Council decision on the Proposed Otago Regional Policy Statement 2021 – Non-Freshwater Planning Instrument Parts

At its meeting on 27 March 2024 the Otago Regional Council considered the recommendations of the Hearings Panel on the Proposed Otago Regional Policy Statement 2021 – Non-freshwater Parts and decided to adopt the Panel's recommendations.

The report of the Hearings Panel and its addendum are published with this decision.

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Proposed Otago Regional Policy Statement 2021

Report and recommendations of the Non-Freshwater and Freshwater Hearings Panels to the Otago Regional Council

MARCH 2024

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Prologue for the Non-Freshwater and Freshwater reports

1. This Prologue is the same for each of the two reports as to the non-freshwater process termed Appendix One, and the freshwater planning instrument (FPI) which is Appendix Two.

2. The Prologue is intended to provide a procedural background. It is also intended to serve as an explanatory statement as to why and how the two reports were prepared, and how the two reports' recommendations are to be combined together to achieve one integrated regional policy statement (ORPS).

3. It also explains how the various Appendices work in with each other to enable a reader to track outcomes of submissions.

1. Background

4. The proposed Otago Regional Policy Statement 2021 (pORPS) is a critical document for the management of natural and physical resources in Otago underpinning the planning framework across the region.

5. The Non-Freshwater Parts of the Proposed Otago Regional Policy Statement 2021 along with the Freshwater Parts will replace the partially operative Otago Regional Policy Statement 2019 (RPS 2019). The RPS 2019 provided an overarching policy framework for the region and will become fully operative in March 2024. The Otago Regional Council notified a reviewed Regional Policy Statement on 26 June 2021.

6. The pORPS is a document that directs and informs the content of both regional and district level plans as well as other types of plans and strategies, for example the Regional Land Transport Plan. The structure of the pORPS is significantly different to the RPS 2019, because it aligns with the National Planning Standards introduced in April 2019. The National Planning Standards outline a mandatory structure and format for regional policy statements. Implementing these standards required revisiting many of the provisions and separating parts into different chapters.

2. Preliminary Integration Issues

2.1 Statutory background

7. Every regional council is required by the Resource Management Act 1991 (RMA) to prepare and adopt a regional policy statement.

   s.60(1) provides:

   > *60. (1) There shall at all times be for each region 1 regional policy statement prepared by the regional council in the manner set out in Schedule 1.*

8. Prior to 2020 that was a straightforward process with Schedule 1 requiring readily understood processes involving opportunities for community input through consultation, submission, and further submission processes. Those processes were followed by a standard hearing process, and a straightforward single appeal process utilising one jurisdiction, with all appeals to be by way of re-hearing before the Environment Court.

9. The result of that straightforward process was to be an integrated document. Section 59 provides that the sole purpose of the regional policy statement is for it to provide an integrated overview of the issues for a region:

> ***59 Purpose of regional policy statements***
> *The purpose of a regional policy statement is to achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.*

10. That integrated procedural process in Part 5 of the RMA all changed from 1 July, 2020 with the introduction into the RMA of Sub-part 4 of Part 5 which introduced a new provision s.80A. It provides in sub-section 1 that:

> ***80A Freshwater planning process***
> *The purpose of this subpart is to require all freshwater planning instruments prepared by a regional council to undergo the freshwater planning process.*

11. The same 2020 amendment Act introduced a new freshwater planning process into the RMA which provided for hearings by specifically appointed Freshwater Hearing Panels to hear submissions on 'freshwater instruments'.

12. What resulted in Otago over the next two years was that the previous procedural process of straightforward integration for regional policy statements, became a complicated, expensive process bearing more hallmarks of dis-integration rather than integration.

2.2 Otago Regional Council initial processes

13. That outcome was no fault at all of the Otago Regional Council (ORC). The ORC just happened to be the first regional council off the block throughout the country required to apply these new mandatory provisions which central government had laid down that it must follow.

14. The confusion arose because a regional policy statement must address all resources of a region, including physical and ecological resources including water resources. The ORC was very cognisant that the new definition of '*freshwater instrument'* in s.80A (2) included, at the very least, critical parts of the proposed regional policy statement, such as the objectives.

15. ORC did not wish to separate out freshwater aspects of what had been prepared as one integrated document, as the RMA required. It believed it was enabled by the new provisions to treat the whole of the regional policy statement as a freshwater instrument. ORC notified the whole of its new Proposed Otago Regional Policy Statement (PORPS) for submissions as an integrated freshwater planning instrument, intending submissions on it would be heard by a freshwater planning panel under the new freshwater planning process.

2.3 High Court declaratory proceedings

16. Because of questions being raised by some submitters about the freshwater planning process being applied to the whole of the regional policy statement, the Otago Regional Council out of understandable caution applied for a declaratory judgment from the High Court. It sought declarations confirming the validity of the course it had adopted in order to achieve the integrated document it was required to prepare.

17. However, the subsequent High Court decision in *ORC v. Royal Forest & Bird Protection Society of New Zealand Incorporated* (2022) NZHC 1777 made it plain that the new legislation did not allow that integrated procedural approach to be followed in respect of the whole of the PORPS.

18. The outcome was the making of declarations by the High Court that the ORC had to differentiate between provisions directly relating to the quantity and quality of water, and the other 'non-freshwater' aspects of the PORPS.

19. The High Court judgment required that ORC identify the freshwater instrument parts of the PORPS and re-notify those provisions as a freshwater planning instrument. That would require submitters who wished to submit under that freshwater planning process having to file fresh submissions to be heard by a Freshwater Planning Panel. The ORC carried out that separation of freshwater provisions, and their re-notification, by shading those freshwater parts of the PORPS in blue. The non-freshwater aspects then constituted the greater part of the PORPS.

20. The High Court endeavoured as far as it could to be pragmatic, by allowing the submissions in respect of the non-freshwater parts of the regional policy statement to be able to proceed utilising the existing submissions on those non-freshwater submission points.

2.4 Processes of the Two Hearing Panels

21. Initially four commissioners were then appointed by the ORC to constitute the Non-Freshwater Hearing Panel - those members being R.D.Crosby (Chair), and RMA Commissioners R. Kirikiri, A. Cubitt and B. Sullivan.

22. Those hearings proceeded in the first half of 2023. The non-freshwater hearing Panel adjourned those proceedings at the end of hearings in May, 2023 to enable completion of the Freshwater hearing process in the hope that some form of integration of the two processes would be possible once the freshwater hearings had been completed.

23. In late 2022 and while the non-freshwater hearings were proceeding in the first half of 2023, the freshwater parts of the PORPS were notified, and submissions and further submissions lodged. The Chief Freshwater Commissioner then pragmatically appointed the same personnel to be the members of a Freshwater Planning Panel, and those freshwater hearings were conducted in August and September, 2023.

2.5 Reporting challenges for the two hearing panels

24. So the Alice in Wonderland legal situation we now find ourselves in, is that we must embark on preparation of two separate reports making recommendations to ORC in respect of two entirely separate procedural processes – but in respect of one integrated document, the PORPS. Pursuant to s. 59 of the RMA the purpose of that one document is "…*to achieve **integrated management** of the natural and physical resources of the whole region."* (Panel's emphasis)

25. In summary, in procedural terms we are required to make one set of recommendations which are subject to the non-freshwater hearing process, only on those aspects of the PORPS not shaded blue; and at the same time, we have to make another separate report of recommendations in respect of the freshwater parts, which are shaded in blue.

26. However, the overall outcome is required by s. 60 of the RMA to be one regional policy statement document. Section 59 of the RMA requires that one document has the purpose of achieving integrated management of the region's resources.

27. During some of the various hearings we have had urged upon us at various times in the two different processes a range of submissions as to the process we must observe. Those submissions have included inter alia that:

   a. We must not take into account evidence or submissions proffered to us in the other process;
   b. We cannot recommend changes in the different process that we have noticed require amendment in the other process;
   c. The non-freshwater process is the 'senior' process and that the freshwater process must be co-ordinated with it;

   and even that, (before we were appointed to common membership of both panels);

   d. the two panels could not confer to achieve an integrated outcome as they each could only properly take into account material heard in their process;

   and finally by ORC in closing on the freshwater hearing process

   e. that an elaborate process of further hearings should be timetabled to enable all submitters and ORC to call evidence and submit as to the impact of freshwater recommendations on the 'non-freshwater planning instrument parts of the RPS', i.e. involving by necessary implication a proposition that the freshwater report preceded the non-freshwater report.

28. We cannot see that there is any express statutory guidance providing a 'priority' or 'seniority' of any nature to the non-freshwater process as has been suggested directly, or by implication, in submissions. The sequential timing of non-freshwater and freshwater hearings that has occurred in this Otago setting has come about solely as a practical matter as a result of the High Court directions as to re-notification of the freshwater planning instrument. In our view neither report containing recommendations has any greater legal weight or priority than the other.

29. Most aspects of those non-integration approaches that were urged upon us are necessarily resolved by the pragmatic consequence of common membership of the two hearing panels. Each member of the two separate hearing panels has only the one brain – we necessarily have been informed by both processes.

30. However, despite the best efforts of the High Court, ORC and the Chief Freshwater Commissioner to be pragmatic and enable us to achieve an integrated document, we still face some arguable jurisdictional procedural challenges as to our ability to make recommendations in one or other process. Moreover, we are keenly aware of the differing appeal rights that arise depending upon which process we make a recommendation in, and what that recommendation is – once again these disjuncts in appeal processes have occurred because of central government statutory direction.

31. The differences in appeal rights appear to be:

a. In respect of the non-freshwater recommendations appeal rights lie to the Environment Court in the normal way, i.e by way of full re-hearing.

b. In respect of the freshwater recommendations where ORC accepts our recommendations or accepts our recommendations for alternative relief outside the submission relief sought, appeal rights lie to the High Court, but are restricted to points of law.

c. In respect of the freshwater recommendations where ORC does not accept our recommendations or does not accept our alternative recommended relief outside the scope of submissions, appeal rights lie to the Environment Court, but do not seem to be restricted to points of law.

32. We observe in passing, without having the temerity to express any views on the point, that it is not at all easy to see how the High Court and Environment Court, (and for that matter any higher courts on further appeal where again rights of appeal appear to differ), are to liaise on the different processes to be able to achieve one integrated document. There does not appear to be any clear procedural process provided by the RMA for any co-ordination to occur between the Environment Court and the High Court in respect of appeals relating to the same document but being heard in two different jurisdictions.

33. We must also grapple with the probably inevitable problem that some changes we consider are necessary in the PORPS provisions have been raised in or by a freshwater submission, but relate to unshaded non-freshwater provisions, and vice versa, i.e. a non-freshwater submission either expressly, or by implication, or by necessary consequence, affects a freshwater provision.

34. In respect of those latter matters we have decided the best we can do is to make the recommendation which best meets the s.59 imperative as to the single purpose of regional policy statements - which we repeat is to provide:

> *… an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.*

35. That being the sole purpose of regional policy statements expressed in the RMA, we do not consider that procedural difficulties imposed by inadequate central legislation as to how the two processes are to be melded into the one regional policy statement should stand in the way of people and resources in Otago being able to have one regional policy statement which is intended to achieve integrated management of resources. That is the vital planning base in the RMA upon which regional and district plans are to be prepared.

36. Our recommendations will endeavour to identify which recommendations relate to which process, but our overall focus is to achieve one integrated document which works in managing the resources of the region.

2.6 Process and format adopted to enable integration of two separate Reports of Recommendations into one planning document

37. Since a 2017 amendment the provisions of the RMA now include some overall procedural principles in s.18A. We interpret those principles as being of particular relevance to a situation such as this where a clear procedural lacuna exists. We are required to achieve one integrated planning document, but are required to do that using two entirely different processes which have different appeal rights. The lacuna lies in the fact that there is no statutory procedural guidance as to how we are to integrate the recommendations we make in two separate reports to achieve that one planning document.

38. We consider that section 18A provides some helpful guidance:

> ***18A Procedural principles***
> *Every person exercising powers and performing functions under this Act must take all practicable steps to—*
>
> **a.** *use timely, efficient, consistent, and cost-effective processes that are proportionate to the functions or powers being performed or exercised; and*
>
> **b.** *ensure that policy statements and plans—*
>
> **i.** *include only those matters relevant to the purpose of this Act; and*
>
> **ii.** *are worded in a way that is clear and concise; and*
>
> **c.** …..

39. Those provisions of s.18A must also be read and applied in conjunction with the hearings procedure provision s.39 (1) RMA relating to non-freshwater hearing processes. It concludes that a hearing panel in a non-freshwater process "*shall establish a procedure that is appropriate and fair in the circumstances."* In Schedule 1 Part 4 a similar direction is found in clause 48 (1) which provides that a freshwater hearings panel must "*regulate its own proceedings in a manner that is appropriate and fair in the circumstances;…"*

40. Bearing those various directives in mind we have endeavoured to exercise our recommendatory powers to achieve an efficient and cost-effective process which ensures the purpose of the Act is met. We have sought to do that by ensuring sustainable management of Otago's resources is provided for in one regional policy statement that provides for the integrated management of Otago's resources – which is what s.60 of the RMA requires.

41. Accordingly we have decided that each set of separate recommendations will have attached to it one final recommended regional policy statement, which will have the same blue shading as was required for the separate hearing processes to mark out the freshwater instrument provisions from the non-freshwater provisions.

42. We have also decided that in practical terms we should prepare this Introductory section, which would have been exactly the same for each of our recommendatory reports for each process. It would be contrary to common sense, and unnecessarily repetitive, expensive and pointless to do that.

43. Instead we intend to formally record that this introductory part of the report is able to be read and applied in both processes.

44. A report by the non-freshwater hearings panel containing recommendations for Otago Regional Council is contained in **Appendix One**.

45. A report by the freshwater hearings panel containing recommendations for Otago Regional Council is contained in **Appendix Two**.

46. **Appendix Three** is the recommended final form of the one PORPS required by s.60 of the RMA - again with blue shading for the freshwater instrument provisions.

47. **Appendix Four** is a tracked change version of the original notified version of the PORPS. It is intended to enable submitters to follow the directions we address below under the sub heading of Part Two as to the structure of the reports and recommended PORPS Appendices One, Two and Three. That structure description explains how submitters can determine the reasoning and source of any recommended changes.

48. Because of the greater scope to make recommendations outside of relief requested in submissions in the freshwater process, on limited occasions where we encountered such problems we used that process to make recommendations for change. In respect of the non-freshwater text in the PORPS, where we have seen such changes as being necessary, we have recommended them as consequential changes.

3. General Observations

49. This whole separate hearing process laid down by central government has been required by the RMA to be funded by ORC as the regional council.

50. The separation of hearing and decision-making functions has involved a process we consider to be more akin to 'disintegration' rather than 'integration' as required by the RMA for regional policy statements. That 'disintegrating' procedural effect will have added significant extra cost to ORC, and probably will still involve major ongoing extra cost and uncertainty in trying to align any appeal processes.

51. We appreciate the following views are outside of our jurisdiction.

52. Nonetheless as the closest body informed as a result of having to operate under this system, we felt we should express the view we hold that Central government may wish to consider assisting ORC in meeting the extra cost incurred by it.

53. That extra cost burden hopefully will not be faced by other councils, who are fortuitously later in the process than the ORC, given the amendments made belatedly in August 2023 to s.80A of the Resource Management Act by s. 805 (4) of the Natural and Built Environment Act 2023 in an attempt to resolve some of the worst deficiencies in the process. (This whole area has become even more complex in that since drafting of our reports has commenced there has been a change of government and the Natural and Built Environment Act 2023 has already been repealed.)

54. It seems wrong that simply being at the front of the queue should result in ORC having to carry such an extra cost burden, that other later regional councils will not have to bear.

4. Structure of Recommendations

55. It is important that the topic decisions supporting recommendations in each of Appendices One and Two are read as a whole together with the tracked change version of the PORPS in Appendix Four. The decision on each topic contains the reasons for the Panel's recommendations. These comprise either adoption of the reasoning and recommendations of the original Section 42A Report, or the replies by s.42A report writers to evidence, or a specific reasoning by the Panel.

56. The tracked change version of the relevant PORPS provisions in Appendix Four forms an integral part of the decisions leading to the recommendations in Appendices One and Two. The source of any change that was dealt with is clearly identified in the track changes version of the PORPS. This records all amendments (additions and deletions) to the notified PORPS provisions recommended to be made by the respective Panels.

57. In an effort to avoid repetition and to be able to produce reasonably timely and concise reports, the Panels have relied upon the submission point identification numbers in the section 42A reports to link submitters to particular issues. All chapters will therefore deal with issues without necessarily repeating the particular submission point or identifying the submitter in respect of the submission giving rise to that consideration.

58. Where the PORPS provisions **remain as notified**, it is because:

    a. The Panel involved has decided to recommend retention of the provision as notified for reasons set out in the relevant subject decision in Appendix One or Two; or

    b. The Panel adopted the reasoning and recommendation of the Section 42A Report Writer to retain the provision as notified as recommended in the Reply to Evidence by the s.42A report writer; or

    c. The Panel adopted the reasoning and recommendation of the Section 42A Report to retain the provision as notified in the original Section 42A report.

59. Where there is a **change to a provision** within the PORPS it is because:

    a. The relevant hearing Panel has amended a provision for reasons set out in the relevant subject decision in Appendix One or Two in response to a submission point which the Section 42A report writer(s) does not recommend in their reports; or

    b. The relevant hearing Panel adopted the reasoning and recommendation of the Section 42A Report Writer to change the provision to that recommended in the Reply to Evidence by the s.42A report writer; or

    c. The relevant hearing Panel adopted the reasoning and recommendation of the Section 42A Report Writer to change the provision to that recommended in the original Section 42A report; or

    d. A consequential change has been necessary following on from a decision in either a), b) or c); or

    e. The Freshwater Panel made a decision on its own volition outside the scope of any particular submission for the reasons set out in Appendix Two.

60. Where there is a **different recommendation** between the Section 42A Report and the Reply to Evidence (i.e., the recommendation by the Section 42A report writer(s) has changed as a result of hearing the evidence of submitters), unless the relevant hearing Panel decision in Appendix One or Two specifically adopts the original report's reasoning and recommendations, the reasoning and recommendations in the (later) reply to evidence has been adopted and it must be taken to prevail.

61. There are limited circumstances where the Panel has taken the opportunity to give effect to national policy statements or implement national environmental standards. Where this occurs the relevant decision in Appendix One or Two clearly sets out the nature of the change and the reason for the change.

62. Finally, there are limited circumstances where the relevant hearing Panel has decided that **alternative relief** is more appropriate than that requested by the submitters, but still within the scope of the relief sought. This is recorded in the Panel's decision in Appendix One. As stated above in Appendix Two on some limited occasions alternative relief has been recommended which is beyond the scope of any submission.

5. Requirements of Section 32AA of the RMA

63. In relation to the requirements of s.32AA of the RMA the Panel has had regard to all the matters required to be considered in terms of s.32 as it has made its assessments of submissions, the s.42A responses and the evidence and submissions it has received.

64. In deciding how to report in a manner which meets the obligations in both the freshwater and non-freshwater processes, it has taken into account particularly the requirements of s.18A of the RMA. That section requires that:

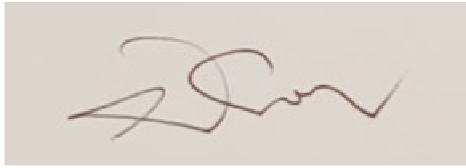
Every person exercising powers and performing functions under the Act must take all practicable steps to:

(a) *use timely, efficient, consistent, and cost-effective processes that are proportionate to the functions or powers being performed or exercised;*

65. To endeavour to slavishly repeat the thought process of a s.32 analysis in respect of each decision on each submission would fly in the face of that requirement of practicable steps being taken. It would involve a massively costly and time consuming repetitive process serving no useful purpose.

66. Instead the Panel has decided this statement of general compliance with the s.32AA process should be recorded. The Panel in particular wishes to record that it believes the decisions it has made on each submission are the most appropriate way to achieve the purpose of the Act in the most efficient, effective and reasonably practicable manner open to it, in each case where it has recommended changes to the PORPS.

For the Hearing Panels:



Ron Crosby

Chair

Proposed Otago Regional Policy Statement Hearings Panel, and Freshwater Hearings Panel

Dated 21 March 2024

Appendix One: Report by the Non-Freshwater Hearings Panel

Section 1: Legal Issues

1. Introduction

1. The Proposed Otago Regional Policy Statement (PORPS) initially gave rise to 1463 submissions involving a very large number of submission points in respect of non-freshwater issues which this report must address, with many of those being impacted by a range of legal issues which have been raised.

2. The principal legal issues underlying the majority of those submission points arise out of a limited number of major concerns, as follows:

   a. The assertion that the overall drafting of the PORPS has adopted an overly protective 'avoid adverse effects' approach, akin to that utilised in the National Policy Statement on Freshwater Management (NPSFM)

   b. A consequent assertion that such an 'avoidance' approach with only very limited qualifications inhibits, or possibly even prevents, the operation, maintenance and development of the following existing or new significant infrastructure and activities, by leaving them without a practicable consent pathway:

      i. Lifeline infrastructure including - renewable electricity generation; the transmission of electricity through the National Grid; the distribution of electricity; telecommunications networks; water distribution, whether for irrigation or drinking water; roading infrastructure; port and airport operations
      ii. Mining & quarrying (particularly for aggregate)
      iii. Ski-field operations
      iv. Aquaculture (particularly for off-shore salmon farming)

3. After the closing of the periods for submissions and further submissions, some caucusing and more informal discussions were conducted by the s.42A report writers in respect of many of those issues. Those pre-hearing processes led to a level of amended recommendations being made by report writers as each chapter of the PORPS was considered by the Hearing Panel ('Panel').

4. Persuasive cases were then presented by submitters to the Hearing Panel ('Panel') in respect of all those issues.

5. A positive feature of this five month long hearing process then occurred. That was demonstrated by the degree to which those major concerns of submitters were listened to and responded to by the s.42A report writers. In the reply reports they provided, many of their earlier recommendations were further amended to address or ameliorate to a greater or lesser extent the major concerns underlying the submission points.

6. Doubtless many submitters will still feel a level of disquiet that it was necessary to undertake the hearing process of preparing detailed legal submissions and providing expert and lay evidence to achieve those amended outcomes. In the Panel's view the outcome on many of the issues of concern is a sound one, which has been tested and resolved in an effective manner by the hearing process, rather than having to await an imposed outcome from this recommendatory report.

7. However, some issues have not been resolved by that process, and do require the Panel to make a decision as to the recommendations it makes.

8. The first of those is the major issue of prioritisation of protection which many submitters asserted underpinned the whole of the PORPS. As will be seen right up until the very last document filed in this proceeding ORC held to its position on this point. Given that fact, despite the very late major change in position by ORC we still consider it necessary to canvass the contrasting positions we had presented to us throughout the hearings.

2. Part 2 RMA – Prioritisation: a protective or enabling approach – or both?

9. In legal terms the fundamental difference in views, and perceptions, of the PORPS related in large part to the issue of how the various aspects of Part 2 of the RMA were to be applied in the PORPS.

10. Various activity groups, including the infrastructure providers and operators, the rural sector, the mining and quarrying and skifield operators, and aquaculture developers in particular, from their varying viewpoints were saying that the PORPS philosophical approach was not 'enabling' as they asserted Part 2 intended.

11. Rather they complained that the PORPS approach was too prescriptive, adopting a default base for all activities that required 'avoidance' of effects in a manner that was too strictly proscribed. The common thread of these submitters' cases was that their particular activity area had either not been recognised or provided for, either at all or adequately, in the identification of regional issues of significance, or that the activity chapters did not contain any, or an adequate, practical consent pathway for their desired activities.

12. The common concomitant approach taken by most of these submitters was that the NPSFM prioritisation hierarchy had effectively been adopted and applied to the broader region-wide natural environment, which resulted in an elevation of protection of every aspect of ecology and the natural environment above human needs and activities.

13. That approach was said to be contrary to the guidance provided by the Supreme Court in the *NZ King Salmon* litigation. (As these Panel considerations develop we will address later on the Supreme Court's more recent decision in *Port Otago Limited v Environmental Defence Society Incorporated (2023) NZSC 112* as a result of which the major change in position by ORC eventuated.)

14. The Kāi Tahu and related mana whenua submitters' approach under Part 2 was more nuanced. They did not level the same degree of concerns about the prioritisation hierarchy of protection of the natural environment, as Kāi Tahu and its associated submitters sought a high level of such protection of the natural environment. Rather their focus was that in some respects the PORPS avoidance of effects approach did not properly give full effect to the Treaty obligations to enable mana whenua to exercise tino rangatirataka in respect of their own takiwa resources, and to exercise kaitiakitaka obligations in respect of that takiwa.

15. To the Panel's mind, those two bases of criticism stem from a common assertion that differing aspects of Part 2 of the RMA were not being properly applied in the overarching PORPS approaches. The Treaty related issue is such a discrete issue that it is best left for a later discussion on the mana whenua chapter provisions in the PORPS.

16. We turn now, then, to address the fundamental difference in approach between 'enabling' or 'protecting' arguments as to what is required for the PORPS to meet the Part 2 objectives of the RMA.

17. The initial ORC response reflected in the s.42A reports was in essence that rather than adopting a prescriptive approach to activities, the approach of the PORPS was to ensure, in accordance with Part 2, that the environment was protected as a first priority by use of priorities, effects

management hierarchies, and the setting of some limits. Ecological limits were a prime example. So long as the environmental bottom lines set to achieve a sustainable level of protection were not transgressed, this approach argued that the outcome would protect the natural environment and enable human activities to be conducted. In short, human activities involving resource use and development were enabled, but only so long as their effects did not breach limits, and for that reason protection of those limits was set as the first priority.

18. When looked at in that light it was said that the combination of the prioritisation hierarchy, limits and detailed effects management hierarchies provided the base protection mechanisms required by Part 2 for the natural environment, while enabling use and development of resources to occur without further restriction.

19. In the Panel's perception what these differing arguments boil down to is a consideration of how and when 'enabling' and 'effects management' regimes envisaged by Part 2 are to be addressed in a regional policy setting.

20. Obviously, the startpoint for that consideration must be the guidance provided by the highest court in the land, the Supreme Court in the *NZ King Salmon* litigation[1]. That case provides clear direction on the knotty potential for conflict between the protectionist language found variously in Part 2 in the ss. 5, 6 & 7 provisions, and the enabling terminology found in s.5 itself. The latter includes phrases such as 'enables people and communities to provide for their social, economic, and cultural well-being' and 'use and development' of resources. The protectionist langage by way of contrast in ss.5,6 & 7 includes words such as 'sustaining', 'safeguarding', 'preserve', 'protect', 'maintain', 'manage' in relation to various aspects of the environment, and 'avoid' 'remedy', 'mitigate' and 'enhancement' as to effects.

21. The submitters supporting the 'enabling' approach understandably stressed the former 'enabling' phrases, while the ORC s.42A reports initially, and other submitters supportive of their protective approach, stressed the latter. In each case the opposing arguments were buttressed by concessionary assertions. On the one hand in support of the 'enabling' approach assertions were made that effects management hierarchies and/or limits were not opposed per se, but they were to the extent that they were so restrictive they did not provide real or practicable consent pathways. On the other hand those supportive of the 'protective' approach asserted that they were not opposed to use and development of resources, but only to the extent that the effects of use and development were in breach of limits.

22. In both the notifed version and in the final s.42A recommended change version of the PORPS a priority was adopted in relation to the integrated management of resources within the Otago region. Policy IM-P2 for example in the notified version used a heading **IM–P2 – Decision priorities**. As notified it provided:

IM–P2 – Decision priorities

Unless expressly stated otherwise, all decision making under this RPS shall:

(1) firstly, secure the long-term life-supporting capacity and mauri of the natural environment,

(2) secondly, promote the health needs of people, and

(3) thirdly, safeguard the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

[1] *EDS v. NZ King Salmon Co Ltd (2014) NZSC 38*

23. In the final recommended version dated 15 September 2023, IM-P1 and IM-P2 were consolidated into the following form as IM-P1:

> **IM-P1 – Integrated approach to decision-making**
>
> Giving effect to the integrated package of objectives and policies in this RPS requires decision-makers to consider all provisions relevant to an issue or decision and apply them according to the terms in which they are expressed, and if there is a conflict between provisions that cannot be resolved by the application of higher order documents, **prioritise**:
>
> (1) the life-supporting capacity and mauri of air, water, soil, and ecosystems, and then
>
> (2) the health and safety of people and communities, and their ability to provide for their social, economic, and cultural well-being, now and in the future.

(Panel's emphasis)

24. The key issue then is whether or not an approach which expressly prioritises protection of the natural environment on a broad region-wide basis is in accordance with Part 2 of the RMA.

25. That issue is also critical to the more indirect criticisms of the PORPS by user submitters. They asserted that even if protection was not expressly stated in other provisions, then by omission of express provisions relating to the recognition of, provision for, and enabling of a raft of significant activities, but by contrast expressly protecting the natural environment, the PORPS was in effect prioritising protection over use and development of resources.

26. The Integrated Management chapter of the PORPS will be addressed in more detail later in this report in relation to the particular submission points that require addressing in detail, but the overall issue of how integrated management should be achieved in accordance with the law needs to be addressed first as a major discrete issue.

27. So what did the Supreme Court have to say in NZ King Salmon about this issue of prioritisation?

2.1 NZ King Salmon case

28. The decision of the Supreme Court in *EDS v. NZ King Salmon* (hereafter simply '*King Salmon*') is by now nearly ten years old, but it remains the leading authority on how the purpose and objectives of the Act are to be achieved and how Part 2 is to be interpreted.

29. In the decade since that decision, aspects of its application have been reviewed by other courts on occasion. Most relevantly for the Otago region, such a potential reconsideration was live during our hearings in the Supreme Court itself, in a case involving Port Otago Limited. That case was heard in May, 2022, but the decision *Port Otago Limited v. EDS (2023) NZSC 112* only issued on 24 August, 2023, after the non-freshwater hearings were concluded but left open to resume if the Supreme Court's decision was received later in the year. When that happened we duly allowed submissions to be lodged as to the implications of that decision.

30. The *Port Otago* case involved the relationship between what was termed the 'Port' Policy 9 of the NZCPS and the 'avoid policies' of Policies 11,13,15 and 16 of the NZCPS. Policy 9 of the NZCPS is the policy which recognises the need nationally and internationally for an efficient port system, whereas Policy 11 protects indigenous biological diversity, Policy 13 protects natural character, Policy 15 protects natural features and landscapes, and Policy 16 protects nationally significant surfbreaks.

31. We will return to address the *Port Otago* case later but commence with a review of the *NZ King Salmon* case.

32. The principal passages of relevance to the priority issue being addressed at this stage of this report are found at paragraph 24 of the *King Salmon* case relating to the definition of 'sustainable management" which is the s.5 purpose of the Act:

> 24. (a)…
>
> (b) …
>
> (c) *Third, there has been some controversy concerning the effect of the word "while" in the definition. The definition is sometimes viewed as having two distinct parts linked by the word "while". That may offer some analytical assistance but it carries the risk that the first part of the definition will be seen as addressing one set of interests (essentially developmental interests) and the second part another set (essentially intergenerational and environmental interests). We do not consider that the definition should be read in that way.* ***Rather, it should be read as an integrated whole.*** *This reflects the fact that elements of the intergenerational and environmental interests referred to in sub-paras (a), (b) and (c) appear in the opening part of the definition as well (that is, the part preceding "while"). That part talks of managing the use, development and protection of natural and physical resources so as to meet the stated interests – social, economic and cultural well-being as well as health and safety. The use of the word "protection" links particularly to sub-para (c). In addition, the opening part uses the words "in a way, or at a rate". These words link particularly to the intergenerational interests in sub-paras (a) and (b).* ***As we see it, the use of the word "while" before sub-paras (a), (b) and (c) means that those paragraphs must be observed in the course of the management referred to in the opening part of the definition. That is, "while" means "at the same time as".***
>
> *(*Panel's emphasis)

33. In broad terms what the Supreme Court termed as 'developmental interests' includes what we have termed as supporters of the 'enabling approach', and what it termed as 'intergenerational and environmental interests' we have termed the 'protectionist approach'. Regardless of the labels applied, those conclusions we have emphasised in *King Salmon* make it plain that the outcome has to be the same – an integrated approach is required for both sets of interests, or on both approaches, to meet the sole purpose of the Act of sustainable management. Each of the elements in s.5(2) must be observed contemporaneously. In terms of a regional policy statement that requires each element to be observed or provided for in the same document. As the Court stressed at paragraph 64 that of course is what s.59 of the RMA requires *"by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region."*

34. On their face, and if only taken that far, those conclusions would mean prioritisation could never be applied. However, the Supreme Court continued in its decision to make it plain that the statutory regime in Part 2 is far more complex than that.

35. It then addressed the provisions found in s.5(2) and observed, still in paragraph 24:

> *(d). Fourth, the use of the word "protection" in the phrase "use, development and protection of natural and physical resources" and the use of the word "avoiding" in sub-para (c) indicate* ***that s.5(2) contemplates that particular environments may need to be protected from the adverse effects of activities in order to***

> ***implement the policy of sustainable management; that is, sustainable management of natural and physical resources involves protection of the environment as well as its use and development.*** *The definition indicates that environmental protection is a core element of sustainable management,* ***so that a policy of preventing the adverse effects of development on particular areas is consistent with sustainable management****. This accords with what was said in the explanatory note when the Resource Management Bill was introduced:*

> *The central concept of sustainable management in this Bill encompasses the themes of use, development and protection*

*(*Panel's emphasis*)*

36. Later in its decision after analysing the terms or concepts of 'avoidance', 'protection' and 'inappropriate' and 'appropriate' use and development, the Court then went further in making the crucial decision for the purposes of that case as to what approach was required to observe Part 2 in the interpretation of the NZCPS policies.

37. Was it the 'overall judgment' approach, which would enable the 'balancing' of a wide range of statutory planning objectives and policies? Or the 'environmental bottom line' approach, which would operate more akin to a 'rules'-based approach? In relation to that issue the Court came down strongly in favour of the 'environmental bottom line' approach, holding at Paragraph 131 and at the start of paragraph 132 as follows:

> *[131] A danger of the "overall judgment" approach is that decision-makers may conclude too readily that there is a conflict between particular policies and prefer one over another,* ***rather than making a thoroughgoing attempt to find a way to reconcile them****. In the present case, we do not see any insurmountable conflict between policy 8 on the one hand and policies 13(1)(a) and 15(a) on the other. Policies 13(1)(a) and 15(a) provide* ***protections against adverse effects of development in particular limited areas of the coastal region – areas of outstanding natural character, of outstanding natural features and of outstanding natural landscapes (which, as the use of the word "outstanding" indicates, will not be the norm****). Policy 8 recognises the need for sufficient provision for salmon farming in areas suitable for salmon farming, but this is against the background that salmon farming* ***cannot occur in one of the outstanding areas if it will have an adverse effect on the outstanding qualities of the area****. So interpreted, the policies do not conflict.*

> *[132] Policies 13(1)(a) and (b) and 15(a) and (b) do, in our view,* ***provide something in the nature of a bottom line. We consider that this is consistent with the definition of sustainable management in s 5(2), which, as we have said, contemplates protection as well as use and development.***

(Panel's emphasis)

38. The fundamental recurring feature in the Supreme Court's reasoning for a bottom lines approach keeps coming back to the s.6 distinction of particular protection of <u>particular</u> areas or aspects of the environment. Thus the Court emphasised that in s.6 outstanding areas were provided with the possibility of an elevated level of protection as compared to s.7 matters. The analysis at paragraphs 26 and 28 makes that distinction plain:

[26] Section 5 sets out the core purpose of the RMA – the promotion of sustainable management of natural and physical resources. Sections 6, 7 and 8 supplement that by stating the particular obligations of those administering the RMA in relation to the various matters identified. ***As between ss 6 and 7, the stronger direction is given by s 6 – decision-makers "shall recognise and provide for" what are described as "matters of national importance", whereas s 7 requires decision-makers to "have particular regard to" the specified matters.*** *The matters set out in s 6 fall naturally within the concept of sustainable management in a New Zealand context. The requirement to "recognise and provide for" the specified matters as "matters of national importance"* ***identifies the nature of the obligation that decision-makers have in relation to those matters when implementing the principle of sustainable management.*** *The matters referred to in s 7 tend to be more abstract and more evaluative than the matters set out in s 6. This may explain why the requirement in s 7 is to "have particular regard to" them (rather than being in similar terms to s 6).*

27. …

[28] It is significant that three of the seven matters of national importance identified in s 6 relate to the preservation or protection ***of certain areas****, either absolutely or from "inappropriate" subdivision, use and development (that is, ss 6(a), (b) and (c)). Like the use of the words "protection" and "avoiding" in s 5,* ***the language of ss 6(a), (b) and (c) suggests that, within the concept of sustainable management, the RMA envisages that there will be areas the natural characteristics or natural features of which require protection from the adverse effects of development.*** *In this way, s 6 underscores the point made earlier that protection of the environment is a core element of sustainable management.*

*(*Panel's emphasis)

39. On the Panel's understanding of the current legal position, the Supreme Court was not directing that Part 2 of the RMA required protection of the natural environment to be prioritised above use and development on a broad-brush basis across a region. Instead, as it repetitively said, "*the RMA envisages that* ***there will be areas the natural characteristics or natural features of which*** *require protection from the adverse effects of development."* It seems plain to the Panel that the Supreme Court approach envisaged the identification of particular aspects or areas of the natural environment which needed protection for particular reasons, before the bottom-line approach of language like 'avoids' could be applied in objectives and policies.

40. This was made plain by way of repetition at paragraphs 148 and 149 of the decision:

[148] At the risk of repetition, s5(2) defines sustainable management in a way that makes it clear that ***protecting the environment*** *from the adverse effects of use or development* ***is an aspect of sustainable management*** *–* ***not the only aspect, of course, but an aspect****. Through ss 6(a) and (b), those implementing the RMA are directed, "in relation to managing the use, development, and protection of natural and physical resources", to provide for the preservation of the natural character of the coastal environment and its protection, as well as the protection of outstanding natural features and landscapes, from inappropriate development, these being two of seven matters of national importance. They are directed to make such provision in the context of "achieving the purpose of [the RMA]". We see this language as underscoring the point that* ***preservation and protection of the environment is an element of sustainable***

> ***management of natural and physical resources**. Sections 6(a) and (b) are intended to make it clear that those implementing the RMA must take steps to implement that protective element of sustainable management.*
>
> *[149] **Section 6 does not, we agree, give primacy to preservation or protection**; it simply means that **provision must be made for preservation and protection as part of the concept of sustainable management**. The fact that ss 6(a) and (b) do not give primacy to preservation or protection within the concept of sustainable management does not mean, however, that a particular planning document may not give primacy to preservation or protection **in particular circumstances**. This is what policies 13(1)(a) and 15(a) in the NZCPS do. Those policies are, as we have interpreted them, entirely consistent with the principle of sustainable management as expressed in s 5(2) and elaborated in s 6.*
>
> *(*Panel's emphasis)

41. And similarly at paragraph 152 in relation to the NZCPs where the Court stated:

> *[152] The NZCPS is an instrument at the top of the hierarchy… Given that environmental protection is an element of the concept of sustainable management, we consider that the Minister was fully entitled to require in the NZCPS that **particular parts** of the coastal environment **be protected** from the adverse effects of development. That is what she did in policies 13(1)(a) and 15(a), **in relation to coastal areas with features designated as "outstanding"**. As we have said, no party challenged the validity of the NZCPS.*
>
> (Panel's emphasis)

42. In the notified version of the PORPS, IM-P2 did not endeavour to identify particular aspects or areas of the natural environment requiring protection for particular reasons – instead it stated on an all-encompassing basis:

> **IM–P2 – Decision priorities**
>
> Unless expressly stated otherwise, all decision making under this RPS shall:
> firstly, **secure** the long-term life-supporting capacity and mauri **of the natural environment,** …
>
> (Panel's emphasis)

43. Whilst the reply form of the PORPS dated 15 September 2023 recommended a more moderated approach in the consolidated IM-P1, nonetheless it still took a broad brush approach to the natural environment by prioritisation of protection:

> **IM-P1 – Integrated approach to decision-making**
>
> Giving effect to the integrated package of objectives and policies in this RPS requires decision-makers to consider all provisions relevant to an issue or decision and apply them according to the terms in which they are expressed, and if there is a conflict between provisions that cannot be resolved by the application of higher order documents, **prioritise**:
>
> 1) the life-supporting capacity and mauri of **air, water, soil, and ecosystems**, and then
> 2) …
>
> (Panel's emphasis)

44. The Panel's conclusion is that the both the notified and the recommended reply version of the PORPS had erred in adopting a broad prioritisation approach to include protection of all of the natural environment. ORC had adopted that approach both in the notified version and in the recommended reply version. The first priority accorded was of the whole of the air, water, soil, and ecosystems. (The definition of 'environment' in the RMA, which is replicated exactly in the PORPS, includes 'ecosystems and their constituent parts, including people and communities' – so it is all encompassing.)

45. By way of contrast the protective absolute 'avoid' approach in the NZCPS was focussed on <u>outstanding</u> natural character (Policy 13 (1)(a)), <u>outstanding</u> natural features and <u>outstanding</u> natural landscapes (Policy 15 (1)(a)). In Policy 11(a) as to indigenous biodiversity the absolute 'avoid' approach was limited to at risk, rare and threatened species, or species and indigenous biodiversity which are nationally significant.

46. Similarly, by way of contrast the NPSFM has been issued against a background of a welter of reports that the states of the quality and/or quantity of many of New Zealand's freshwater bodies are so degraded or reduced that they are particularly sensitive to certain existing or ongoing levels of adverse effects from the use of water. Those are particular aspects of environmental concern as to the sensitivity of a particular aspect of the natural environment in freshwater bodies. As a consequence, in its expression of the concept of Te Mana o Te Wai at cl.1.3 the NPSFM provides a hierarchy of obligations expressed as follows:

> *(5) 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*

47. We observe in passing that the similarity between that NPSFM hierarchy and the prioritisation in the notified IM-P2 and the reply version IM-P1 is obvious. Each is based to an extent on aspects of the wording in s.5(2) of the RMA.

48. There is no such particularisation in the PORPS warranting its application of a prioritisation for protection purposes of all of '*the life-supporting capacity and mauri of* ***air, water, soil, and ecosystems'.*** Nor is there any region wide identification in the s.32 report of risk to all of those natural environment aspects or areas warranting such an all-encompassing protection approach reflected in the prioritisation of protection.

