council’s submission on policy LF-FW-P7. ORC’s s 42A report proposes a new policy addressing some of the same issues:

LF-FW-P7A – Water allocation and use

Within limits and in accordance with any relevant environmental flows and levels, the benefits of using fresh water are recognised and over-allocation is either phased out or avoided by:

(1) allocating fresh water efficiently to support the social, economic, and cultural well-being of people and communities to the extent possible within limits, including for:

(a) community drinking water supplies,

(b) renewable electricity generation, and

⁹ Otago and Central South Island Fish and Game Councils, Real Journeys Ltd and NZSki Ltd.

¹⁰ At para 16.

¹¹ FPI001.007.

(c) land-based primary production,

(2) ensuring that no more fresh water is abstracted than is necessary for its intended use,

(3) ensuring that the efficiency of freshwater abstraction, storage, and conveyancing infrastructure is improved, including by providing for off-stream storage capacity, and

(4) providing for spatial and temporal sharing of allocated fresh water between uses and users where feasible.

7.2 Mr Taylor’s evidence posits that, consistent with the hierarchy of obligations, this policy should prioritise community drinking water ahead of water for renewable electricity generation and land-based production.

7.3 Felicity Boyd’s opening statement of evidence records that she deliberately avoided any prioritisation in this policy. She continues:

In my view, decisions about prioritising allocation for certain activities must be considered as part of development flows and levels and take limits for specific catchments rather than in advance of that process and in a region-wide way.

7.4 However, part 3.2(2)(c)(iii) of the NPSFM expressly directs regional councils to apply the hierarchy of obligations when developing policies about water allocation. To the extent that the regional policy statement’s water allocation policy fails to do so, it is inconsistent with the NPSFM. The regional policy statement needs to provide the allocation prioritisation that the NPSFM requires. It is not open to the regional council to decline to provide that direction, so as to enable prioritisations that are inconsistent with the NPSFM.

7.5 If the regional council considers that the hierarchy of obligations needs to be applied with context-specific nuance, then it should develop an allocation policy to that effect, rather than not providing the required prioritisation at all.

8 Conclusion

8.1 QLDC seeks that the s 42A version of the Freshwater Planning Instrument be approved, subject to:

- (a) Broadening LF-WAI-P1’s approach to prioritising “the health needs of people” when managing freshwater so that it is not limited to ingestion and immersive activities, and at minimum reflects the various health needs that community water supplies serve;
- (b) Amending LF-WAI-P7A by prioritising water allocation for the health needs of people, in accordance with the hierarchy of obligations, when phasing out or avoiding over-allocation.

8.2 Dunedin City Council's evidence and submissions provide suitable potential amendments to address the above matters. QLDC endorses those suggestions.

Date: 30 August 2023

A handwritten signature in blue ink, appearing to read 'J Campbell / B Watts', written over a dotted line.

J Campbell / B Watts
Counsel for QLDC