49. Absent such particularisation of aspects or areas needing protection, then in the Panel's view the *King Salmon* decision makes it plain that for an integrated regional policy statement like PORPS to be in accordance with Part 2 of the RMA it must apply subclauses (a), (b) and (c) of section 5(2) as an integrated whole. Those sub-clauses ***"must be observed in the course of the management referred to in the opening part of the definition. That is, "while" means "at the same time as".*** In short there is to be no general prioritisation of protection above the enabling function of the RPS.

50. We consider that conclusion is supported by the statements made at paragraphs 129 and 130 of the *King Salmon* decision which are very relevant to the more nuanced manner in which the reply version of the consolidated IM-P1 is worded, so that it only applies in situations of conflict of policies:

> *[129] When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, "avoid" is a stronger direction than "take account of ". That said however, we accept that there may be instances where particular policies in the NZCPS "pull in different directions". But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording.* ***It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.***
>
> *[130]* ***Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another****.* ***The area of conflict should be kept as narrow as possible****. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5. As we have said, s 5 should not be treated as the primary operative decision-making provision.*

(Panel's emphasis)

51. An objective for an integrated RPS to meet the s.59 imperative of the RMA should be to ensure that as far as possible there are not irreconcilable provisions. A broad sweeping prioritisation involving a protectionist approach over an enabling one in the PORPS, either expressly or indirectly, does not in our view accord with Part 2.

2.2 Port Otago case

52. The next point to consider is just how, if at all, the *Port Otago* decision of the Supreme Court can be said to have varied, developed or further clarified the *NZ King Salmon* guidance. The Supreme Court itself expressed the view that nothing it said in Port Otago changed the concepts laid down in the *NZ King Salmon* case.

53. The first point to note about this decision was that the Supreme Court in *Port Otago* did not depart at all from the general principles established in three of its earlier decisions – those being:

   (i) the *NZ King Salmon* case itself in 2014 about the interpretation approach to be adopted to the directive nature of policies in the NZCPS
   (ii) the related *Sustain our Sounds* case[2] also in 2014 particularly as to application of adaptive management techniques to reduce or avoid adverse effects; and finally,
   (iii) the *Trans-Tasman*[3] decision in 2021, which in relation to different related legislation introduced a concept of 'material harm' into the assessment of adverse effects under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

54. In *Port Otago* all of those principles were adopted and applied in various ways. At paragraph 81 the Court particularly stressed that the 'structured analysis' approach it concluded would be necessary in resolving conflicting policies was not the same as the "overall judgment" approach it rejected in the *King Salmon* case. In relation to the *Trans-Tasman* case the Supreme Court noted (at para 65) that:

[2] *(2014) NZSC 40*
[3] *(2021) NZSC 127*

the standard was protection from material harm, albeit recognising that temporary harm can be material. Although in a different context, the comments are nonetheless applicable to the NZCPS. It is clear from <u>*Trans-Tasman*</u> *that the concepts of mitigation and remedy may serve to meet the "avoid" standard by bringing the level of harm down so that material harm is avoided.*

55. At paragraph 68 of the Port Otago decision the Supreme Court provided a summary of the application of those principles as follows:

> *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.*

56. The Court's analysis then shifted to address the issue of how the conflicting directive policies in the NZCPS were to be addressed – in that case being the conflict between the directive policy enabling port development which it termed the 'ports' policy and the avoidance policies which were also directive.

57. Most importantly, at paragraph 72 the Court held that the resolution of such conflicts did need to be addressed "at the regional policy statement and plan level as far as possible." The Supreme Court's rationale for that approach was so that those considering particular projects would have guidance on what matters would be the focus of decision-making on any applications for consents where such conflicts in policies arose, and could weigh whether it was worth applying. Importantly, too, the Court observed that "decision-makers at the consent level will have as much guidance as possible on methods for addressing conflicts between policies."

58. It is of interest and significance to observe, however, that having made that decision as to process, the Supreme Court immediately found itself in the same predicament this Panel faces. That is that it simply did not have enough contextual factual material before it to provide other than high level guidance in the proposed policy it went on to suggest to reconcile the differences in the policies. At paragraph 75 it stated:

> *As there is not sufficient information before us to attempt any detailed reconciliation between the ports policy and the avoidance policies, we provide only general guidance as to how a decision-maker at the resource consent level might approach the reconciliation between the ports policy and the avoidance policies.*

59. That general guidance was then described in paragraph 76 in terms that the decision-maker would have to be satisfied that:

> *(a) the project is required to ensure the safe and efficient operation of the ports in question (and not merely desirable);*
>
> *(b) assuming the project is required, all options to deal with the safety or efficiency needs of the ports have been considered and evaluated. Where possible, the option chosen should be one that will not breach the relevant avoidance policies. Whether the avoidance policies will be breached must be considered in light of the discussion above on what is meant by "avoidance"; including whether conditions can be imposed that avoid material harm; and*
>
> *(c) if a breach of the avoidance policies cannot be averted, any conflict between the policies has been kept as narrow as possible so that any breach of any of the avoidance*

policies is only to the extent required to provide for the safe and efficient operation of the ports.

60. Importantly for the consideration of the policy approach in the PORPS the Court also held at paragraph 77 that "*There can be no presumption that one directive policy will always prevail over another.*" That is a very clear direction from the Supreme Court that rules out a general prioritisation approach of avoidance policies above other directive policies.

61. At paragraphs 78 and 79 the Supreme Court stressed that the assessment of which policy prevails will depend upon "the particular circumstances of the case." And further that in the structured analysis approach it had laid down that decision-makers will need to assess what it is which is being directed to be provided for, and the "*importance and rarity of the environmental values at issue in the particular circumstances"* and the intrinsic worth of the protected environmental values." The Court concluded at paragraph 82 on these issues that:

> *Resolution of any conflict, through a structured analysis, will have to occur at resource consent level with regard to particular projects.*

62. The Court stressed at paragraph 81 that the 'structured analysis' required was not a 'loose overall' evaluation but:

> *Rather they are disciplined, through the analytical framework we have provided, to focus on how to identify and resolve potential conflicts among the NZCPS directive policies.*

The Court at paragraph 84 then continued to observe that:

> *…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.*

2.2.1 ORC response to Port Otago decision

63. Given that guidance by the Supreme Court, it did not come as too much of a surprise when a significantly amended form of the provisions of the consolidated IM-P1 was finally presented by ORC's counsel in a version dated 10 October 2023 which encompassed all of the ORC recommended changes advanced by the s.42A report writers and its counsel. That final recommended form of IM-P1 in the 10 October version provides:

> **IM-P1 – Integrated approach to decision-making**
>
> Giving effect to the integrated package of objectives and policies in this RPS requires decision-makers to:
>
> (1) consider all provisions relevant to an issue or decision and apply them according to the terms in which they are expressed, and
>
> (2) if after (1) there is an irreconcilable conflict between provisions in this RPS which apply to an activity, only consider the activity if:
>
> (a) the activity is necessary to give effect to a policy in this RPS and not merely desirable, and

(b) all options for the activity have been considered and evaluated, and
(c) if possible, the chosen option will not breach any other policy of this RPS, and
(d) if (c) is not possible, any breach is only to the extent required to give effect to the policy providing for the activity, and

(3) if 2(d) applies, evaluate all relevant factors in a structured analysis to decide which of the conflicting policies should prevail, or the extent to which a policy should prevail, and

(4) in the structured analysis under (3), assess the nature of the activity against the values inherent in the conflicting policies in this RPS in the particular circumstances.

64. The major point to be noted about that change is that the previously recommended ORC position that in the event of a conflict between relevant provisions there was to be prioritisation of the protection of all of '*the life-supporting capacity and mauri of **air, water, soil, and ecosystems'*** has disappeared. Instead a complex sequence of provisions provides a consent pathway in the form of a 'structured analysis'. The manner in which that change came about is enlightening. It arose as late as 29 September 2023 in a 'Memorandum of submissions by ORC's counsel in response to submitters on the implications of the Supreme Court judgment in Port Otago Limited v Environmental Defence Society Incorporated.' Paragraph 26 of that submission which tendered the recommended version of IM-P1 merely said that amendment of that provision was "appropriate". We agree.

65. This prioritisation issue of protection objectives and policies as a rigid concept was the major issue in all of the submissions and presentations we read and heard over nearly twelve months. Until the very last week or so of that whole hearings process ORC's position had not changed that that prioritisation was the appropriate legal stance upon which the PORPS was to be based. The change was plainly a result of the Supreme Court decision, yet even then at paragraph 28 of the submission by ORC's counsel the following was stated:

28. It is proposed to adopt the Court's methodology not because the Court's judgment requires it, rather because it is a suitable policy response to resolve any conflict which (despite best efforts) remains in the PORPS, so as to achieve integrated management.

66. We consider this very late change and modification of position to be inevitable in the light of the two Supreme Court decisions. That Court had made it crystal clear in both decisions that the type of broad prioritisation of Part 2 RMA protection provisions previously recommended by ORC was not appropriate at all in the absence of clear statutory direction. In the event of conflict of provisions, prioritisation was only warranted when particular circumstances or particular features or areas warranted protection policies being given priority over enabling provisions.

67. In our view the outcome now finally recommended is much more in keeping with both Supreme Court decisions and provides a consent pathway through a structured analysis approach as was recognised by the Supreme Court in the Port Otago case was apposite in those limited situations where conflicting provisions could not be reconciled.

68. This more nuanced approach to situations where potential conflicts may arise between provisions will need to inform the Panel's consideration of other prioritisation positions for protective provisions in other parts of the PORPS as they are examined in detail. In our view the message to be taken form the Supreme Court's decisions is that every attempt is to be made to reconcile

provisions and in the very limited cases where that cannot be achieved a structured analysis approach is to be utilised to ensure in the confined factual context involved that an appropriate weighting is given in the final decision-making one way or the other.

69. The NPSFM provides a clear example of where a statutory prioritisation for protection is expressly made. Its effects management hierarchy based on that prioritisation is not apposite to be applied on a broad-brush approach to general Part 2 matters. However, it is also important to record that the death-knell sounded by the Supreme Court's guidance to general provisions of Part 2 matters in our view cuts both ways. In the absence of express statutory prioritisation of enabling provisions ahead of protection provisions so-called 'bespoke' priority provision for REG or electricity transmission infrastructure, or for any other activities, similarly is not appropriate.

70. Our consideration as to how the detailed submission points on the Integrated Management chapter, and other relevant chapters, are affected by this conclusion will be addressed in the topic chapters which follow in this report. In particular, the Supreme Court's guidance will need to be considered later by the Panel in its consideration of the effects management hierarchy wording recommended in the s.42A reports in this non-freshwater process.

71. However, at this stage it is also appropriate to continue to consider the final recommended form of IM-P1. It has been set out above but for convenience is repeated here:

> **IM-P1 – Integrated approach to decision-making**
>
> Giving effect to the integrated package of objectives and policies in this RPS requires decision-makers to:
>
> > (1) consider all provisions relevant to an issue or decision and apply them according to the terms in which they are expressed, and
> > (2) if after (1) there is an irreconcilable conflict between provisions in this RPS which apply to an activity, only consider the activity if:
> >
> > > (a) the activity is necessary to give effect to a policy in this RPS and not merely desirable, and
> > > (b) all options for the activity have been considered and evaluated, and
> > > (c) if possible, the chosen option will not breach any other policy of this RPS, and
> > > (d) if (c) is not possible, any breach is only to the extent required to give effect to the policy providing for the activity, and
> >
> > (3) if 2(d) applies, evaluate all relevant factors in a structured analysis to decide which of the conflicting policies should prevail, or the extent to which a policy should prevail, and
> >
> > (4) in the structured analysis under (3), assess the nature of the activity against the values inherent in the conflicting policies in this RPS in the particular circumstances.

72. The base framework for this recommended new form of IM-P1 is found in the Supreme Court's own suggested format for a policy in the previous 2019 version of the Otago RPS at the paragraph 87 of its decision. It provides for a cascade approach to avoidance of effects but still concludes with opportunity for resource consent to be sought where the adverse effects are shown to be the minimum necessary to achieve the "*efficient and safe operation of the port or ports*." That resource consent process would necessarily have to be carried out using the 'structured analysis' approach referred to in paragraph 84 of the Supreme Court's decision which means:

… 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

73. The problem we perceive with the ORC recommended wording for IM-P1 is that the opening words of the new provision and the opening words of sub-clause (2) would restrict the resource consent pathway which is opened up to only apply where there is irreconcilable conflict "*between provisions in this RPS*". That restriction is too restrictive.

74. The Port Otago case itself is an example of where the conflict did not exist between the proposed RPS provisions, (because it provided for a prioritisation of avoidance policies), but rather between two differing types of provisions in the NZCPS. There has now been a proliferation of such national policy statements, which to some degree or other in particular factual settings may well have the potential to be irreconcilably in conflict with each other or internally within each document. That may also occur in some other settings as between RMA's own provisions, or as between PORPS provisions. In other words at each level in the RMA schema there is potential for such conflict to arise in particular factual settings.

75. We also have one final observation to make about the Supreme Court's structured analysis approach. It is addressing primarily situations where an apparent irreconcilable conflict has arisen between relevant statutory provisions – usually in objective or policy form akin to a rule in effect. While we move on below to recommend some amendments to the ORC suggested adoption of the Supreme Court structured analysis approach, we wish to make the important observation that in some limited situations activities will be proposed which are not expressly provided for by a particular relevant objective or policy but which may appear contrary to another relevant policy. Yet in overall RMA terms the proposed activity may have limited if any real adverse effects. In those situations the structured analysis wording suggested by the Supreme Court requiring a necessity to 'give effect to' a relevant statutory provision may not be open. In our view that situation can be met, however, under sub-clause (1) of the proposed ORC response with sub-clauses (2) and (3) only applying where there is a clear potential for apparent irreconcilable conflict between statutory provisions. If a broad purposive analysis of policies or other statutory provisions is made under subclause (1) of the proposed ORC response, then for the majority of activities with a beneficial environmental outcome and limited effects, even if no express or specific policy or statutory provision identifying the activity exists, a consenting path will still be available.

76. What this highlights for the drafting of plans is the necessity to ensure that enabling policies are relatively broadly worded to ensure that protection policies do not unreasonably inhibit what might be in more general section 5 terms be beneficial activities for the community and the environment.

77. As a consequence the wording of IM-P1 must be amended to be less restrictive as it is not possible at this stage to be aware of all the potential contextual settings where an irreconcilable conflict may arise giving rise to the need for a resource consent to be able to be considered in a structured analysis, or where an express relevant policy or statutory provision may not be available for a proposed activity.

78. In our view the following changes are needed:

IM-P1 – Integrated approach to decision-making

Giving effect to the integrated package of objectives and policies in this <u>RPS and other relevant statutory provisions</u> requires decision-makers to:

(1) consider all provisions relevant to an issue or decision and apply them purposively according to the terms in which they are expressed, and

(2) if after (1) there is an irreconcilable conflict between <u>any of the relevant RPS and/or statutory provisions</u> which apply to an activity, only consider the activity if:

(a) the activity is necessary to give effect <u>to a relevant policy or statutory provision</u> and not merely desirable, and
(b) all options for the activity have been considered and evaluated, and
(c) if possible, the chosen option will not breach any other <u>relevant</u> policy or statutory provision, and
(d) if (c) is not possible, any breach is only to the extent required to give effect to the policy or statutory provision providing for the activity, and

(3) if 2(d) applies, evaluate all relevant factors in a structured analysis to decide which of the conflicting policies or statutory provisions should prevail, or the extent to which any <u>relevant</u> policy or statutory provision should prevail, and

(4) in the analysis under (1), (2) or the structured analysis under (3), assess the nature of the activity against the values inherent in the <u>relevant</u> policies or statutory provisions in the particular circumstances.

79. Before the report moves onto the topic chapters, we will also address the Supreme Court's guidance in *King Salmon* and the *Port Otago* cases on the interpretation of some other fundamentally important words or phrases, prior to addressing a range of other discrete legal issues which have arisen in the submissions or during the hearings. However, before addressing those legal matters of interpretation or definition we need to address two other discrete and significant Part 2 issues raised in submissions and presentations at the hearings.

3. Lack of provision of a rural chapter & the National Planning Standards 2019

80. One of those issues was related in part to the prioritisation issue, in that rural user submitters, such as OWRUG, NZ Beef and Lamb and Horticulture NZ in particular, had been critical of the lack of any specific rural chapter in the PORPS.

81. However, the omission of such a chapter has its own legal complications in that since 2019 the combination of s. 58I of the RMA and the National Planning Standards ('NPS') has meant that regional councils have certain statutory obligations that must be observed as a mandatory matter in the manner in which proposed regional policy statements are prepared.

82. Standard 2 of the NPS contains the mandatory requirements for regional policy statements and commences at clauses 1-5 by saying:

1. All parts and their titles in table 2 must be included, in the order shown. Additional parts must not be included.
2. Chapters and sections that are black in table 2 must be included, in the order shown.

3. Unless otherwise specified, chapters and sections that are grey in table 2 must be included if relevant to the regional policy statement, in the order shown.

4. If a chapter in table 2 is included, its associated heading must also be included.

5. Local authorities must add sections and subsections within chapters where appropriate to organise related provisions.

83. The only words under the heading Domains and Topics that are coloured black and grey in Table 2 are as follows (Those in black are bold in Table 2 and all the other words are coloured grey):

PART 3 – DOMAINS AND TOPICS

DOMAINS

Chapters: Air

Coastal environment Section: Coastal marine area

Geothermal

Land and freshwater

TOPICS

Chapters: Ecosystems and indigenous biodiversity

Energy, infrastructure and transport

Hazards and risks

Historical and cultural values

Natural character

Natural features and landscapes

Urban form and development

84. Table 2 of the NPS, therefore, did not require a rural chapter – strange though that might seem for a country most of which comprises rural land. It is even more odd when Table 19 of the NPS contains specific colours for planning maps specifically for General Rural, Rural Production and Rural lifestyle zones. Moreover, Table 16 of the NPS provides acronyms by way of a Table 16 for what is described as 'zone framework' which include the following:

RURZ – Rural zones
GRUZ – General rural zone
RPROZ – Rural production zone
RLZ – Rural lifestyle zone

85. The NPS clearly therefore anticipates the likelihood or necessity in plans for Rural zones, but makes no express mandatory provision for Rural Chapters in an RPS to address the objectives and policies in plans for such zones.

86. ORC faced the problem, therefore, that in preparation of the PORPS Table 2 of the NPS did not make a provision for rural related issues as a Topic. Some rural related issues were included in the Urban form and development (UFD) chapter in the PORPS. Those issues related to aspects of UFD principally in respect of reverse sensitivity issues and control of the urban/rural interface for subdivision and development.

87. Strong bodies of evidence were provided by the interested submitters described above seeking that a rural chapter be incorporated to provide enabling provisions for their activities. The later chapters of this report relating to the UFD and Land and freshwater (LF) chapters will address the

Panel's views on the substantive merits of those requests, but the first question that requires to be addressed is whether that is legally possible given the mandatory nature of s.58I and the NPS 2019 Table 2 provisions.

88. The Panel sought specific submissions on that issue from Counsel for OWRUG and NZ Beef and Lamb and it was addressed by Horticulture NZ both in submissions and in the evidence of Lynette Wharfe the expert planning witness for Horticulture NZ.

89. Mr Page for OWRUG submitted that clause 10 of Standard 2 (which he termed Direction 10) provided a mandatory answer to the issue. It provides:

> *10. Any other matter addressed by the regional policy statement not covered by the structure in table 2 must be included as a new chapter, inserted alphabetically under the Topics heading in Part 3.* ***Additional chapters must not be synonyms or subsets of the chapters in table 2.***

(Panel's emphasis)

90. Mr Page submitted that because of the phrase 'Any other matter addressed by the regional policy statement not covered by the structure in table 2 must be included as a new chapter' cl.10 imposes a mandatory duty on a regional council to import different chapters.

91. We do not agree with Mr Page. The first use of the word 'must' in this clause is in our view only mandatory as to process i.e. if a regional council decides to add a new chapter, then clause 10 directs how that must be formatted - "*alphabetically under the Topics heading",* and where - "*in Part 3"*.

92. However, clause 10 importantly does contain one direction as to substance and that is in the last sentence which we have highlighted in bold which plainly enables some additional chapter consideration. The words 'synonym' and 'subset' are not defined in the NPS, and their use is unhelpful. A synonym is defined in the Oxford Dictionary as being:

> *A word or phrase that means exactly or nearly the same as another word or phrase in the same language.*

93. It is hardly a word that is useful when comparing two or more full potential chapters of an RPS.

94. The word 'subset' is not much better in that broad type of comparative context. Its Oxford Dictionary meaning is:

> *A smaller group of people or things formed from the members of a larger group.*

95. Neither word is of much relevance to a broad comparison of potential chapters in an RPS addressing objectives, policies, methods, principal reasons and anticipated environmental results.

96. The basic approach to interpretation of enactments under the Legislation Act 2019 in s.10 is that the meaning must be ascertained from 'its text and in the light of its purpose and its context*.*

97. Applying that approach in this situation the purpose of the last sentence of clause 10 of Standard 2 appears to be to avoid repetition of chapter content by requiring that an additional chapter contains nothing which is similar in nature to the matters in one of the named chapters in Table 2.

98. Such a decision necessarily involves a consideration of the substance of the context of the possible rural chapter and a comparison with other chapter content in the UFD and LF chapters.

99. If that comparison finds similarities or subsets in a proposed rural chapter with the other two chapters, then any attempt to frame a separate chapter may well run a risk of not complying with clause 10 of Standard 2. However, at this point we do observe that as Mr. Page stressed in his submissions an example for formatting of a separate chapter not contained in Table 2 is provided for in clause 18 of Standard 10. Interestingly, the example provided is where a mining chapter may be included – that appears in the right hand column of clause 18 Standard 10.

100. Further important considerations must be whether the form of the proposed draft new rural chapter was advanced with sufficient detail in the submission process enabling scope for the Panel to consider its inclusion; or, whether any lack of its inclusion in the consultation/submission process limits the ability to include it now.

101. Furthermore, one of the critical s.32A considerations may prove to be that the costs of uncertainty of potential litigation over the enforceability of such a chapter when it has not been a part of the consultation process, and/or to whether it accords with clause 10 of Standard 2 in the NPS, and the concomitant duration, uncertainty and cost of such litigation, may well outweigh the benefits of achieving certainty by adding provisions to either the UFD or LF chapters.

102. All of those considerations will need to be taken into account in the detailed substantive consideration of the UFD and LF chapters which follow.

103. As part of that consideration we also point out that the complaints listed in Mr Page's submissions at paragraph 29 that a rural activity at the moment will have to be considered under many different chapters depending on whether the effects produced affect indigenous biodiversity, transport issues, historic values, or natural features, may not be solved by insertion of a rural chapter. That is because the NPS requires at Standard 2 clause 9 (a) and (b) as follows:

> *9. Provisions (excluding the provisions in Part 2) that:*
>
> > *a. apply predominantly to only one topic must be located in the relevant chapter under the Topics heading*
> >
> > *b. apply to more than one topic must be located in the relevant chapters under the Domains heading*

104. In short the NPS does not pave a ready path for the substantive inclusion by way of submission of a new rural chapter – illogical as that may seem in a region which is 99% non-urban. There is, however, potential jurisdiction under the NPS for the inclusion of such a chapter so long as it can meet some vaguely worded concepts that require that they are not '*synonyms or subsets of the chapters in table 2.*'

4. Mana Whenua Part 2 Issues & papakāika and Māori land definitions

105. The last of the major Part 2 issues was summarised in the s.42A report in the following way:

> *The request by Kāi Tahu related submitters ('Kāi Tahu') to see that the PORPS enabled them to exercise tino rangatiratanga in respect of their own "ancestral lands, water, sites, waahi tapu, and other taonga" (s.6 (e) RMA), according to their own tikanga, thus enabling them to exercise their kaitiakitanga (s.7(a) RMA) responsibilities. They asserted that was required by the s.8 obligation to "take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)".*

106. The evidence we received as to the relationship between ORC and its s.42A report writer Mr Adams and Kāi Tahu related submitters showed a refreshing willingness by ORC in the PORPS

to acknowledge and give effect to the s.6(e), s.7(a) and s.8 statutory encouragements to ensure the RPS provided for Otago's Māori community. We say 'refreshing' because all members of the Panel at various times over the span of the RMA have heard tangata whenua Māori complaint about the challenging attitude of some councils that have adopted the legally technical position that the Crown is the Treaty partner, and that as local authorities are not strictly Treaty partners the Treaty principles need only be taken into account and are not required to be observed. Another common experience is to hear Māori complaints that the s.6(e) and s.7(a) imperatives and s.8 obligations have effectively only received lip service.

107. That has definitely not been the case in either respect with this PORPS. In the notified version a very proactive commitment was made by the ORC right at the start of the PORPS to the Part 2 approach it was to adopt with the statement at page 3:

> *…Developing this new Regional Policy Statement (RPS) has provided an opportunity for renewed partnership between Kāi Tahu in Otago and Southland, and the ORC. We present this foreword to the notified version together, in recognition of that partnership and in anticipation of the work to come.*

108. Moreover, Kāi Tahu submitters all described how the ORC had made major efforts to engage on the proposed terms of the PORPS right down to and during the hearings process. That volunteered partnership approach was reflected also in the s.42A report writer's willingness to accept many of the requests made in the Kāi Tahu related submissions and to seek out submitters for pre-hearing discussions. It was plain from the extensive changes that were recommended by the s.42A reports to the mana whenua provisions throughout the PORPS at the request of various mana whenua submitters, that the wishes of the latter were listened to, and where considered appropriate, were recommended to be accepted.

109. Limited areas where no agreement was reached will be traversed in the later MW chapter which consider the submissions on mana whenua provisions throughout the PORPS. Some other issues where agreement was reached, or reached only in part, and where the Panel considers it also needs to discuss some of those issues in detail, will also feature in that later chapter. (One of those will be the very preference by Kāi Tahu interests for use of the term 'mana whenua' rather than 'takata or tangata whenua'.)

110. At this point of the report, however, we need to address two significant practical issues which arise from the consideration of Part 2 of the RMA, where the agreement on wording proposed by mana whenua was finally accepted by the s.42A report writer and recommended to be accepted by the Panel. That aspect of Part 2 relates to the effect of the combination of the definitions agreed upon for the phrase 'Māori land', when coupled with the definition of the word 'papakāika'.

111. The background to that agreed recommendation lies in large part in the issue as to what is the appropriate approach to be taken to the Part 2 considerations in respect of the 'enabling' within the PORPS of the tino rakatirataka rights and kaitiakitaka obligations which mana whenua sought.

112. In essence Kāi Tahu witnesses gave strong evidence, reinforced by submissions by their counsel Mr. Cameron and their expert planning witnesses, which emphasised the frustrations that have arisen historically for Kāi Tahu in the Otago region as a result of nearly all-encompassing land loss in breach of the Treaty. That land loss has been exacerbated in their view by the application of early planning and later RMA controls, in which they have in the past had little input. The result was described as being an outcome where Kāi Tahu had commonly been left only poorer quality lands, often near the coastline, where it was difficult for them to even grow sufficient food without removing native growth or affecting landcapes, or where infrastructure services were not available to enable development, let alone provide sources of employment and income.

113. The Treaty breaches that resulted in massive land loss of over 34 million acres for Kāi Tahu have been exhaustively detailed by the Waitangi Tribunal in the Ngāi Tahu Report WAI 27 on their historic 'nine tall trees' claims. Those breaches are a matter of public record. Minimal lands remained in Māori customary ownership in Otago. The consequence has been a Treaty settlement for Kāi Tahu recorded in the Ngāi Tahu Claims Settlement Act 1998 which, as with all Treaty settlements, provided amongst other recompense a monetary level of compensation. While that was significant on its face, it was a tiny percentage of the then current land value lost through historic Treaty breach. Those settlement funds have been particularly well husbanded and developed by Kāi Tahu, but the hard reality for Kāi Tahu people on the ground in Otago was that the settlement did not provide any significant land resource for Otago Kāi Tahu to occupy and use. Of the small amounts of poorer quality reserve lands that were set aside for Kāi Tahu's continued occupation we were told by Mr. Edward Ellison that only 50% remains in Māori ownership.

114. In the meantime before the Treaty settlement, repetitive planning legislation had vested planning control of all of their ancestral lands, water, sites, wāhi tapu, and other taonga, including any customary rights in respect of water or coastal waters, in the Crown, local authorities or Crown owned entities. So, too with fisheries, but as that has been the subject of the Fisheries Settlement legislation, Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, we cannot address that further, other than as background to Kāi Tahu historical concerns. Similarly so with aquaculture claims, where another national settlement has occurred in the Māori Commercial Aquaculture Claims Settlement Act 2005, although an aspect of the consequence of that process will be considered later in the Coastal chapter of this report.

115. Those planning controls were described in the evidence as adding to the harsh outcomes for the Otago Kāi Tahu community, by imposing such restrictions and controls that they faced major costly legal hurdles in trying to develop their lands to support themselves. They described that they had suffered the experience of local authorities taking over by statutory authority control and management of all water and coastal water and fisheries, thus excluding them even further from control of use of their own resources or taonga through the exercise of kaitiakitaka responsibilities. Yet the outcome, they asserted, was to find those resources often degraded, pillaged, or adversely affected in a manner which was not acceptable to their own kawa and tikaka.

116. Their response to all that background was to strongly submit, as identified in the issue above, that the PORPS must recognise their needs and enable them to exercise tino rakatirataka in respect of their own "ancestral lands, water, sites, waahi tapu, and other taonga" (s.6(e) RMA), according to their own tikaka, thus enabling them to exercise their "kaitiakitanga" (s.7(a) RMA) responsibilities.

117. The overall approach of Kāi Tahu was succinctly summarised by their counsel Mr. A. Cameron in the following manner in the Coastal environments hearing week:

> _1.Integrated management sits at the heart of a regional policy statement. It is core to the purpose of the PORPS, its function and its significance. From a Kāi Tahu perspective, integrated management is central to the concepts of "ki uta, ki tai", and the interconnected nature of whenua, wai, and moana._ [4]

118. Counsel for Kāi Tahu and planning experts relied upon the major advances in recognition of Treaty rights and obligations as a result of three streams of jurisprudence over recent decades. The first was the much more developed recognition in the general Courts of tikanga as a source of law in New Zealand, particularly where referred to in legislation, and of certain Treaty principles as

[4] *Submission on Integrated Management chapter A. Cameron counsel for Kāi Tahu 8 February, 2023*

identified in the NZ Maori Council litigation from the 1980s; the second was the strong body of Waitangi Tribunal jurisprudence identifying a number of relevant Treaty principles; and thirdly, the Environment Court's increasing recognition of the weight of Treaty principles under s.8 of the RMA.

119. Much was made of these issues in support of requests for relief that very broad definitions be applied to Māori lands and customary concepts such as papakāika, so as to leave control of development and use of those lands in the hands of Kāi Tahu according to their tikaka. In general terms their counsel Mr Cameron described the current situation in the following terms:

> *58 ...The PORPS represents a significant opportunity to unlock native reserves and Māori land for Kāi Tahu whānau. As discussed in the evidence of Evelyn Cook, the Catlins area is a good example of such land, where recognition of Kāi Tahu rakatirataka would enable whānau to better use and develop their own land.*[5]

120. The recommended definitions for the two terms at issue included the following aspects, (which have been highlighted below by the Panel), in respect of those parts that may be described as being the 'high-points' of that enabling approach:

Māori Land	for the purposes of this RPS, means land within the region that is: **(1) owned by Te Rūnanga o Ngāi Tahu or its constituent papatipu rūnaka and to be used for the purpose of:** **(a) Locating *papakāika* development away from land that is either at *risk* from *natural hazards*, including climate change effects such as sea level rise, or is otherwise unsuitable for *papakāika* development,** **(b) extending the area of an existing *papakāika* development.** (2) Māori communal *land* gazetted as Māori reservation under s338 Te Ture Whenua Māori Act 1993; (3) Māori customary *land* and Māori freehold *land* as defined in s4 and s129 Te Ture Whenua Māori Act 1993; (4) former *Māori land* or general land owned by Māori (as those terms are defined in Te Ture Whenua Māori Act 1993) that has at any time been acquired by the Crown or any local or public body for a public work or other public purpose, and has been subsequently returned to its former Kāi Tahu owners or their successors and remains in their ownership; (5) general *land* owned by Māori (as defined in Te Ture Whenua Māori Act 1993) that was previously Māori freehold *land,* has ceased to have that status under an order of the Māori Land Court made on or after 1 July 1993 or under Part 1 of the Māori Affairs Amendment Act 1967 on or after 1 April 1968, that is in the ownership of Kāi Tahu whānui; (6) vested in a Trust or Māori incorporation under Te Ture Whenua Māori Act 1993; (7) held or claimed (whether as an entitlement, part of an ancillary claim, or because it was transferred or vested) either: (a) as part of redress for the settlement of Treaty of Waitangi claims; or (b) by the exercise of rights under a Treaty settlement Act or Treaty settlement deed (as those terms are defined under the Urban Development Act 2020); **(8) owned by a person or persons with documentary evidence of Kāi Tahu whakapapa connection to the *land,* where that evidence is provided by either the Māori Land Court or the Te Rūnanga o Ngāi Tahu Whakapapa Unit.** **…**

[5] *Submission on MW chapter A. Cameron counsel for Kāi Tahu 8 February, 2023*

Papakāika or papakāinga	**means *subdivision*, use and development by *mana whenua*, either on their own or in conjunction with other parties, of *Māori Land* and associated resources to provide for themselves in general accordance with tikanga Māori, which may include residential activities and non-residential activities** for cultural, social, educational,151 recreational, environmental, **or commercial purposes.**

121. A challenge was raised for Transpower as to whether there was proper scope for the broader `Māori land' definition sought to be inserted when the PORPS did not have a definition of 'Māori land' originally. We have looked at the references in the Kai Tahu submissions that Mr. Cameron provided in his 8 February 2023 response which were repeated by Mr. Anderson for ORC in closing, and we accept they do indeed provide sufficient scope. The very term 'ancestral lands' used in the submissions Mr. Anderson took us through, in our view includes all of the lands in the Otago region which fell within the takiwā of Kāi Tahu. So any submission which made reference to those ancestral lands and sought definition of them in the PORPS was broad enough to cover what has been recommended to us by way of a definition.

122. The larger issue is what the consequence of that definition is when coupled with the definition of 'papakāika'.

123. One matter raised by the Panel during the hearings was that under clause 8 of the recommended definition of 'Māori land' all that was needed was whakapapa proof of connection to land, when the likelihood was that any Kāi Tahu with Otago whakapapa would be likely to be able to establish such a connection with ancestral land they were likely to acquire in Otago. Another related concern with the definition of 'papakāika' was that it arguably opened the door for possible joint venturers with no whakapapa linkages to the land to become involved in 'non-residential activities for ... commercial puposes' which would be within such a broad definition of 'papakāika'. That could include the non-customary entities, such as any major trading company operated by Kāi Tahu commercial interests, but could also include general commercial entities with no whakapapa linkages at all, whether direct or indirect.

124. The original s.42A report had recommended that the phrase 'commercial purposes' in the papakāika definition be prefaced with the word 'limited', but Kāi Tahu submitters strongly argued for the removal of the word 'limited', so that it would apply to any 'commercial purposes'. That request was made on the basis that it was asserted that tikaka could be relied upon to ensure that was not abused with major industrial or commercial developments, or large residential subdivisions being commenced under the guise of being papakāika.

125. That broader wording change sought by Kāi Tahu, and the general effect of the combination of the two definitions, were particularly challenged in evidence by the Dunedin City Council planner Mr. Freeland. The basis of the challenge was that, if granted, the relief sought by Kāi Tahu would mean that on change of ownership of any land in Otago into the ownership of anyone with Kāi Tahu whakapapa, an effective zoning change could occur by virtue of the combination of the very broad definitions of 'Māori land' and 'papakāika'. That could result in an enabling of a raft of uncontrolled industrial or commercial activities, or major residential developments on rural land with inadequate services. The DCC concern was that such an outcome would be in breach of legitimate expectations of natural justice under the RMA that such major changes in adjoining land use could not occur without undergoing a plan change or gaining a resource consent, involving a thorough assessment of effects of development in either pathway.

126. Another concern expressed by Mr Freeland was that there would be a real uncertainty as to what land might fall within the definition of 'Māori land' meaning the exposure to effects on adjoining

property owners was real with their having no opportunity for input on those effects. If needed he sought mapping of 'Māori land'.

127. The s.42A response to that assertion was to say that it was time some trust was placed by the general community in the Treaty partner to be able to control activities so they would not breach tikaka through the exercise of rakatiratanga involving the responsibilities of kaitiakitaka, which should ensure adverse effects were controlled on Māori land by Māori, rather than by local authority controls.

128. Mr Cameron, counsel for Kāi Tahu, particularly addressed these issues in some further submissions in response on 9 February 2023. As to the uncertainty issue he responded:

> *29. The Panel can rely on the evidence already before it as to the nature and extent of Kāi Tahu landholdings, to find that the changes, while momentous to Kāi Tahu as those most likely to benefit from them, are unlikely to be all that significant to the public at large.*
>
> *30. That is consistent with s 32(1)(c), which requires a level of detail that corresponds to the scale and significance of effects that are anticipated from the implementation of the proposal – here, in our submission, few to none…. here the principal aim is to enable Kāi Tahu to develop their landholdings and take the lead in the management of any adverse effects. That is unlikely to pose many, if any, problems for other private landowners*.

129. That submission might be argued to be correct if current land holdings by Kāi Tahu people could somehow be fixed in time, and limited to cultural or traditional uses. However, that is not the position, and is particularly not the position if the definition remains as recommended.

130. We do not see any real benefit, however in trying to impose restrictions in a planning context related to ownership issues. Section 6(e) requires that the PORPS 'recognise and provide' for the 'relationship of Maori and their culture and traditions with their ancestral lands.' Given that effectively all land in Otakou falls within the historic purview of ancestral lands for Kāi Tahu one might reasonably question what purpose a detailed definition provides. But given that the link with papakāika must in the end be based on whakapapa we can see benefit if clause 8 is utilised, but in a slightly amended form. The key to what happens in terms of controls on the use of such land should not rest on ownership, but rather the potential effects of activities on that land.

131. For example, if the definitions remain as recommended, then if major commercial opportunities were to be identified in future anywhere in Otago, a Kāi Tahu person with whakapapa links could be utilised and funded as owner by a commercial operator and be able to acquire the land. The land could then be used under the papakāika definition by being leased by the funder and developed, and after development acquired by that funder/developer and probably on-sold. We do not regard that scenario as being beyond possibility, or impractical, or unrealistic. It is the way of the world for commercial operators to look for and take advantage of such opportunities. Their drivers are returns of income or capital, not culture or traditions. It is the latter we understand Kāi Tahu to be seeking to enable under their tikaka and not the former.

132. The real concern arises out of that potential for commercial opportunity, as contrasted with a need for recognition of cultural and traditional relationships with ancestral lands, and that requires to be addressed.

133. Mr Cameron's response for Kāi Tahu in his 9 February 2023 submission on that issue was that a failure to adopt the recommended definition package would bring into play s.32 considerations:

> *31. It is also consistent with s 32(2)(c), which requires an assessment of the risk of acting or not acting where there is uncertainty about the subject matter of any provisions. In this case, failing to act on the proposed definition due to a lack of information as to its location would exclude from future consideration land that is subsequently acquired by Kāi Tahu, whether to substitute or supplement other landholdings, which might also benefit from the same enabling approach that applies to land in categories (2) to (6). Doing so would create a real risk of perverse outcomes and arbitrary barriers to the expression of rakatirataka, kaitiakitaka, and mana whenua.*

134. For the reasons outlined above as to the positive development of attitudes to Part 2 matters affecting mana whenua of any area, which has been increasingly enforced by the Environment Court and the general courts, we do not think the risk of "*perverse outcomes and arbitrary barriers to the expression of rakatiratake, kaitiakitaka, and mana whenua"* is real into the future - certainly not at law. Local authorities are now well aware of the changing RMA atmosphere, and that has been significantly reinforced at a national and regional level by the recognition of the concept of Te Mana o Te Wai and other strong provisions as to mātauranga and mahika kai in the NPSFM. In Otago it has also been demonstrated by the PORPS approach to 'partnership' with mana whenua.

135. However, we are also cognisant of the history of past bad planning practice outlined by Kāi Tahu traversed earlier in this discussion, and the inhibitions they have experienced through poor, overly restrictive planning controls on use and development of their lands.

136. In our view a balanced view of how to meet the Part 2 imperatives without handing a planning 'free pass' entirely to Kāi Tahu can be achieved through a tightening of the papakāika definition. We do not think the insertion of the word 'limited' before the concept of 'commercial purposes' assists much if at all. After all, how would 'limited' be interpreted and applied? Is it to be a measure of size of physical footprint of development in area, height, width or length? Or is it to relate somehow to production levels, or gross or net income, and how are those to be fixed, monitored and enforced?

137. In such a context it is always best to consider the nature of the 'problem' or issue being addressed to assess what is the purpose sought to be achieved by a provision. In this case the problem is a perceived inability of Kāi Tahu people to have the freedom to construct papakāika to meet their cultural and traditional practices as well as housing and some income needs. Housing provision readily falls into a definition for papakāika. The more vexed issue is what income purposes papakāika are intended to serve. The issue of commercial activities may be met to the extent warranted by s.6(e) if those purposes can be reasonably closely defined.

138. In Kai Tahu's submission at para 3.6 what was sought was referred to as provisions enabling Kāi Tahu to be able to use land for '*papakāika, marae or associated activities'.* We do not consider that any adjoining person could reasonably challenge that papakāika can meet the test for 6(e) of providing for the relationship of mana whenua with their ancestral lands when those lands are used for '*activities for cultural, social, educational, recreational, environmental, … purposes.'* All of those purposes to some extent or other involve cultural or traditional aspects of use.

139. The problem arises when the word 'commercial' is inserted in that list. Immediately its insertion introduces potential adverse effects which do not need to have a cultural or traditional perspective at all, which is as far as s.6(e) goes. We do not believe that not enabling that freedom of commercial activity at whatever scale impacts on Kāi Tahu people's relationship with their ancestral lands. We anticipate that Kāi Tahu may feel a home-related occupation should be included. We can accept that such an inclusion would also enable what might be described on the evidence we heard of a common usage that might well be expected to occur in a papakāika.

140. We are satisfied that on the evidence we have heard that papakāika are most likely to be constructed adjacent to or in close proximity to marae, or locations of substantial Māori occupation. We also accept that tikaka will play a major role in where, and to what extent, that sort of papakāika development might occur. We do not consider it reasonable to seek to limit Kāi Tahu as to where any new such development may occur. Practicalities such as land availability and services availability will also have a natural limitation on their development.

4.1 Recommendation

141. For those reasons we accept the definition of 'Māori land' as recommended in clause 8 but amend the wording of the Māori land and papakāika definitions to read:

Māori land

for the purposes of this RPS, means land within the region that is:
(1) owned by Te Rūnanga o Ngāi Tahu or its constituent papatipu rūnaka and to be used for the purpose of:
(a) Locating *papakāika* development away from land that is either at *risk* from *natural hazards*, including climate change effects such as sea level rise, or is otherwise unsuitable for *papakāika* development,
(b) extending the area of an existing *papakāika* development,
(2) Māori communal *land* gazetted as Māori reservation under s338 Te Ture Whenua Māori Act 1993,
(3) Māori customary *land* and Māori freehold *land* as defined in s4 and s129 Te Ture Whenua Māori Act 1993,
(4) former *Māori land* or general land owned by Māori (as those terms are defined in Te Ture Whenua Māori Act 1993) that has at any time been acquired by the Crown or any local or public body for a public work or other public purpose, and has been subsequently returned to its former Kāi Tahu owners or their successors and remains in their ownership,
(5) general *land* owned by Māori (as defined in Te Ture Whenua Māori Act 1993) that was previously Māori freehold *land,* has ceased to have that status under an order of the Māori Land Court made on or after 1 July 1993 or under Part 1 of the Māori Affairs Amendment Act 1967 on or after 1 April 1968, that is in the ownership of Kāi Tahu whānui,
(6) vested in a Trust or Māori incorporation under Te Ture Whenua Māori Act 1993,
(7) held or claimed (whether as an entitlement, part of an ancillary claim, or because it was transferred or vested) either:
(a) as part of redress for the settlement of Treaty of Waitangi claims, or
(b) by the exercise of rights under a Treaty settlement Act or Treaty settlement deed (as those terms are defined under the Urban Development Act 2020), or
(c) as SILNA lands,
(8) owned by a person or persons with documentary evidence of Kāi Tahu whakapapa connection to the *land,* where that evidence is provided by either the Māori Land Court or the Te Rūnanga o Ngāi Tahu Whakapapa Unit.

Papakāika ~~or papakāinga~~

means *subdivision*, use and development by *mana whenua* of *Māori land* ~~ancestral or tribal lands~~ and associated resources to provide for ~~sustain~~ themselves in general accordance with tikaka ~~tikanga~~ Māori for their cultural and traditional purposes, which may include ~~residential activities and non-residential activities for~~ cultural, social, housing, educational, recreational, environmental, or home occupation ~~limited commercial~~ purposes.

5. Interpretation of other terms in the RMA

142. In the course of reaching its 'bottom line' approach decision the Supreme Court in *King Salmon* provided other guidance on the interpretation of the words or phrases such as 'avoid', 'adverse effects' and the concepts of 'protection' and 'inappropriate use and development' - all of which are terms found throughout the PORPS.

143. The most important of those to be considered is the use of the word 'avoid'.

5.1 Avoid

144. The interpretation of this word was addressed quite succinctly in the *King Salmon* decision from paragraphs 92-97 which were summarised at paragraph 24(b) in discussing the meaning of 'sustainable management':

> *[24] We make four points about the definition of "sustainable management":*
>
> *(a) First, …*
>
> *(b) Second, as we explain in more detail at [92] to [97] below, in the sequence "avoiding, remedying, or mitigating" in sub-para (c),* ***"avoiding" has its ordinary meaning of "not allowing" or "preventing the occurrence of".*** *The words "remedying" and "mitigating" indicate that the framers contemplated that developments might have adverse effects on* ***particular sites****, which could be permitted if they were mitigated and/or remedied (assuming, of course, they were not avoided).*
>
> (Panel's emphasis)

145. The consequence in practical terms, as many submitters stressed to us, is that the use of the word 'avoid' has a preventive effect, particularly if it is coupled with a requirement that 'activities' themselves are avoided rather than the 'adverse effects' of those activities.

5.2 Adverse effects

146. Even though the Supreme Court in the *King Salmon* case held that a bottom lines approach was available under Part 2 for the protection of some aspects or particular areas of the environment, which required certain activities with adverse effects to be avoided, nonetheless the Court held that a correct application of Part 2 did not require prohibited activity status rules to be applied to rule out all effects which were transitory or minor in nature, stating:

> *[145] The definition of "effect" in s 3 is broad. It applies "unless the context otherwise requires". So the question becomes, what is meant by the words "avoid adverse effects" in policies 13(1)(a) and 15(a)? This must be assessed against the opening words of each policy. Taking policy 13 by way of example, its opening words are: "To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development". Policy 13(1)(a) ("avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character") relates back to the overall policy stated in the opening words.* ***It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding.*** *Moreover, some uses or developments may enhance the natural character of an area*
>
> (Panel's emphasis)

147. What is minor or transitory was not at issue in the *King Salmon* case and the interpretation of those words remain open for consideration in any particular factual context. It would be a bold approach, however, to accept that a type of activity or effect was not required to be avoided by a provision in the PORPS because it was argued to be minor or transitory. As to the latter, the issue of return frequency or intensity, (as of sound for example), may impact the outcome; and the amount of litigation over the meaning of 'minor effects' in the RMA provisions as to non-notification is indicative as to how vexed that consideration of what is 'minor' can prove to be.

148. However, some further guidance is now available from the Supreme Court decision in the *Port Otago* case which discussed the concept of avoiding effects from 'material harm'. At paragraph 66 of that decision the Supreme Court described the significance of that phrase:

> *[66] In summary, the Court in Trans-Tasman said that decision-makers must <u>either be satisfied there will be no material harm or alternatively be satisfied that conditions can be imposed that mean</u>:*
>
> > *(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…*

(Panel's emphasis)

149. In short as with much of the terminology in this RMA area, the particular contextual factual setting both as to the nature of the effects and as to the mitigation measures available will have a significant influence as to the outcome of the consideration.

5.3 'Inappropriate use and development'

150. A similarly vexed issue of what is 'inappropriate' was squarely before the Supreme Court in the *King Salmon* case. On this issue it made the following opening observation:

> *[98] Both pt 2 of the RMA and provisions in the NZCPS refer to protecting areas such as outstanding natural landscapes from "inappropriate" development –* ***they do not refer to protecting them from any development****. This suggests that the framers contemplated that there might be "appropriate" developments in such areas, and raises the question of the standard against which "inappropriateness" is to be assessed.*

(Panel's emphasis)

151. The Court also conducted a deeper analysis:

> *[29] The use of the phrase "inappropriate subdivision, use or development" in s 6 raises three points:*
>
> > *(a) First, s 6(a) replaced s 3(c) of the Town and Country Planning Act, which made "the preservation of the natural character of the coastal environment, and the margins of lakes and rivers, and the protection of them from unnecessary subdivision and development" a matter of national importance. In s 6(a), the word "inappropriate" replaced the word "unnecessary". There is a question of the significance of this change in wording, to which we will return.*

(b) Second, a protection against "inappropriate" development ***is not necessarily a protection against any development. Rather, it allows for the possibility that there may be some forms of "appropriate" development****.*

(c) Third, there is an issue as to the precise meaning of "inappropriate" in this context, in particular whether ***it is to be assessed against the particular features of the environment that require protection or preservation or against some other standard.*** *This is also an issue to which we will return.*

152. That later consideration appears at paragraphs 100 to 105 relevant portions of which stated:

[*100]* ***The scope of the words "appropriate" and "inappropriate" is, of course, heavily affected by context.*** *…*

[101] We consider that where the term "inappropriate" is used in the context of protecting areas from inappropriate subdivision, use or development, ***the natural meaning is that "inappropriateness" should be assessed by reference to what it is that is sought to be protected.*** *It will be recalled that s 6(b) of the RMA provides:*

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

…

(b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:

… A planning instrument which provides that any subdivision, use or development that adversely affects an area of outstanding natural attributes is inappropriate is consistent with this provision.

…

[105] We consider that ***"inappropriate" should be interpreted in s 6(a), (b) and (f) against the backdrop of what is sought to be protected or preserved****.* ***That is, in our view, the natural meaning.*** *The same applies to objective 2 and policies 13 and 15 in the NZCPS. Again, however, that does not resolve the fundamental issue in the case, namely whether the "overall judgment" approach adopted by the Board is the correct approach. We now turn to that.*

*(*Panel's emphasis)

153. It is plain from the *King Salmon* decision that where that phrase 'inappropriate use and development' is used in the sense of 'protection' it is a qualifier of the absolute protection level which might otherwise have been seen as warranted to accord with the word 'avoid'.

154. That will become particularly relevant in the Ecology chapter of this report because while ss.6(a) and (b) contain that qualifier, s.6(c) does not. By contrast, in the Heritage chapter where the qualifier does apply the discussion in the Heritage topic in this report will address the complex issue of what is, or is not, inappropriate where Heritage structures have deteriorated. For that reason, this chapter of the report addressing legal issues will return later to address what effect that difference should make in the PORPS to the issue of the protection level of indigenous biodiversity or not.

5.4 ‘Protection’ & ‘Maintaining’

155. The word ‘protection’ also featured significantly in the reasoning in *King Salmon* with the Court stressing at paragraph 149, (cited earlier), that primacy was not given to protection by ss.6(a) and (b) of the RMA, but that in particular circumstances such protection may be required. In the context of a discussion considering the interpretation of the word ‘protect’ that consideration by the Court bears repetition:

> *[149] Section 6 does not, we agree, give primacy to preservation or protection; it simply means that provision must be made for preservation and protection as part of the concept of sustainable management. The fact that ss 6(a) and (b) do not give primacy to preservation or protection within the concept of sustainable management does not mean, however, that a particular planning document may not give primacy to preservation or protection* ***in particular circumstances****. This is what policies 13(1)(a) and 15(a) in the NZCPS do. Those policies are, as we have interpreted them, entirely consistent with the principle of sustainable management as expressed in s 5(2) and elaborated in s 6.*

(Panel’s emphasis)

156. Earlier at paragraph 24 (d) (cited earlier) the Court had also observed:

> *(d) Fourth, the use of the word “protection” in the phrase “use, development and protection of natural and physical resources” and the use of the word “avoiding” in sub-para (c) indicate* ***that s 5(2) contemplates that particular environments may need to be protected from the adverse effects of activities in order to implement the policy of sustainable management; that is, sustainable management of natural and physical resources involves protection of the environment as well as its use and development.*** *The definition indicates that environmental protection is a core element of sustainable management,* ***so that a policy of preventing the adverse effects of development on particular areas is consistent with sustainable management****. This accords with what was said in the explanatory note when the Resource Management Bill was introduced:*
>
> *The central concept of sustainable management in this Bill encompasses the themes of use, development and protection.*

(Panel’s emphasis)

157. Then at paragraphs 62 and 90 the Court provided descriptions of the varying levels of protection envisaged by the RMA and the NZCPS in the coastal marine area:

> *[62] The overall purpose of these directions is to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use and development (policy 13) or to protect the natural features and natural landscapes (including seascapes) from inappropriate subdivision, use and development (policy 15).* ***Accordingly, then, the local authority’s obligations vary depending on the nature of the area at issue. Areas which are “outstanding” receive the greatest protection: the requirement is to “avoid adverse effects”. Areas that are not “outstanding” receive less protection: the requirement is to avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects****. In this context, “avoid” appears to mean “not allow” or “prevent the occurrence of”, but that is an issue to which we return at [92] below.*
>
> …

> *[90] … s 5(2)(c) of the RMA talks about "avoiding, remedying or mitigating any adverse effects of activities on the environment" and s 6(a) identifies "the preservation of the natural character of the coastal environment (including the coastal marine area) … and the protection of [it] from inappropriate subdivision, use and development" as a matter of national importance to be recognised and provided for. The NZCPS builds on those principles, particularly in policies 13 and 15.* ***Those two policies provide a graduated scheme of protection and preservation based on the features of particular coastal localities, requiring avoidance of adverse effects in outstanding areas but allowing for avoidance, mitigation or remedying in others****.*

(Panel's emphasis)

158. The graduated approach we have highlighted above, which has been taken in the NZCPS, has also been adopted either in the notified or amended reply versions in some provisions of the PORPS. As the consideration of the following domain and topic chapters will make plain, the significance of the varying levels of protection required in s.6 terms for differing contexts will dictate the wording we recommend for the PORPS.

159. The potential differences in treatment levels of the concept of 'protection' arose as to the context in which it is used in respect of areas of significant indigenous vegetation and significant habitats of indigenous fauna in s.6(c) RMA, where the word 'protection' is used, as contrasted to the regional function provisions in s.30(1)(ga). In the latter context the word 'maintaining' is used in respect of 'maintaining indigenous biological diversity'.

160. The question that gives rise to is whether that difference in wording between 'protection' in s6(c) of the Resource Management Act 1991 ('RMA') and 'maintaining' in s 30(1)(ga) RMA, has any legal significance; and if so, how should that difference manifest itself or be reflected in the PORPS?

161. This issue was canvassed in various ways by a number of counsel with a number of those seeking an enabling approach asserting that the difference in protective levels between s.6(c) and s.30(1)(ga) had been overlooked in the PORPS, particularly because of what was asserted to be a very high level of protection provided in the ECO chapter for indigenous biodiversity. During the ECO chapter hearings the Panel posed that statutory difference and the weight to be given to it to counsel for DOC Ms Warnock, to which she responded in Supplementary submissions dated 9 May 2023.

162. In those submissions she advanced the argument that 'protection' being a noun suggested a standard to be achieved, but in recognition of the *King Salmon* discussion in para 24(d) quoted above she submitted "*you achieve protection of something (e.g., particular values) from something else (e.g., inappropriate uses, adverse effects)"*. The lack of an activity qualifier in s.6(c) such as 'inappropriate' activity against which protection is required she submitted meant that s.6(c) was requiring decision-makers to provide for protection against "**all threats**" including direct, indirect and naturally occurring threats. As counsel for DOC, therefore, she advocated that what was required of PORPS was to provide objectives, policies and methods which protected against all such threats.

163. By way of general authority for the discussion of s.6(a) to (c) Ms Warnock cited paragraph 28 of *King Salmon*. However as can be seen below, that paragraph does not refer to 'threats'. The introduction of that word is a rather new concept we do not favour when RMA terminology usually addresses adverse 'effects' of activities rather than any 'threat' which an activity itself might be said to constitute. Paragraph 28 of *King Salmon* only referred to adverse effects:

> *[28] It is significant that three of the seven matters of national importance identified in s 6 relate to the preservation or protection of certain areas, either absolutely or from*

"inappropriate" subdivision, use and development (that is, ss 6(a), (b) and (c)). Like the use of the words "protection" and "avoiding" in s 5, ***the language of ss 6(a), (b) and (c) suggests that, within the concept of sustainable management, the RMA envisages that there will be areas the natural characteristics or natural features of which require protection from the adverse effects of development.*** *In this way, s 6 underscores the point made earlier that protection of the environment is a core element of sustainable management.*

(Panel's emphasis)

164. Ms Warnock had earlier submitted:

16. In relation to the risk from direct human-made threats (subdivisions, use and development), case law states that protection is not metonymic with 'prevention' or 'prohibition' of all activities. However, in a planning sense, protection is commonly achieved by 'avoid adverse effects' policies …

165. In relation to s.30(1)(ga) Ms Warnock commenced with the observation that it is a function setting provision which uses the verb form of 'maintaining' suggesting action or measures, as can be expected in a function setting provision. She then cited the Environment Court in *Oceana Gold (New Zealand) Ltd v Otago Regional Council* [2019] NZEnvC 41 (63) where the Court stated that s 30(1)(ga) (and s 30(1)(c)(iiia)) required 'the maintenance of an existing level or quality' of biological diversity. That conclusion was reached on the basis that if a substantive standard was not being set a neutral verb such as 'managing' rather than 'maintaining' would have been used. The Court went on to hold what that meant was a standard whereby the quality of an indigenous resource on a region-wide basis "does not get worse".

166. However, at paragraph 22 of her submissions, counsel for DOC went a little further in our view by submitting:

22. *Accordingly, in the context of regional council functions, 'maintaining' biodiversity encompasses a broad range of actions, across temporal dimensions, that includes, for example: maintaining as far as possible at present level, restoring to some previous level, repairing,* ***enhancing, improving, expanding*** *etc*.

(Panel's emphasis)

167. We do not regard '*enhancing, improving, expanding'* as being metonymic with the phrase *'does not get worse.'* Each of those concepts involve a measure of improvement rather than maintenance. To some extent, though, we can accept that restoration or repair of degraded biodiversity may be said to result in maintaining of region-wide biodiversity at a level which meant it did not get worse.

168. In conclusion Ms Warnock submitted:

25. *Accordingly, 'maintaining' indigenous biodiversity is not metonymic for protection but it can include protection,* ***i.e., protection is a subset of maintenance****.*

(Panel's emphasis)

169. Maintenance can include a form of protection, but protection in the sense used by the Supreme Court in *King Salmon* in our view is set at a higher level of protection for particular areas or aspects of significance than is provided by the word 'maintaining', which relates at a broader regional

level to all biodiversity. That difference between the two levels was really acknowledged in the DOC submissions at paragraph 24 where it was said:

> 24. *Section 30(1)(ga) includes* all *indigenous biodiversity and so encompasses significant areas of biodiversity (i.e. s.6(c) matters).*

170. However, while from a slightly different approach, we nonetheless accept as generally accurate the final paragraphs of the submissions for DOC on this issue when Ms Warnock said:

> *26. In 'maintaining' indigenous biodiversity, use and development leading to negative change will be tolerated if that change can be ameliorated in some way, minimised, remedied, offset or compensated, and actions can be quite interventionist in this sense.*
>
> *…*
>
> *28. In summary therefore, the core difference between 'protection' and 'maintaining' is that 'protection' of specific areas in s.6(c) is, of necessity, (ex) ante or pro-active. Whereas, 'maintaining' in s 30(1) (ga) is at the region-wide level and can be achieved using a range of actions, including ex post facto actions*.

171. In the Panel's view an appropriate wording for a system of sustainable management that accords with the RMA would require replacing the phrase 'will be tolerated' with 'may be acceptable' in paragraph 26 of those submissions.

172. In summary then our view of the effect of the different wording in s.6(c) and s.30(1)(ga) is that the latter provision requires as a function of the regional council that it maintains the regionwide values of indigenous biodiversity- i.e. that it ensures through the PORPS provisions that the regionwide state of indigenous biodiversity is not made worse. That is a very broad function and of itself did not rule out or prevent the enabling of a degree of activity which in some locations may adversely affect indigenous biodiversity, so long as on a region-wide basis the state of indigenous biodiversity was not made worse. A good example would be the activity of pastoral farming involving grazing of tussocks which are present throughout the region. However, the advent of the NPS-IB with its specific provisions as to a limited consent pathway such as in sub-clauses 3.10(3) and 3.16(1) will affect the cascading assessment involved in the effects management hierarchy under that NPS.

173. Within that broad span of maintaining indigenous biodiversity throughout the region section 6(c) enables indigenous biodiversity to be specifically protected in areas or circumstances where it has a level of significance warranting protection that marks it apart from the general indigenous biodiversity. Obvious examples will be where a species is nationally or regionally under threat.

174. The challenge is to apply those approaches and the NPS-IB provisions to the Ecological chapter which will be addressed later in this report.

175. What also needs addressing first as a general matter is whether off-setting and compensation are available only as consent pathways for provisions imposed as part of the broader s 30(1)(ga) function, or whether they should also be available in respect of provisions protecting significant indigenous biodiversity under s.6(c). In respect of those aspects now covered by the NPS-IB its provisions will of course provide the direction to be taken.

6. Environmental Offsetting and Compensation

176. An argument raised strongly by Mr. S. Christensen as counsel for Oceana Gold Limited was that the PORPS did not properly address the provisions of s.104(1)(ab) which, as relevant, provides:

104 Consideration of applications

*(1) When considering an application for a resource consent and any submissions received, the consent authority **must, subject to Part 2** and section 77M**, have regard to–***
(a) …

(ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and

(Panel's emphasis)

177. As we understood his argument Mr Christensen submitted that since 2017 (the year when that provision was inserted in the RMA), it was mandatory for regard to be had as to any methods of offsetting or compensation provided for by that subsection in a resource consent application, that meant in turn that a methodology had to be provided for and that required an appropriate consent pathway in the PORPS. He noted that the notification date for the partially operative 2019 ORPS pre-dated the commencement date of the amendment so it could not be considered in that RPS.

178. Mr Christensen refined his arguments down to these propositions[6]:

42. The position in the notified pORPS is therefore in error:

a. Section 104(1)(ab) is clear that all offset and compensation proposals are to be had regard to.

b. The biodiversity and compensation principles in the NPSFM and exposure draft NPSIB post-date the enactment of section 104(1)(ab) and do not conflict with it by providing principles as to what proposals should and should not achieve that are able to be applied to guide the assessment of any proposal an applicant advances.

c. The partially operative RPS 2019 provisions regarding biodiversity offsetting and compensation could not consider section 104(1)(ab) and are in conflict with it by purporting to proscribe the circumstances when decision makers can consider a biodiversity offsetting and compensation proposals.

d. The PORPS largely repeats the provisions of the partially operative RPS 2019 as if section 104(1)(ab) does not exist, but the Otago Regional Council's own evidence on the matter acknowledges section 104(1)(ab) and notes that proposals that do not confirm to the PORPS 2021 will still be considered and may be accepted.

43. The result is that the provisions of APP3 and 4 as notified must be changed to read as considerations and not as presumptive limits. The revisions recommended by Oceana Gold's experts express matters as they must be expressed and should be adopted.

[6] *Opening Submissions on Behalf Of Oceana Gold (New Zealand) Limited –17 April 2023*

179. In response to those submissions Ms Warnock counsel for DOC in her submissions on the ECO chapter[7] said:

> *33. Oceania Gold submits that – as a matter of law – s 104(1)(ab) RMA provides a veto (or, as a corollary, a mandatory rule) that an RPS cannot contain a threshold at all for when offsetting will/won't be considered. This submission is incorrect. The wording in s 104(1) RMA, requires consent authorities to 'have regard to' the list of matters in s 104(1)(a)(c). 'Have regard to' means give genuine attention and thought to; it does not mean that it must be achieved or actioned.*

180. Both submissions in our view carry some weight.

181. Ms Warnock is strictly quite correct in her submission, but her paragraph probably underplays the weight that the wording of 'have regard to' plays in RMA language. In the context of a regional policy statement, which has the statutory purpose under s.59 of achieving "integrated management of the natural and physical resources of the region", a statutory provision under s.104 as to a methodology to which regard must be had on any resource consent application, must have some relevance under the Part 2 consideration of sustainable management.

182. However, we do not accept the inherent suggestion in Mr Christensen's argument that there is some mandatory aspect as to the need to provide a consent pathway involving the s.104(1)(ab) methodology of offsetting or compensation. The mandatory aspect is only triggered at resource consent stage, and is a mandatory requirement to give genuine consideration to the offsetting or compensation which has been proposed as part of the application for resource consent. That does not convert it into a mandatory matter at the regional policy statement stage.

183. We do, nonetheless, consider that the introduction of a mandatory requirement for consideration on a resource consent application of such a methodology is something which should be given considerable weight at the regional policy statement stage. The corollary of that view is that provisions which might have the effect at a regional policy stage of preventing such a consideration as part of a consent pathway, should be very carefully considered before being approved.

7. Terminology of 'limits', 'environmental limits', 'tipping points' and 'thresholds'

184. At various times in the PORPS as notified and as recommended to be amended in the s.42A report processes and evidence these various terms have come up for consideration.

185. A limited submission response addressed the terms listed above, as well as other similar terms such as 'constraints', 'bottom lines' or 'environmental bottom lines'. Fish & Game supported the use of the term 'environmental limits' as better addressing this type of descriptor or terminology. Other submitters as described in the original s.42A report (at paras 123- 130) sought a range of differing terms or definitions.

186. In her 22 October, 2022 brief of Supplementary Evidence as to the Introduction and General Themes section, Ms. Felicity Boyd set out as an Appendix locations where the word 'limit' was used in the PORPS or the s.42A reports. That brief recommended that the Panel utilise two different definitions for the word 'limit' depending upon whether the provision was being used in the freshwater or non-freshwater parts of the PORPS. (Previously in her original s.42A report on Introduction and General Themes on this issue Ms. Boyd had sought to achieve a broader context

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for 'limits' than purely biophysical limits by recommending use of a new definition for a phrase 'environmental limits'.)

187. The reason for the differentiation recommended finally by her was that the NPSFM provided a definition for the term 'limits' which was restricted to biophysical limits, whereas the general or natural meaning of the word 'limit' by the Oxford dictionary definition she quoted was broader in its application than just to biophysical limits. That Oxford definition is:

> *Any of the fixed points between which the possible or permitted extent, amount, duration, range of action, or variation of anything is confined; a bound which may not be passed, or beyond which something ceases to be possible or allowable.*

188. The NZCPS uses the term 'limits' in that broader sense. That appears at Objective 6 as to enabling use and development in "…*appropriate places and forms, and within appropriate limits*;". The words 'limits' and 'thresholds' are also used in that broader context at Policy 7 (2) where the following appears:

> *"…Where practicable, in plans, set thresholds (including zones, standards or targets), or specify acceptable limits to change, to assist in determining when activities causing cumulative effects are to be avoided."*

189. By contrast the NPSFM definition of 'limit' is used in a more limited biophysical sense:

> **limit** means either a limit on resource use or a take limit
>
> **limit on resource use** means the maximum amount of resource use that is permissible while still achieving a relevant target attribute state or a nutrient outcome needed to achieve a target attribute state (see clauses 3.12 and 3.14)

190. The use of the phrase 'tipping point' and the word 'threshold' is much more limited in the PORPS. The only use of the phrase 'tipping point' is in SRMR – I11 where it used in a context of either cumulative effects or gradual climate change resulting in a tipping point being reached.

191. The word 'threshold' is sparingly used in the PORPS. It appears at SRMR – I11 in the Environmental section discussion, but otherwise mainly appears in various locations in the IM chapter and on one or two occasions in the CE, HCV-HH and HAZ chapters. Generally, we are satisfied with the s.42A recommendations to retain the notified use of those terms on the basis that in SRMR – I11 what is being addressed are the outcome of usually gradual or incremental effects which take effects beyond limits that are sustainable. They may have the potential to be catastrophic in some settings but only once a tipping point has been passed. In the other contexts the use of the term 'threshold' we consider is appropriate as thresholds need to be identified or limits set for more identifiable effects to maintain a sustainable environment.

192. The only s.42A recommendation as to their use which we differ from is at the Environmental section discussion following on at SRMR – I11. The relevant notified part of that discussion read:

> *At the same time a resilience approach is needed that identifies thresholds and sets limits on the use of natural resources to avoid permanent and potentially catastrophic changes occurring, as would occur if a tipping point is reached.*

193. The s.42A report writer Ms. Boyd recommended in her 22 October, 2022 Appendix the deletion of the word 'threshold' but gave no particular reason for doing so other than that the newly defined 'limits' sufficed. We only differ slightly from her view on one aspect.

7.1 Recommendation

194. We are in agreement with the practical recommendation by Ms. Todd that the term 'limit' for freshwater purposes must accord with the NPSFM definition approach. That can be best achieved by her suggestion of a definition for freshwater purposes in the LF chapter, together with a separate definition of the word for all other purposes in the PORPS. At paragraph 21 of her brief her recommendation, with which we agree, was:

> **Limit** In the LF – Land and freshwater chapter, "limit" has the meaning defined in the NPSFM, and elsewhere, "limit" has its natural and ordinary meaning.

195. We see no need to delete the word 'threshold' in that discussion section of SRMR I11 and recommend the wording remains as notified, other than to change the word 'and' to 'or' to align with the wording used in Policy 7 (2) of the NZCPS which refers to them as alternatives. Therefore, we recommend the passage to read:

> *At the same time a resilience approach is needed that identifies thresholds ~~and~~ or sets limits on the use of natural resources to avoid permanent and potentially catastrophic changes occurring, as would occur if a tipping point is reached.*

Section 2: Introduction and General Provisions

1. Introduction

1. The PORPS commences with a chapter entitled Introduction and General Provisions which addresses the following subheading sections:

   (i) Foreword or mihi
   (ii) Contents
   (iii) Purpose
   (iv) Description of the region
   (v) How the policy statement works
   (vi) Interpretation
   (vii) National direction documents; and
   (viii) MW- Mana whenua

2. The last of those sections, MW, is dealt with in this report in Section 3: Mana Whenua. It is a significant area given the Part 2 RMA indentification of issues to be variously dealt with as either national interest matters of Māori relationships with their resources which are required to be recognised and provided for in s.6(e); kaitiakitanga matters to which particular regard is to be had under s.7(a); and matters of Treaty principle which are to be taken into account under s.8.

3. The balance of the matters listed in the Introduction and General Provisions chapter contents range in significance from formal introductory matters such as the Foreword/Mihi pages; or machinery/descriptive provisions such as the Contents, Description of region, and How the policy statement works; through to the more significant substantive matters such as the Purpose, Interpretation and National direction documents sections.

4. In the introductory Legal section to this report we have identified that in terms of Part 2 RMA, and in particular of the s.5 purpose of sustainable management of the environment, the PORPS as notified had a prioritised focus on environmental protection in a manner that in the Panel's view did not align with the approach of the Supreme Court in the *NZ King Salmon* and *Port Otago* decisions.

5. However, we also described in the Legal section how that prioritisation was amended in many respects as a result of the submission and hearing processes in the s.42A reply reports. As a result numerous changes were recommended by the s.42A report writers to the notified form of the PORPS, with a final significantly changed position being addressed after the issue of the *Port Otago* decision through the closing submissions of counsel for ORC. Those changes were all reflected in the final recommended version of the PORPS received by the Panel from ORC dated 10 October, 2023.

6. The overall result has in the Panel's view been a recommended regional policy statement which much better recognised the s.5 aspects of human use and enjoyment of resources, while at the same time protecting the environment, within limits, for future generations. As a further result the Panel's overview has often come down to a process of ensuring that an integrated approach to use and enjoyment of resources is enabled at the same time as protection of those resources within limits. The Panel believes the form of the PORPS which the Panel has recommended the ORC to adopt, does achieve that integrated outcome which aligns appropriately with the s.5 RMA purpose.

7. Necessarily the Legal section discussions of matters of:

- overall statutory purpose and function
- related higher court decisions;
- integration with national direction documents in the form of National Policy Statements, (of which there are now a surfeit), National Environmental Standards, and other statutory regulations;
- and miscellaneous important interpretations of definitions

8. We have canvassed in considerable detail most of those issues in the Legal section of the Introduction, in Mana Whenua chapter or in the domain and topic chapters.

9. The balance of this chapter then will be restricted to addressing any final aspects of wording recommended in the 10 October 2023 version which we need to address, but which has not been addressed in those other areas of this report. The need for such discussion is really by now somewhat reduced, and often finely balanced as to whether further change is needed. A good example of that is the Foreword or mihi, to which we now turn.

2. Foreword or mihi

10. The only aspects of the wording here that have even caused some hesitation by the Panel arise again out of the earier notified prioritisation approach. Two sentences cause us to reflect as to whether that prioritisation approach is still reflected to some degree. (To the extent that that might be so, there are countless submissions, (e.g. Federated Farmers, Oceana Gold, OWRUG to name but three), enabling a rewrite of any text to ensure the enabling aspect of human use of resources is appropriately recognised). The phrases in the Foreword/mihi that cause us to reflect somewhat are:

> *We have placed the environment <u>at the centre of all we do</u> in our long-term vision...*
> (Panel's emphasis.)
>
> *The purpose of these visions is to protect the mauri of water bodies in Otago, a responsibility shared by all. The aim is to achieve positive outcomes for water and habitat that also address the community's needs and interests.*

11. The rationale in each case underlying these expressions is protection of the environment. A number of s.42A reports and evidence authored by Lisa Hawkins and Felicity Boyd under two differing titles were presented to us variously entitled as to the Introduction and General Provisions, or Themes. In the s.42A reply report of 23 May 2023 entitled 'Introduction and General Themes', Ms. Boyd had carefully traversed a series of reports from a range of experts and also referred to Kāi Tahu evidence to set out the threats which had developed over time to the sustainability of the environment. That survey covered paragraphs 18 to 34 of that reply report. It then led to the statement at paragraph 35 by Ms Boyd that:

> *In my view, given the evidence presented on the state of Otago's terrestrial, freshwater, and marine biodiversity, there is good reason to be cautious about the extent to which the use and development of resources should be enabled.*

12. The concern we have is that a generally expressed '*good reason to be cautious'* was utilised in the notified PORPS to warrant a prioritisation of protection of the environment over human use.

13. We had read or heard all of the information Ms Boyd stressed, and we are not in major disagreement with Ms Boyd, or the witnesses she referred to, as to the significance of those concerns. Where we have differed is in the overall approach to be adopted by the notified PORPS as a result. We have concluded that the Supreme Court's direction as to the appropriate approach for a regional policy statement or a plan is to ensure that both human use of resources and protection of the environment are enabled or addressed at the same time, with prioritisation of protection being utilised only in limited identifiable special circumstances. That will only occur where either by statutory direction, such as in the NPSFM, or as a result of unequivocal evidence, that is required to maintain sustainability of a particularly endangered resource.

14. In terms of the Introduction/mihi examples we have quoted above the first still leaves a concern for the Panel because we do not think it accurately reflects the change in the recommended amended long-term vision which follows it. That long-term vision has been recommended in the 10 October, 2023 version to refer to people and communities and their uses or well-being, and reads:

> *The management of natural and physical resources ~~in Otago,~~ by and for the people of Otago, ~~including~~ in partnership with Kāi Tahu, ~~and as expressed in all resource management plans and decision making,~~ achieves a healthy~~,~~ and resilient~~, and safeguarded~~ natural ~~systems~~ environment, ~~and~~ including the ecosystem services ~~they offer~~ it provides, and supports the well-being of present and future generations~~, mō tātou, ā, mō kā uri ā muri ake nei~~.*

15. In our view the sentence preceding that would be more appropriately worded:

> *Our long-term vision recognises that use of resources and protection of the environment must occur in an integrated sustainably managed way: ..."*

16. The second quote we had identified to consider in the Introduction/mihi is less concerning as it appears to relate primarily to freshwater resources where the NPSFM direction as to priority must be followed. However, as we have discussed in our consideration of the term 'mauri' in the Legal section of the Introduction to our freshwater report in Appendix Two, we have recommended that what is protected is the wellbeing of the waters. That in turn will mean 'mauri' is protected but without having to become entangled in trying to define what 'mauri' precisely means. For that reason we recommend a slight change in this wording.

2.1 Recommendation

17. That the wording of the Introduction/mihi be amended to read in the last text paragraph on page 3 of the 10 October, 2023 version:

> *~~We have placed the environment at the centre of all we do in o~~Our long-term vision recognises that use of resources and protection of the environment must occur in an integrated sustainably managed way: ..."*

> and at the second paragraph of text at page 4:

> *The purpose of these visions is to protect the wellbeing of water bodies in Otago, so as to protect their mauri, a responsibility shared by all. The aim is to achieve positive outcomes for water and habitat that also address the community's needs and interests.*

3. Purpose

18. At para 24 of the original s.42A report by Lisa Hawkins entitled Introduction and general provisions dated 22 May, 2022, the report writer had noted:

> *Federated Farmers considers the previous overview section of the partially operative RPS 2019 to be more aspirational, with the pORPS being seen to be too narrow and negative in its focus. The submitter seeks the overview of the partially operative RPS to be reinstated, specifically for the following text to replace the first two paragraphs in the pORPS*
>
> > *"Continued prosperity and wellbeing is essential to ensuring the community is equipped to face the environmental, economic, cultural and social changes of the 21st century, and to provide opportunities for all people to realise their aspirations. A thriving and healthy natural environment is vital to sustaining our wellbeing. The RPS is a high level policy framework for the sustainable integrated management of resources, identifying regionally significant issues, the objectives and policies that direct how natural and physical resources are to be managed and setting out how this will be implemented by the region's local authorities. "*

19. Ms Hawkins did not accept the underlying premise advanced by Federated Farmers that the PORPS was too narrow and negative in its focus, but nonethless she did conclude at para 30 that:

> *…the links between a thriving natural environment and community wellbeing could be more explicitly set out in the purpose.*

20. Therefore, she recommended an amendment to reflect the second part only of the Federated farmers submission as follows:

> The ORPS also promotes a thriving and healthy natural environment as being vital to sustaining our wellbeing.

21. With one reservation, the Panel considers the points made in the first paragraph advanced by Federated Farmers as to enabling opportunities for people to realise their economic, cultural and social aspirations or needs should also be reflected in the Purpose in this Introduction chapter. That is important given the changes we have recommended in the Legal section to the Introduction to this report to the overall approach required of enabling human activities while protecting the environment. The sole reservation relates to the proposed use of the word 'aspirations'. In Appendix Two when addressing that word in relation to LF-FW-P7A we expressed the view that the term 'aspirations' was too uncertain. Whilst it is being suggested here by a submitter in a more general context, for consistency reasons we prefer to use the term 'intentions'.

22. To include both concepts would involve a wording such as:

> The ORPS also aims to provide communities, including mana whenua, with opportunities to carry out activities to achieve their economic, cultural and social needs and intentions, while at the same time promoting a thriving and healthy natural environment as being vital to sustaining our wellbeing.

23. Finally, on the Purpose section in the original s.42A report submission points by NZ Pork and Horticulture NZ were also not accepted which had sought to specifically add 'food production' to paragraph three of the Purpose statement. That paragraph as notified read:

The ORPS responds to identified significant regional values and resource management issues relating to Otago's environment, historic heritage, economy, recreational opportunities and communities.

24. The reasons given in paragraph 32 of the s.42A report for rejecting that request were:

> *The list included in paragraph three is not a list of 'significant regional values and resource management issues' as has been interpreted by the submitters. Rather it comprises descriptors which significant regional values and resource management issues may relate to. I consider these terms contained within the pORPS (environment, historic heritage, economy, recreational opportunities and communities) to be broad enough to encompass food production as it relates to the economy and the community. I therefore recommend to not accept these submission points.*

25. The Panel struggles to understand why such an important aspect to the Otago community as food production or primary production should be excluded as a descriptor which 'significant regional value' may relate to, when heritage and recreation opportunities are. That is particularly so in a broad diverse rural region such as Otago where that descriptor of economic activity is so pervasive. We do not consider addition of the phrase 'food production' undermines this descriptor list, and in fact we consider it augments it appropriately for the Otago region.

3.1 Recommendation

26. That the second and third paragraphs of the Purpose section of the PORPS at p.6 of the 10 October 2023 version be amended to read:

> The Otago Regional Policy Statement (ORPS) provides a policy framework that aims to achieve long-term environmental sustainability by integrating the protection, restoration, enhancement, ~~and~~ use and development of Otago's *natural and physical resources*. The ORPS also aims to provide communities, including mana whenua, with opportunities to carry out their activities to achieve their economic, cultural and social needs and intentions, while at the same time promoting a thriving and healthy natural *environment* as being vital to sustaining our wellbeing.
>
> The ORPS responds to identified significant regional values and resource management issues relating to Otago's *environment*, *historic heritage*, economy, food production and recreational opportunities and communities. The ORPS sets out objectives, policies, and methods to address and resolve, over time, the identified issues as effectively and efficiently as possible. The ORPS gives effect to the statutory requirements set out in the Resource Management Act 1991 (RMA ~~1991~~), as well as relevant national direction instruments, and is informed by iwi authority planning documents. *Regional* plans and *district plans* must give effect to the ORPS.

4. Description of the region

27. A corollary of the points we have just made about the importance of food or primary production in Otago relates to the section of the Introduction which describes the region. At paragraph 40 of the original s.42A report, and in following paragraphs, requests in submissions were identified seeking that this section more appropriately recognise the significance of the

primary production basis of the Otago region. At paragraph 46 to some measure that proposition was accepted but the comparative contribution of the rural productive sector to the Otago economy was queried but without any detailed analysis, or recognition of its export value. The latter was a point often stressed to us in the hearings.

28. The amendment recommended in the s.42A report was as follows:

> Otago's economy centres around construction, primary production ~~agriculture~~, tourism, ~~mineral mining~~, and education. The construction industry is a major contributor to employment numbers in Otago, supported by the region's population growth. The primary production sector is a source of revenue and employment for the districts and the wider region. Otago's farms are also a key contributor to the national food supply network. The University of Otago enrols approximately 20,000 students each year from around New Zealand and internationally, contributing to annual population spikes in Dunedin and significantly boosting the economy. Tourism ~~has~~ also has~~d~~ a significant impact on the regional economy, contributing about a quarter of the region's total gross domestic product. This is the highest of any region in New Zealand, and primarily concentrated in the Queenstown Lakes District.

29. The reply report suggested some further amendments so that the paragraph as recommended finally to the Panel was:

> Otago's history recognises the early exploration and occupation of Otago by Māori followed by the arrival of settlers from Europe and Asia. Otago's economy centres around construction, *primary production* ~~agriculture~~, tourism, ~~*mineral* mining,~~ and education. The construction industry is a major contributor to employment numbers in Otago, supported by the region's population growth. The *primary production* sector is a source of revenue and employment for the districts and the wider region. Otago's farms are also a key contributor to the national food supply network. The University of Otago enrols approximately 20,000 students each year from around New Zealand and internationally, contributing to annual population spikes in Dunedin and significantly boosting the economy. Tourism ~~has~~ also has ~~had~~ a significant impact on the regional economy, contributing about a quarter of the region's total gross domestic product. This is the highest of any region in New Zealand, and primarily concentrated in the Queenstown Lakes District.

30. The Panel wishes to record its agreement with those recommended changes but wishes to also recognise the export value consideration. With that addition in its view the recommended paragraph now aligns with the recommended changes to the Purpose section above.

4.1 Recommendation

31. That the fifth paragraph of the section Description of the region in the PORPS be amended to read:

> Otago's history recognises the early exploration and occupation of Otago by Māori followed by the arrival of settlers from Europe and Asia. Otago's economy centres around construction, primary production ~~agriculture~~, tourism, ~~mineral mining~~, and education. The construction industry is a major contributor to employment numbers in Otago, supported by the region's population growth. The primary production sector is a source of domestic and export revenue and employment for the districts, the

wider region and the nation. Otago’s farms are also a key contributor to the national food supply network. The University of Otago enrols approximately 20,000 students each year from around New Zealand and internationally, contributing to annual population spikes in Dunedin and significantly boosting the economy. Tourism ~~has~~ also has~~d~~ a significant impact on the regional economy, contributing about a quarter of the region’s total gross domestic product. This is the highest of any region in New Zealand, and primarily concentrated in the Queenstown Lakes District.

5. Remaining Introduction and General Provisions

32. As we have described above the balance of the substantive matters in the Introduction and General Provisions chapter of the PORPS as to Interpretation and Mana Whenua sections which the Panel has considered it needs to address have been dealt with elsewhere in our reports.

33. That has occured in large part for definitions in either the Legal section of the Introduction to this non-freshwater report, or in the legal section to the Freshwater Appendix Two report, or in the Mana Whenua section of this report.

34. Others have been addressed in other topic chapters as terms arise which were integral to the consideration of the issues addressed in those topic chapters. Good examples of the latter are the important definitions of ‘effects management hierachy’ which is dealt with in the ECO chapter and ‘regionally sigificant infrastructure’ which is dealt with in the EIT chapter. Otherwise where definitions or other provisions have not been specifically addressed, then as we have detailed in the Introduction to this report that is because the Panel has accepted the wording recommended by the s.42A report process and the reasons provided.

Section 3: Mana Whenua and Resource Management Issues of Significance to Iwi Authorities in the Region (MW & RMIA)

1. Introduction

1. The PORPS contains numerous provisions which particularly impact on the interests of the iwi in Ōtākou, which is Kāi Tahu. While differing submissions, often on differing provisions, were lodged by Ōtākou Kāi Tahu and Murihiku Kāi Tahu organisations, other submission points were raised in a submission by Te Rūnanga o Ngāi Tahu.

2. Unsurprisingly, given their close whakapapa based interrelationships, their interests were almost always commonly held, albeit on occasion differently expressed. No major issue, though, arose either in the formal written submissions or at the hearings between the provincial Kāi Tahu hapū based papatipu rūnaka or between them and the main Te Rūnanga o Ngāi Tahu. For those reasons, and for ease of reference, we will utilise a common nomenclature for their submissions, that they conveyed 'mana whenua' or 'Kāi Tahu' views. Those views were often expressed at hearing through two Kāi Tahu consultancies Aukaha and Te Ao Marama Incorporated.

3. In the introductory legal section to the combined reports we have already stressed two major matters of importance that have arisen during this PORPS process which arise from Kāi Tahu history, and the ORC approach to Kāi Tahu history, and the ORC approach to Kāi Tahu interests. We do not need repeat those in detail again here. A summary can suffice.

4. The first point is that the Panel accepted the overall thrust of the Kāi Tahu submissions and evidence that the extent of the Treaty breaches it had experienced had resulted in massive loss of land and other resources for Kāi Tahu. Those breaches have been the subject of a series of findings in favour of Kāi Tahu in the Waitangi Tribunal in WAI 27, and major settlement with that iwi which followed in the Ngāi Tahu Claims Settlement Act 1998. That settlement included all Kāi Tahu hapū with s.9 of the Settlement Act stating:

> ***9* Meaning of Ngāi Tahu and Ngāi Tahu Whānui**
>
> *(1) For the purposes of this Act and any other enactment, unless the context otherwise requires,* ***Ngāi Tahu*** *and* ***Ngāi Tahu Whānui*** *each means the collective of individuals who descend from the primary hapū of Waitaha, Ngāti Māmoe, and Ngāi Tahu, namely Kāti Kurī, Kāti Irakehu, Kāti Huirapa, Ngāi Tuahuriri, and Kai Te Ruahikihiki.*

5. As a consequence of the major Treaty breaches involved, Kāi Tahu had been left with tiny fragments of land in Otago often near the coastal environment, which environmentally happens to be a more sensitive area for Kāi Tahu to seek to use and develop the scarce resources left in their ownership. Their lay witnesses described how since World War 2 those hard realities had been exacerbated by restrictive planning approaches under previous Town and Country planning statutes, and by the manner in which even the more well-intentioned RMA provisions as to Māori and Treaty related issues, had been applied to their lands and resources.

6. From the point of view of Kāi Tahu interests, therefore, they had faced what they plainly perceived, even for cultural purposes, as a series of statutory and planning barriers to the use and development of their very limited landholdings and other resources, including wai Māori (freshwater), wetlands and wai tai (coastal waters). They expressed in strong terms that the

outcome was a trammelling of their tino rangatiratanga or rakatirataka in respect of those resources.

7. They sought relief that would give real effect to the s.6(e) and s.8 considerations that they argued should enable them to use those resources as they required. However, Kāi Tahu submitters also stressed two other major environmental considerations that underpinned their submissions.

8. They were that the concept of tino rakatirataka properly applied required that they be offered the opportunity through the PORPS of having their views on how the environmental footprint of humankind was to be imposed on the Otago region recognised as a true Treaty partner at the decision-making table, rather than being considered as just another interested party.

9. Coupled with that major concern was the concomitant kaitiaki responsibility for the environment recognised in s.7(a) of the RMA, which is an inherent part of the exercise of tino rakatirataka. It was made clear by Kāi Tahu witnesses that while the latter, tino rakatirataka, may enable use of resources, alongside it ran obligation and responsibility to care for the environment – kaitiakitaka.

10. In respect particularly of wai Māori (freshwater) and wai tai (coastal waters), the thrust of the Kāi Tahu evidence was that the outcome of both national and local governments' management of those resources over the decades of their control and management had been well-nigh disastrous. In their view the outcome for freshwater had been increasing over-allocation of water, and serious degradation of water quality from discharges and sedimentation. Similarly, they asserted there had been major degradation of some areas of coastal waters both as a result of discharges and sedimentation. They expressed not dissimilar views as to the state of the whenua in many locations.

11. In respect of all those resources they complained that they had in the past not been properly consulted as to their views, and certainly had been commonly excluded from decision-making roles. Moreover, they had either lost, or had reduced, most of their customary access to customary resources in freshwater and coastal waters. Added to all those concerns was the assertion that biodiversity of mahika kai had been suffering badly as well.

12. In a statutory planning sense these sorts of issues were sought by ORC to be addressed in the PORPS in a manner which accorded with the National Planning Standards in three principal sections being:

- Mana Whenua, (MW) which is Chapter 4 of Part 1 of PORPS
- Resource Management Issues of significance to Iwi Authorities in the region (RMIA), a section of Chapter 5 of Part 2 of the PORPS; and
- Wāhi Tūpuna, which are covered in the first section of the Historical Cultural Values (HCV) Chapter 13 of Part 3 of the PORPS

13. In addition to those specific sections of the PORPS there are a number of other provisions which have specific references to mana whenua interests of engagement in most of the topic chapters of the PORPS.

14. This section of this report will address the MW chapter and RMIA chapter respectively. The HCV chapter of this report will address any wāhi tupuna issues. All other mana whenua aspects will be dealt with as each subject topic chapter is addressed.

15. Finally, by way of introduction to these mana whenua issues one further aspect of the PORPS section bears a summarised repetition here from the observations of the Panel in the Introductory part of the legal section to both reports.

16. In that we had acknowledged that ORC had made genuine and repetitive efforts in the preparation of the PORPS and in the hearing of submissions to engage in a meaningful manner with Kāi Tahu entities and individuals. We noted that had occurred in the consultation phase; in the policy statement drafting; in the s.42A report responses to the mana whenua submissions; and finally in responses to mana whenua evidence and submissions in our hearings. We had also earlier observed that the genuineness of that engagement by ORC had led to a much larger measure of agreement with mana whenua as to the content of those provisions affecting or engaging mana whenua response.

17. The consequence of that co-operative engagement by all involved had been that relatively few major issues impacting on mana whenua require consideration by the Panel.

18. We would like to record our appreciation to the mana whenua submitters for the positive co-operative efforts they have made to resolve points of difference with ORC at the various stages involved and to ORC for its willingness to respond in an understanding and similarly positive manner to mana whenua concerns. Finally, we take this opportunity of acknowledging the value of the input of the s.42A report writer Mr James Adams who had demonstrated a real grasp of the historical, Treaty, statutory and related practical concerns of mana whenua who have engaged in this process.

2. MW – *Mana whenua* Chapter

2.1 Preliminary matters

19. Before moving to address issues on particular provisions, there are three preliminary issues we need to address of general application to this chapter and to other mana whenua provisions in the PORPS. They are:

- The use of the phrase mana whenua rather than tangata whenua
- The impacts of definitions of 'Māori land', and 'papakāika'
- The dialectal spelling use of 'k' for 'ng' by Kāi Tahu.

2.1.1 Tangata whenua or Mana whenua

20. The term tangata whenua, or in Kāi Tahu dialectal spelling 'takata whenua', is the term commonly utilised in te ao Māori to refer to the people occupying a particular rohe. In the RMA, NZCPS, NPSFM, NPSIB (to identify just some of the NPSs more widely engaged in the PORPS), the term 'tangata whenua' is used. In the RMA the s.2 definition of 'tangata whenua' is:

> ***tangata whenua***, in relation to a particular area, means the iwi, or hapu, that holds mana whenua over that area

(Panel's emphasis)

21. In the lifelong knowledge of Te Reo Māori held by the kaumātua on our panel, Rauru Kirikiri, it was unusual – if not ungrammatical - to see the phrase 'mana whenua' used to describe

people (tangata/takata), rather than to describe the actual authority (mana) that those people held. In other words an iwi or hapū has mana whenua and therefore cannot be mana whenua.

22. Nevertheless, over time, and throughout the Māori world, the phrase ‘mana whenua’ has become accepted and is widely used as equating to ‘tangata whenua’.

23. Furthermore, an indication that either phrase may be used in an authoritative statutory sense has been given in the NZ National Planning Standards. In the Regional Policy Statement Structure Standard as Chapter 2, Mandatory Directions are specified. Part 1 – Introduction and General Provisions uses the following terminology as an option:

[TANGATA WHENUA/MANA WHENUA]

Chapter: [Tangata whenua/mana whenua]

24. It was made clear to the Panel during the hearings by respected Kāi Tahu kaumātua, and by their counsel and planning witnesses, that Kāi Tahu in Ōtākou preferred the phrase ‘mana whenua’ instead of ‘takata whenua’ throughout the PORPS to relate to the people who hold mana in the region. In the spirit of co-operation that we have earlier referred to, ORC accepted that preference, and the notified and following versions of the PORPS all use that phrase.

25. Finally, no submitter sought a preference for the use of the words ‘tangata whenua’ in this context and that is decisive, in that we do not have jurisdiction to change the terminology, whatever view may be held as to its appropriateness.

2.1.2 Definition impacts of definitions of ‘Māori land’, ‘papakāika’

26. The definitions of ‘Māori land’ and ‘papakāika’ are critical to those provisions seeking to enable Kāi Tahu interests to be able to utilise their lands.

27. Those issues have been discussed in detail in Section 1: Legal Issues of this report and will not be repeated here.

2.1.3 Dialectal spelling of ‘k’ for ‘ng’

28. The Kāi Tahu dialect commonly utilised throughout its customary areas of occupation is to pronounce the northern form in Te Reo Māori of the dipthong ‘ng’ as a ‘k’. However, that has not always been uniform and in the past certain words have been spelt with the ‘ng’ form, and that spelling has been adhered to. That is most significantly demonstrated by the name Te Rūnanga o Ngāi Tahu (TRONT) itself where both in the ‘Ngai’ and in the ‘Runanga’ the ‘ng’ form has been used rather than the ‘k’. That is because the 1996 legislation establishing TRONT the ‘ng’ form of spelling was used, and without tohutō or macrons – Te Runanga o Ngai Tahu Act 1996. That spelling for the overarching Kāi Tahu governing body is used in the PORPS.

29. Similarly, in the spelling of the papatipu rūnanga the ‘k’ has not been used in the PORPS for Te Rūnanga o Moeraki, or Te Rūnanga o Ōtākou because that is their preference. So too, in Southland for the neighbouring Hokonui Rūnanga, and for Awarua Rūnanga, Waihopai Rūnanga and Ōraka-Aparima Rūnanga. However, one Ōtākou Rūnaka does use the ‘k’ form – Kāti Huirapa Rūnaka ki Puketeraki. We have adhered to these nomenclatures accordingly.

30. We are not aware of any submissions seeking changes to achieve uniformity of the use of the ‘k’ spelling and therefore leave this brief note of record as to why there are those differences in spelling in the PORPS.

2.2 Primary issues in the Mana Whenua Chapter

31. In his final reply on non-freshwater issues counsel for ORC, Mr Anderson identified the following matters as legal issues still requiring resolution:

    1. MW-P4 - sustainable use of Māori land & native reserves
    2. Māori land definition - jurisdiction
    3. SILNA land
    4. Aquaculture
    5. MW-M4 – introductory words
    6. MW-M4(1) – bias
    7. MW-M4(2) – lawfulness

2.2.1 MW-P4 – sustainable use of Māori land and native reserves

32. The final recommended version of the PORPS of 10 October 2023 recommended that MW-P4 read:

> **MW-P4 – Sustainable use of ~~Māori land~~ Native Reserves and *Māori land***
>
> Kāi Tahu are able to ~~protect,~~ develop and use *land* and resources within native reserves and ~~land held under Te Ture Whenua Māori Act 1993~~ *Māori land* in accordance with mātauraka and tikaka, ~~a way consistent with their culture and traditions and~~ to provide for their economic, cultural and social aspirations, including for *papakāika*, marae and marae related activities.~~, while:~~
>
> ~~(1) avoiding adverse *effects* on the health and safety of people,~~
>
> ~~(2) avoiding significant adverse *effects* on matters of national importance, and~~
>
> ~~(3) avoiding, remedying, or mitigating other adverse *effects*.~~

33. The issues raised by some submitters was that as notified MW-P4 contained three sub-provisions which Mr Anderson for ORC termed as 'qualifiers' of the ability to use and develop Māori lands to provide for their economic, cultural, and social aspirations. Those qualifiers were:

    … while:

    (1) avoiding adverse effects on the health and safety of people,

    (2) avoiding significant adverse effects on matters of national importance, and

    (3) avoiding, remedying, or mitigating other adverse effects.

34. The concern of some submitters was that without any such 'qualifiers' in place there would be no constraints on the effects of Māori use and development of their lands even if those were being used for economic purposes, no matter how large or adverse the effects. The response of Kāi Tahu, and the s.42A report writer and counsel for ORC was effectively that it was incorrect to label future use and development by Māori as unconstrained, because there were other provisions limiting those uses in that they had to accord with 'mātauraka and

tikaka'. It was said that ensured appropriate kawa was followed underpinned by mātauraka and controlled by kaumātua. Those concepts involved the application of the ethic and exercise of kaitiakitaka principles which were singularly focused on protecting environmental health. The s.42A report writer went as far as to say that in Treaty terms it was time for the general public and ORC to trust the responsible exercise of those tikaka based responsibilities.

35. As we have said in the discussion of the definition earlier of Māori land and papakāika, that trusting approach in the opinion of the Panel has its risks. It cannot be ruled out that hard-nosed commercial players, either within or outside Māori entities, will see such a lack of formal regulation as an opportunity to avoid the usual impact of RMA 'limits' or 'standards' designed to protect the environment. Through the use of a variety of legal technical holding means such as leases or joint venture management contracts which maintained an underlying façade of 'Māori' ownership, practical tikaka based control could be lost, but the unconstrained use opportunity remain. It was those concerns that led us to decide that the practical way of resolving this issue was to recognise that the major Kāi Tahu demand expressed to us was to be able to carry on customary uses and development controlled by tikaka and kawa. The changes we have recommended to the definitions of Māori land and papakāika ensure that this is what is intended, which is to allow for customary uses.

36. For other non-customary economic uses we consider that RMA considerations should apply as they do in order to control potential adverse effects by others from economic use and development of land.

37. One other change which the Panel sees as being necessary relates to the barrier posed by planning controls, particularly in the Catlins area, to the customary use of Māori land. The area of Māori land is now so limited that we propose to recommend the MW-P4 uses should be enabled even if they happen to fall within ONFL overlays.

2.2.1.1 Recommendation

38. Therefore, consistent with the approach we have taken to the definition of the terms 'Māori land' and 'papakāika' we recommend that the wording of MW-P4 be as follows:

MW–P4 – Sustainable use ~~of Māori land~~ Native Reserves and *Māori land*

Kāi Tahu are able to:

(1) ~~protect~~, develop and use *land* and resources within native reserves and *Māori land* ~~held under Te Ture Whenua Māori Act 1993~~, including within land affected by an ONFL overlay, in accordance with mātauraka and tikaka, ~~in a way consistent with their culture and traditions and~~ to provide for their ~~economic,~~ cultural and social aspirations, including for *papakāika,* marae related activities, ~~while:~~

(2) provide for the economic use of their Māori land or native reserves resources subject to the provisions of the RMA, this regional policy statement and any relevant plan, while:

(~~1~~a) avoiding adverse *effects* on the health and safety of people,

(~~2~~b) avoiding significant adverse *effects* on matters of national importance, and

(~~3~~c) avoiding, remedying, or mitigating other adverse *effects*.

2.2.2 Māori land definition – jurisdiction

39. This issue arose out of submissions that there was no jurisdiction for the ORC in any submission to change the definition of 'Te Ture Māori land' in the notified version to 'Māori land' as recommended in the s.42A report.

40. We intend to deal with this point concisely as it is fully addressed to our satisfaction in the legal submissions in reply on 29 May 2023 by Mr Anderson for ORC – at pages 23-29 – and we do not need to repeat those submissions at any length here.

41. However, one aspect of those submissions by Mr Anderson addressed the term 'ancestral lands' and drew our attention to the formal written submissions on the notified PORPS reference to 'ancestral lands'. We record here once more that in our view it is beyond question that in Ōtākou all the whenua constitutes Kāi Tahu ancestral lands. Otherwise, we find ourselves in full agreement with Mr Anderson's identification of submissions which open up scope for using this terminology for amendment to reflect the identification of lands sought to be used by Kāi Tahu to meet their customary and social aspirations, as well as their economic ones.

42. We also record our agreement both with Kāi Tahu's planner and ORC's counsel that the areas of Māori land will be limited, but if at district plan level it was seen as of assistance to identify them, then that was the appropriate scale at which to address the matter. Despite the concerns expressed by Dunedin City Council's planner Mr Freeland, on the evidence we heard as to the small scale of Māori land ownership in Otago, it is not viewed as a regional scale issue by us. We agree with the Reply Report recommendation in that regard.

2.2.3 SILNA land

43. This issue is integrally part of the preceding discussion. The SILNA lands have had a tortuous path described by the Waitangi Tribunal in one report (WAI27) as a 'cruel-hoax' – the lands involved being particularly poor quality and remote to access. Originally intended by the Crown to be available for other South Island landless iwi members, those areas now remaining in Kāi Tahu hands, or open to being so by future vesting order were always ancestral lands of Kāi Tahu. They were originally gained by the Crown in a series of transactions which have also been acknowledged both by the Waitangi Tribunal and by Parliament in the Ngai Tahu Claims Settlement Act 1998 as having been acquired in breach of the Treaty.

44. We accordingly regard them as being lands which should fall within MW-P4. No further amendments are required to achieve that outcome than those recommended in the 10 October 2023 version. Out of caution, we have recommended the inclusion of SILNA lands at clause 7(c) of the definition of Māori lands.

2.2.4 Aquaculture

45. Two new proposed sub-clauses as policy MW-P2(8A) and method MW-M5(3A) have been sought by Kāi Tahu. Those provisions read after relevant introductory wording as follows:

> **MW-P2 – Treaty principles**
>
> *Local authorities* exercise their functions and powers in accordance with <u>the principles of Te Tiriti o Waitangi</u> ~~Treaty principles,~~[1] by:

[1] *00226.046 Kāi Tahu ki Otago*

…

(8A) *regional plans* and *district plans* recognising and providing for aquaculture settlement outcomes identified under the Māori Commercial Aquaculture Claims Settlement Act 2004, [2] and …

MW-M5 – Regional plans[3] and district plans

Local authorities must amend their *regional plans*[4] and *district plans* to:

…

(3A) provide for the outcomes of settlements under the Māori Commercial Claims Aquaculture Settlement Act 2004.

46. The final recommended version of the PORPS dated 10 October 2023 recommends these two provisions be adopted. In this manner Kāi Tahu seek provisions requiring regional plans to recognise and provide for aquaculture settlement outcomes under the Māori Commercial Aquaculture Claims Settlement Act 2004.

47. As counsel for ORC has pointed out to us there is no mandatory statutory obligation upon a regional council to do so either in its policy statement or in its Regional Coastal Plan. However, there is the ability to do so.

48. The Panel has heard evidence that aquaculture space settlements are of course desired by Kāi Tahu and that space will be sought to be set aside in RMA terms to enable settlement agreements to be effectively implemented. The Panel is satisfied that it is in accord with both s.6(e) considerations and s.8 as to Treaty principles for these provisions to be included in the PORPS. The only change we have made from that sought is to delete reference to district plans as the aquaculture space will be in a regional coastal plan not a district plan.

2.2.4.1 Recommendation

49. We accordingly recommend that the PORPS is amended to include as MW-P2 and MW-M5 respectively the following sub-clauses:

MW-P2 – Treaty principles

(9) *regional plans* recognising and providing for aquaculture settlement outcomes identified under the Māori Commercial Aquaculture Claims Settlement Act 2004.[5]

MW-M5 – *Regional plans* and *district plans*

(4) provide for the outcomes of settlements under the Māori Commercial Claims Aquaculture Settlement Act 2004.

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[2] *00234.008 Te Rūnanga o Ngāi Tahu*
[3] *Clause 16(2), Schedule 1, RMA*
[4] *Clause 16(2), Schedule 1, RMA*
[5] *00234.008 Te Rūnanga o Ngāi Tahu*

2.2.5 MW-M4 – Introductory Words

50. In the final 10 October 2023 recommended version of the PORPS the following wording was recommended for MW-M4:

> **MW-M4 – Kāi Tahu rakatirataka ~~involvement in resource management~~**[6]
>
> *Local authorities* must facilitate Kāi Tahu involvement in resource management (including decision making), to the extent *mana whenua* consider themselves able to accommodate,[7] by:
>
> (1) ~~including accredited Kāi Tahu commissioners~~ including accredited commissioners approved or nominated by Kāi Tahu[8] on hearing panels for *resource consent* applications, notices of requirements~~,~~[9] plan changes or plans where Kāi Tahu values may be affected,
>
> (2) resourcing Kāi Tahu participation in resource management decision making, including funding,
>
> (3) joint management agreements and full or partial transfers of functions, duties or powers from *local authorities* to iwi authorities in accordance with section 33 of the RMA ~~1991~~,[10] and
>
> (4) entering into a Mana Whakahono ā Rohe with one or more iwi authorities.

51. The original introductory wording recommended in the s.42A report suggested terminology of "to the extent desired by mana whenua, including by…". Concerns were expressed that the terminology conveyed an impression Kāi Tahu could control the local authority decision-making process.

We agree with the final recommended version because as we understood matters the concern that terminology was intended to address was to avoid Kāi Tahu entities becoming swamped by RMA processes which they might be unable to accommodate.

2.2.5.1 Recommendation

52. We recommend the amendment of the opening words of MW-M4 to read:

> **MW-M4 – Kāi Tahu rakatirataka ~~involvement in resource management~~**[11]
>
> *Local authorities* must facilitate Kāi Tahu involvement in resource management (including decision making), to the extent *mana whenua* consider themselves able to accommodate,[12] by: ….

[6] *00226.052 Kāi Tahu ki Otago*
[7] *00223.034 Ngāi Tahu ki Murihiku*
[8] *Clause 16(2), Schedule 1, Resource Management Act 1991.*
[9] *00223.034 Ngāi Tahu ki Murihiku*
[10] *Clause 16(2), Schedule 1, RMA*
[11] *00226.052 Kāi Tahu ki Otago*
[12] *00223.034 Ngāi Tahu ki Murihiku*

2.2.6 MW-M4(1) – bias

53. Another matter which arose out of MW-M4 was the provision in sub-clause (1) which as notified reads as follows:

> (1) including accredited Kāi Tahu commissioners on hearing panels for *resource consent* applications, notices of requirement~~s~~, plan changes or plans where Kāi Tahu values may be affected,

54. The Panel was concerned that such a provision had all the hallmarks of apparent bias being possible whenever a Kāi Tahu interest was at stake. It was explained to the Panel that was not the intent but rather that Kāi Tahu have the ability to engage in decision-making by nominating accredited commissioners. If Kāi Tahu were involved in the process such Commissioners could be impartial.

55. The response by October 2023 in the final recommended version stage was that the report writer and counsel for ORC recommended an amended version as follows:

> (1) ~~including accredited Kāi Tahu commissioners~~ including accredited commissioners approved or nominated by Kāi Tahu on hearing panels for *resource consent* applications, notices of requirement~~s~~, plan changes or plans where Kāi Tahu values may be affected, …

56. The Panel agrees that the amended wording resolves the concerns it had but for the sake of certainty the word 'commissioner' should be in the singular and the word 'independent' should be added because of the perception effect of this clause referring to matters where 'Kāi Tahu values' may be affected.

2.2.6.1 Recommendation

57. We recommend that sub-clause (1) of MW-M4 is amended to read:

> (1) ~~including accredited Kāi Tahu commissioners~~ including an independent accredited commissioner approved or nominated by Kāi Tahu on hearing panels for *resource consent* applications, notices of requirement~~s~~, plan changes or plans where Kāi Tahu values may be affected, …

2.2.7 MW-M4(2) – lawfulness as to proposed funding for Kāi Tahu

58. Both as notified and as finally recommended in the 10 October 2023 version of MW-M4(2) this provision stated:

> **MW-M4 – Kāi Tahu rakatirataka ~~involvement in resource management~~**
>
> *Local authorities* must facilitate Kāi Tahu involvement in resource management (including decision making), to the extent *mana whenua* consider themselves able to accommodate, by:
>
> …
>
> (2) resourcing Kāi Tahu participation in resource management decision making, including funding,
>
> ….

59. The issue was initially raised by some submitters, and the Panel too, as to the validity and reasonableness of such a mandatory funding provision for Kāi Tahu when other funding processes under local government legislation appeared to control those sorts of expenditures.

60. At closing stage in May 2023 ORC still stood by the provision, but then a series of appeals involving Te Whānau a Kai and Gisborne District Council resulted in a ruling by the Court of Appeal that it was unlawful to circumvent or cut across the Local Government Act's framework for decisions about both funding and expenditure. That litigation culminated in the dismissal of an application for leave to appeal reported as *Te Whānau a Kai v. Gisborne District Council* 2023 NZSC 77.

61. ORC's counsel Mr Logan then filed a helpful memorandum for the Panel drawing attention to various provisions in the PORPS which would require reconsideration as a result of the Court of Appeal's decision in that case. One of those provisions was MW-M4(2) which Mr Logan advised could "no longer stand". That Memorandum was agreed with by memoranda filed by counsel for Kāi Tahu on 25 July 2023 and counsel for Dunedin City Council on 2 August 2023.

62. In the Memorandum by Counsel for Kāi Tahu Mr Cameron suggested change to MW-P4(2) to read as follows:

> … (2) implementing actions to foster the development of mana whenua capacity to participate in resource management decision making,…

63. Mr Garbett as counsel for DCC accepted that change was appropriate and by memorandum of 25 September 2023 Mr Logan for ORC advised it too had no objection to that wording.

64. In the Panel's view, as the DCC submission on the provision challenged its validity, that opened scope for an amendment addressing that concern. The amendment proposed seems to accord with the overall sound working relationship between those two authorities and Kāi Tahu rūnaka who will come under pressure in meeting their kaitiaki and rakatirataka responsibilities – and Mr Garbett in his memorandum had indicated a funding agreement was in place for DCC to assist in that regard anyway.

2.2.7.1 Recommendation

65. That MW-M4 be amended as follows:

(2) <u>implementing actions to foster the development of mana whenua capacity to participate</u> ~~resourcing Kāi Tahu participation~~ in resource management decision making, ~~including funding~~,

3. Resource Management Issues of Significance to Iwi Authorities In the Region Chapter (RMIA)

66. The RMA provides as follows in s.62(1)(b):

> ***62.*** **Contents of regional policy statements**
>
> *(1) A regional policy statement must state—*
>
> *(a) the significant resource management issues for the region; and*
>
> *(b) the resource management issues of significance to iwi authorities in the region; and …*

67. At paragraph 554 of the original s.42A report the following was stated:

> 554. Iwi consultancies Aukaha and Te Ao Mārama Incorporated (as agents of, and in consultation with, Otago's mana whenua) have led preparation of the corresponding section of the PORPS 2021. The issues presented represent Kāi Tahu's key concerns with resource management in Otago.

68. As a consequence of the fact that Kāi Tahu led the development of this chapter, submissions by Kāi Tahu agencies were not major and in general constituted almost a process of 'polishing' the provisions Kāi Tahu had already shaped in the preparation stage. That is unsurprising, because as Mr Adams the s.42A report writer pointed out:

> 553. A regional policy statement must state the resource management issues of significance to iwi authorities in the region. Only mana whenua can make such statements with authenticity in Otago.

69. That reality, and the limited room for major submission points to be raised by those other than iwi authorities in relation to issues of significance to iwi authorities, is reflected by Mr Adams' repetitive observation in recommending the rejection of various limited submission points seeking amendment to particular provisions, that the notified provision is "*a direct expression of iwi concerns.*"

70. In the closing submissions by ORC's counsel in reply, no major outstanding legal issues were identified as needing to be addressed in relation to this chapter. In the s.42A reply report some very limited further planning wording aspects were addressed which Kāi Tahu had requested. The Panel agree with the s.42A report on all those issues so no further analysis is required here.

Section 4: Significant resource management issues for the region (SRMR)

1. Introduction

1. This section sets out the Panel's analysis and recommendations in relation to the non-Freshwater provisions for Significant resource management issues for the region. The analysis and recommendations for the Freshwater SRMR provisions can be found in Appendix Two.

2. New Issue statements

2. A number of submitters sought the introduction of a number of new significant resource management issues into the pORPS. Because Ms Todd, the s42A report author, did not recommend the addition of any new SRMRs, these issues were discussed at length at the hearing. While there was a high degree of commonality expressed by the various submitters, a range of different forms of wording were advanced, with most being relatively specific to the respective concern of each submitter. In response to this, the Panel issued Minute 6 which directed caucusing of planning experts for those submitters interested in pursuing such relief. The Panel considered that its deliberations would be assisted by any proposed wording for a new issue or issues that submitters may be able to agree upon.

3. Caucusing was undertaken by two separate groups of planning experts in March 2023, and as a result submitters are now seeking two new significant resource management issues for:

   a. Infrastructure; and

   b. Users of natural and physical resources, including primary production, mineral and aggregate extraction, tourism and industrial activities.

4. The parties who participated in the caucusing were identified in Ms Todd's reply report, so we do not repeat that here. The parties involved in the infrastructure caucusing prepared a Joint Witness Statement ("JWS for Infrastructure") which included the proposed wording for the new significant resource management issue. The following matters were agreed by parties at caucusing:

   i. The issue should cover infrastructure in general (as defined in the pORPS and RMA), rather than Regionally Significant Infrastructure, given that the scope of the latter is yet to be determined and any distinction can be addressed at the objective and policy level in the ORPS.

   ii. The purpose of an infrastructure issue is to acknowledge that because of functional needs and operational needs, it may not be possible to avoid sensitive environments in both rural and urban contexts.

   iii. Infrastructure can both benefit and adversely affect Māori. The experts considered that Kāi Tahu is most appropriately placed to identify how infrastructure may affect their well-being and aspirations should they wish to do so and noted that any drafting resulting from the caucusing would be circulated to Kāi Tahu for comment (Minute 8).

5. The parties involved in the more general 'use of resources' SRMR also prepared a Joint Witness Statement ("JWS for resource users") which included proposed wording for a new significant resource management issue for users of natural and physical resources. While Fish and Game, Realnz and NZSki were a part of both caucusing groups, they still sought the inclusion of a further issue that stated the "social, cultural and economic well-being of Otago's communities depends on use and development of natural and physical resources."

6. After the caucusing occurred, all other submitters were given an opportunity to respond to the proposed new issue(s) by 21 April 2023. The only response received was from Mr Barr for QLDC. He agreed that there should be a dedicated issue for infrastructure in the SRMR chapter of the pORPS but suggested a range of amendments.

7. In her reply, Ms Todd considered the appropriateness of the two new SRMRs. She advised that "*after considering the evidence provided on this matter, discussion at the hearing, and the guidance on the Quality Planning website*", that *"new significant resource management issues have been identified for the Otago region."* In particular, she noted that:

    a. *The proposed new issues are consistent with the criteria on the Quality Planning website because:*

        i. *The issues are about sustainable management of natural and physical resources, and the conflict between allowing the use of these resources to provide for the well-being of the community, while managing the adverse effects on these resources. In my opinion this is an issue that must be addressed to promote the purpose of the RMA; and*

        ii. *The issues concern a conflict between users of resources, and effects on the environment.*

    b. *A number of submitters participated in the caucusing and consider that these issues are significant for the region. I have considered the evidence submitted on behalf of these parties, and the drafting of the proposed new issues. Having considered these matters, and the importance of infrastructure, primary production, tourism and industry in the region, I agree that a significant resource management issue (or issues) has been identified for the region.*

8. However, Ms Todd noted in her reply report that *"the underlying issue is essentially the same across the three proposals: the conflict between using natural and physical resources, and the need to manage the adverse effects of these uses on the environment."* As a consequence of that position, she recommended one combined SRMR for the region, based on the JWS for resource users SRMR.

9. Having reviewed the three options proposed by the submitters (which included the option of Fish and Game, Realnz and NZSki), we found ourselves in agreement with Ms Todd that the issues are similar and minor changes could encompass all matters of concern. Hence, we have accepted Ms Todd's proposed SRMR as mostly appropriate, subject to the reintroduction of the JWS for resource users paragraph regarding the benefits that activities can have on the natural environment, and the direct reference to the role infrastructure will play in addressing climate address found in the infrastructure JWS issue.

2.1. Recommendation

10. The Panel recommends the addition of a new significant resource management issue for the region:

SRMR-I10A – the social, cultural and economic well-being of Otago's communities depends on the use and development of *natural and physical resources*, but that use and development can compromise or conflict with the achievement of *environmental outcomes*

Statement

The ability to access and use *natural and physical resources*, including for *infrastructure*, *primary production*, *mineral* and aggregate extraction, tourism and *industrial activities*, is essential for the social, cultural and economic well-being of the region. Access to, and the ability to use, *natural and physical resources* can be impacted by regulatory changes, incompatible *land* uses, *natural hazards* and *climate change.* Equally, the use and development of the region's *natural and physical resources* can have adverse *effects* on the *environment* which need to be appropriately managed.

Context

The well-being of Otago's communities relies on the ability to access and use the region's *natural and physical resources*. The quality of these resources and the ability to access them has a direct bearing on the well-being of people and communities in the region.

Failing to plan and provide for activities that contribute to the regional economy can lead to adverse socioeconomic consequences. Conversely, failure of activities to sustainably manage their impact on *natural and physical resources* can also lead to poor socioeconomic outcomes.

Appropriate access to and use of *natural and physical resources* needs a planning framework that recognises and provides for the essential operational, locational and functional requirements of activities while managing the adverse *effects* of these activities. The ongoing *effects* of *climate change* (addressed elsewhere in the Issues section) will have an ongoing impact on the operation of activities.

Impact snapshot

Environmental

The use of *natural and physical resources* can have adverse *effects* on the *environment*, which need to be appropriately managed to avoid, remedy or mitigate the adverse *effects*. Loss or degradation of resources can diminish their intrinsic values. Some of Otago's resources are nationally or regionally important for their natural values and economic potential and so warrant careful management.

However, it is recognised that the natural *environment* can benefit as activities change how they interact with, access and use natural resources. Activities that use *natural*

and physical resources can achieve positive *environmental outcomes*, for example riparian planting, habitat restoration and enhancement, public access, and *pest* control activities. This can be as mitigation or compensation for the *effects* of activities or as contributions from economically sustainable activities in the region. Some activities, for example renewable electricity generation and other infrastructure, will have a significant role to play in addressing climate change.

Economic

Activities that rely on *natural and physical resources* generate direct and indirect economic benefits; therefore, their ability to operate, or to improve their operational efficiency, affects the economy of the region.

The ability to access and use *natural and physical resources* may impact the ability of activities to optimise the use of investments and assets and realise their potential economic value.

Activities that rely on *natural and physical resources* also rely on clear regulatory settings to inform investment decision-making about the use and development of *natural and physical resources*.

Social

The ability for activities to access and use *natural and physical resources* provides for the social and cultural well-being of people and communities including by supporting employment, livability, recreation, resilience, food security and investment into communities. Inappropriately located *subdivision*, use and development can increase the potential for harm to human health arising from incompatible activities locating in close proximity to each other.

3. SRMR – Introductory section

3.1. Discussion

11. The introduction to the SRMR chapter was discussed in section 3.8.3 of Ms Todd's s42A report. Several submissions were made on this section of the SRMR chapter. Ms Todd made some minor changes in response, but several submitters pursued other changes at the hearing which she addressed in her reply.

12. In reassessing the Transpower submission, Ms Todd agreed that identifying issues only as they relate to natural resources is inappropriately narrow and inconsistent with the purpose of the RMA, and sections 59 and 30(1) of the RMA. As a consequence, she recommended adopting the amendments suggested by Ms McLeod in her EIC. We agree this appropriate and have adopted Ms Todd's position accordingly.

13. However, we did not believe the amendments made in response to the Fish and Game, Realnz and NZSki submission appropriately reflect the new issue recommended, which does in fact recognise that social and economic well-being depends on resource use. We have made a change to reflect that, which also addressed the Federated Farmers submission.

14. With respect to Horticulture NZ submission to add 'food production' to the sentence in the 2nd paragraph that deals with 'social and cultural perspective', Ms Todd stated that she:

> *"…did not consider that this level of detail is necessary for the issues statement. It is covered more generally by the reference to agricultural industries in the statement about impacts from an economic perspective. I have not changed my opinion on this."*

15. However, we agree with HortNZ that food production is not just an economic resource issue but also an essential part of community well-being. As proposed, the HortNZ addition does appear out of place in this sentence because the provision does not reference 'health' and unfortunately, that part of s5 of the Act does not appear in the introductory text.

16. In response to the Yellow-eyed Penguin Trust, who sought the inclusion of 'health' benefits (as well as enabling social, economic and cultural well-being) within the introductory text, Ms Todd stated that 'health' is *"covered more generally by the existing text".* We disagree with that and consider the lack of direct reference to that part of s5 of the RMA to be an oversight.

17. As a consequence, we have accepted the submission of the Yellow-eyed Penguin Trust and that of HortNZ as they more accurately reflect reality.

3.1.1. Recommendation

18. The Panel recommends the following amendments to the first three paragraphs of the Introduction section as follows:

a. Amend paragraphs one and two:

> Otago's people and communities rely on the *natural and physical resources* that Otago's *environment* provides to enable their social, economic, and cultural well-being. Natural resources include *freshwater* (i.e. surface and groundwater, *wetlands*, estuaries), *land* and soil, terrestrial, and *freshwater* ecosystems, coastal and marine ecosystems, and air, landscapes, vegetation and natural landforms. Physical resources include *infrastructure*, *buildings* and facilities.
>
> From an economic perspective *natural and physical resources* support, and are impacted by, agricultural industries (e.g. grazing, cropping, horticulture, viticulture), urban development, industrial development, *infrastructure*, energy generation, transport, marine industries (fishing and aquaculture), tourism and *mineral* extraction. From a social, health, and cultural perspective *natural and physical resources* support and are impacted by food production, recreation, housing, and cultural activities ~~(Refer Figure 2)~~.
>
> ~~*Figure 2 - Relationships between natural resources, resource use and strategies*~~

b. Delete Figure 2.

c. Amend paragraph three:

> This RPS identifies the ~~eleven~~ twelve most significant issues impacting the Otago region. Issues firstly considered include *natural hazards*, *climate change*, *pest* species, *water* quantity and quality, and *biodiversity* loss, collectively the "natural asset-based issues". Two "place-based issues" of regional significance are then

addressed - being Otago's coast and Otago's *lake* areas. The use and development of resources is also recognised as being essential to the wellbeing of the community, while acknowledging that this can lead to conflicts when managing the adverse effects of this use. Finally, issues of economic and domestic pressures, cumulative impacts and *resilience* are considered.

4. SRMR-I1 – *Natural hazards* pose a *risk* to many Otago communities

4.1. Discussion

19. SRMR-I1 considers the risks and issues associated with natural hazards in Otago and the potential impacts of natural hazards on community, property, infrastructure and the wider environment. Eighteen submissions were received on this SRMR-I1, seeking a broad range of amendments.

20. SRMR-I1 was discussed in section 3.8.4 of Ms Todd's s42A report, revisited in her Supplementary Evidence 05A with regard to the ability of infrastructure and distribution networks to respond to natural hazard events, and further discussed in her reply report. We have reviewed her responses to the submissions, and the recommendations that have flowed from that. The Panel did not have any concerns with the amendments recommended by the s.42A reports for the reasons set out in those reports and was not persuaded at the hearings that any change to the s.42A final position was required.

5. SRMR-I2 – *Climate change* is likely to impact our economy and environment

5.1. Discussion

21. SRMR-I2 considers the potential impacts of climate change on the Otago Region. The issue addresses the tensions and risks climate change poses to environmental, economic, and social well-being. A total of 28 submissions were received, including one from CIAL which requests that SRMR-I2 be retained as notified. The remaining submissions seek a range of general and specific amendments.

22. Ms Todd discussed SRMR-I2 in section 3.8.5 of the s42A report, with her analysis in paragraphs [145] to [167]. She made a number of recommendations which we generally consider appropriate, with a number of exceptions that we discuss below.

23. In relation to HortNZ's request for amendment to the first paragraph to acknowledge the impacts of climate change on food production systems and related food supply and food security needs, Ms Todd considers that this "*is covered more generally in the Statement by the sentence acknowledging that climate change may affect the number and types of crops and animals that the land can sustain.*" We disagree. The current statement only notes that there will be a change in what the land can sustain. It does not identify one of the wider implications of that, which is the impact this may have on food supply and food security. Hence, we have accepted HortNZ's submission on this.

24. Ms Hunter, for Contact, sought the addition of two paragraphs that acknowledge the critical role that renewable electricity generation has to play in New Zealand's decarbonisation requirement. In response, Ms Todd did not agree that it is necessary to discuss the role of Otago's renewable energy facilities in achieving New Zealand's climate change and decarbonisation requirements. In her view, the suggested amendments go into a much greater level of detail about the response to climate change than is necessary to outline the issue.

25. While we agree with Ms Todd that the suggested amendments are possibly too detailed for inclusion here, we do agree with Ms Hunter's sentiment. We believe SRMR can and should state what the implications of the issue will be. In this case, it is likely to mean that human intervention will be required and that there will be effects arising from that. We have recommended amendments accordingly.

26. With respect to the change made in respect to the Fish and Game submission, we have deleted the last part of Ms Todd's addition, where it stated it 'may also exacerbate the original risk', as that was not sought by the submitters, and we heard no evidence on that. Likewise, with the amendment in response to QLDC request, we have removed reference to the word 'adversely', which was not sought by the submitter. While we accept climate change may impact on visual and recreation values of Otago landscape, it does not necessarily follow that they will all be negative.

27. We also agree with the Trojan and Wayfare submission that the notified text needs amendment in relation to the impact on skiing to recognise the reality of the situation.

5.2. Recommendation

28. The Panel recommends the following amendments:

a. Amend the title of SRMR-I2 as follows:
SRMR-I2 – Climate change will ~~is likely to~~ impact our economy and environment.

b. In the Statement, amend the third sentence as follows:

This will be compounded by stronger winds, increased temperatures and longer dry periods, which may affect the number and types of crops and animals that the land can sustain, food production systems and related food supply and food security needs, and the potential for renewable electricity generation.

c. Add the following after the first paragraph in the Statement:

Our responses to climate change, whether that be mitigation or adaptation, will also impact on our economy and environment. An example of this will be the need to protect and maximise existing renewable electricity generation activities in the region, as well as providing for the development of new renewable electricity generation activities.

d. In the Context, add the following paragraph to the end of the subsection:

Rainfall and temperature change may result in drier soils and changes to river flow (low flow and floods), as well as increased occurrence of slips/landslides. Sea level rise will have impacts on coastal communities, infrastructure and habitats, while the risk of wildfire will also increase. Changing climate also risks increased biosecurity issues of

increased plant, fungal and animal pests and diseases.

e. In the Impact snapshot, delete “OCCRA report”,

f. In the Environmental impact snapshot:

i. Remove the word ‘native’ from the first sentence as follows:

For terrestrial ~~native~~ ecosystems and species, higher frequency of severe events (e.g. high/low temperatures, intense rainfall, drought, fire weather) could reduce *resilience* of ~~native~~ terrestrial ecosystems and species over time with adverse impacts on biodiversity.

ii. Add the following sentence to the end of the subsection:

Human adaptation to climate change, such as building or expanding dams or flood protection schemes, will be necessary and may give rise to adverse impacts on ecosystems, in addition to those imposed by climate change itself.

g. In the ‘regional industry’ section, amend the last paragraph as follows:

~~For~~ Some tourism activities may be affected. ~~there will be negative impacts on skiing where~~ For example, the number of snow days experienced annually could decrease by as much as 30-40 days in some parts of the region. This reduction in natural snowfall will mean that ski fields will be more reliant on snowmaking. The duration of snow cover is also likely to decrease, particularly at lower elevations. This will also lead to reduced summer waterflows.

h. In the Social impact snapshot, add the following sentence to the end of the first paragraph:

Additionally, the visual and recreational values of Otago’s landscape may be impacted on by the effects of climate change.

6. SRMR-I3 – *Pest* species pose an ongoing threat to indigenous *biodiversity*, economic activities and landscapes

6.1. Discussion

29. SRMR-I3 considers pest species in Otago and the significant impact these species have on the region’s environment, economy and social wellbeing. Twenty-one submissions were received on SRMR-I3, seeking a broad range of amendments.

30. SRMR-I3 was discussed in section 3.8.6 of Ms Todd’s s42A report, and further discussed in her reply report. We have reviewed her responses to the submissions, and the recommendations that have flowed from that. We generally agree with her recommendations with the following exceptions.

31. Horticulture NZ and OWRUG sought an amendment to the Statement to recognise that climate change will potentially exacerbate the impacts of existing pest species and provide opportunities for new pest species to establish, potentially threatening food production and supply. Similarly, the Yellow-eyed Penguin Trust sought that the increased risks of pests and

diseases due to climate change be acknowledged, particularly with respect to declining endemic species.

32. Ms Todd considers that climate change is covered in SRMR-I2 and that this amendment is therefore not necessary. We respectfully disagree and consider that recognition of the potential impacts of climate change on the types and density of pest species is an important matter for SRMR-I3. Climate change is recognised in other SRMRs, for example SRMR-I1 where the context states that "natural hazards may be exacerbated by climate change…". We recommend that an additional sentence relating to climate change be added to the Statement that acknowledges the potential impact of climate change.

6.2. Recommendation

33. The Panel recommends the following amendment to SRMR-I3:

a. Add the following sentence to the end of the Statement of SRMR-I3 as follows:

Climate change may compound the impacts of existing pest species and provide opportunities for new pest species to establish.

7. SRMR-I4 – Poorly managed urban and residential growth affects productive *land*, treasured natural assets, *infrastructure* and community well-being

7.1. Discussion

34. SRMR-I4 considers the impacts of poorly managed urban and residential growth on environmental, economic, and social well-being. A total of 20 submissions were received on this SRMR-I4, seeking a broad range of amendments.

35. SRMR-I4 was discussed in section 3.8.7 of Ms Todd's s42A report, with a number of outstanding matters discussed in her reply report. We have reviewed her responses to the submissions, and the recommendations that have flowed from that, and are in agreement with her final position on this SRMR.

7.2. Recommendation

36. The Panel recommends the following amendments to SRMR-I4:

a. Amend the Title:
SRMR–I4 – Poorly managed urban and residential growth affects productive *land*, treasured natural assets, *rural industry*, *infrastructure* and community well-being

b. Amend the Statement as follows:

Natural resources used for urban development are permanently transformed – with the opportunity cost of removing urban activity being too high for land to revert to productive uses. Frequently, places that are attractive for urban growth also have landscape and productive values all of which must be balanced and where possible protected. The growth

of ~~Wanaka~~ Wānaka and Queenstown is changing the natural landscape. Mosgiel's and Cromwell's growth is occurring on some of Otago's most highly productive soil, which removes the option for agriculture. Towns like Arrowtown, Clyde and Milton experience poor air quality in winter, while experiencing pressure to grow.

c. In the Context:

   i. Amend the fourth paragraph as follows:

   Urban growth, especially if it exceeds infrastructure capacity (either through sheer pace and scale or by lack of planning) or if it occurs in a way or at a rate that mean that appropriate infrastructure is not provided, is lagging or is inefficient, can result in adverse impacts on the environment, existing residents, business and wider society. ~~Quality urban environments are those that maximise the positive aspects of urban areas and minimise the negative.~~

   ii. Add the following paragraph to the end of the Context:

   In addition, the productive *land* in Otago contributes to the social and economic well-being of the community through production of food and other rural production-based products. In some parts of Otago, *land* and soil resources are particularly valuable for food production. However, where development occurs in a place or manner that removes or reduces the potential to use productive *land*, including through *reverse sensitivity effects*, the ability of *land* to support *primary production* is compromised.

d. Amend the Environmental impact snapshot:

Urban areas and associated concentration of human activity result in adverse impacts on the natural *environment*, as a result of *land* consumption, landscape, waterway and vegetation modification for housing, industry, transport of goods and people and recreation areas, the diversion and use of *water*, and *waste* disposal and effluent and pollution *discharges* to air, *land* and *water*. Urban or rural lifestyle expansion can remove *land* and soil resources from productive uses, including for the production of food.[56] All of these can also impact *mana whenua* values. These impacts can also result in loss or impediment of access to important resources including significant *biodiversity* or natural features and landscapes. Poorly managed urban growth can lead to additional carbon emissions, this can create tensions between the need to increase residential housing stock and the need to meet carbon reduction targets.

Urban ~~development~~ growth within *rural areas* can also lead to reverse- sensitivity *effects* on existing *primary production* activities and related rural based activities, because urban activities can be sensitive to the *effects* generated by *primary production* activities and related rural based activities. ~~whereby traditional methods of *pest* management or the undertaking of rural production activities cannot be deployed due the proximity of urban populations and the potential for adverse impacts on those populations~~.

…

e. Amend the Economic impact snapshot:

While potentially providing short term commercial returns, poorly managed urban growth and development may result in long term impacts including:

- the loss of *land* for *primary production* activities ~~productive *land*~~ (either directly though building on it, or indirectly though *reverse sensitivity effects*);
- the consequences of previous decisions (low density development, including rural ~~residential~~ lifestyle, in the short term can preclude higher density development in the medium to longer term);
- increased capital and operational costs for *infrastructure* which can foreclose other more suitable investments or spending, increased costs from less efficient spatial arrangements (such as increased transportation and *infrastructure* costs to both users and operators), and loss of valued natural capital and future opportunities; and
- housing affordability ~~can be~~ challenges are present in the region and are negatively affected by urban growth where demand outpaces supply.
- conflict arising from the location of incompatible activities within proximity of each other, including the potential for *reverse sensitivity effects* on the continued operation and growth of rural based activities.

  ~~In Otago, housing has been more affordable for homeowners than the NZ average in recent years, however house value growth has been higher in Otago (12.6% per annum) than the NZ average (7%) since 2017.~~

  …

f. Amend the third paragraph of the Social impact snapshot:

   Transportation of goods and people between and within urban areas can also generate impacts on humans. For example, increased traffic congestion and lack of safe and attractive alternatives within urban areas impacts people and businesses living near to high volume traffic routes, resulting in lost time for family and other activities for those who use them, and ~~*road* fatalities on rural highways~~ deaths and serious injuries on the transport network.

8. SRMR-I7 – Rich and varied *biodiversity* has been lost or degraded due to human activities and the presence of *pests* and predators

8.1. Discussion

37. SRMR-I7 considers the issues associated with the loss of biodiversity in Otago, including habitat loss, land use change, vegetation clearance and invasive species. It addresses marine, freshwater and terrestrial environments. Twenty-four submissions were received on SRMR-I7, seeking a broad range of amendments.

38. SRMR-I7 was discussed in section 3.8.10 of Ms Todd's s42A report and further discussed in her reply report. We have reviewed her responses to the submissions, and the recommendations that have flowed from that. The Panel did not have any concerns with the amendments recommended by the s.42A reports for the reasons set out in those reports and was not persuaded at the hearings that any change to the s.42A final position was required.

9. SMRM-I8 – Otago's coast is a rich natural, cultural and economic resource that is under threat from a range of terrestrial and marine activities.

39. Only 10 submissions were received on SRMR – I8. With two of those supporting its retention unchanged, that left only 8 submissions seeking change. All of those submissions only sought limited changes to the Statement section following the issue and the accompanying Context section, but not to the issue wording itself.

40. The Panel did not have any concerns with the amendments recommended by the s.42A reports for the reasons set out in those reports and the Panel was not persuaded at the hearings that any change to the s.42A final position was required.

10. SRMR-I10 – Economic and domestic activities in Otago use natural resources but do not always properly account for the environmental stresses or the future impacts they cause

10.1. Discussion

41. SRMR-I10 considers the issues associated with economic and domestic activities on natural resources, such as development, water abstraction, discharges, primary production, transport and tourism. A total of 29 submissions were received in relation to this SRMR, including one from Beef+ Lamb and DINZ seeking it to be retained as notified. The remaining submissions seek a broad range of amendments across the whole of SRMR-I10.

42. Ms Todd addresses SRMR-I10 in section 3.8.13 of her s42A report and again in her reply report. She recommended a small number of changes, noting that the concerns expressed by some submitters around the lack of recognition of the importance of various activities are better dealt with by the new significant resource management issue for the region. We agree with that. Had that new issue not been introduced, the Panel would have made significant changes to this issue, given how negatively it is expressed.

43. However, we do acknowledge that this issue is in fact about activities not always accounting for the effects they may cause. With that in mind, we agree with the forest companies' submission that the words 'poorly managed' should be included in the statement.

44. We also had some sympathy for the submissions of Trojan and Wayfare who consider that the use of the term 'social licence' is not a good fit in the context of an RMA policy document. They question what it means and how its use is justified. We too do not understand the relevance of that term in an RMA document. As a consequence, we accept their opposition to this provision as a whole for the reasons they stated but prefer our amendments to theirs as it better addresses the concern.

10.2. Recommendation

45. The Panel recommends the following amendments to SRMR-I10:

a. Amend the Statement as follows:

Sediment from poorly managed development and ~~forestry~~ *primary production* activities flows into streams and builds up in the coastal *environment*, smothering kelp forests and affecting rich underwater habitats. *Water* abstraction and *wastewater* and *stormwater discharges* adversely affect the natural *environment*, cultural and *amenity values*, and recreation. Agriculture~~, fishing~~ and *minerals* extraction support employment and economic well-being but also change landscapes and habitats. Otago's port moves freight to and from Otago and Southland, but operates alongside sensitive *environments*, including the Aramoana saltmarsh. Tourism and recreation, which relies on the *environment*, can also put pressure on natural *environments*.

b. Amend the 'Social' subsection as follows:

Damage to or loss of natural features and landscapes compromises *amenity values.* Failure of business to sustainably manage their impact on natural resources can also have social impacts. ~~compromise the social licence of a business sector to operate. This adversely impacts social capital (trust) and can create community division.~~ In extreme cases it can lead to ~~calls for~~ reduced access to resources.

11. SRMR – I11: Cumulative impacts and resilience – the environmental costs of our activities in Otago are adding up with tipping points potentially being reached

46. The issues related to the use of terminology such as 'limits' 'tipping points' and 'thresholds' were addressed in Section 1: Legal Issues of Appendix One. No further issues arise.

Section 5: Integrated Management (IM)

1. Introduction

1. The purpose of a regional policy statement is to provide an overview of the resource management issues of the region and the policies and methods to achieve integrated management of the natural and physical resources of the region. Integrated management is an approach to environmental management that seeks to manage resources together under one regime rather than creating silos by managing different areas, resources, or effects separately. The concept of integrated management is consistent with the Kāi Tahu understanding that all parts of the environment (te taiao) are interconnected, and that it is important to reflect this through holistic management. A holistic approach to managing te taiao must value all parts of the environment and recognise and reflect the interconnections between these components.

2. The National Planning Standards provide for (but do not require) an RPS to include a chapter on integrated management, within Part 2 – Resource Management Overview. This allows for provisions to be included that address integrated management of resources across domains and topics, and as such ORC has incorporated such a chapter. The pORPS 2019 has been criticised for providing limited direction on how integrated management is to be achieved, particularly in relation to providing specific direction on matters that cross domains and topics, such as freshwater management. The Council considered that including an integrated management chapter, as provided for by the National Planning Standards, would assist with ensure this regional policy statement is more explicit and direct in setting out how integrated management is expected to occur.

3. The *IM – Integrated management* chapter is to be read alongside all of the other chapters of the pORPS 2021. It directs how integrated management is to be achieved in the management of Otago's environment and provides specific direction on climate change adaptation and mitigation. It is intended that the provisions of this chapter will assist decision-makers to resolve tensions between provisions in other chapters of the pORPS.

4. The underlying principle expressed in s.59 of the RMA bears repetition at the start of this chapter consideration:

> ***59 Purpose of regional policy statements***
> *The purpose of a regional policy statement is to achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods <u>to achieve integrated management</u> of the natural and physical resources of the whole region.*

(our emphasis)

5. The topics addressed particularly in IM-P1 and IM-P2 as to the Integrated Approach and Decision Priorities respectively tended to dominate and permeate the whole of the hearings before us. The significance of that focus on the issue of prioritisation of 'protection' of natural resources is reflected in the lengthy discussion in the Legal Section in Appendix One of the differing views which we broadly termed as 'enabling' or 'protectionist' approaches.

6. We do not intend to repeat any of that legal section discussion in this chapter consideration and hence only where necessary will make reference to the findings made there.

7. The consideration of particularly IM-O1 and IM-03 and IM-P1, IM-P2 and IM-P14 in this chapter will accordingly be very limited.

8. In relation to the amendments we have suggested for those provisions, and for IM-P6, IM-P13, IM-P14 and IM-P15, there has been an underlying legal purpose. The 32AA assessment for those amendments, therefore, is that they all are intended to more accurately align the provisions involved with the purpose of the RMA in the manner directed by the Supreme Court's decisions in *NZ King Salmon*, *Save Our Sounds* and the *Port Otago* case.

2. IM-O1 and IM-O3

9. The notified versions of these two objectives were as follows:

IM–O1 – Long term vision

The management of natural and physical resources in Otago, by and for the people of Otago, including Kāi Tahu, and as expressed in all resource management plans and decision making, achieves healthy, resilient, and safeguarded natural systems, and the ecosystem services they offer, and supports the well-being of present and future generations, mō tātou, ā, mō kā uri ā muri ake nei.

IM–O3 – Environmentally sustainable impact

Otago's communities carry out their activities in a way that preserves environmental integrity, form, function, and resilience, so that the life-supporting capacities of air, water, soil, ecosystems, and indigenous biodiversity endure for future generations.

10. In essence the submissions on these objectives, as with those on IM-P1 and IM-P2, were primarily focussed on the prioritisation issues. The outcome of those considerations were affected by the Supreme Court decisions as discussed in the Legal Section of this report. The consequence is addressed in the finally recommended IM-P1 which recommended amalgamating IM-P1 and IM-P2 and creating a consent pathway utilising the 'structured analysis' approach applied by the Supreme Court in the *Port Otago* case.

11. There were some other changes which were consistent with that approach recommended by the final 10 October, 2023 reply report which we set out below:

IM-O1 – Long term vision (mō tātou, ā, mō kā uri ā muri ake nei)

The management of *natural and physical resources* ~~in Otago,~~ by and for the people of Otago, ~~including~~ in partnership with Kāi Tahu, ~~and as expressed in all resource management plans and decision making,~~ achieves a healthy~~,~~ and *resilient*~~, and safeguarded~~ natural ~~systems~~ *environment*, ~~and~~ including the ecosystem services ~~they offer~~ it provides, and supports the well-being of present and future generations~~, mō tātou, ā, mō kā uri ā muri ake nei~~.

IM-O3 – ~~Environmentally s~~Sustainable impact

Otago's communities ~~carry out their activities in a way~~ provide for their social, economic, and cultural well-being in ways that support or restore ~~preserves~~ environmental integrity, form, functioning, and *resilience*, so that the life-supporting capacities of air, *water*, *soil*, and ecosystems are safeguarded~~, and indigenous *biodiversity* endure~~ for future generations.

12. The Panel agrees with the changes recommended with only one change to IM-O3 to amend the phrase 'are safeguarded' to read 'are sustainably managed' to be consistent with the aim of ensuring there is not an implied prioritisation, and to be closely consistent with the s.5 RMA language.

2.1. Recommendation

13. As discussed above, the 10 October, 2023 version wording for IM-O1 is recommended to be accepted, but the wording for IM-O3 is recommended to be amended as follows:

IM-O1 – Long term vision (mō tātou, ā, mō kā uri ā muri ake nei)

The management of *natural and physical resources* ~~in Otago,~~ by and for the people of Otago, ~~including~~ in partnership with Kāi Tahu, ~~and as expressed in all resource management plans and decision making,~~ achieves a healthy~~,~~ and *resilient*~~, and safeguarded~~ natural ~~systems~~ *environment*, ~~and~~ including the ecosystem services ~~they offer~~ it provides, and supports the well-being of present and future generations~~, mō tātou, ā, mō kā uri ā muri ake nei~~.

IM-O3 – ~~Environmentally s~~Sustainable impact

Otago's communities ~~carry out their activities in a way~~ provide for their social, economic, and cultural well-being in ways that support or restore ~~preserves~~ environmental integrity, form, functioning, and *resilience*, so that the life-supporting capacities of air, *water*, *soil*, and ecosystems are ~~safeguarded~~ sustainably managed~~, and indigenous *biodiversity* endure~~ for future generations.

3. IM-P1 and IM-P2

14. In the final reply reports in May, 2023 these two policies were recommended to be amalgamated into one policy with which the Panel was in agreement.

15. Then in the aftermath of the *Port Otago* Supreme Court decision the ORC in final closing submissions of counsel outlined why the final 10 October, 2023 version of the PORPS recommended major changes to the prioritisation issue in these two policies, and recommended a 'structured analysis' approach to achieve intergated management.

16. In the Legal section of this report after the discussion of the *Port Otago* Supreme Court decision and the ORC change of position, we had continued on to address why the 10 October, 2023 recommended wording still required further amendment. That was because of the need to potentially resolve objective or policy differences arising between a range of various statutory instruments.

3.1. Recommendation

17. We do not propose to repeat that Legal section discussion here, but for the sake of the record as to this chapter topic we do set out below our recommendation as to the changes we recommend to the final 10 October, 2023 version of the amended and combined IM-P1 and IM-P2 by deleting those notified provisions and replacing them with the following IM-P1:

IM-P1 – Integrated approach to decision-making

Giving effect to the integrated package of objectives and policies in this RPS and other relevant statutory provisions requires decision-makers to:

(1) consider all provisions relevant to an issue or decision and apply them purposively according to the terms in which they are expressed, and

(2) if after (1) there is an irreconcilable conflict between any of the relevant RPS and/or statutory provisions which apply to an activity, only consider the activity if:

(a) the activity is necessary to give effect to a relevant policy or statutory provision and not merely desirable, and
(b) all options for the activity have been considered and evaluated, and
(c) if possible, the chosen option will not breach any other relevant policy or statutory provision, and
(d) if (c) is not possible, any breach is only to the extent required to give effect to the policy or statutory provision providing for the activity, and

(3) if 2(d) applies, evaluate all relevant factors in a structured analysis to decide which of the conflicting policies or statutory provisions should prevail, or the extent to which any relevant policy or statutory provision should prevail, and

(4) in the analysis under (1) or (2), and in the structured analysis under (3), assess the nature of the activity against the values inherent in the relevant policies or statutory provisions in the particular circumstances.

4. IM-P4 – Setting a Strategic approach to ecosystem health

18. This policy was notified as follows:

IM–P4 – Setting a strategic approach to ecosystem health

Healthy ecosystems and ecosystem services are achieved through a planning framework that:

(1) protects their intrinsic values,

(2) takes a long-term strategic approach that recognises changing environments,

(3) recognises and provides for ecosystem complexity and interconnections, and

(4) anticipates, or responds swiftly to, changes in activities, pressures, and trends.

19. Submissions on IM-P4 requested the following:

- Amendments to balance ecological health with use, development and growth;
- Several amendments to increase clarity and give the policy more 'teeth', for example through clause (1) seeking to enhance as well as maintain intrinsic values, promote ecological resilience, and recognise that cumulative effects often undermine ecological health.

- Clarity as to whether the policy applies to resource consent processes or only to district and regional plan preparation;
- That clause (2) refer to RMIA-MKB-I5 to acknowledge the need for a partnership approach, and references the 'impacts of climate change';
- Recognition of the importance of robust science and monitoring data; and
- An additional clause recognising the importance of environmental limits in ecosystem health.

20. The s.42A and reply reports by Ms Boyd recommended a number of amendments in response to these submissions, including:

- Clarifying that the policy applies to district and regional plan development and not resource consents;
- Changing 'protects' to 'have particular regard' in clause (1) to better reflect s.7(d) of the RMA;
- Recognising the impacts of climate change in clause (2);

21. We note that there are a number of provisions that are relevant to this policy, including RMIA-MKB-I5. Referring to this issue in isolation would potentially confuse matters. We also do not agree that this policy should reference resource use, as the impacts on ecosystem health are the subject of this policy. Such matters are appropriate to be addressed in the ECO chapter, and human impacts in a broader sense are addressed in IM-P14.

22. IM-P6 addresses the use of scientific data and monitoring and requires that the best available information be used. We do not consider it necessary to repeat this through recognising the importance of science and monitoring data in IM-P4, as requested by Federated Farmers. Similarly, cumulative effects are addressed by IM-P13 and environmental limits by IM-P14. We don't consider is appropriate to address these matters in IM-P4 as well.

4.1. Recommendation

23. We recommend that the wording in the reply report version of the PORPS be adopted for IM-P4, as follows:

IM-P4 – Setting a strategic approach to ecosystem health

Healthy and *resilient* ecosystems and ecosystem services are achieved by developing *regional plans* and *district plans* ~~through a planning framework~~ that:

(1) ~~protects~~ have particular regard to ~~their~~ the *intrinsic values* of ecosystems,
(2) ~~takes~~ take a long-term strategic approach that recognises ~~changing *environments*~~ ongoing environmental change, including the impacts of *climate change*,
(3) ~~recognises~~ recognise and ~~provides~~ provide for ecosystem complexity and interconnections, and
(4) ~~anticipates~~ anticipate, or ~~responds~~ respond swiftly to, changes in activities, pressures, and trends.

5. IM-P5 – Managing environmental interconnections

24. The notified version of IM-P5 was as follows:

> **IM–P5 – Managing environmental interconnections**
>
> Coordinate the management of interconnected *natural and physical resources* by recognising and providing for:
>
> (1) situations where the value and function of a *natural or physical resource* extends beyond the immediate, or directly adjacent, area of interest,
>
> (2) the effects of activities on a *natural or physical resource* as a whole when that resource is managed as sub-units, and
>
> (3) the impacts of management of one *natural or physical resource* on the values of another, or on the *environment*.

25. In her s.42A report, Ms Boyd recommended deleting IM-P13 – Managing cumulative effects and adding a new clause (4) to IM-P5 addressing cumulative effects. This was opposed by submitters, including Kāi Tahu ki Otago and the Director General of Conservation, and Ms Boyd recommended in her reply report that IM-P13 be reinstated, albeit in an amended form. We agree with that approach, which is addressed in relation to IM-P13 later in this report, and consider that a clause addressing cumulative effects in not required in IM-P5.

26. There was concern from submitters, including Wise Response and Kāi Tahu ki Otago, as to how IM-P5 would be applied and implemented. For example, would it apply to both regulatory and non-regulatory work? Ms Boyd discussed this in her supplementary evidence and reply report, stating that she considered that it should apply to all resource management processes. Ms Boyd's supplementary evidence recommended amending the chapeau as follows:

> <u>In resource management decision-making,</u> <u>manage the use and development</u> ~~Coordinate the management~~ of interconnected *natural and physical resources* by recognising ~~and providing for:~~
>
> <u>...</u>

27. Ms McIntyre for Kāi Tahu questioned "why the scope of the policy has been limited to "resource management decision-making", as recognition of environmental connections should be an integral part of all resource management processes".[1] In her reply report, Ms Boyd stated that she considered that decision-making "occurs in a range of resource management processes, such as plan-making, consent applications, and during monitoring and enforcement".[2]

28. We have some sympathy for Ms McIntyre's view that 'resource management decision-making' may be too narrow to capture the breadth of resource management processes that this integrated management policy is clearly intended to capture. Ms Boyd's list of examples only includes regulatory decision-making and, in our view, this could be a common interpretation. We prefer the following wording proposed by Ms McIntyre in Appendix 1 to her Evidence in Chief:

[1] *EIC of Ms Sandra McIntyre for Kāi Tahu ki Otago, para82(b)*

[2] *Reply Report of Ms Felicity Boyd, 23 May 2023, para 84*

Manage the use and development of interconnected natural and physical resources by recognising:

…

29. Turning to other submissions, we agree with Ms Boyd's recommendation to accept the request by Fish and Game and Kāi Tahu that clause (2) should refer to the 'environment' rather than 'natural and physical resources'.

5.1. Recommendation

30. We recommend the following amendments to IM-P5:

IM-P5 – Managing environmental interconnections

~~Coordinate the management of~~ Manage the use and development of interconnected *natural and physical resources* by recognising~~ and providing for~~:

(1) situations where the value and function of a *natural or physical resource* extends beyond the immediate, or directly adjacent, area of interest,

(2) ~~the *effects* of activities on a *natural or physical resource* as a whole when that resource is managed as sub-units~~ situations where the *effects* of an activity extend to a different part of the *environment*, and

(3) the impacts of management of one *natural or physical resource* on the values of another, or on the *environment*.

6. IM-O4 – Climate change

31. As notified, IM-O4 reads:

IM-O4 – Climate change

Otago's communities, including Kāi Tahu, understand what *climate change* means for their future, and *climate change* responses in the region, including adaptation and mitigation actions, are aligned with national level *climate change* responses and are recognised as integral to achieving the outcomes sought by this RPS.

32. Five submitters sought to retain this provision as notified while a number sought changes. Many of the changes sought requested that the objective reference local, regional, and national objectives and targets for climate change. Wise Response requested that the objective require a reduction in the rate of resource and energy use to sufficient "fair share" and concurrently promote a shift to essential renewable energy. Manawa Energy (Manawa) sought reference to strategic actions alongside adaptation and mitigation while Contact Energy (Contact) sought better recognition of renewable energy's role.

33. Ms Boyd, the s42A report author, made some changes in response to these submissions, and also in relation to the broader submissions on climate change. The changes did not include any recognition of the role renewable electricity generation will play in addressing climate change which, in her opinion, is the more appropriately located in the EIT-EN section is.

34. While we generally with, and accept, the changes Ms Boyd has made, we do feel that greater recognition should be provided for the role of renewable electricity generation in this provision.

We heard compelling evidence from all the REGs, particularly from Contact, on how significant this role will be. Ms Hunter, the planner for Contact, stated at paragraph 8.5 of her EIC:

> *Mr Hunt explains that New Zealand law sets a target for the country to reduce net emissions of greenhouse gases to zero by 2050.*[8] *The Government also has an aspirational target of transitioning to 100% REG by 2030.*[9] *Mr Hunt also explains that electricity demand is expected to grow substantially as New Zealand uses more electricity to decarbonise the economy.*[10] *The ongoing use and development of new REG facilities is, therefore, a critical and significant component of climate change mitigation in New Zealand.*

35. While we agree with Ms Boyd in section 6.5 of her s42A report that REGs do not need a standalone provision in the IM section, we agree with Ms Hunter that it should at least be recognised, given the IM provisions address 'integrated management of resources across domains and topics', as Ms Boyd stated in her introductory chapter. The development of REGs generally affects 'resources across domains and topics', some of which will have restrictive limits to their use. In our view, IM-P12 recognises this by acknowledging that climate mitigation/adaption activities will potentially compromise these limits when addressing climate change. REGs projects are likely to be some of the most important of these activities in the near future.

6.1. Recommendation

36. The Panel recommends amending IM-O4 as follows:

> **IM-O4 – Climate change**
>
> Otago's communities, including Kāi Tahu, understand what *climate change* means for their future, and responses to *climate change* ~~responses~~ in the region, (including *climate change adaptation* and *climate change mitigation* ~~actions,~~):
>
> (1) are aligned with national level *climate change* responses,
>
> (2) assist with achieving the national target for emissions reduction, including by having a highly renewable energy system, and
>
> (3) are recognised as integral to achieving the outcomes sought by this RPS.

7. IM-P8 – Climate change impacts

37. As notified, IM-P8 reads:

> **IM–P8 – Climate change impacts**
>
> Recognise and provide for *climate change* processes and *risks* by identifying *climate change* impacts in Otago, including impacts from a te ao Māori perspective, assessing how the impacts are likely to change over time and anticipating those changes in resource management processes and decisions.

38. A number of submitters sought retention of this policy as notified (CIAL, CODC, Greenpeace and Ravensdown) while others sought a range of wording changes along with the inclusion of reference to information requirements and consultation processes. Ms Boyd made some minor

changes in response to these submissions and promoted a restructuring of the policy so that its direction is more clearly expressed.

39. We have reviewed Ms Boyd's assessment of the submissions and find ourselves in agreement with the conclusions she has reached.

7.1. Recommendation

40. The Panel recommends amending IM-P8 as follows:

> **IM-P8 – Effects of ~~C~~climate change ~~impacts~~**
>
> Recognise and provide for the *effects* of *climate change* ~~processes and *risks*~~ by:
>
> (1) identifying the *effects* of *climate change* ~~impacts~~ in Otago, including ~~impacts~~ from ~~a te ao Māori~~ the perspectives of Kāi Tahu as mana whenua, assessing how the ~~impacts~~ *effects*[204] are likely to change over time, and
>
> (2) ~~anticipating~~ taking into account[205] those changes in resource management processes and decisions.

8. IM-P9 – Community response to climate change impacts

41. As notified, IM-P9 reads:

> **IM–P9 – Community response to climate change impacts**
>
> By 2030 Otago's communities have established responses for adapting to the impacts of *climate change*, are adjusting their lifestyles to follow them, and are reducing their *greenhouse gas* emissions to achieve net-zero carbon emissions by 2050.

42. Six submitters sought retention of this policy. The Waitaki Irrigators requested that it either be deleted or that it become an anticipated environmental result. Federated Farmers also requested that it be deleted, questioning whether the policy aligned with the requirements of the RMA and suggested that it is a matter for climate change legislation or regulations. Several other submitters sought changes to the policy.

43. Ms Boyd agreed with the submitters who questioned whether IM-P9 is expressed as a policy. She felt that part of the policy is an outcome (the reference to 'achieving net-zero carbon emissions') with other parts being methods (that communities adjust their lifestyles and reduce greenhouse gas emissions). She recommended that it be deleted provided her recommendation to incorporate *"assist with achieving the national target for emissions reduction"* into IM-O4 is accepted.

44. We have recommended the requested amendment to IM-O4 and agree with Ms Boyd that the other parts of the provision are not appropriate for a policy and that they lack clarity. Hence, we have accepted her recommendation to delete IM-P9.

8.1. Recommendation

45. The Panel recommend as follows:

(a) Delete IM-P9.

(b) incorporate the reference to the national target for emissions reduction into IM-O4.

9. IM-P10 – Climate change adaptation and mitigation

46. As notified, IM-P10 reads:

IM–P10 – *Climate change* adaptation and mitigation

Identify and implement *climate change* adaptation and mitigation methods for Otago that:

(1) minimise the *effects* of *climate change* processes or *risks* to existing activities,

(2) prioritise avoiding the establishment of new activities in areas subject to *risk* from the *effects* of *climate change*, unless those activities reduce, or are resilient to, those *risks*, and

(3) provide Otago's communities, including Kāi Tahu, with the best chance to thrive, even under the most extreme *climate change* scenarios.

47. Along with support to retain the policy as notified, there were numerous requests for amendments on a range of issues. No submission sought the deletion of this policy. Ms Boyd has recommended a number of changes in response to the submissions. We generally accept this recommendation with the exception of deleting the phrase 'existing activities' from the first clause.

48. While we agree with the addition of the wider environment to clause (1), explicit reference to 'existing activities' is considered appropriate by the Panel given the focus of this provision. There will be some, if not many, existing activities that will require adaption plans to be implemented to protect them against the effects of climate change. Consequently, we have recommended a modified version of Ms Boyd's amendment as proposed in her supplementary report.

49. We also agree with Ms Boyd's recommendation, in response to the DCC submission to include IM-P11 into IM-P10 (with the amendments made in response to Dr Freeman for OWRUG), but we again agree with both Manawa and Contact that the policy needs to recognise the role that renewable electricity generation plays in mitigation. In the Panel's view, that activity will be critical in addressing the climate change issue. We have therefore adopted a combination of the wording proposed by Ms Styles (for Manawa) and Ms Hunter (for Contact), as follows:

Protects its existing renewable electricity facilities and provides for the development of new renewable electricity generation and infrastructure.

9.1. Recommendation

50. The Panel recommend as follows:

(a) Amend IM-P10 as follows:

IM-P10 – Climate change adaptation and <u>climate change</u> mitigation

Identify and implement *climate change adaptation* and <u>*climate change*</u> *mitigation* methods for Otago that:

(1) minimise the *effects* of *climate change* ~~processes or *risks*~~ on existing activities and the wider environment,

(2) ~~prioritise avoiding the establishment of new activities in areas subject to *risk* from the *effects* of *climate change*, unless those activities reduce, or are resilient to, those *risks*, and~~

(3) provide Otago's communities, including Kāi Tahu, with the best chance to thrive, ~~even under the most extreme *climate change* scenarios~~

(4) enhance environmental, social, economic, and cultural *resilience* to the adverse *effects* of *climate change*, including by facilitating activities that reduce those effects, and

(5) protects Otago's existing renewable electricity facilities and provides for the development of new renewable electricity generation and infrastructure.

(b) Delete IM-P11.

10. IM-P12 – Contravening environmental bottom lines for climate change mitigation

51. As notified, IM-P12 reads:

> **IM–P12 – Contravening environmental bottom lines for climate change mitigation**
>
> Where a proposed activity provides or will provide enduring regionally or nationally significant mitigation of *climate change* impacts, with commensurate benefits for the well-being of people and communities and the wider *environment*, decision makers may, at their discretion, allow non-compliance with an environmental bottom line set in any policy or method of this RPS only if they are satisfied that:
>
> (1) the activity is designed and carried out to have the smallest possible environmental impact consistent with its purpose and *functional needs*,
>
> (2) the activity is consistent and coordinated with other regional and national *climate change* mitigation activities,
>
> (3) adverse *effects* on the *environment* that cannot be avoided, remedied, or mitigated are offset, or compensated for if an offset is not possible, in accordance with any specific criteria for using offsets or compensation, and ensuring that any offset is:
>
> (a) undertaken where it will result in the best ecological outcome,
>
> (b) close to the location of the activity, and
>
> (c) within the same ecological district or coastal marine biogeographic region,
>
> (4) the activity will not impede either the achievement of the objectives of this RPS or the objectives of regional policy statements in neighbouring regions, and

(5) the activity will not contravene a bottom line set in a national policy statement or national environmental standard.

52. This provision attracted a range of submissions including several submitters seeking its retention to those requesting it be deleted. Others sought that this approach be applied to other provisions that regulate important infrastructure. Wise Response submitted that the Government would legislate for individual projects if they are important enough so sought deletion of the policy or alternatively, that approval be sought from the Minister of Conservation to breach bottom lines. OWRUG also sought deletion of the policy or that it be amended for consistency with the purpose of the RMA. They submit it is not clear whether this policy achieves the purposes of the RMA or if it can be reconciled with other highly directive provisions within relevant NPSs or the pORPS 2021 itself. Federated Farmers considers that the policy sets such a high bar for these activities that it is unlikely any activities would meet the criteria. A range of other amendments were also sought by other submitters.

53. Ms Boyd recommended a number of amendments in her s42A report but revisited this provision in her reply given the lengthy discussion in the various hearings in relation to the importance of increasing renewable electricity generation as a method for reducing greenhouse gas emissions. The REG submitters generally considered that IM-P12 provided an important pathway for developing climate change mitigation projects.

54. In response to that, Ms Boyd made further changes which led to the following provision being recommended by her:

IM-P12 – Contravening ~~*environmental* bottom lines~~ *limits* for *climate change mitigation*

~~Where~~ If a proposed activity provides or will provide enduring regionally or nationally significant *climate change mitigation* ~~mitigation of *climate change* impacts~~, with commensurate benefits for the well-being of people and communities and the wider *environment*, decision makers may~~, at their discretion,~~ allow non-compliance with a~~n *environmental*~~ ~~bottom line~~ limit set in, or resulting from, any policy or method of this RPS only if they are satisfied that:

(1) ~~the activity is designed and carried out to have the smallest possible environmental impact consistent with its purpose and *functional needs*~~

(2) the activity is consistent ~~and coordinated~~ with other regional and national *climate change mitigation* activities, and

(3) adverse *effects* on the *environment* ~~that cannot be~~ are avoided, remedied, or mitigated so that they are minimised to the greatest extent practicable and any residual adverse *effects* are offset, or compensated for, and ~~if an offset is not possible, in accordance with any specific criteria for using offsets or compensation, and ensuring that any offset is:~~

~~(a) undertaken where it will result in the best ecological outcome,~~

~~(a) close to the location of the activity, and~~

~~(b) within the same ecological district or coastal marine biogeographic region,~~

(4) ~~the activity will not impede either the achievement of the objectives of this RPS or the objectives of regional policy statements in neighbouring regions, and~~

(5) the activity will not contravene ~~a bottom line set in~~ a national policy statement or national environmental standard., and

(6) it is demonstrated that there are no other reasonable alternatives to the activity proposed.

55. While the Panel considers this iteration of the policy to be an improvement, we are of the opinion that there are still a number of clauses that are unlikely to assist with the development of key projects that are designed to address climate change impacts. We address these below.

56. While Port Otago considered the policy a practical balancing approach to facilitate climate change mitigation projects, they sought explicit recognition of climate change adaptation because it is not clear whether this is provided for in the policy.

57. In her s42A report, Ms Boyd agreed with Port Otago that it is unclear whether the policy applies to climate change adaptation or climate change mitigation or both. But she went on to say:

> *"I note that the title and clause (2) refer only to climate change mitigation, but the chapeau refers to "mitigation of climate change impacts" which is more aligned with adaptation. In my opinion, environment limits are important to protecting the health of natural resources and breaches should only be provided for in limited circumstances. Climate change mitigation assists to reduce the sources or enhance the sinks of greenhouse gases, meaning that less adaptation may be required. I consider that breaching environmental limits for this purpose could be appropriate in certain circumstances due to the national and potentially international benefits of climate change mitigation. For these reasons**, I consider the policy should be clearly focused only on climate change mitigation, not climate change adaptation**, and therefore do not recommend accepting the submission point by Port Otago".*

58. The Panel does not understand why this provision should not be available to projects that may be critical in protecting or relocating communities and infrastructure from actual or expected climate effects. In our view, this will be just as important in the response to climate change effects as reducing the source of that change. The rate and magnitude of climate change impacts is not known with any great certainty so communities must have all options available to them for any necessary response. Hence, we agree with Port Otago and have included *climate change adaptation* within the policy.

59. Meridian considers that clause (2) is unclear in terms of how 'consistency' is to be determined and seeks its deletion. That clause reads *"the activity is with other regional and national climate change mitigation activities*". The Meridian submission queried whether "*this requires the same source of renewable electricity generation (e.g., hydro, solar or wind); or consistency of technology used; or scale of electricity generation; or scale of greenhouse emissions avoided relative to electricity generated."*

60. In her response to this matter, Ms Boyd referred to the Climate Change Response Act which sets up the policy framework for climate change action in New Zealand. The emissions reduction plan

which will flow from this legislation will describe how the country will meet emissions budgets and make progress towards achieving the 2050 target. As a consequence, Ms Boyd considers that *"it is important that the application of this policy is consistent with the broader policy framework for climate change mitigation"* and recommended against accepting the submission.

61. We agree with Meridian on this point. In our view, this clause introduces an unnecessary degree of uncertainty in its current form. But regardless of this, it is not needed given the chapeau refers to 'regionally or nationally significant' projects, and given the fact that it is not mandatory to apply the policy. One would expect that any applicant looking to utilise this provision would need to address the matter Ms Boyd's report raises to convince the decision maker it is worthy.

62. On the point of it not being mandatory, several submitters requested that the decision makers must always apply the policy in such circumstances. However, we believe that where limits are being compromised, a value judgment will be required before it can be determined whether this policy should be applied or not. Hence, we have not recommended that change but do consider the word 'only' to be superfluous in the last line of the chapeau.

63. The remaining matter to discuss is Ms Boyd's response to Mr Farrell (for Fish and Game), who was of the view that, as she put it*, " activity is to be provided the ability to "get around' the policies and methods of the pORPS …then it is appropriate that this should be as a 'last resort' – i.e. after assessment has determined that there are no other reasonable alternatives."* Ms Boyd accepted this proposition, given the alternative pathway this policy provides, and recommended a clause addressing this matter accordingly.

64. Again, we consider this superfluous given that the chapeau refers to 'regionally or nationally significant' projects, and the fact that it is not mandatory to apply the policy. It raises similar issues to that which Meridian raised in respect of clause 2. There will always be alternatives to the project, but the issue is always whether there is a proponent for these projects. Hence, we do not accept this recommendation.

65. In line with our recommendations to other provisions, we also recommend that 'to the greatest extent practicable' be replaced 'to the extent reasonably practicable'.

10.1. Recommendation

66. The Panel recommends the following amendments to IM-P12 (changes compared to the Reply Report):

IM-P12 – Contravening ~~environmental bottom lines~~ limits for climate change mitigation and climate change adaptation.

~~Where~~ If a proposed activity provides or will provide enduring regionally or nationally significant *climate change mitigation* or *climate change adaptation* ~~mitigation of *climate change* impacts~~, with commensurate benefits for the well-being of people and communities and the wider *environment*, decision makers may~~, at their~~ ~~discretion,~~ allow non-compliance with a~~n *environmental* bottom line~~ limits set in, or resulting from, any policy or method of this RPS ~~only~~ if they are satisfied that:

(1) ~~the activity is designed and carried out to have the smallest possible environmental impact consistent with its purpose and *functional needs*,~~

(2) ~~the activity is consistent and coordinated with other regional and national~~

~~*climate change mitigation*~~ activities, ~~and~~

(3) adverse *effects* on the *environment* ~~that cannot be~~ are avoided, remedied, or mitigated so that they are minimised to the extent reasonably practicable, and any significant residual adverse *effects* are offset, or compensated for, and ~~if an offset is not possible, in accordance with any specific criteria for using offsets or compensation, and ensuring that any offset is:~~

~~(a) undertaken where it will result in the best ecological outcome,~~

~~(b) close to the location of the activity, and~~

~~(c) within the same ecological district or coastal marine biogeographic region,~~

(4) ~~the activity will not impede either the achievement of the objectives of this RPS or the objectives of regional policy statements in neighbouring regions, and~~

(5) the activity will not contravene ~~a bottom line set in~~ a national policy statement or national environmental standard.

11. Other IM Climate Change Provisions

67. Related to the IM climate change objectives and policies, are several methods, being IM-M1(2) and (3), IM-M3(1), IM-M4 and IM-M5. IM-AER3 is also related to climate change. We have reviewed the submissions on those provisions and Ms Boyd's responses. The Panel has not identified any issue of concern with these provisions as now recommended and adopt them accordingly.

68. Ms Boyd also addressed climate change in a general sense in section 6.3.1 of her s42A report. She made several recommendations on the relevant provisions in that section. We agree with those recommendations except where a change has been recommended in our decision report on the specific provisions.

12. IM-P6 and IM-P15 – Uncertainties and Precautionary approach

69. Two policies addressed these linked issues in the notified PORPS. Policy IM-P6 was initially notified as addressing the need to use the best available information and to avoid delay in doing so. Policy IM-P15 addressed the need to reflect the NZCPS 2010 Policy 3 imperative as to a precautionary approach to decision-making, (which also appears expressly or impliedly in other forms in other national policy statements). That required that a precautionary approach was to be adopted to RMA decision-making where effects are uncertain, unknown or little understood.

70. Policy IM-P6 as notified adopted a very simplistic response to a complex issue and read:

IM–P6 – Acting on best available information

Avoid unreasonable delays in decision-making processes by using the best information available at the time, including but not limited to mātauraka Māori, local knowledge, and reliable partial data.

71. The risks of such a simplified approach can be at either end of the spectrum.

72. At the 'protectionist' end it can lead to decisions being made to always avoid effects because enough information as to those effects is not available. Particularly where an activity is new that may well always be the case. At the other end of the scale a permissive or too 'enabling' approach may lead to decisions being made to allow activities because adverse effects are not known, rather than incur delay whilst attempts are made to prove sustainable effects. If that was to occur then there is the risk that in actual practice serious adverse effects may occur, or cumulatively arise.

73. The notified version of IM-P15 addressed the precautionary principle as follows:

> **IM–P15 – Precautionary approach**
>
> Adopt a precautionary approach towards proposed activities whose effects are uncertain, unknown or little understood, but could be significantly adverse, particularly where the areas and values within Otago have not been identified in plans as required by this RPS.

74. The submission responses to these policies were varied. As to IM-P6 Kāi Tahu sought retention as notified; DOC sought an emphasis on the precautionary principle; DCC sought speedier albeit careful decision-making to enable evidence to be gathered; Federated Farmers and OWRUG sought that reliable data be available before decisions were made; Fonterra also sought more detailed reliable evidence before decisions were made; University of Otago and others such as Lauder Creek Farming and the Yellow-eyed Penguin Trust stressed the need for 'robust' or 'scientific' evidence. Harbour Fish and Southern Inshore Fisheries sought opportunity for stakeholder input. Wise Response sought greater emphasis on timely decision-making against reliable evidence.

75. As to IM-P15, similarly there was a wide variety of views in submissions (summarised at paragraphs 437 to 447 of the s.42A report). In the case of this policy, though, many sought that it be deleted for various reasons. One of the more compelling of those submissions was from OWRUG which asserted that where susceptible areas and values may not have been identified in the manner required by the PORPS, this policy potentially could operate as a holding pattern that prevented activities which could achieve the purpose of the RMA from commencing. It made the point that that outcome would not be reasonable or appropriate.

76. As had been demonstrated as long ago as 2014 in the Supreme Court decision in *Sustain our Sounds v. NZKS* SC 84/2013 [2014] NZSC 40, the issue of uncertainty as to effects of decision-making under the RMA has long been addressed, particularly in the aquaculture area, by a system of practical adaptive management. In large measure, as demonstrated by that case, that practice probably developed a particular impetus from the need to meet Policy 3 of the NZCPS, as well as the natural antipathy of decision-makers to grant consents when some potential adverse effects were uncertain or unknown.

77. In essence that adaptive management practice involves a proposition whereby consents are staged to enable some limited initial activity, often staged over years or seasons, where effects are closely measured and monitored, with those results being commonly compared to predictive computer-modelled outcomes. If the results of those measurements of effects demonstrates sustainable levels of effects, then the consent conditions imposed will allow movement to the next consented stage to be measured and monitored. That type of adaptive management approach was not expressly provided for in the notified PORPS. It has become standard now in many areas – particularly also as to the effects of drawdown from both surface and groundwater takes where computer-modelled outcomes are given an opportunity to be proven in practice.

78. The outcome of the submission response and inputs from the Panel during the hearings was a recommended change by the s.42A report to amend IM-P6 and other provisions to enable an adaptive management approach to be adopted by regional, coastal and district plans. The report writer also recommended that IM-P6 and IM-P15 as to the precautionary principle be amalgamated as they were addressing related issues. That amalgamation had been sought by submitters such as DOC and Mr. Highton.

79. The recommended provision was:

> **IM-P6 – ~~Acting on best available information~~ Managing uncertainties**
>
> ~~Avoid unreasonable delays in decision-making processes by using the best information available at the time, including but not limited to mātauraka Māori, local knowledge, and reliable partial data.~~
>
> In resource management decision-making, manage uncertainties by using the best information available at the time, including scientific data and mātauraka Māori, and:
>
> (1) taking all practicable steps to reduce uncertainty, and:
>
> (a) in the absence of complete and scientifically robust data, using information obtained from modelling, reliable partial data, and local knowledge, with preference for sources of information that provide the greatest level of certainty, and
>
> (b) avoiding unreasonable delays in making decisions because of uncertainty about the quality or quantity of the information available, and
>
> (2) adopting a precautionary approach, including through use of adaptive management, towards activities whose *effects* are uncertain, unknown, or little understood, but potentially significantly adverse.

80. There was some resistance to that proposed amalgamation by Ms. McIntyre for Kāi Tahu on the basis that such a change would appear to emphasise the consenting aspect ahead of the precautionary principle. The report writer's view was that each aspect was important, neither was stressed as a priority, and that they sensibly could and should be in the same provision.

81. The Panel's desire to see adaptive amanagement practices identified as an appropriate decision-making tool was recognised by the wording proposed. Therefore, the Panel was satisfied that the suggested amendments addressed the concerns of submitters, and at the same time in the same provision appropriately applied the precautionary principle.

12.1.1. Recommendation

82. That IM-P6 and IM-P15 be amalgamated into an amended IM-P6 as follows, with IM-P15 being deleted:

> **IM-P6 – ~~Acting on best available information~~ Managing uncertainties**
>
> ~~Avoid unreasonable delays in decision-making processes by using the best information available at the time, including but not limited to mātauraka Māori, local knowledge, and reliable partial data.~~
>
> In resource management decision-making, manage uncertainties by using the best information available at the time, including scientific data and mātauraka Māori, and:

(1) taking all practicable steps to reduce uncertainty, and:

(a) in the absence of complete and scientifically robust data, using information obtained from modelling, reliable partial data, and local knowledge, with preference for sources of information that provide the greatest level of certainty, and

(b) avoiding unreasonable delays in making decisions because of uncertainty about the quality or quantity of the information available, and

(2) adopting a precautionary approach, including through use of adaptive management, towards activities whose *effects* are uncertain, unknown, or little understood, but potentially significantly adverse.

13. IM-P13 – managing cumulative effects

83. The management of cumultaive effects has been one of the most vexed issues in relation to various parts of the environment. Effects such as the effects of discharges on freshwater and coastal water quality from sedimentation is a classic illustration in many parts of the country where multiple sources could potentially be contributing to the adverse effects on water quality. In the RMA itself in s.3 cumulative effects are defined as an integral part of the suite of 'effects' the definition including:

- any cumulative effect which arises over time or in combination with other effects, regardless of the scale, intensity, duration, or frequency of the effect.

84. Significant new such effects over recent years have been the increasing, yet often hard to perceive, effects of climate change and related sea-level rise.

85. As notified the PORPS addressed cumulative effects issues in IM-P13 as follows:

IM–P13 – Managing cumulative effects

Otago's environmental integrity, form, function, and resilience, and opportunities for future generations, are protected by recognising and specifically managing the cumulative effects of activities on natural and physical resources in plans and explicitly accounting for these effects in other resource management decisions.

86. Once again as with other notified provisions the emphasis in the notified version contained a protectionist tone.

87. The submitter response was again diverse (and is summarised at paragraphs 403-409 of the S.42A report by Ms. Boyd). Kāi Tahu identified the omission of climate change and sea level rise; some such as Federated Farmers were concerned that terms like 'accounting' were impractical and not RMA related language, and OWRUG maintained such effects were impractical to definitively 'account for'; a number sought use of the term 'environment' rather than natural and physical resources, as such resources fell within the definition of 'environment'; and DCC advanced a wording which provided more balance between use and protection of the environment.

88. It is significant, though, that no submitter sought the deletion of Policy IM-P13 which probably reflects the level of concern that is felt as to the serious potential impacts of cumulative effects in some areas of the environment. That reality is reflected most significantly by the stringent terms of the NPSFM attempting to address the dual problems of cumulative effects on water

quality, and over allocation. (That observation once more highlights how nonsensical it is to attempt to address integrated management of the environment in a discussion which is not supposed to address freshwater quality and quantity issues.)

89. The report writer Ms. Boyd waxed and waned about the outcome of the submitter response initially and after hearing their evidence and submissions. In her initial report she did not think policy IM-P13 provided particularly clear direction on how it should be implemented. She addressed this policy again in a statement of supplementary evidence, where she proposed to incorporate the direction about managing cumulative effects in a new clause in IM-P5 instead. In that evidence she also concluded that IM-P13 that provided the policy direction to IM-M1(4) and without that policy, it was difficult to understand what that part of the method is implementing. As notified IM-M1(4) had stated:

> (4) ensure cumulative effects of activities on natural and physical resources are accounted for in resource management decisions by recognising and managing such effects, including:
> (a) the same effect occurring multiple times,
> (b) different effects occurring at the same time,
> (c) different effects occurring multiple times,
> (d) one effect leading to different effects occurring over time,
> (e) different effects occurring sequentially over time,
> (f) effects occurring in the same place,
> (g) effects occurring in different places,
> (h) effects that are spatially or temporally distant from their cause or causes, and,
> (i) more than minor cumulative effects resulting from minor or transitory effects,

90. All of those effects are variants of cumulative effects so without a policy as a base the method would have been left swinging unsupported by a policy framework. At that stage Ms. Boyd had recommended that Policy IM-P13 be deleted and be replaced by a new additional cumulative effects clause being added to Policy IM-P5.

91. But finally, in the face of strong opposition from DOC and Kāi Tahu to such a change the Reply report in May 2023 recommended a more balanced approach by amendment to Policy IM-P13 as follows:

> **IM-P13 – Managing cumulative effects**
>
> ~~Otago's environmental integrity, form, function, and resilience, and opportunities for future generations, are protected by recognising and specifically managing the cumulative effects of activities on natural and physical resources in plans and explicitly accounting for these effects in other resource management decisions.~~
>
> In resource management decision-making, recognise and manage the impact of cumulative effects on the form, functioning and resilience of Otago's environment (including resilience to climate change) and the opportunities available for future generations.

92. Given the Supreme Court's direction as to the need to avoid prioritisation, but also taking into account the general concern about the potential seriousness of cumulative effects, the Panel is satisfied that the policy should be retained, and that the wording finally recommended is appropriate. The reference to 'climate change' is possibly arguably unnecessary in this policy because that issue is subject to express policies in the final recommended version of IM-P8, IM-

P10 and IM-P12. However, as climate change is one form of cumulative effect we are not concerned about that added reference.

13.1.1. Recommendation

93. The Panel recommends that the wording for policy IM-P13 in the reply report version dated 10 October 2023 be adopted as follows:

IM-P13 – Managing cumulative effects

~~Otago's environmental integrity, form, function, and resilience, and opportunities for future generations, are protected by recognising and specifically managing the cumulative effects of activities on natural and physical resources in plans and explicitly accounting for these effects in other resource management decisions.~~

In resource management decision-making, recognise and manage the impact of cumulative effects on the form, functioning and resilience of Otago's environment (including resilience to climate change) and the opportunities available for future generations.

14. IM- P14 – sustaining resource potential

94. The notified form of IM-P14 read:

IM–P14 – Human impact

Preserve opportunities for future generations by:
(1) identifying limits to both growth and adverse effects of human activities beyond which the environment will be degraded,
(2) requiring that activities are established in places, and carried out in ways, that are within those limits and are compatible with the natural capabilities and capacities of the resources they rely on, and
(3) regularly assessing and adjusting limits and thresholds for activities over time in light of the actual and potential environmental impacts.

95. Much of the submission response focussed on concerns at what was perceived to be a 'protectionist' approach by use of terminology such as 'preserve' in the chapeau, coupled with 'limits' on use for that purpose. In short much of the submission and argument about this Policy related to the prioritisation issue addressed earlier in relation to IM-P1, which was addressed as the initial major issue in the Legal section of the Introduction to this report. The removal of any aspect of prioritisation such as a start point of 'preservation' would necessarily require some amendment to this policy also to ensure the focus was on management of effects while addressing all relevant considerations.

96. However, much of the submission response also related to the use of the term 'limits' – and that issue has been addressed in the Definitions section of the Introduction to this Report. In that discussion we concluded that we could not see any difficulty with the definition and use of that term in the manner proposed. Whilst not needing to repeat that consideration here, for ease of reading the discussion related to this policy we repeat that the definition we have recommended to be adopted is:

Limit
In the LF – Land and freshwater chapter, "limit" has the meaning defined in the NPSFM, and elsewhere, "limit" has its natural and ordinary meaning.

97. The natural meaning of a 'limit' according to the Oxford dictionary is:

> *Any of the fixed points between which the possible or permitted extent, amount, duration, range of action, or variation of anything is confined; a bound which may not be passed, or beyond which something ceases to be possible or allowable.*

98. In the definitions section the Panel had decided that was an entirely appropriate use of the term 'limit' for RMA purposes.

99. The final recommended 10 October 2023 version responded positively to the submission input seeking a more 'enabling' approach to activities and was worded as follows:

> **IM-P14 – ~~Human impact~~ Sustaining resource potential**
>
> When preparing *regional plans* and *district plans*, ~~P~~preserve opportunities for future generations by:
>
> (1) where necessary to achieve the objectives of this RPS, identifying ~~environmental~~ limits ~~to both growth and adverse *effects* of human activities~~ beyond which the *environment* will be degraded,
>
> (2) requiring that activities are established in places, and carried out in ways, that are within those ~~environmental~~ limits and are compatible with the natural capabilities and capacities of the resources they rely on, ~~and~~
>
> (3) regularly assessing and adjusting ~~environmental~~ limits and ~~thresholds for~~ the way activities are managed over time in light of the actual and potential environmental impacts~~.~~, including those related to *climate change*, and
>
> (4) providing for activities that reduce, mitigate, or avoid adverse *effects* on the *environment*.

100. At first sight the wording of sub-clause (4) as recommended may appear to be too 'protective' in tone by appearing to limit activities to those with no effects, by using the terms 'avoid' and 'reduce' adverse effects. However, on further reflection the use of 'mitigate' does envisage that adverse effects may not be able to be completely avoided, or reduced to any great extent. On that basis the Panel can accept that phraseology as being enabling, but appropriately requiring 'mitigation' of adverse effects.

101. The only other concern the Panel has with that suggested wording relates to its start point in a policy relating to human activities. The term 'preserves' in the chapeau is not consistent in our view with the Supreme Court's directions as discussed in the Legal section of the Introduction to this report. Again, as for the change we recommended in relation to IM-O3 above, we recommend that a wording is used of 'sustainably manage' rather than 'preserve'. As we observed above in relation to IM-O3 that phraseology better reflects s.5 RMA language and is consistent with the aim of ensuring there is not an implied prioritisation of 'preservation'.

14.1.1. Recommendation

102. Accordingly we recommend that the wording of Policy IM-P14 is amended to read:

> **IM-P14 – ~~Human impact~~ Sustaining resource potential**
>
> When preparing *regional plans* and *district plans*, ~~Preserve~~ sustainably manage opportunities for future generations by:
>
> (1) where necessary to achieve the objectives of this RPS, identifying ~~environmental~~ limits ~~to both growth and adverse *effects* of human activities~~ beyond which the *environment* will be degraded,
>
> (2) requiring that activities are established in places, and carried out in ways, that are within those ~~environmental~~ limits and are compatible with the natural capabilities and capacities of the resources they rely on, ~~and~~
>
> (3) regularly assessing and adjusting ~~environmental~~ limits and ~~thresholds for~~ the way activities are managed over time in light of the actual and potential environmental impacts~~.~~, including those related to *climate change*, and
>
> (4) providing for activities that reduce, mitigate, or avoid adverse *effects* on the *environment*.

Section 6: Air

1. Introduction

1. One of the functions of the ORC is to control the discharge of contaminants to air. This function is specified in section 30(f) of the RMA and is the subject of the AIR chapter of the PORPS. While the air quality in Otago is generally good for most of the year, many communities experience poor air quality in the winter months. In addition, point source discharges to air can result in localised adverse effects if they are not appropriately managed.

2. The provisions of the AIR chapter are in part dictated by the Resource Management (National Environmental Standards for Air Quality) Regulations 2004 (NESAQ) and address the significant resource management issues in the SRMR chapter. The AIR provisions address ambient air quality and discharges which can cause nuisance effects, with each provision generally dealing with one or other of these two purposes. The NESAQ applies to both purposes: it sets ambient air quality standards for some contaminants that must be achieved in defined airsheds to protect public health; and contains restrictions and prohibitions on the discharges to air from specified activities, which can have nuisance effects and/or adverse health effects. ORC has gazetted 22 airsheds in the Otago region in its Regional Plan: Air for Otago. These comprise Otago's main urban areas, with a 23rd airshed being the balance of the region.

3. Over 100 submission points were received on the AIR provisions. These submission points seek specific amendments to provisions as well as address the overall approach and direction of the provisions. There are a number of commonalities in these submission points and, where considered appropriate, we have grouped these for ease of discussion.

4. The section 42A Report, supplementary evidence and Reply Report of Ms Hannah Goslin have helped us immensely. Some of the matters raised have been resolved through the course of the hearing and these are given minimal attention in this report. Where not discussed, we have adopted the recommendations in the Reply Report.

2. General themes

5. Two general themes emerged from submissions and were addressed in the s42A report:

   - Consistency between the PORPS and the NESAQ; and
   - The inclusion of a policy to manage reverse sensitivity issues.

6. We address these two matters below prior to considering the specific provisions.

7. Ms Goslin also dealt with a number of definitions, but these are dealt with either in the context of the issue or elsewhere in the decision documents.

2.1. The PORPS and the NESAQ

8. Several submitters were concerned that some provisions are more stringent than the requirements of the NESAQ. The terms 'avoid' and 'protect' are used with little qualification, which submitters consider would place additional and unjustified restrictions on activities. They acknowledge that the RPS can go beyond the requirements of the NESAQ but consider

that extreme care should be taken in doing so and that the NESAQ provides an appropriate balance between the protection of natural resources and provisions for growth and development.

9. Updates to the NESAQ were due to be gazetted in late 2021, however these are yet to be released. There was some conjecture at the hearing as to what these updates may contain and whether we should future-proof the AIR provisions to account for the anticipated changes. We cannot, and do not want to, anticipate what amendments may be made to the NESAQ and have therefore focussed our consideration on whether the proposed provisions address the requirements of the existing NESAQ.

2.2. Reverse sensitivity

2.2.1. Introduction

10. Horticulture NZ's Ms Wharfe seeks the addition of a new policy to manage reverse sensitivity issues as follows:

> Avoid locating new sensitive activities near existing activities which are permitted or consented to discharge to air.

11. The inclusion of this policy was supported by Ms Tait for Fonterra[1] and a similar provision was proffered by Mr Tuck for Silver Fern Farms. At the hearing, Mr Tuck sought an amendment to Ms Wharfe's policy to refer to "existing primary production or rural activities". Submitters provided examples of reverse sensitivity issues, particularly in the rural sector, where urban and semi-urban development can impinge on traditional rural activities that emit odour, spray drift and dust.

12. Fonterra, Horticulture NZ and NZ Pork sought to either amend AIR-M3 or include a new method to require urban spatial planning to consider reverse sensitivity effects.

13. This matter was addressed by Ms Goslin in her s42A report[2] and reply report,[3] and by counsel for ORC, Mr Anderson. Ms Goslin considers that a policy response would be more appropriate at a regional plan level and noted that UFD-P7 and UFD-P8 address reverse sensitivity in rural areas, while UFD-P6 addresses reverse sensitivity in industrial areas. Mr Anderson considers that the Reply Report version of AIR-P5 is broad enough to address reverse sensitivity issues, although he acknowledged that AIR-P5 could be interpreted to only address discharges from activities. That amended AIR-P5 which was recommended provided:

> **AIR-P5 – Managing certain discharges**
>
> Manage the *effects* of *discharges* to air beyond the boundary of the property of origin from activities that include but are not limited to:
>
> (1) outdoor burning of organic material,
>
> (2) agrichemical and fertiliser spraying,
>
> (3) farming activities,

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[1] *Susannah Tait for Fonterra, paras [9.28] – [9.31]*
[2] *S42A Report of Hannah Goslin, paras 13-14, para 151*
[3] *Reply Report of Hannah Goslin, para 74*

(4) activities that produce dust, and

(5) industrial and trade activities.

2.2.2. Discussion

14. We do not accept Ms Goslin's view that reverse sensitivity can be fully addressed through the regional plan. District council plan and consenting processes do not have to be consistent with a regional plan and a significant part of this issue, as we understand it, is to ensure that inappropriate development does not reversely affect existing activities that discharge to air. That is because while s.75(3) RMA requires that a district plan give effect to a regional policy statement, s.75(4)(b) only requires that a district plan not be inconsistent with a regional plan. We heard evidence from Ms Tait, Ms Wharfe and Mr Tuck that this is a particular issue in rural environments, but it is not just restricted to the urban/rural interface. A provision in a regional plan will not address the encroachment of sensitive activities, such as urban subdivisions, into rural or industrial areas.

15. Turning to AIR-P5, we consider that a long bow would need to be drawn to interpret AIR-P5 as applying to reverse sensitivity issues – a common reading would have it apply solely to managing discharges rather than managing activities which may alter the effects of those discharges.

16. We agree that UFD-P6, UFD-P7 and UFD-P8 address reverse sensitivity issues and note that UFD-M2(3)(e) directs district plans to *"ensure that urban development is designed to…minimise the potential for reverse sensitivity effects to arise…"*. However, we acknowledge that reverse sensitivity issues can be significant for air discharges and agree with submitters that reference in the AIR chapter is appropriate, especially in relation to territorial authority plans.

17. While we do not support a new policy, we have recommended adding an additional clause to our recommended version of AIR-P4, which incorporates notified AIR-P4 and AIR-P5. The recommended wording acknowledges that, in some cases, reverse sensitivity effects can be managed. It will be for the district and regional plans to refine this, but we were reluctant to include an outright 'avoid' in this context. Reverse sensitivity issues are not limited to primary production and rural activities and we do not accept Mr Tuck's suggested addition.

18. AIR-M3 relates to territorial authorities' roles in 'achieving good air quality' and we consider that reverse sensitivity issues should also be addressed here. We have recommended that wording similar to that proposed by Ms Wharfe is inserted into AIR-M3. We do not consider that reference to UFD-P6, UFD-P7 and UFD-P8 is necessary, as these provisions should be considered anyway in relation to developments.

19. Considering s.32AA, we consider that the proposed amendments address a gap in this chapter and that the proposed additions to the policy and method further clarify the intent of AIR-O1 and AIR-O2.

2.2.3. Recommendation

20. Add an additional clause to the 10 October 2023 reply report version of AIR-P4 (which merged AIR-P4 and AIR-P5) as follows:

(4) locating new sensitive activities to avoid potential reverse sensitivity effects from existing consented or permitted discharges to air, unless these can be appropriately managed.

21. Add an additional clause to AIR-M3 as follows:

(3) managing new sensitive activities to avoid reverse sensitivity effects in relation to consented and permitted activities that discharge to air.

3. AIR-O2 – Discharges to air

3.1. Introduction

22. As notified, AIR-O2 reads:

AIR-O2 – Discharges to air

Human health, *amenity* and *mana whenua* values and the life-supporting capacity of ecosystems are protected from the adverse *effects* of *discharges* to air.

23. Only QLDC sought to retain AIR-O2 as notified, while many submitters sought amendments on the basis of concerns that 'protection' is unqualified[4] and similar to avoidance[5]. 'Protected' in this policy is used very broadly and applies to a broad range of environmental facets. Those submitters in opposition expressed a preference for management rather than avoidance.

24. Ms Wharfe proposed the following amended wording for AIR-O2 in her rebuttal evidence, which was generally supported by the planners for Fonterra, Horticulture NZ, Ravensdown and Silver Fern Farms:

The localised adverse effects of discharges on human health, amenity values and mana whenua values and the life-supporting capacity of ecosystems are appropriately managed protected from the adverse effects of discharges to air. [6]

25. The options, as identified by Ms Goslin at paragraph 14 of her reply report, are to retain the goal of 'protecting human health, amenity values and mana whenua values and the life-supporting capacity of ecosystems'; soften the objective to include a qualifier to the goal of protection; or redraft the objective to relate to the managing of adverse effects. Ms Tait and Ms Wharfe preferred the latter option and suggested wording.

26. We consider that there is also a further option, whereby protection only applies to some of the matters listed. For example, should amenity values be protected from the adverse effects of air discharges in the same way as human health?

27. More minor amendments were also sought to AIR-O2, including clarifying that AIR-O2 relates to the localised effects from discharges to air, rather than ambient air quality which is

[4] *Lynette Wharfe for Horticulture NZ, para [34] – [35]; Steve Tuck for Silver Fern Farms Limited, para [6.1]*
[5] *Susannah Tait for Fonterra, paras [9.2] – [9.4]*
[6] *Rebuttal evidence of Lynette Wharfe for Horticulture NZ, para [41]*

addressed by AIR-O1.[7] This request was supported by other submitters[8] and recommended by Ms Goslin in her reply report.[9]

3.2. Discussion

28. We agree with submitters that the term 'protected' in AIR-O2 goes too far. Ms Goslin states[10] that: "I do not consider that 'protection' is akin to 'avoid' or infers prohibition of discharges to air as stated by Ms Tait. As I understand it the goal of 'protection' of particular values can be achieved in a number of ways which are expressed by the policies (particularly AIR-P3 to AIR-P5)."

29. We are unconvinced by Ms Goslin's approach, whereby AIR-O2 requires wide-ranging protection but associated policies AIR-P3 and AIR-P4 take a more enabling approach. We refer back to our discussion in the legal section of our recommendation report, where we discussed 'protection' and 'maintaining'. This discussion was primarily in relation to indigenous biodiversity but it is also relevant here. We acknowledged that protection of particular areas or values from adverse effects is appropriate in some situations and is consistent with s.5(2). However, there is a need to be specific about what those areas or values are being protected from. In the case of AIR-O2, we would be protecting the specified values from all localised adverse effects of discharges to air. We consider that this is akin to avoid.

30. This is especially the case for amenity values, which can be problematic to determine given their subjective nature. Section 7(c) requires that we "shall have particular regard to" "the maintenance and enhancement of amenity values" (our emphasis). We consider that the protective approach to AIR-O2 goes beyond s.7(c). In addition, the recommended change to AIR-P4(3)[11] requires that the amenity effects listed are to be avoided, remedied or mitigated. The policy appears consistent with s.7(c) however there is a disconnect between AIR-P4(3) and AIR-O2.

31. We agree with Ms Goslin that 'appropriately managed', as requested by Ms Wharfe and Ms Tait, is too subjective and provides little clarity. That said, we agree with submitters that 'protected' is not appropriate. There will likely be situations where discharges will adversely affect amenity values and mana whenua values, and even perhaps human health and the life-supporting capacity of ecosystems, but these effects may be determined appropriate. We consider that 'not compromise' signals the importance of the attributes and values listed, while providing some flexibility to provide for such discharges if the level of adverse effects is acceptable.

32. In terms of s32AA, we consider the revised wording of AIR-O2 is more appropriate to achieve the purpose of the RMA as it:

    a. Clarifies the outcome sought by the policy framework; and

    b. More clearly responds to parts of the issues of regional significance, including SRMR-I4.

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[7] *Para 5.23 of the EIC for Ravensdown (Carmen Taylor)*
[8] *Para [37] – [41] of the Rebuttal Statement of Evidence for Horticulture NZ (Lynette Wharfe)*
[9] *Para 16 of the Reply Report of Hannah Goslin*
[10] *Para 15 of the Reply Report of Hannah Goslin*
[11] *Para 60 of the Reply Report of Hannah Goslin recommends AIR-P4 and AIR-P5 are amended and merged*

3.3. Recommendation

33. That Objective AIR-O2 be amended as follows:

AIR-O2 – Discharges to air

The localised adverse effects of *discharges* to air do not compromise h~~H~~uman health, *amenity values,* ~~and~~ *mana whenua* values and the life-supporting capacity of ecosystems. ~~are protected from the adverse *effects* of *discharges* to air~~.

4. AIR-P1 – Maintain good ambient air quality

4.1. Introduction

34. AIR-P1 was notified as follows:

AIR-P1 – Maintain good ambient air quality

Good ambient air quality is maintained across Otago by:

(1) ensuring *discharges* to air comply with ambient air quality limits where those limits have been set, and

(2) where limits have not been set, only allowing *discharges* to air if the adverse *effects* on ambient air quality are no more than minor.

35. AIR-P1 was discussed in Section 7.7 of the section 42A report and in section 3 of Ms Goslin's reply report. Three submitters sought that AIR-P1 be retained as notified, while other submitters expressed concerns about the consistency of the policy with the NESAQ[12] and use of the phrase 'no more than minor'. [13] QLDC and Ravensdown also expressed concern about use of 'good' in relation to ambient air quality, which Ms Goslin has since recommended be deleted in the heading and policy wording.

36. AIR-P1 and AIR-P2 support AIR-O1, with AIR-P1 seeking to maintain ambient air quality where it is within the NESAQ standards, and AIR-P2 seeking to improve air quality that is degraded – that is, not meeting the relevant NESAQ standards. In relation to ambient air quality, the wording in AIR-P1 refers to 'limits' while the NESAQ uses 'standards'. Ms Tait for Fonterra and Ms Taylor for Ravensdown consider this is unclear, with Ms Taylor stating that:

> In addition, for other contaminants, there are a range of international guidelines that are used by air quality specialists when considering the 'health' of ambient air quality and the effect of an activity or activities (i.e., guidelines provide guidance and thus absolute compliance is not always appropriate). On this basis, the development of new regional 'limits' within regional plans is not appropriate or required.[14]

37. Ravensdown, Silver Fern Farms and Fulton Hogan oppose use of the term 'no more than minor' in AIR-P1, with both Ms Taylor and Ms Tait considering that the term has specific

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[12] *Susannah Tait for Fonterra, para [9.9]*
[13] *Susannah Tait for Fonterra, para [9.11]; Carmen Taylor for Ravensdown, para [5.8]*
[14] *Carmen Taylor for Ravensdown, para [5.7]*

application under the RMA that should not be applied here.[15] In response. Ms Goslin's response is that:

> In circumstances where there have been no limits set for a particular contaminant, I consider an assessment to ensure that adverse effects on ambient air quality are no more than minor is appropriate as the future Regional Air plan is unlikely to provide an exhaustive list of all contaminants that could be discharged into air.[16]

38. Ms Tait and Ms Taylor request that the existing wording for AIR-P1 is replaced with the following:

> Otago's ambient air quality is, at a minimum, maintained, where ambient air quality standards are complied with, by allowing discharges to air where the discharge complies with relevant air quality standards, limits or guidelines.[17]

39. The final recommended version of this provision in the 10 October 2023 version is as follows:[18]

AIR-P1 – Maintain ~~good~~ ambient air quality

~~Good a~~Ambient air quality is, at a minimum, maintained across Otago by:

(1) ensuring *discharges* to air comply with ambient air quality limits where those limits have been set, and

(2) where limits have not been set, only allowing *discharges* to air if the adverse *effects* on ambient air quality are no more than minor.

4.2. Discussion

40. Considering whether the policy should refer to 'limits' or 'standards and guidelines', we agree with Ms Goslin's position that using the broader term 'limits' allows the Council to include standards and guidelines in the Air Plan, with additional flexibility for the future. This is an important consideration given that the NESAQ is currently under review.

41. We understand that the NESAQ includes 'ambient air quality standards' and that guidelines are also commonly used in air quality assessments and regional plans. We acknowledge the submitters' concerns that 'limits' is not a term commonly used in air quality and therefore recommend that the wording is amended to clarify that 'limits' include 'ambient air quality standards' and 'guidelines'. The term 'ambient air quality standards' is defined in the PORPS, with reference to the NESAQ definition. We do not think that 'guideline' needs to be defined – if and how a guideline is used would need to be considered for each airshed.

42. We note that the word 'limits' is also used in AIR-M2. As recommended in the Reply Report, this method requires the Council to *"prepare or amend and maintain its regional plans to (1A) set limits (including ambient air quality standards) to maintain ambient air quality in accordance with AIR-P1, and improve ambient air quality in accordance with AIR-P2"*. To be consistent with our recommendation for AIR-P1, we recommend a consequential amendment to AIR-M2 to refer to 'ambient air quality standards and guidelines'.

[15] *Carmen Taylor for Ravensdown, para [5.8]; Susannah Tait for Fonterra, para [9.11]*
[16] *Para 27 of the Reply Report of Hannah Goslin*
[17] *Carmen Taylor for Ravensdown, para [5.19]; Susannah Tait for Fonterra, para [9.13]*
[18] *Para 29 of the Reply Report of Hannah Goslin*

43. Turning to the use of ‘no more than minor’ in clause (2), we agree with submitters that the term is not used appropriately in this policy. However, the alternate wording proposed by Ms Taylor and Ms Tait would only apply where air quality standards have been set. The policy as proposed by ORC also importantly includes maintaining air quality for parameters where such standards have not been set. We consider that it is important that the policy continues to cover both scenarios.

44. A key concern about the inclusion of ‘no more than minor’ is that it would provide for the incremental addition of small discharges which could, over time, degrade air quality. We agree with Ms Tait and Ms Taylor that some deterioration of ambient air quality may be acceptable in situations where air quality is good. We agree with the intent of the policy to maintain Otago’s air quality but recommend that discharges to air should only be allowed “if the adverse *effects* on ambient air quality are ~~no more than minor~~ avoided, remedied or mitigated”.

45. In terms of s32AA, we consider the change is more effective in achieving the outcome sought as:

   a. It aligns with the outcomes sought in AIR-O1 and AIR-O2;

   b. There has been no technical evidence provided during the course of this hearing that indicates a more stringent regime than that set out in the NESAQ is required in the Otago Region; and

   c. The amended wording provides flexibility for the future Air Plan to set limits that are not prescribed in the NESAQ currently or that may be set in the future.

4.3. Recommendation

46. That Objective AIR-P1 be amended as follows:

AIR-P1 – Maintain ~~good~~ ambient air quality

~~Good a~~Ambient air quality is, at a minimum, maintained across Otago by:

(1) ensuring *discharges* to air comply with ambient air quality limits, including *ambient air quality standards* and guidelines, where those have been set as limits ~~have been set~~, and

(2) where limits, including *ambient air quality standards* and guidelines, have not been set, only allowing *discharges* to air if the adverse *effects* on ambient air quality are avoided, remedied or mitigated ~~no more than minor~~.

5. AIR-P3 – Providing for discharges to air, AIR-P4 –Avoiding certain discharges and AIR-P5 – Managing certain discharges

5.1. Introduction

47. As notified, AIR-P3 reads:

AIR-P3 – Providing for discharges to air

Allow discharges to air provided they do not adversely affect human health, amenity and mana whenua values and the life supporting capacity of ecosystems.

48. As notified, AIR-P4 reads:

AIR-P4 – Avoiding certain discharges

Generally avoid discharges to air that cause offensive, objectionable, noxious or dangerous effects.

49. The reply report version dated 10 October 2023 of AIR-P5 currently reads:[19]

AIR-P5 – Managing certain discharges

Manage the *effects* of *discharges* to air beyond the boundary of the property of origin from activities that include but are not limited to:

(1) outdoor burning of organic material,

(2) agrichemical and fertiliser spraying,

(3) farming activities,

(4) activities that produce dust, and

(5) industrial and trade activities.

50. Policies AIR-P3, AIR-P4 and AIR-P5 address direct discharges to air and implement AIR-O2. Ms Goslin states that the *"intent of AIR-P3 is to provide a bookend for how effects are to be managed at the lower end of the effects spectrum"*.[20] This essentially provides for a permitted activity rule, although Ms Goslin acknowledges that this may not be appropriate in all situations. AIR-P4 and AIR-P5, as notified, address discharges as they progress along the effects spectrum with AIR-P4 addressing those discharges with significant and potentially unacceptable adverse effects, and AIR-P5 setting out what effects can be managed.

51. Submitters proposed wording changes to AIR-P3 to clarify the terminology and intent.[21] These were accepted by Ms Goslin in her right of reply.[22] Submitters on AIR-P4 sought outcomes ranging from deleting the policy[23], to requesting less stringency for offensive or objectionable effects[24], to redrafting to remove 'avoid'. [25] Submitters on AIR-P5 sought removal of the phrase 'beyond the boundary of the property of origin',[26] and the acknowledgement of lifeline utilities and infrastructure. [27]

52. Policies AIR-P4 and AIR-P5 were a focus at the hearing and a range of alternatives were discussed. These included alternatives for 'avoid' in AIR-P4, including 'avoid, as a first priority'

[19] This version includes the recommendations from the hearing reports prepared under s42A of the RMA
[20] Para 40 of the Reply Report of Hannah Goslin
[21] Susannah Tait for Fonterra, para [9.16]; Carmen Taylor for Ravensdown, para [5.29]
[22] Para 42 of the Reply Report of Hannah Goslin
[23] Including: James Taylor for Dunedin City Council, para [16]; Lynette Wharfe for Horticulture NZ, para [49]
[24] Including: Claire Hunter for Oceana Gold, para [9.3]; Steve Tuck for Silver Fern Farms, para [6.7]; Susannah Tait for Fonterra, para [9.17]
[25] Carmen Taylor for Ravensdown, para [5.21]
[26] Carmen Taylor for Ravensdown, para [5.23]
[27] James Taylor for Dunedin City Council, para [18]; Luke Peters for Queenstown Lakes District Council, para [4.7]

or 'avoid, where reasonably practicable'. While 'avoid' was accepted for noxious or dangerous effects, it was considered by submitters to be too restrictive for the more subjective offensive or objectionable effects. In response, the Chair suggested that AIR-P4 and AIR-P5 are merged into one policy which addresses the management of discharges to air. This was considered by Ms Goslin and recommended in her reply report, as follows:[28]

AIR-P4 – Managing ~~Avoiding~~ certain discharges:

~~Avoid discharges to air that cause offensive, objectionable, noxious or dangerous effects.~~

Manage the adverse *effects* of *discharges* to air by:

(1) avoiding noxious or dangerous *effects*,

(2) ensuring *discharges* to air do not cause offensive or objectionable *effects*,

(3) avoiding, remedying or mitigating other adverse *effects* from *discharges* to air, including but not limited to *discharges* arising from:

(a) outdoor burning of organic material,

(b) agrichemical and fertiliser applications,

(c) *primary production* activities,

(d) activities that produce dust, and

(e) industrial and trade activities.

5.2. Discussion

53. We agree with evidence and discussions at the hearing that some redrafting is required to clarify the intent of these policies. We generally agree with Ms Goslin's recommendations in her reply report and consider that these go a long way to addressing the submitters' concerns. We adopt her recommendations for AIR-P3, AIR-P4 and AIR-P5, with the exception of the additional clause in AIR-P4, discussed above, to address reverse sensitivity.

54. In relation to offensive or objectional effects in AIR-P4(2), Ms Goslin accepted Ms Taylor's request to replace 'avoid' with 'ensure discharges to air do not cause', although noted that she considers there to be little difference between the two phrases.[29] We agree that avoid is too restrictive and could infer a prohibited activity status. While we acknowledge that such effects will generally be unacceptable, we do not consider that a blanket 'avoid' is justified. We consider that the wording proposed by Ms Taylor softens 'avoid' and opens the door to further consideration of activities with such effects, even if this is via a non-complying activity rule. We note that methods to assess the extent of offensive or objectionable effects are well established, and discharges with potentially offensive or objectionable effects may be able to be located in appropriate locations.

55. Turning to S32AA, we consider the recommended changes will be more efficient at achieving the outcome sought in AIR-O2, are consistent with Part 2 and will better provide for section 17 of the RMA.

[28] *Para 60 of the Reply Report of Hannah Goslin*
[29] *Para 57 of the Reply Report of Hannah Goslin*

5.3. Recommendation

56. Amend AIR-P3 as follows:

AIR-P3 – Providing for discharges to air

Provide for ~~Allow~~ *discharges* to air that ~~provided they~~ do not adversely affect human health, *amenity values,* ~~and~~ *mana whenua* values and the life supporting capacity of ecosystems.

57. Amend AIR-P4 as follows:

AIR-P4 – Managing certain discharges

~~Generally avoid *discharges* to air that cause offensive, objectionable, noxious or dangerous *effects*.~~

Manage the adverse *effects* of *discharges* to air by:

(1) avoiding noxious or dangerous *effects*,

(2) ensuring *discharges* to air do not cause offensive or objectionable *effects*,

(3) avoiding, remedying or mitigating other adverse *effects* from *discharges* to air, including but not limited to *discharges* arising from:

(a) outdoor burning of organic material,

(b) agrichemical and fertiliser applications,

(c) *primary production* activities,

(d) activities that produce dust, and

(e) industrial and trade activities.

(4) locating new sensitive activities to avoid potential reverse sensitivity effects from existing consented or permitted discharges to air, unless these can be appropriately managed.

58. Delete AIR-P5:

AIR-P5 – Managing certain discharges

~~Manage the *effects* of *discharges* to air beyond the boundary of the property of origin from activities that include but are not limited to:~~

~~(1) outdoor burning of organic material,~~

~~(2) agrichemical and fertiliser spraying,~~

~~(3) farming activities,~~

~~(4) activities that produce dust, and~~

~~(5) industrial and trade activities.~~

6. AIR-M2 – *Regional plans*

6.1. Introduction

59. The notified version of AIR-M2 reads as follows:

> **AIR-M2 – Regional plans**
>
> No later than 31 December 2024, Otago Regional Council must prepare or amend and maintain its *regional plans* to:
>
> (1) avoid offensive, objectionable, noxious or dangerous *discharges* to air,
>
> (2) include provisions to mitigate the adverse *effects* from *discharges* to air beyond the boundary of the property of origin,
>
> (3) implement the prioritisation of actions set out in AIR-P2,
>
> (4) mitigate the adverse *effects* of *discharges* to air in areas adjacent to *polluted airsheds* where the *discharge* will adversely affect air quality in the *polluted airshed*, and
>
> (5) give effect to the Air Quality Strategy for Otago and any subsequent amendments or updates.

60. Several submitters sought amendments to AIR-M2, while QLDC sought that it be retained as notified. Some of the suggested amendments were to align AIR-M2 to the respective submitters' objective and policy amendments.

61. Cosy Homes Charitable Trust sought to advance the timeline for the regional plan from 2024 to 2023, while Ms Goslin noted in her reply report that ORC do not intend to notify the future Regional Air Plan until 30 June 2025.[30]

62. Ms Goslin recommended the addition of clause (1A) as a consequential change to provide for AIR-P4. She also recommended consequential changes to clauses (1) and (2) to reflect changes she recommended to the policy framework.

63. Both Ms Wharfe and Ms Tait raised concerns at the hearing about the requirement in clause (5) to require territorial authorities to 'give effect to' the Air Quality Strategy for Otago. Ms Tait requested that the clause be deleted, and Ms Wharfe sought to replace 'give effect to' with 'have regard to.'[31] Ms Wharfe considered that a date for the Strategy should be included.[32] We were told that this is a non-statutory document and, upon review, we could not find a date reference on the document.

6.2. Discussion

64. We recommend the version of AIR-M2 that is included in Ms Goslin's Reply Report, with a consequential amendment from AIR-O2 to include reference to '*ambient air quality standards and guidelines*' in AIR-M2(1A).

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[30] Reply Report of Hannah Goslin, para 89(a).

[31] Lynette Wharfe for Horticulture New Zealand, paras [78]-[79] Susannah Tait for Fonterra, para [9.33](d)

[32] Lynette Wharfe for Horticulture New Zealand, para [77]

65. We agree with Ms Goslin that the date for the Regional Air Plan should be aligned with the Council's intentions signalled in the draft Annual Plan 2021-2031, and we do not have the justification to bring this forward, as sought by the Cosy Homes Charitable Trust. The date that they sought has already past and we consider that the Regional Air Plan should be prepared to give effect to this RPS.

66. Ms Goslin has recommended deleting clause (5) in response to the evidence of Ms Wharfe and Ms Tait. We support this and do not consider it appropriate to refer to a non-statutory and undated document in an RPS.

67. In relation to s32AA, several of the suggested changes are consequential to the recommended changes to policy direction set out above and in Ms Goslin's Reply Report. Therefore, we consider the amendments will be more efficient and effective at achieving AIR-O1 and AIR-O2.

6.3. Recommendation

68. Amend AIR-M2 as follows:

AIR-M2 – Regional plans

~~No later than 31 December 2024,~~ Otago Regional Council must prepare or amend and maintain its *regional plans* to:

(1A) set limits (including *ambient air quality standards* and guidelines*)* to maintain ambient air quality in accordance with AIR-P1, and improve ambient air quality in accordance with AIR-P2,

(1) manage the adverse effects of discharges to air by avoiding noxious or dangerous effects and ensuring discharges to air do not cause offensive or objectionable effects, ~~avoid offensive, objectionable, noxious or dangerous *discharges* to air~~,

(2) include provisions to avoid, remedy or mitigate other ~~the~~ adverse *effects* from *discharges* to air ~~beyond the boundary of the property of origin~~,

(3) ~~implement the prioritisation of~~ prioritise the actions set out in AIR-P2 to reduce PM_{10} and $PM_{2.5}$ concentrations in *polluted airsheds*,

(4) mitigate the adverse *effects* of *discharges* to air in areas adjacent to *polluted airsheds* where the *discharge* will adversely affect air quality in the *polluted airshed*, and

~~(5) give effect to the Air Quality Strategy for Otago and any subsequent amendments or updates.~~

(5) include measures to ensure that discharges to air do not adversely affect *mana whenua* values.

Section 7: Coastal Environment (CE)

1. Introduction

1. The coastal environment of the Otago region is some 480 kilometres long and encompasses a range of differing types of environments including open coast, harbours, estuaries and terrestrial features and ecosystems which together comprise the coastal marine area and areas adjacent to it. The coastal marine area is defined in s.2 of the RMA as being the area that extends as its seaward boundary from the outer limit of the territorial sea inshore to the line of mean high water springs. That inner boundary is extended where it crosses a river at which locations the inland line is drawn at the lesser point of one kilometre upstream from the river mouth, or a point five times the width of the river mouth. In other words fully or partially estuarine areas are included in the coastal marine area.

2. The term 'coastal environment' itself is not defined, either in the RMA or in the PORPS. Nor is it specifically defined even in the NZCPS 2010 which repetitively applies its objectives and policies to the 'coastal environment'. That repetitive reference in the NZCPS to the 'coastal environment' is of course consistent with the expression in Part 2 of the RMA that the protection of the 'coastal environment' is a matter of national importance. The provisions of s.6(a) of the RMA commence as follows:

> ***6* Matters of national importance**
>
> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:*
>
> *(a) the preservation of the natural character of the <u>coastal environment</u> (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development: …*
>
> (Panel's emphasis)

3. However, Policy 1(2) of the NZCPS does describe the extent of the coastal environment in very broad terms. That description includes, amongst other matters, coastal lakes and wetlands and their margins, as well as features of coastal vegetation and landscapes, and other inter-related coastal marine and terrestrial systems. Policy 1 provides:

> *(1) Recognise that the extent and characteristics of the coastal environment vary from region to region and locality to locality; and the issues that arise may have different effects in different localities.*
>
> *(2) Recognise that the coastal environment includes:*
> *(a) the coastal marine area;*
> *(b) islands within the coastal marine area;*
> *(c) areas where coastal processes, influences or qualities are significant, including coastal lakes, lagoons, tidal estuaries, saltmarshes, coastal wetlands, and the margins of these;*
> *(d) areas at risk from coastal hazards;*

(e) *coastal vegetation and the habitat of indigenous coastal species including migratory birds;*
(f) *elements and features that contribute to the natural character, landscape, visual qualities or amenity values;*
(g) *items of cultural and historic heritage in the coastal marine area or on the coast;*
(h) *inter-related coastal marine and terrestrial systems, including the intertidal zone; and*
(i) *physical resources and built facilities, including infrastructure, that have modified the coastal environment.*

4. Against that broad background description of the coastal environment the PORPS as notified identified a range of significant resource management issues for the coastal environment listed in the SRMR chapter. The issue most directly identified in this chapter related to the coastal environment is also identified in SRMR-I8 as follows:

SRMR–I8 – Otago's coast is a rich natural, cultural and economic resource that is under threat from a range of terrestrial and marine activities

5. SRMR-I1 as to natural hazard effects; SRMR-I2 as to climate change impacts; SRMR-I3 as to pest species; SRMR-I7 as to effects of predators and pests; and SRMR-I10 as to environmental impacts of activities, also relate in varying degrees to the coastal environment.

6. In addition in the RMIA chapter as to resource management issues of significance to iwi authorities in the region, the section under the sub-header RMIA-CE identified 5 issues arising from: a lack of integrated management across the land-water interface RMIA-CE-I1; the degradation of water quality from discharges RMIA-CE-I2; the effects of activities on Kāi Tahu ability to access and harvest kaimoana RMIA-CE-I3; the decline in species as a result of habitat disturbance and modification RMIA-CE-I4; and the poor recognition and protection of wāhi tapu and wāhi tūpuna values RMIA-CE-I5.

7. In relation to most of those issues the hearing panel accepted the reasoning and conclusions advanced by the s.42A reports as they developed, which in large part particularly as to the coastal environment accepted propositions advanced by Kāi Tahu submitters and DOC. As we observed in the overall Introduction to the joint reports ORC made every effort to liaise with Kāi Tahu and the outcome was often an agreed position which the panel accepted. Therefore, only a few limited issues related to Kāi Tahu's relationship with the coastal environment need specific discussion in this chapter.

8. As discussed in the legal section of this report the preservation of the natural character of the coastal environment, wetlands and lakes and rivers required by s.6(a) of the RMA is qualified by the additional words "*and the protection of them from inappropriate subdivision, use and development*". The NZCPS consequently has a range of policies aimed at providing that level of preservation and protection, while at the same time it contains other policies aimed at enabling activities, which must be taken as being recognised by the NZCPS as being appropriate in some settings within that coastal environment. It is in those activity areas in the coastal environment where potential conflicts between protection and activity policies may arise, and where, unsurprisingly, emphasis arose in the PORPS submissions process and hearings.

9. The start point of that consideration of the NZCPS policies has to be s.62(3) of the RMA which requires that an RPS "must give effect" to a New Zealand coastal policy statement.

10. Examples of the NZCPS objectives and policies which provide for activities include Objective 6 which includes direction enabling certain forms of subdivision, use, and development in the coastal environment. In particular, bullet points 1 and 2 of Objective 6 acknowledge that:

- *the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;*
- *some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;*

Then bullet point 3 recognises that: '*funtionally some uses and developments can only be located on the coast or in the coastal marine area':* with bullet point 4 acknowledging that:

- *the coastal environment conains renewable energy resources of significant value;*

11. More specifically, there are then a range of policies in the NZCPS supportive of the enabling of activities, or in some cases requiring provisions for them. They include Policy 6 as to provision of infrastructure and extraction of minerals; Policy 7 as to varying types of urban activity; Policy 8 as to aquaculture; Policy 9 as to ports; and Policy 10 as to closely limited circumstances for reclamations providing significant regional or national benefit.

12. Another area of activity identified in the NZCPS which is particularly relevant to the evidence called by Kāi Tahu entities is Policy 6(d) which provides:

Policy 6: Activities in the coastal environment

1. *In relation to the coastal environment:*
   (a) *…*
   (b) *…*
   (c) *…*
   (d) *recognise tangata whenua needs for papakāinga, marae and associated developments and make appropriate provision for them; …*

13. The reason why Policy 6(1)(d) is so crucial to Kāi Tahu communities in Otago is because their evidence was clear that in gross historical breaches of the Treaty they have lost almost all of their lands, and have been left with only a few pockets of Māori lands or Māori-owned general lands which are commonly near the coast. Their marae are in or near the coastal environment in Otago.

14. In terms of other Part 2 RMA considerations we will not repeat here the conclusions reached in the legal section of this report other than to emphasise what is now the clear legal outcome, that no general priority is to be afforded to directive protection policies over other directive policies which enable activities. In the legal section of this report, and in the Integrated Management chapter topic discussion, particularly of IM-P1, we have also taken up the direction of the Surpeme Court in the Port Otago case to ensure consent pathways exist to enable a consideration of activity applications for consent in a structured analysis approach.

15. An example of where a general prioritisation has been recommended is in a new CE-P3(1A) as follows:

CE-P3 – Coastal water quality

Manage water quality in the coastal environment by:
(1A) prioritising the restoration of coastal water quality where it is considered to have deteriorated to the extent described within CE-P2(2), …

For reasons described in the legal section and summarised above this wording is not in accord with the Supreme Court's judgment in the *Port Otago* case and we do not accept that aspect of the suggested new policy. The issue of restoration will be one of the factors needing to be assessed in a structured way.

16. In terms of s.32AA of the RMA the wording we recommend below is necessary to ensure that the policy is the most appropriate way to achieve the purpose of this Act.

1.1 Recommendation

17. That can be achieved by rewording the suggested new subclause 1A as follows:

CE-P3 – Coastal water quality

Manage water quality in the coastal environment by:
(1A) restoring coastal water quality where it is considered to have deteriorated to the extent described within CE-P2(2), …

18. In some respects, for example as to wetland protection, the coastal chapter is treated somewhat differently in the PORPS provisions, often because of the application of NZCPS or exclusionary definitions in the NPSFM and NPSIB as to coastal wetlands. The challenge for this part of the report on the Coastal Environment topic chapter is to ensure that a consistent approach is adopted for the vexed protection and enabling provisions in response to submissions.

19. We agree with the nearly all of the summary of the primary issues needing consideration in respect of this chapter provided in the reply report of 23 May 2023 by the s.42A report writer Mr Andrew McLennan. That summary was as follows:

a. Kāi Tahu relationship with the coastal environment
b. Identifying biodiversity in the coastal environment
c. Providing for infrastructure in the coastal environment
d. Connections to other chapters within the pORPS21
e. Identifying the extent of the coastal environment
f. Providing for aquaculture

20. We propose to address each of those issues other than (e) in that order, as we do not consider that we need to address issue (e). We do, however, also address in this section a legal funding issue, and regional surf breaks.

2. Kāi Tahu relationship with the coastal environment

21. The relationship of Kāi Tahu with the coastal environment in the notified version of the PORPS in its coastal environment chapter was encompassed primarily in Objective CE-O1:

CE–O1 – Safeguarding the coastal environment

The integrity, form, functioning and resilience of Otago's coastal environment is safeguarded so that:
(1) the mauri of coastal water is protected, and restored where it has degraded,
(2) coastal water quality supports healthy ecosystems, natural habitats, water-based recreational activities, existing activities, and customary uses, including practices associated with mahika kai and kaimoana, …

22. That objective was supported by a more specific objective CE-O4 as follows:

CE–O4 – Kāi Tahu associations with Otago's coastal environment

The enduring cultural association of Kāi Tahu with Otago's coastal environment is recognised and provided for, and mana whenua are able to exercise their kaitiaki role within the coastal environment.

23. The relevant policies included first a requirement in Policy CE-P2(2) and (3) to identify areas where adverse effects on coastal water was restricting mahika kai practices, and areas of particular interest to mana whenua (using that term for takata whenua for reasons discussed in the MW chapter). In addition, other policies of relevance to mana whenua included CE-P3 as to water quality requiring protection against adverse effects on the identified areas of particular interest to mana whenua; CE-P5 as to indigenous biodiversity requiring avoidance of significant adverse effects on habitats of importance for cultural purposes; CE-P8 as to public access, which at subclause (5) excepted the right for unimpeded public access where required to '*protect places or areas of significance to takata whenua, including wāhi tūpuna*'; CE-P11 as to aquaculture which sought to enable this activity at appropriate locations taking into account, inter alia, potential '..*cultural benefits associated with the operation and development of aquaculture activities*'.

24. The most specific policy, however, was CE-P13 as follows:

CE–P13 – Kaitiakitaka

Recognise and provide for the role of Kāi Tahu as kaitiaki of the coastal environment by:

(1) involving mana whenua in decision making and management processes in respect of the coast,

(2) identifying, protecting, and improving where degraded, sites, areas and values of importance to Kāi Tahu within the coastal environment, and managing these in accordance with tikaka,

(3) providing for customary uses, including mahika kai and the harvesting of kaimoana,

(4) incorporating the impact of activities on customary fisheries in decision making, and

(5) incorporating mātauraka Māori in the management and monitoring of activities in the coastal environment.

25. In submissions by mana whenua submitters a more specific objective and policy suite was sought principally seeking greater flexibility for mana whenua to carry out activities which

were either in or affected the coastal environment. The particular objective was sought as a primary objective, rather than as a sub-clause to CE-O1 as notified, but was finally recommended to be adopted in the reply report by Mr Maclennan in the following restricted form. (We observe in passing that the title to this new provision emanated from mana whenua submitters):

> **CE-O1A – Te Mauri o te Moana**
>
> The mauri, health and well-being of Otago's coastal water is protected, and restored where it is degraded, including through enhancing coastal water quality where it has deteriorated from its natural condition.

26. This recommended provision effectively adapts a highly protective concept very similar to that utilised in the NPSFM for Te Mana o te Wai. We accept the evidence and reasoning advanced in support of such an objective seeking to protect the health and wellbeing of coastal waters, and the enhancement of them where degraded, because that will protect the mauri of the coastal waters. We do have, though, two reservations.

27. The first is that there is an important, albeit subtle, difference in the wording proposed here, as compared to the wording used in the NPSFM. In the NPSFM the fundamental concept of 'Te Mana o te Wai' is described by recognising that '*protecting the health of freshwater protects the health and wellbeing of the wider environment. It protects the mauri of the wai. …'* As we discussed in the legal section of this report that approach neatly avoids any need to define what is 'mauri', whereas this proposed wording will require that 'mauri' is closely defined because it is specifically required to be protected. That wording arose from the notified version of subclause (1) of CE-01, which was worded in a manner that emphasised the protection of 'mauri' even more specifically, as follows:

> *(1) the mauri of coastal water is protected, and restored where it has degraded,*

28. The second problem is that as recommended once again there is a failure in this provision to recognise the qualifier in s.6(a) of the RMA that protection of the coastal environment is only required against inappropriate activities.

29. Once again in terms of s.32AA of the RMA the wording we recommend below is needed to ensure that the objective is worded in a manner that ensures it is the most appropriate way to achieve the purpose of this Act.

2.1 Recommendation

30. In our view those two problems can be overcome by some small but important changes as follows:

> **CE-O1A – Te Mauri o te Moana**
>
> The ~~mauri,~~ health ~~and well-being~~ of Otago's *coastal water* is:
> (a) protected <u>from inappropriate activities so as to protect the health and well-being of the wider environment and the mauri of coastal waters</u>, and
> (b) restored where it is degraded, including through enhancing *coastal water* quality where it has deteriorated from its natural condition.

31. A consequential change would also need to be made to the final recommended version of CE-P2 (2)(a)(i) as to identification of degraded quality water areas which was recommended in the following form:

CE-P2 – Identification

Identify the following in the coastal environment: …

(2) areas of water quality in the coastal marine area that are considered to have deteriorated so that:

(a) it is having a significant adverse effect on:

(i) the mauri of coastal water

2.2 Recommendation

32. Consistency would require that provision to read:

(i) the ~~mauri~~ health of coastal water

33. Other provisions in the coastal environment chapter which directly relate to Kāi Tahu's relationship with the coastal environment included Policies CE-P9 and CE-P10 as to activities respectively on land and otherwise in the coastal environment. Kāi Tahu through its planning witness Mr Bathgate particularly sought inclusion of specific policy provision enabling mana whenua to provide for their needs for papakāika, marae and associated developments. The final s.42A report response (at paragraph 149) was that CE-M3 and CE-M4 (1)-(3) already addressed location issues. However, Policy 6 of the NZCPS specifically stated in this regard as follows:

Policy 6 Activities in the coastal environment

(1) In relation to the coastal environment:

…

(d) recognise tangata whenua needs for papakāinga, marae and associated developments and make appropriate provision for them;

34. We do not consider that mention of activities in methods CE-M3 and CE-M4 (1)-(3) specifically apply to that goal or are at all sufficient to meet that specific directive in the NZCPS. CE-M4(9) by contrast does make that provision in respect of district plans when it says:

(9) recognise takata whenua needs for papakāika, marae and associated developments within the coastal environment and make appropriate provision for them,

35. However, that is a method which rather 'hangs' out on its own at the moment as there is no policy support for it.

2.3 Recommendation

36. We agree with Mr Bathgate that a new clause is required in CE-P9 as follows:

(7) enabling mana whenua to provide for their cultural and social needs for papakāinga, marae and associated developments and make appropriate provision for them.

2.4 Recommendation

37. Finally, in accordance with the conclusions reached in the Mana Whenua chapter consideration we accept that all references to 'takata whenua' in this coastal chapter should be changed to 'mana whenua'.

38. In terms of s.32AA of the RMA that two recommendations are respectively required first to ensure the policy support for the method is the most appropriate way to achieve the purpose of this Act, and secondly is required for consistency.

3. Identifying biodiversity in the coastal environment

39. The first point to be noted in respect of indigenous biodiversity in the coastal environment chapter is that the new NPSIB specifically acknowledges that it only applies in the 'terrestrial environment' (clause 1.3(1) of the NPSIB) and that while both NPSs apply in the terrestrial coastal environment that in the event of conflict between the two "*the New Zealand Coastal Policy Statement prevails*." (clause 1.4(1) and (2) NPSIB).

40. The base problem faced in both terrestrial and coastal environments is the identification and mapping of areas of significant indigenous biodiversity or natural character that may be under threat. That problem is often capable of being at least reduced in scope in the terrestrial environment by means of recourse to desktop reviews of aerial photography, and doubtless in future assisted by drone footage – all of which can be readily available at relatively low cost for large areas with follow-up ground research in addition being practical by using the assistance of vehicles on a broad basis.

41. In the coastal environment those low-cost methods of identification on a broad basis are not available. Marine biological research is a painstakingly slow process involving divers carrying out benthic assessments, aided in deeper waters to some extent by submersibles operated from larger surface vessels but again with only short distance viewing available and at huge cost. Moreover, for a large stretch of unprotected coast as in the Otago region off-shore weather and visibility conditions have a major impact.

42. These concerns were raised by the hearing panel repetitively during the coastal hearings as it seemed that the massive cost and time span required to identify and map indigenous biodiversity and natural character in the marine environment may not have been properly appreciated. The panel was concerned at that cost factor given the provisions of CE-P5 which as notified stated:

CE–P5 – Coastal indigenous biodiversity

Protect indigenous biodiversity in the coastal environment by:
(1) identifying and avoiding adverse effects on the following ecosystems, vegetation types and areas:
(a) indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists,

(b) taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened,
(c) indigenous ecosystems and vegetation types in the coastal environment that are threatened or are naturally rare,
(d) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare,
(e) areas containing nationally significant examples of indigenous community types, and (f) areas set aside for full or partial protection of indigenous biodiversity under other legislation, and

(2) identifying and avoiding significant adverse effects and avoiding, remedying or mitigating other adverse effects on the following ecosystems, vegetation types and areas:
(a) areas of predominantly indigenous vegetation in the coastal environment,
(b) habitats in the coastal environment that are important during the vulnerable life stages of indigenous species,
(c) indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable,
(d) areas sensitive to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh,
(e) habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes,
(f) habitats, including areas and routes, important to migratory species, and
(g) ecological corridors, and areas important for linking or maintaining biological values identified under this policy.

43. The method that flowed from Policy CE-P5 was CE-M3 which required that local authorities must work collaboratively together to:

3) identify areas and values of indigenous biodiversity within their jurisdictions in accordance with CE–P5, map the areas and describe their values in the relevant regional and district plans, and

44. One of the major concerns expressed by some submitters was a concern at how workable or practical the policy was when it required ‘avoidance’ of effects with all its near prohibitive connotations on areas that it would be well-nigh impossible physically and financially to have identified during the life of the coastal plan.

45. The Panel itself was not so concerned about the cost imposition on applicants for resource consent because as a matter of preparation on their assessment of environmental effects, they would have to carry out benthic research which would disclose what types of species were present and estimate effects and propose mitigation measures if warranted anyway. The concern was more at the overall cost to councils of imposing those mapping burdens – and particularly on ORC itself in respect of the marine environment.

46. Moreover, adding to that concern was the fact that the NZCPS did not require such a detailed level of identification and mapping for indigenous biodiversity in Policy 11 as it did for areas

of high natural character in Policy 13(1)(c) and for natural features and landscapes in Policy 15(d). Counsel for ORC in closing opined that the reason for that mapping not being required for Policy 11 purposes in the NZCPS was because it seemed likely that the Board of Inquiry into the NZCPS was contemplating DOC would provide the requisite mapping. That has not occurred.

47. The cost and practical concerns were raised by the hearing panel with ORC's counsel who in closing on 29 May 2023 formally responded as follows:

> *332. The concern was that, at least in the marine environment, little work had been done and ORC was imposing upon itself a significant and costly obligation.*
>
> *333. Substantial progress had in fact been made by the Regional Council through the NIWA report, Identification of Significant Ecological Areas for the Otago Coastal Marine Area, June 2022; although the report does identify gaps in available information and makes recommendations for cost-effective ground-truthing and monitoring programmes.*
>
> *334. ORC does not resile from the task of identifying important and vulnerable biodiversity in the coastal environment*

48. The marine area involved is so vast, (including as it does the whole of the territorial sea area out to 12 nautical miles or approximately 22 kilometres off-shore), the task required by CE-P5 so detailed, and the costs potentially so large that the panel still holds serious concerns as to its practicality. However, faced with that formal response by ORC through its counsel the panel is unable to gainsay such a formal assurance by ORC. As it can take the matter no further, no change is recommended.

49. One other related matter that we need to address is the recommended move of CE-P5 to replace the notified version of ECO-P7 which as notified stated:

> **ECO–P7 – Coastal indigenous biodiversity**
>
> Coastal indigenous biodiversity is managed by CE–P5, and implementation of CE–P5 also contributes to achieving ECO–O1.

50. We struggle to understand why that change is recommended.

51. Other changes that were recommended to us for the ECO chapter in the final 10 October 2023 version included the insertion of the phrase "*Outside the coastal environment*". That occurs now in the final recommended version at the start of ECO-P3 as to protection of significant natural areas and taoka, and ECO-P4 as to consent pathways for certain new activities. Plainly in those important areas in the ECO chapter those exclusionary words mean it is recommended that the CE chapter provisions will apply to the coastal environment and the ECO chapter outside it. Even more relevant is the fact that in the final recommended version of ECO-P6 as to management of effects on indigenous biodiversity the same qualifier appears - that it only applies "*Outside the coastal environment*". We fail to understand why one would then follow those provisions in the ECO chapter with a provision applying only to the coastal environment, particularly when it opens with the words:

> *Protect indigenous biodiversity in the coastal environment by:*

52. Finally, as to this recommended move, we wonder if the s.42A report writer considered clause 9 of the National Planning Standards which provides:

> *8. Excluding the provisions in Part 2, provisions that apply to the coastal marine area must be located in the Coastal marine area section.*

53. The provisions in Part 2 (of Table 2 in the National Planning Standards) relate to overview matters being:

> *Significant resource management issues for the region*
>
> *Resource management issues of significance to iwi authorities in the region*
>
> *Integrated management*

54. In other words, all other coastal marine area provisions, such as CE-P5, must be in the CE chapter as we read clause 8 of the National Planning Standards.

55. In terms of s.32AA of the RMA the discussion above describes sufficiently the factors that have led us to the recommendation that CE-P5 remains in the coastal chapter.

3.1 Recommendation

56. As a consequence of all those considerations we recommend that CE-P5 remains in the coastal chapter. (In the discussions below on provision for infrastructure and aquaculture development we look again in more detail at the extent of the protective wording of CE-P5).

3.2 Scientific Uncertainty

57. The final issue we need to discuss as to indigenous biodiversity in the coastal environment chapter related to methods CE-M3(6) and CE-M4(6). Those provisions require a precautionary approach in assessing the effects of activities where "*there is scientific uncertainty*". The concern raised was whether that was broad enough to cover actual gaps in knowledge because many such gaps exist or may not have been filled in sufficient detail, i.e. where there was no or inadequate information available.

58. The response in closing by ORC's counsel was that "*Deficits in knowledge do create uncertainty*" on the basis that "*When there are information shortfalls, there is scientific uncertainty.*" (paras 337-338). Whilst we can see the force of those arguments we would still prefer to see the precautionary approach broadened to include the phrase "*or a lack of relevant knowledge*" in both those methods so that no arguments can arise, as we fear that lack of relevant knowledge will be the most likely scenario for years to come.

59. Again, in terms of s.32AA of the RMA that recommendation is the most appropriate way to achieve the purpose of this Act.

3.2.1 Recommendation

60. That methods CE-M3(6)(a) and CE-M4(6)(a) be amended to read:

> (a) there is scientific uncertainty <u>or a lack of relevant knowledge</u>, or ...

4. Providing for infrastructure in the coastal environment

61. The concerns of infrastructure providers in terrestrial settings were echoed in the coastal chapter hearings. In short infrastructure submitters who took part in the coastal chapter hearings were concerned that the same overly protectionist objectives and policies framework also applied in the coastal environments chapter as applied on land. In the Panel's view those Part 2 RMA issues are in principle guided by the Supreme Court's decisions in *King Salmon* and *Port Otago* – both of which of course related to and arose out of provisions in the NZCPS. We do not need, therefore, to repeat the discussion canvassed in the legal section of this report here.

62. Rather it is a matter of standing back and considering whether the protectionist prioritisation complained of in terrestrial settings applies in the coastal environment chapter, and whether there is a consent pathway providing for the 'structured analysis' approach specified by the Supreme Court in the event of an apparent conflict between applicable policies.

63. In that regard there are two areas of policy and methods which immediately come to attention. The first is that CE-P4 as to natural character does not contain the qualifier of protection from inappropriate use development and subdivision that occurs in s.6(a) RMA and also in Policy 13(1) of the NZCPS.

64. Another aspect of concern in the PORPS is that CE-M3 (5)(a) as to regional plan content in the notified version controlled the use and development of the coastal marine area, in order to:

> (a) <u>preserve</u> natural character; natural features, landscapes and seascapes; and indigenous biodiversity of the coastal marine area in accordance with CE–P4, CE–P5 and CE–P6.
>
> (Our emphasis)

65. Again, no qualifier appeared in that provision as to protection from inappropriate activities. (We also record that no qualifier appears in the chapeau to CE-P6, which it should do, to be consistent with the s.6 RMA approach.)

66. Finally, the term 'prioritising', (which given the *Port Otago* case must raise flags), appears again in the recommended final version of Policy CE-P3 as we have discussed above.

67. These protective provisions in the coastal environment chapter have been sought to be reconciled as to provision for infrastructure in the coastal environment by the provision of Objective CE-O5 and Policies CE-P9 as to activities on land within the coastal environment; and CE-P10 as to activities within the coastal marine area; (with CE-P11 being enabling as to aquaculture). The NZCPS at Policy 6(1)(a) and other provisions requires a recognition of the vital need for enabling some crucial energy related infrastructure and mining activities in some settings:

> ***Policy 6 Activities in the coastal environment***
>
> *(1) In relation to the coastal environment:*
> *(a) recognise that the provision of infrastructure, the supply and transport of energy including the generation and transmission of electricity, and the extraction of minerals are activities important to the social, economic and cultural well-being of people and communities; …*

68. The most crucial policy in the coastal marine area in the PORPS for infrastructure is Policy CE-P10. It opens with wording that is directive. However, as notified, it was most difficult to accept it as being truly enabling when it commenced with the use of the word 'must' allied with 'maintain or improve' in subclause (2):

> **CE-P10 – Activities within the coastal marine area**
>
> Use and development in the coastal marine area must:
>
> (1) enable multiple uses of the coastal marine area wherever reasonable and practicable, and
>
> (2) maintain or improve the health, integrity, form, function and resilience of the coastal marine area, or ~~and~~
>
> (3) have a functional need or operational need to be located in the coastal marine area, or
>
> (4) have a public benefit or opportunity for public recreation that cannot practicably be located outside the coastal marine area.

69. The construction of infrastructure, such as for example a main state highway armouring or a telecom tower or some renewable energy construction such as for tidal or wind power capture, simply cannot always '*maintain or improve the health, integrity, form, function and resilience of the coastal marine area,'*. Construction of such infrastructure is always going to have some adverse effect. This wording as notified was too prescriptive to meet the needs recognised in Policy 6(1)(a) of the NZCPS, but the recommended addition of the alternative between subclauses (1) and (2) and sub-clauses (3) and (4) by the use of the word 'or' instead of the word 'and' resolves that issue.

70. Once more in terms of s.32AA of the RMA that recommended wording which we agree with is the most appropriate way to achieve the purpose of this Act by enabling a realistic consent pathway.

4.1 Recommendation

The chapeau to CE-P6 should be amended to read:

> Protect natural features, and landscapes ~~and~~ (including seascapes) in the coastal environment from inappropriate activities by:
>
> ...

71. The recommended use of 'or' after subclause (2) of CE-P10 as in the recommended 10 October 2023 version is adopted providing consent pathways through subclauses (3) and (4).

5. Connections to other chapters within the pORPS21

72. In para 61 of the opening legal submissions on the CE chapter Mr Logan counsel for ORC said:

61. The National Planning Standards provide that if specific provisions relating to the coastal environment are located in other chapters, they must be cross-referenced to the coastal environment chapter."

73. As authority for that he cited clause 7 of the National Planning Standards. It provides:

> *7. Any specific provisions relating to the coastal environment which are located in other topic chapters must be cross-referenced in the Coastal environment chapter.*)

74. In other parts of the PORPS which are addressed in other sections of this report other views may be expressed as to the need or otherwise for such cross-referencing. However. in the CE chapter we accept that the National Planning Standards do require such cross-references and we do not therefore recommend any removal from that chapter of cross-referencing that has occurred.

6. Providing for aquaculture

75. The major submitters in the aquaculture area were Kāi Tahu, DOC and Sanford Limited. At the time of our hearings Sanford had under active development a concept for a series of consents to enable major off-shore marine structures for salmon farming. While this process plainly does not involve decision-making on that proposal, it was a useful example against which to test the assertions made by Sanford that the PORPS notified provisions made appropriate provision for aquaculture consent pathways as required by Policy 8 of the NZCPS and should not be significantly changed. Policy 8 of the NZCPS provides:

> ***Policy 8 Aquaculture***
>
> *Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:*
>
> *(a) <u>including in regional policy statements</u> and regional coastal plans <u>provision for aquaculture activities in appropriate places</u> in the coastal environment, recognising that relevant considerations may include:*
>
> *(i) the need for high water quality for aquaculture activities; and*
>
> *(ii) the need for land-based facilities associated with marine farming;*
>
> *(b) <u>taking account of the social and economic benefits of aquaculture</u>, including any available assessments of national and regional economic benefits; and*
>
> *(c) ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.*
>
> (Panel's emphasis)

76. The propositions advanced by some of DOC's and Kāi Tahu's planning witnesses which caused concern for Sanford related to requests to effectively strengthen the protective provisions of the RPS in relation to indigenous biodiversity and as to significant natural areas. We have discussed above in relation to infrastructure our concerns about the level of protection for natural character in CE-P4 failing to adopt the qualifier of protection from inappropriate activities contained in s.6(a) of the Act. We have also discussed in the legal section of this

report the distinction between s.6(a) and (b) protection with that qualifier, as compared to s.6(c) as to indigenous biodiversity which does not have that qualifier.

77. The difference in protection levels by the two subclauses (1) and (2) of CE-P5 are that in subclause (1) protection is required to avoid effects on ecosystems within the tightly described types of at-risk species or fauna habitats in subclause (1). In other words that is a strong 'avoid' directive as to <u>all</u> effects, based squarely on s.6(c). By contrast in subclause (2) the requirement is worded as follows:

> *(2) identifying and avoiding significant adverse effects and avoiding, remedying or mitigating other adverse effects on the following ecosystems, vegetation types and areas:*

78. The difference in protection levels reflects what is found between Policies 11(a) and 11(b), 13(a) and 13(b), and 15(a) and 15(b) of the NZCPS.

79. What that distinction highlights is the necessity to ensure a provision like CE-P5 does not extend beyond the s.6(c) protection which bears repeating:

> *(c)* the protection of areas of <u>significant</u> indigenous vegetation and <u>significant</u> habitats of indigenous fauna:

(Panel's emphasis)

80. Both the notified and recommended versions of CE-P5 distinguished between the protection offered by subclauses (1) and (2). The list of matters protected under subclause (1) as notified were all matters which it is unlikely could be challenged as being "*<u>significant</u> indigenous vegetation and <u>significant</u> habitats of indigenous fauna".* In fact they echo those in Policy 11(1) of the NZCPS. The initial s.42A response to the DOC and Kāi Tahu planning evidence seeking additional protection for more species or habitats was to suggest addition of a subclause to CE-P5(1) that added in areas identified in accordance with APP2. That caused concern for Mr Low, the Sanford planning witness. However, in his final recommendations Mr Maclennan the s.42A report writer sought to ensure that concern was removed by moving down the recommended reference to: "*(h) significant natural areas identified in accordance with APP2 that are not included in (1) above"* from the subclause (1) level of protection to subclause (2) level.

81. In our view that amendment would have been appropriate on the recommended wording of the definition of '*significant natural area'* in the PORPS as it was at the coastal environment hearings in May 2023 prior to the promulgation of the NPSIB. In that form it was recommended as follows:

> ***Significant natural area*** *means areas of significant indigenous vegetation and significant habitats of indigenous fauna ~~that are located outside the coastal environment.~~*

82. However, the definition of SNA or significant natural area has now changed in the October 2023 recommended version to read:

Significant natural area[1]	~~means areas of significant indigenous vegetation and significant habitats of indigenous fauna that are located outside the coastal environment.~~ has the same meaning as in the Interpretation in the National Policy Statement for Indigenous Biodiversity 2023 (as set out in the box below): means: (a) any area that, after the commencement date, is notified or included in a district plan as an SNA following an assessment of the area in accordance with Appendix 1; and (b) any area that, on the commencement date, is already identified in a policy statement or plan as an area of significant indigenous vegetation or significant *habitat* of indigenous fauna (regardless of how it is described); in which case it remains as an *significant natural area* unless or until a suitably qualified ecologist engaged by the relevant local authority determines that it is not an area of significant indigenous vegetation or significant *habitat* of indigenous fauna.

83. There is a need to amend that definition as the NPSIB definition refers to APP 1, whereas in the PORPS APP 1 is headed '*APP 1- Criteria for identifying outstanding water bodies*' with APP 2 containing '*Criteria for identifying areas that qualify as significant natural areas (SNAs)*'. That definition in (a) needs correction so that we can recommend that the final recommended version of CE-P5 is adopted.

6.1 Recommendation

84. Accordingly, we need to recommend the definition of SNA in (a) is amended to delete the reference to APP 1 and for it to read APP 2 as follows:

Significant natural area	~~means areas of significant indigenous vegetation and significant habitats of indigenous fauna that are located outside the coastal environment.~~ has the same meaning as in the Interpretation section of the National Policy Statement for Indigenous Biodiversity 2023 (except with a reference to Appendix 2 rather than Appendix 1) as set out below: means: (a) any area that, after the commencement date, is notified or included in a district plan as an SNA following an assessment of the area in accordance with Appendix 2; and (b) any area that, on the commencement date, is already identified in a policy statement or plan as an area of significant indigenous vegetation or significant *habitat* of indigenous fauna (regardless of how it is described); in which case it remains as an *significant natural area* unless or until a suitably qualified ecologist engaged by the relevant local authority determines that it is not an area of significant indigenous vegetation or significant *habitat* of indigenous fauna.

85. With that amendment to the definition of an SNA the wording of CE-P5 does leave open a consent pathway for aquaculture which will have to address any potential for conflict between the protective CE-P5 and the enabling policies in Policy 8 of the NZCPS and Policy CE-P11 of the PORPS, as to provision for aquaculture. That will have to occur in a structured analysis approach reconciling the relevant policies in their particular factual setting in accordance with the *Port Otago* case.

[1] *00139.129 DCC, 00237.049 Beef & Lamb NZ*

86. The enabling Policy CE-P11 as to aquaculture was recommended in the October 2023 final version to provide:

> **CE-P11 – Aquaculture**
>
> Provide for the development and operation of aquaculture activities ~~within appropriate locations and limits~~ where this is in accordance with CE-P3 to CE-P12, taking into account:
>
> (1) the need for high quality water required for an aquaculture activity,
>
> (2) the need for land-based facilities and infrastructure required to support the operation of aquaculture activities, and
>
> (3) the potential social, economic and cultural benefits associated with the operation and development of aquaculture activities.

87. We do have a concern, though, with the words "*where this is in accordance with*". From one point of view that phrase potentially gives rise to the possibility of an argument that failure to comply with any provision in CE-P3 to CE-P12 would mean consent cannot be given. We do not understand that that is what was intended. Rather what we take those words to be intended to mean is that any consideration of particular aquaculture proposals has to take into account all of the relevant policies in the particular factual context involved. Some of those policies have an 'avoid' approach, and some have an 'enabling' approach.

6.2 Recommendation

88. We consider it is necessary instead to adapt the Supreme Court approach in the Port Otago case of specifying that all relevant matters have to be considered. As a consequence, we recommend an amended wording as follows for the opening words of CE-P11:

> **CE-P11 – Aquaculture**
>
> Provide for the development and operation of aquaculture activities ~~within appropriate locations and limits~~ taking into account policies CE-P3 to CE-P12, and:
>
> (1) the need for high quality water required for an aquaculture activity,
>
> (2) the need for land-based facilities and infrastructure required to support the operation of aquaculture activities, and
>
> (3) the potential social, economic and cultural benefits associated with the operation and development of aquaculture activities.

89. In terms of s.32AA of the RMA that recommendation is needed to ensure the policy provides for the most appropriate way to achieve the purpose of this Act

7. Funding Issue

90. In the Mana Whenua chapter, we discussed the effect of the litigation involving Te Whānau a Kai v. Gisborne District Council which culminated in an exchange of memoranda between counsel for ORC and Kāi Tahu and DCC accepting that provisions requiring mandatory funding of resources in an RPS was not in accordance with relevant Local Government Act provisions

controlling funding processes for local governments. One of the PORPS provisions of that nature identified by Mr Logan for ORC was CE-M1A(2). As recommended in the final 10 October 2023 version it provided:

> (2) implementing actions to foster the development of *mana whenua* capacity to contribute to the Council's decision-making processes, including resourcing,

91. In the ORC memorandum on this issue Mr. Logan as counsel for ORC observed that this provision could not stand. The panel agrees but only as to the last phrase 'including resourcing.' Otherwise the balance wording is the same as the wording proposed by Kāi Tahu's counsel on 25 July and accepted by ORC's counsel on 25 September, 2023.

92. We have also considered CE-M5 which is worded differently with its opening wording stating:

> "*Local authorities* shall consider the use of other mechanisms or incentives to assist in achieving Policies CE-P2 to CE-P1~~2~~3, including" and there then follow a range of possible actions including "(4) funding assistance for restoration projects (for example, through Otago Regional Council's ECO Fund)."
>
> (Panel's emphasis)

93. We agree with Mr Logan who classed such provisions as being discretionary, and that being so, they are able to comply with local government funding requirements before being adopted. That provision in our view does not offend the Te Whānau a Kai judicial direction.

94. In terms of s.32AA this change to CE-M1A(2) is needed to respond to a legal clarification made of the restrictions imposed on RMA funding commitments by the need to observe other local government funding legislation.

7.1 Recommendation

95. We recommend that CE-M1A(2) be amended to read:

> (2) implementing actions to foster the development of *mana whenua* capacity to contribute to the Council's decision-making processes

8. Surf breaks – CE-P2, CE-P7, and CE-M3(2), CE-M3(5)(b), CE-M4(10) and CE-M5(6)

96. These provisions as notified provided, (with only relevant parts quoted):

> **CE–P2 – Identification**
>
> Identify the following in the coastal environment:
>
> …
>
> (5) the nationally significant surf breaks at Karitane, Papatowai, The Spit, and Whareakeake ~~and any regionally significant surf breaks~~.
>
> **CE–P7 – Surf breaks**

Manage Otago's nationally ~~and regionally~~ significant surf breaks so that:

(1) nationally significant surf breaks are protected by avoiding adverse effects on the surf breaks, including on access to and use and enjoyment of them, and

~~(2) the values of and access to regionally significant surf breaks are maintained.~~

CE–M3 – Regional plans

Otago Regional Council must prepare or amend and maintain its regional plans no later than 31 December 2028 to:

(1) map areas of deteriorated water quality in the coastal environment, in accordance with CE– P2(2) and CE–P2(3),

(2) map the areas and characteristics of, and access to, nationally ~~and regionally~~ significant surf breaks,

…

(5) control the use and development of the coastal marine area, in order to:

(a) preserve the natural character; natural landscapes, features, and seascapes; and indigenous biodiversity of the coastal marine area in accordance with CE–P4, CE–P5 and CE–P6, and

(b) manage Otago's nationally ~~and regionally~~ significant surf breaks in accordance with CE– P7,

CE–M4 – District plans

Territorial authorities must prepare or amend and maintain their district plans to:

…

(10) provide access to nationally ~~and regionally~~ significant surf breaks, and

97. Submissions were made in support by Kāi Tahu, Wise Response, Forest & Bird, and in opposition as to the regional aspect by DCC and Port Otago. The s.42A report concluded no change needed to be made, and no recommendation was made to delete the reference to regional surf breaks.

98. The thrust of the opposition was that while the NZCPS in Policy 16 specifically directed protection for national significant surf breaks, it did so by specific identification of those in Schedule 1. Four of those listed in Schedule 1 of the NZCPS are located in the Otago Region. They are identified for protection by that specific method as being expressly identified as being of national significance.

99. In the PORPS in the Environmental section of the Impact Snapshot for SRMR-I8 surf breaks are referred to in the second paragraph, but only at a nationally significant level:

Natural features, landscapes, seascapes, and surf breaks of national significance can be affected by human activity, climate change, and natural hazards.

100. In the notified objectives CE-O1(5) specifically seeks to protect surf breaks but only those of national significance:

> **CE–O1 – Safeguarding the coastal environment**
>
> The integrity, form, functioning and resilience of Otago's coastal environment is safeguarded so that:
>
> …
>
> (5) surf breaks of national significance are protected.

101. Then the policy in CE-P2(5), already cited above, specifically identifies where those national significance surf breaks are located:

> (5) the nationally significant surf breaks at Karitane, Papatowai, The Spit, and Whareakeake and any regionally significant surf breaks.

102. The problem raised in opposition submissions was that there is no method specifying how surf breaks qualify to be identified as regional surf breaks, and no criteria exist in the PORPS to assist in that regard.

103. The s.42A response to that problem at paragraph 291 was to refer to the provisions of Policy 13(2)(c) of the NZCPS and Policy CE-P4 of the PORPS which each together might enable identification of areas of natural character requiring protection from inappropriate development. The conclusion reached was:

> *Therefore, in a general sense there is a mechanism within CE – P4 of the pORPS to identify and preserve surf breaks within the region that are not identified as nationally significant within Schedule 1 of the NZCPS. However, there is a growing body of research that highlights the need to provide greater protection of surf breaks within the RMA framework. This research has also developed a methodology for identifying surf breaks of regional significance (Atkin, Bryan, Hume, Mead, & Waiti, 2019).*

104. However, that research methodology is not specified in the PORPS and no submission we are aware of sought its inclusion.

105. We are of the view that with no such mechanism or criteria for identification existing in the PORPS for regionally significant surf breaks, that it is not appropriate to have policies and methods providing for their protection and identification.

8.1 Recommendation

106. That all references to regionally significant surf breaks in CE-P2, CE-P7, and CE-M3(2), CE-M3(5)(b), CE-M4(10) and CE-M5(6) as follows:

> **CE–P2 – Identification Identify the following in the coastal environment:**
>
> …
>
> (5) the nationally significant surf breaks at Karitane, Papatowai, The Spit, and Whareakeake ~~and any regionally significant surf breaks~~.

CE–P7 – Surf breaks

Manage Otago's nationally ~~and regionally significant~~ surf breaks so that:

(1) nationally significant surf breaks are protected by avoiding adverse effects on the surf breaks, including on access to and use and enjoyment of them~~, and~~

~~(2) the values of and access to regionally significant surf breaks are maintained.~~

CE–M3 – Regional plans

Otago Regional Council must prepare or amend and maintain its regional plans no later than 31 December 2028 to:

(1) map areas of deteriorated water quality in the coastal environment, in accordance with CE– P2(2) and CE–P2(3),

(2) map the areas and characteristics of, and access to, nationally ~~and regionally~~ significant surf breaks,

…

(5) control the use and development of the coastal marine area, in order to:

(a) preserve the natural character; natural landscapes, features, and seascapes; and indigenous biodiversity of the coastal marine area in accordance with CE–P4, CE–P5 and CE–P6, and

(b) manage Otago's nationally ~~and regionally~~ significant surf breaks in accordance with CE– P7,

CE–M4 – District plans

Territorial authorities must prepare or amend and maintain their district plans to:

…

(10) provide access to nationally ~~and regionally~~ significant surf breaks, and

Section 8: Land and Freshwater (LF)

1. LF-FW – Fresh water

1.1. Integrated catchment management

1.1.1. Introduction

1. Beef + Lamb and DINZ, through the legal submissions of Dr Somerville and the opening statement of Ms Perkins, proposed a new policy on integrated catchment management be inserted in the LF-WAI section of the PORPS. Their proposed wording is as follows:

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) 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.

2. This proposed policy reflected the evidence from these submitters, along with those of OWRUG, that there is a substantial amount of freshwater improvement work being done across the region by established catchment groups. As we have previously discussed, we were impressed by the commitment and achievements of these groups. We heard that ORC staff already support and work with many of these groups and the submitters wanted these catchment-based approaches to be recognised through the PORPS.

3. Ms Boyd provided additional information in her reply report that discussed ORC's commitment to integrated catchment management through its Long term Plan 2021-31.[1] A pilot Catlins Integrated Catchment Group is underway and more groups are proposed to follow. From the information we received, this ORC-led approach is different to the more 'grass-roots', community-led approach that we heard about from the submitters. We consider that there is a place for both types of approaches.

4. Ms Boyd supports including a provision that addresses integrated management and considered whether the proposed provision should be a policy or a method. The Panel support her view that a method is more appropriate. The method proposed by Ms Boyd in her reply report is as follows:

LF-FW-M8AA – Integrated catchment management

Otago Regional Council may:

(1) develop and implement an integrated catchment management programme for the region, and

(2) work in partnership with *mana whenua* and in collaboration with communities to develop catchment action plans that:

(a) collate and build on existing work in the catchment,

(b) incorporate science and mātauraka Māori, and

(c) identify and target effective environmental management actions.

5. The method recommended by Ms Boyd captures the catchment action plan approach included in the Long-term Plan but would not capture the established community-led groups that may not fit with the Council-led catchment action plan approach. We consider that the PORPS should acknowledge the role of both approaches and note that community initiatives at a local catchment level are recognised in the submitters' proposed clause (d). This is in part done through Ms Boyd's proposed clause (2)(a) but this is in relation to development of catchment action plans rather than on-the-ground delivery of these plans.

6. We propose adding the following clause to Ms Boyd's recommended wording to ensure that both approaches are captured:

(3) Encourage and support community initiatives, at varying catchment levels, that help to deliver catchment action plans.

7. This work will be dependent on funding and interest by mana whenua and local communities. The chapeau of this method includes the word 'may' which we consider is appropriate given these potential limitations.

[1] *FPI Reply Report of Ms Felicity Boyd, 15 September 2023, from para 78*

1.1.2. Recommendation

8. We recommend the following new method be added to the LF-FW section:

> **LF-FW-M8AA – Integrated catchment management**
>
> Otago Regional Council may:
>
> (1) develop and implement an integrated catchment management programme for the region,
>
> (2) work in partnership with mana whenua and in collaboration with communities to develop catchment action plans that:
>
> (a) collate and build on existing work in the catchments,
>
> (b) incorporate science and mātauraka Māori, and
>
> (c) identify and target effective environmental management actions, and
>
> (3) encourage and support community initiatives, at varying catchment levels, that help to deliver catchment action plans.

1.2. Wetland management

1.2.1. Introduction

9. We addressed the legal issues around wetland definitions in the Legal Issues section of Appendix Two. While we are not going to revisit that discussion in detail, a summary is needed here to put the discussion that follows into context. The issues primarily arise due to a requirement to address the RMA's broad approach to wetland protection and the NPSFM's more narrow approach through its focus on 'natural inland wetlands'.

10. The RMA has broadly defined 'wetland' in s.2 as:

> ***wetland*** *includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions*

11. Section 6(a) recognises and provides for 'the preservation of the natural character of … wetlands … from inappropriate subdivision, use and development' as a matter of national importance.

12. In addition to s.6 recognition in the RMA, the NZCPS includes provisions that apply to wetlands in the coastal environment, most specifically Policy 11(b). While earlier versions of the NPSFM included general, protective provisions which related to 'wetlands', the NPSFM 2020 contained more specific provisions with definitions of 'natural wetlands' and 'natural inland wetlands'.

13. The PORPS was notified under the original 2020 version of the NPSFM and later amended in response to the 2023 amendments to the NPSFM. As discussed in the Legal Issues section, the NPSFM amendments amalgamated the previous definitions of 'natural wetland' and 'natural inland wetland' into one definition of 'natural inland wetland'. The definition of 'natural inland wetland' introduced to the NPSFM in the 2023 amendments reads as follows:

> ***natural inland wetland*** *means a wetland (as defined in the Act) that is not:*
>
> *(a) in the coastal marine area; or*
>
> *(b) a deliberately constructed wetland, other than a wetland constructed to offset impacts on, or to restore, an existing or former natural inland wetland; or*
>
> *(c) a wetland that has developed in or around a deliberately constructed water body, since the construction of the water body; or*
>
> *(d) a geothermal wetland; or*
>
> *(e) a wetland that:*
>
> > *(i) is within an area of pasture used for grazing; and*
> >
> > *(ii) has vegetation cover comprising more than 50% exotic pasture species (as identified in the National List of Exotic Pasture Species using the Pasture Exclusion Assessment Methodology (see clause 1.8)); unless*
> >
> > *(iii) the wetland is a location of a habitat of a threatened species identified under clause 3.8 of this National Policy Statement, in which case the exclusion in (e) does not apply*

14. Policy 6 of the NPSFM places a strong emphasis on the protection of 'natural inland wetlands', as follows:

> *Policy 6: There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.*

15. Policy 6 is in part implemented by clause 3.22 of the NPSFM, which directs that a policy is included in regional plans with wording the same or similar to that provided in the clause. The opening wording of this policy states:

> *The loss of extent of natural inland wetlands is avoided, their values are protected, and their restoration is promoted, except where:…*

16. The policy enables a 'loss of extent or values' in a natural inland wetland where that arises from a wide-ranging list of activities. The activities are, with one exception, subject to there being a functional need to locate the activity in the specified area and the effects of the activity being managed through applying the NPSFM effects management hierarchy (defined in clause 3.21).

17. Following some debate through the hearing process, we concluded in the 'Legal Issues' section of Appendix Two that there is no difference in stringency between the principles for the effects management hierarchies in the NPSFM and the NPSIB.

18. Turning back to the definition of 'natural inland wetland', as we stated in the 'Legal Issues' section of Appendix Two,

> *That new combined definition is intended to exclude some RMA defined wetlands from the detailed level of protection and restoration otherwise required by the NPSFM, and to provide a base for a closely controlled consent pathway in clause*

3.22(1) of the NPSFM for some types of activities which are described in that sub-clause.

19. In response to what the report writers perceived as a gap between the NPSFM 'natural inland wetlands' and the RMA definition, the ORC officers proposed a definition for 'natural wetland' that is broader than the NPSFM 'natural inland wetland' definition, as follows:

> ***Natural wetland*** *means a wetland (as defined in the Act) that is not:*
>
> *(a) a deliberately constructed wetland, other than a wetland constructed to offset impacts on, or to restore, an existing or former natural wetland; or*
>
> *(b) a wetland that has developed in or around a deliberately constructed water body, since the construction of the water body.*

20. The officers considered that the RMA definition arguably includes constructed wetlands, which can be built for purposes including stormwater or wastewater detention and treatment, and that such wetlands should be excluded from the pORPS provisions.

21. Ms Hunter for Oceana Gold expressed concern that the definitions, coupled with amendments to LF-FW-P9, "would likely result in a more onerous policy environment for activities where there may be 'natural wetlands' present, and likely result in significant costs to resource users which have not been properly quantified."[2] She considers that, as recommended, a broader level of protection would apply to 'natural wetlands' than to 'natural inland wetlands', which are proposed to be managed under clause 3.22 of the NPSFM and have the accompanying exemptions for activities. Ms Hunter considers that a "more appropriate approach would see the policy framework responding more specifically to the distinction between higher value "natural inland wetlands" and "natural wetlands"."[3]

22. The extent of wetland loss in Otago was not a matter of contention, with both historical losses and more recent losses being highlighted by Ms Boyd, Mr Couper for Fish and Game, Mr McKinlay for the Director General of Conservation, and numerous witnesses for Kāi Tahu. We heard evidence about the extent of loss of both wetland extent and condition. This has resulted from drainage predominantly for farmland as well as the introduction and spread of invasive species.

23. Submitters, including the Director General of Conservation and Fish and Game, highlighted the different types of high value wetlands that fall outside of the NPSFM definition of 'natural inland wetland'. The evidence in chief of Mr McKinlay for the Director General of Conservation addressed the importance of Otago's ephemeral wetlands and the values that they can hold.

24. Mr McKinlay drew our attention to the Upper Taiari and Paerau Wetland Scroll Plain complex, which he stated is unique in New Zealand and is 'the largest intact scroll plain complex in the Southern Hemisphere'[4]. The complex provides habitat for a wide range of indigenous flora and fauna. He goes on to state that there are three distinct categories of wetland within the complex: permanent river and lagoon, semi-permanent shallow, marshy areas, and temporary/ephemeral wetlands which exist for two months or less on average a year. Some categories would be considered as 'natural inland wetland' while others would not, potentially leading to inconsistent and inadequate management.

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[2] *Supplementary evidence of Ms Claire Hunter for Oceana Gold, 18 August 2023, para 15.*
[3] *Ibid., para 22.*
[4] *Evidence in Chief of Mr Bruce McKinlay for the Director General of Conservation, 23 November 2022, para 63.*

25. Mr McKinlay also highlighted Otago's nationally significant inland saline ecosystems and referred us to a Wildlands Consultants report prepared for ORC.[5] He discussed the geology of these areas and the threatened plant, lichen and lepidoptera species that these areas support.[6]

26. We stated in the Legal Issues section that:

> *As we understand the concerns of the DOC witnesses and Ms Boyd, it is that areas like the Taiari scroll plain and other locations with ephemeral wetlands which are grazed will likely have significant aspects of ecological and hydrological importance which are exposed to potential degradation unless the RPS recognises those risks. In our view, the s.6 protection and the protection intended by policies 5 and 9 of the NPSFM is still able to be provided by the requirement for protection from inappropriate activities. The RPS can assist by the LF and/or the ECO chapter identifying particular values where development activities may be inappropriate. We consider that a better mechanism than attempting to insert a new definition of 'natural wetlands'.*

27. We went on to conclude that:

> *"… the 'natural wetland' definition is superfluous, and worse that it is potentially raising the level of protection of all wetlands as defined to a level of absolute preservation and restoration through recommended Objective LF-FW-O9(3) and recommended policies LF-FW-P9 and LF-FW-P10 which are beyond the outcomes intended by s.6(a) of the RMA. The recommended objective and the two recommended policies do not provide the qualifier of protection from inappropriate use and development that s.6(a) provides. Nor do they provide the consent pathways and the application of the effects management hierarchy that the provisions relating to natural inland wetlands apply. We are concerned that that strict absolute outcome provides a higher level of protection for wetlands exempted from the 'natural inland wetland' definition in the NPSFM than the protection level accorded to those falling within that definition. That means that the recommended PORPS provisions have the potential to be considered as being contrary to the overall scheme in the 2023 NPSFM as to the manner of treatment of non-coastal wetlands through the 'natural inland wetland' terminology and effects management hierarchy provisions.*

28. We accept that constructed wetlands should not be subject to the same level of protections as 'natural' wetlands, however constructed wetlands would arguably not support *"a natural ecosystem of plants and animals that are adapted to wet conditions"* (Panel's emphasis) as per the RMA definition of 'wetland'. We also consider it unlikely that constructed wetlands would have a level of natural character that would justify being preserved as per s.6(a) of the RMA. We therefore do not consider that an exclusion for constructed wetlands is necessary.

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[5] *Evidence in Chief of Mr Bruce McKinlay for the Director General of Conservation, 23 November 2022, para 79.*

[6] *Ibid, para 80-85.*

29. With these conclusions in mind, we turn to addressing the specific wetland management provisions of the LF-FW section. As notified, these provisions fall in both the non-FPI and FPI processes, as follows.

a. LF-FW-O9 – Natural wetlands

b. LF-FW-P8 – Identifying natural wetlands

c. LF-FW-P9 – Protecting natural wetlands

d. LF-FW-P10 – Restoring natural wetlands

e. LF-FW-AER – AER11

1.2.2. LF-FW-O9

30. As notified, LF-FW-O9 reads as follows:

LF-FW-O9 – Natural wetlands

Otago's natural wetlands are protected or restored so that:

(1) mahika kai and other mana whenua values are sustained and enhanced now and for future generations,

(2) there is no decrease in the range and diversity of indigenous ecosystem types and habitats in natural wetlands,

(3) there is no reduction in their ecosystem health, hydrological functioning, amenity values, extent or water quality, and if degraded they are improved, and

(4) their flood attenuation capacity is maintained.

31. Four submitters supported LF-FW-O9 as notified, one sought its deletion and several submitters sought amendments. The amendments sought to include the following:

(a) Oceana Gold considered that the objective is unclear on what is to be achieved – what the reference to the range of values means, what needs to be enhanced, and what the endpoint of enhancement is.

(b) The Director General of Conservation sought that ephemeral wetlands are specifically referenced, for the reasons discussed above.

(c) The Director General also sought the that 'protect or restore' is replaced with 'protect and restore', although the planning evidence of Mr Brass accepted that this does not need to be pursued.

(d) DairyNZ sought that wetlands only be restored only where they are degraded, and Oceana Gold sought that wetlands are 'protected, improved or restored'.

(e) Beef + Lamb and DINZ, Kāi Tahu ki Otago, and Ballance seek that 'range' be replaced with 'extent' in clause (2).

(f) Ballance, NZSki, Realnz, Silver Fern Farms, and Fulton Hogan sought varying amendments to clauses (2) and (3) to reduce their stringency.

(g) Beef + Lamb and DINZ sought that 'amenity values' be deleted from clause (3), considering that wetlands do not need to be aesthetically pleasing.

(h) Wise Response sought that wetland flood attenuation capacity in clause (4) should be steadily improved rather than just maintained, while Kāi Tahu ki Otago sought reference to water storage capacity alongside flood attenuation capacity in clause (4).

(i) DOC sought the addition of a new clause to recognise the importance of wetlands in providing habitat to mobile species such as waterfowl and rails.

32. Federated Farmers sought that the objective be deleted, as it is inconsistent with the NPSFM and a duplication of provisions located in *ECO – Ecosystems and indigenous biodiversity* chapter. We have dealt with these matters above and in the Legal Issues section.

33. Consistent with our determinations above, we are recommending that the PORPS does not use the term 'natural wetlands'. We agree with Oceana Gold that the objective is unclear, particularly as there are no benchmarks to guide whether it is being achieved.

34. We also find that LF-FW-O9, as notified, is not consistent with s.6(a) of the RMA through seeking protection or restoration of all 'natural wetlands', therefore not necessarily providing for appropriate subdivision, use and development. Our recommended amendments seek to clarify this.

35. We carefully considered whether to remove 'amenity values' from clause (3), as requested by Beef + Lamb and DINZ. Ms Boyd's s.42A report directs us to the RMA definition of 'amenity value' and, more importantly, to the definition of 'loss of values' in clause 3.21(1) of the NPSFM which the PORPS adopts. The latter definition includes 'amenity values' in the list of values in clause (b). While this definition applies to natural inland wetlands and rivers, we consider it appropriate to apply to the broader consideration of wetlands in LF-FW-O9.

1.2.2.1. Recommendation

36. The Panel recommends the following amendments to LF-FW-O9:

LF-FW-O9 – ~~Natural w~~Wetlands

Otago's ~~natural~~ wetlands are protected from inappropriate subdivision, use and development and, where degraded, ~~or restored~~ restoration is promoted so that:

(1) mahika kai and other mana whenua values are sustained and enhanced now and for future generations,

(2) there is no net decrease, and preferably an increase, in the ~~range~~ extent and diversity of wetland indigenous ecosystem types and habitats ~~in natural wetlands~~, and

(3) there is no reduction and, where degraded, there is an improvement in ~~their~~ wetland ecosystem health, hydrological functioning, amenity values, extent or water quality, ~~and if degraded they are improved, and~~

(4) their flood attenuation and water storage capacity is maintained or improved.

37. As a consequential amendment, we recommend deleting the definition of ‘natural wetland’ from the PORPS. We note that the RMA definition of ‘wetland’ was included in the notified PORPS and it is appropriate that this remains.

38. As a further consequential amendment, we recommend deleting ‘natural’ from ‘natural wetland’ or wetlands’ in other provisions in the PORPS, specifically LF-FW-M6(7), LF-VM-E2 paragraph 3 and LF-FW-AER11.

1.2.3. LF-FW-P8

39. As notified, LF-FW-P8 reads as follows:

LF–FW–P8 – Identifying *natural wetlands*

Identify and map *natural wetlands* that are:

(1) 0.05 hectares or greater in extent, or

(2) of a type that is naturally less than 0.05 hectares in extent (such as an ephemeral *wetland*) and known to contain threatened species.

40. QLDC, DCC, Kāi Tahu ki Otago, and CODC support LF-FW-P8 and seek to retain it as notified. Forest and Bird also support LF-FW-P8 but submitted that the policy should specify that mapping is to be completed by 2030.

41. Submissions by PWCG and Lloyd McCall sought that the wetland area in (2) is increased from 0.05 hectares to 1 hectare, while City Forests sought that it be increased to 0.25 hectares to be consistent with the NESPF. The 0.05 hectare area included in LF-FW-P8(1) is consistent with clause 3.23(1) of the NPSFM and we consider that increasing this area would result in the policy being inconsistent with the NPSFM.

42. As outlined above, the NPSFM approach to managing wetlands was amended after the s42A report and evidence in chief were prepared. The 2023 amendments to the NPSFM deleted the definition of ‘natural wetland’ and introduced a new definition of ‘natural inland wetland’ that is provided in paragraph 384 above. The amended definition of ‘natural inland wetland’ is narrower than that included in the NPSFM 2020 (and RMA) and is accompanied by an additional suite of clauses which provide consent pathways for urban development, mining, quarrying and landfills and clean-fills, in addition to specified infrastructure activities (which were provided for in the NPSFM 2020).

43. LF-FW-P8(1) and (2) replicate Clause 3.23(1)(a) and (b) of the NPSFM which did not change through the 2023 amendments. What did change in the PORPS is the recommended amendment in clause (1) from ‘natural wetland’ to ‘natural inland wetland’. As discussed above, we consider that there are differences between the two.

44. Ms Boyd’s supplementary evidence on the NPSFM 2023 amendments addressed the difference in the definitions but did not specifically consider the implications for LW-FW-P8. This policy was also not addressed in Ms Boyd’s reply report, however was amended under Clause 16(2) of Schedule 1 of the RMA to apply to ‘natural inland wetlands’ rather than ‘natural wetlands’.

45. The relevant portion of the 2023 NPSFM definition of 'natural inland wetland' for LF-FW-P8 is:

Means a wetland (as defined in the Act) that is not:

...

(e) a wetland that:

(i) is within an area of pasture used for grazing; and

(ii) has vegetation cover comprising more than 50% exotic pasture species (as identified in the National List of Exotic Pasture Species using the Pasture Exclusion Assessment Methodology (see clause 1.8)); unless

(iii) the wetland is a location of a habitat of a threatened species identified under clause 3.8 of this National Policy Statement, in which case the exclusion in (e) does not apply

46. The Director General of Conservation and Otago Fish and Game raised concerns about the large number of wetlands that would fall outside of the 'natural inland wetland' definition, many of which may provide habitat for threatened species. However, we point out that the presence of threatened species is one of the double negatives that is in the provision to ensure these are natural inland wetlands.

47. Ms Boyd, in her supplementary evidence for the FPI process on the implications of the NPSIB, recognised that some wetlands will "fall through the cracks" due to not being mapped or due to the prevalence of exotic pasture species. We agree with the Director General and Fish and Game that mapping is an important precursor to managing wetlands and will help to reduce the likelihood of some wetlands falling through the cracks. Broader mapping would also mean that the Council would be better able to give effect to s.6(a) of the RMA and Policies 5, 13 and 14 of the NPSFM.

48. A Wildland Consultants report on ecosystem mapping was provided as Appendix 13 to the s.32 report[7]. This Wildland report details the mapping of potential and actual natural terrestrial and wetland ecosystems using a methodology agreed to by regional councils across New Zealand. In relation to mapping of ephemeral wetlands, the report states at section 2.6:

49. Ephemeral wetlands were poorly mapped in existing layers such as LCDB and FENZ, as they generally occur at much smaller areas than the minimum mapping units of these classifications. However, ephemeral wetlands are in most cases easily distinguished in aerial imagery, and were mapped by hand digitisation across all parts of Otago where ephemeral wetlands occur. Almost 3,000 ephemeral wetlands were ultimately mapped. Very shallow ephemeral wetlands would be less easy to distinguish and are not likely to have been mapped, and other ephemeral wetlands where the wetland boundary is not sharp.

50. This section of the Wildland report goes onto conclude that:

    The end result of these wetland ecosystem mapping approaches is wetland mapping of significantly better spatial and thematic resolution than any other existing regional scale mapping of wetlands.

51. It therefore appears that a comprehensive mapping exercise has been completed to a high level for all wetlands and not just 'natural inland wetlands'.

52. While we understand Ms Boyd's reason for recommending that LF-FW-P8 apply solely to 'natural inland wetlands', given the 2023 amendments to the NPSFM, we do not accept that the proposed change can be justified under Clause 16(2) of Schedule 1 of the RMA. Such an

[7] Lloyd, K. (2020) Mapping of potential natural ecosystems and current ecosystems in Otago Region. Wildlands Consultants Contract Report No. 5015a prepared for Otago Regional Council.

amendment changes the intent of the policy through the use of a narrower definition, which we do not consider is of 'minor effect' or corrects a 'minor error' as per s.16(2).

53. As we explained in the Legal section to the Introduction to this Appendix Two report the legal situation is that a 'wetland' not falling within the definition of 'natural inland wetland' does not magically lose all RMA protection. It will still remain a defined 'wetland' under the RMA and the protective policies in the NPSFM still apply to it. What that means in practice is that for such wetlands falling outside the 'natural inland wetland' definition any proposed activity will still at law have to be assessed as to whether it is an inappropriate use or development under s.6(a) RMA. Moreover, it will have the protective policies applying to it under the NPSFM such as policies 5 and 9. The manner in which we have recommended the adoption of the RMA 'wetland' definition above, and the use of only that term in the heading and chapeau to the objective LF-FW-09 ensures that level of protection is addressed in both plan and consenting processes.

54. Care is needed in considering what is required by the NPSFM for both identification and mapping of wetlands and how that is reflected in the PORPS. Identification in the NPSFM is required by regional councils of both 'natural inland wetlands', (see cl.3.8(3)(e)), and importantly of 'the location of habitats of threatened species', (see cl.3.8(3)(c).

55. However, sub-clause 3.23(1) of the NPSFM refers to both identifying and mapping and commences by requiring:

> (1) Every regional council must identify and map every natural inland wetland in its region that is:
>
> *(a) 0.05 hectares or greater in extent; or*
>
> *(b) of a type that is naturally less than 0.05 hectares in extent (such as an ephemeral wetland) and known to contain threatened species.*

56. In other words as the chapeau of cl. 3.23 in sub-clause(1) commences with reference only to identifying and mapping of every 'natural inland wetland' then sub-clauses (a) and (b) only appear to apply to 'natural inland wetlands'. That at first sight also appears to mean that in terms of cl.23(1) of the NPSFM those wetlands falling outside the definition of 'natural inland wetland' are not required to be identified or mapped.

57. But that becomes confused even further in that sub-clause 3.23(4) then states that all mapping must be completed within 10 years of commencement date and specifies the regional council must:

> *...prioritise its mapping, for example by:*
>
> *(a) first, mapping any wetland at risk of loss of extent or values; then*
> *(b) mapping any wetland identified in a farm environment plan, or that may be affected by an application for , or a review of, a resource consent; then*
> *(c) mapping all other natural inland wetlands of the kind described in subclause (1).*

58. Whilst we acknowledge that the priority provided is stated in cl.23 (4) as being 'by way of example' it is still a mandatory requirement to carry out the mapping. The word used is 'must.' In the absence of any other priority being suggested in our view it must be followed.

59. The result is an unhappy state of confusion as to whether wetlands not falling within the definition of 'natural inland wetlands' are required to be mapped, but sub-clause 3.23(4) appears to expressly require that to be done.

60. Given that confusing statutory background we do recognise that in respect of policies like LF-FW-P8 as to both identification and mapping of wetlands, if that policy is restricted only to identification pursuant to cl.3.23(1) of the NPSFM as to 'natural inland wetlands', then some significant wetlands that fall within the exclusion of 'natural inland wetlands' may be overlooked in plan formulation and consenting processes. That is because an assumption may be made by some planners that the *R J Davidson Family Trust v Marlborough District Council* [*2018*] *NZCA 316* decision means that higher level protection issues have been addressed in the RPS with no identification or mapping process needed for those sensitive areas. That would not be legally correct because as we have explained any 'wetland' still has the higher level protection as described above. Moreover, sub-clause 3.23(4) (a) also expressly requires them to be mapped. Therefore, out of an excess of caution to safeguard against that possibility we consider this identification and mapping policy in LF-FW-P8 needs another limb in addition to requiring identification and mapping solely of 'natural inland wetlands' as apparently required by cl.3.23(1) of the NPSFM.

1.2.3.1. Recommendation

61. In the amended wording we have recommended below we have addressed two other areas of significance – one as to threatened species and another as to extent. That recommended wording reflects the priority and wording specified in clause 3.23(4) of the NPSFM, which the regional council is bound at law to comply with, (but subject to the area limitations for 'natural inland wetlands' in sub-clause 3.23(1)). LF-FW-P8 should read:

LF–FW–P8 – Identifying ~~*natural*~~ *wetlands*

By 3 September 2030, ~~Identify~~ identify and map ~~*natural wetlands* that are~~:

1. any wetland at risk of loss of extent or values,

2 any wetland identified in a farm environment plan, or that may be affected by an application for, or a review of, a resource consent, and

3. all other natural inland wetlands that are:

   (i) 0.05 hectares or greater in extent, or

   (ii) of a type that is naturally less than 0.05 hectares in extent (such as an ephemeral *wetland*) and known to contain threatened species.

62. We make the closing observation that in terms of the s.32AA analysis we had earlier expressed concerns in the Legal section about not having enough information to decide cost issues as to identification and mapping if a 'natural wetlands' definition was adopted and applied in the PORPS. That issue does not arise with this recommended change above. The regional council is bound at law to comply with the NPSFM. What we have finally recommended for LF-FW-P8 is taken expressly from a combination of clauses 3.23(1) and (4) of that statutory instrument the NPSFM. We do not consider there is any discretion to depart from that legal obligation.

1.2.4. LF-FW-P9 and LF-FW-P10

63. As notified, LF-FW-P9 reads as follows:

LF-FW-P9 – Protecting *natural wetlands*

Protect natural wetlands by:

(1) avoiding a reduction in their values or extent unless:

(a) the *loss of values* or extent arises from:

(i) the customary harvest of food or resources undertaken in accordance with tikaka Māori,

(ii) restoration activities,

(iii) scientific research,

(iv) the sustainable harvest of sphagnum moss,

(v) the construction or maintenance of *wetland utility structures*,

(vi) the maintenance of operation of *specific infrastructure*, or *other infrastructure*,

(vii) natural hazard works, or

(b) the Regional Council is satisfied that:

(i) the activity is necessary for the construction or upgrade of *specified infrastructure*,

(ii) the *specified infrastructure* will provide significant national or regional benefits,

(iii) there is a *functional need* for the *specified infrastructure* in that location,

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

(v) the other *effects* of the activity (excluding those managed under (1)(b)(iv)) are managed by applying the *effects management hierarchy,* and

(2) not granting resource consents for activities under (1)(b) unless the Regional Council is satisfied that:

(a) the application demonstrates how each step of the *effects management hierarchies* in (1)(b)(iv) and (1)(b)(v) will be applied to the *loss of values* or extent of the *natural wetland*, and

(b) any consent is granted subject to conditions that apply the *effects management hierarchies* in (1)(b)(iv) and (1)(b)(v).

64. LF-FW-P10 was notified as follows:

LF-FW-P10 – Restoring *natural wetlands*

Improve the ecosystem health, hydrological functioning, *water* quality and extent of

natural wetlands that have been degraded or lost by requiring, where possible:

(1) an increase in the extent and quality of habitat for indigenous species,

(2) the restoration of hydrological processes,

(3) control of pest species and vegetation clearance, and

(4) the exclusion of stock.

65. As notified, LF-FW-P9 largely reflected clause 3.22 of the 2020 version of the NPSFM. The key differences are: the split between protection in LF-FW-P9 and restoration in LF-FW-P10, whereas clause 3.22 addresses both; and the reference in LF-FW-P9 to the biodiversity effects management hierarchy in the ECO chapter rather than the NPSFM effects management hierarchy. The 2023 amendments to the NPSFM resulted in LF-FW-P9 becoming more stringent than the updated requirements, with the addition of Clause 3.22(1)(c)-(f) in the NPSFM. Following consideration of submissions and evidence, including in the context of the 2023 NPSFM amendments, Ms Boyd recommended substantial amendments to LF-FW-P9 as follows:

LF-FW-P9 – Protecting *natural wetlands*

Protect natural wetlands by:

(1) in the coastal environment, managing them in accordance with the NZCPS in addition to (2) or (3) below,

(2) except as provided for by (3), managing activities to ensure they maintain or enhance the ecosystem health, indigenous biodiversity values, and hydrological functioning of *natural wetlands*,

(3) for *natural inland wetlands*, implementing clause 3.22(1) to (3) of the NPSFM.

66. Clause (2) of the revised recommended LF-FW-P9 was developed through discussions between Mr Farrell for Fish and Game, Mr Brass for the Director-General of Conservation, Ms McIntyre for Kāi Tahu ki Otago, Ms Bartlett for Ngāi Tahu ki Murihiku, and Ms Boyd for ORC. The intent of the clause is to provide flexibility for the LWRP to manage different activities in different ways, provided activities are collectively achieving a common outcome. We acknowledge the collaborative efforts of the parties.

67. Parties including Oceana Gold raised concerns that LF-FW-P9 was stricter for wetlands that are not considered to be natural inland wetlands. We acknowledge that this could be the case and consider that the wording proposed in clause (2) is problematic. This clause could be interpreted to directly link an activity to its effects on a specific wetland and require the listed values of that wetland to be managed. This would close the door to approaches such as compensation and offsetting. In addition, clause (2) would apply to all activities without having the exceptions provided by clause 3.22 of the NPSFM, or the s.6(a) of the RMA qualifier of protection *"from inappropriate subdivision, use, and development"*.

68. The Panel considers that, for the reasons discussed above, the exceptions in clause 3.22 should also apply to those wetlands that aren't 'natural inland wetlands'. This would provide for the effects management hierarchy to apply to proposed activities that could affect such wetlands, for such activities to need to demonstrate a functional need to be in the proposed location, and for there to be significant national or regional benefits from these activities.

69. It is also important here to refer to Policy 5 and Policy 9 of the NPSFM, which we discussed in the Legal Issues section. These refer to water bodies and freshwater ecosystems, and habitats of freshwater indigenous species, respectively. The RMA definition of 'water body' includes 'freshwater' in a 'wetland', with 'freshwater' including 'all water except coastal water and geothermal water'.

70. Given that a water body includes a wetland, we also have to give effect to Policy 5 and Policy 9 of the NPSFM. In short, wetland health needs to be improved where it is degraded and otherwise maintained, and the habitats of freshwater indigenous species are to be protected. Policies 5 and 9 of the NPSFM are implemented through LF-FW-P7 clauses (1) and (2) respectively, which we discuss later in this section of our report, but we must ensure that the wetland provisions are consistent with these national directions.

71. Whereas LF-FW-P9 deals with protecting natural wetlands, LF-FW-P10 addresses restoring natural wetlands. Both protecting and restoring are part of Policy 6 and clause 3.22(1) of the NPSFM, in relation to 'natural inland wetlands'. Policy 6 reads:

> **Policy 6:** There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.

72. The 'no further loss of extent' component of Policy 6, which is largely mirrored by clause 3.22(1), is implemented through clause (3) of LF-FW-P9 which refers to clause 3.22(1) to (3) and only applies to 'natural inland wetlands'. Clause (2) of LF-FW-P9 also indirectly addresses the 'no further loss of extent' through its expression to 'maintain or enhance'. We are therefore satisfied that policies LF-FW-P9 and LF-FW-P10 give effect to the NPSFM.

73. We do question whether there needs to be separate protect and restore policies, or whether the same could be achieved through one policy relating to managing natural wetlands. LF-FW-P9 is not strictly about natural wetland protection given the reasonably long list of exceptions that are provided through clause 3.22(1) of the NPSFM. Similarly, LF-FW-P10 is not restricted to restoration but is also about managing wetlands to retain their existing values (for example, through controlling pest species and vegetation clearance in clause (3)).

74. Ms Boyd notes in her s.42A report that some aspects of clause 3.22(4) of the NPSFM are not addressed through LF-FW-P9 and LF-FW-P10, namely Māori freshwater values, and amenity values. Clause 3.22(4) of the NPSFM states:

> *Every regional council must make or change its regional plan to include objectives, policies, and methods that provide for and promote the restoration of natural inland wetlands in its region, with a particular focus on restoring the values of ecosystem health, indigenous biodiversity, hydrological functioning, Māori freshwater values, and amenity values.*

75. While this clause applies to a regional plan and not a regional policy statement, we note that all the matters of focus that are listed are addressed in LF-FW-O9. These matters will also need to be considered where the NPSFM effects management hierarchy applies to a proposed activity. Ms Boyd advises[8] that no submitter sought amendments to add Māori freshwater values and amenity values to LF-FW-P9 and LF-LW-P10. However, as these provisions are part of the freshwater process, we can recommend amendments that are outside the scope of

[8] *S.42A report of Ms Felicity Boyd, para 1475.*

submissions. We consider that addition of Māori freshwater values and amenity values would aid to implement LF-FW-O9 and ensure that the PORPS is consistent with the NPSFM.

76. Some submitters sought changes to the chapeau of LF-FW-P10 to either reduce or increase its stringency. Policy 6 and clause 3.22(1) of the NPSFM require that restoration of natural inland wetlands is 'promoted', while clause 3.22(4) requires regional plans to include provisions that "provide for and promote" restoration. The notified version of LF-FW-P10 uses the term 'requiring, where possible' and, following consideration of submissions and evidence, Mr Boyd recommended that this be amended to 'requiring, to the greatest extent practicable'. It is important to note that LF-FW-P10 applies to improving the values and extent of wetlands that have been degraded or lost and is likely to be applied through non-regulatory methods. It will not apply to more intact, high value wetlands.

77. Policy 6 of the NPSFM requires a halt to the loss of extent and the protection of values (of natural inland wetlands) but there is no requirement to increase wetland extent. We are concerned about a potentially strict interpretation of 'requiring' in a regulatory sense and, while we acknowledge the importance of wetland restoration, we consider that 'promoted' is an appropriate term to use in the PORPS. It's relevant here to note that Policy 5 of the NPSFM is to improve the health and well-being of water bodies "if communities choose".

78. Turning to clause (4)(d) of LF-FW-P10, Beef + Lamb and DINZ, Federated Farmers and John Highton consider that some sheep grazing can be beneficial to wetland health and referenced the Stock Exclusion Regulations as already managing this issue (sheep were deliberately excluded from the regulations). We accept these submissions and refer particularly to the evidence of Emma Crutchley for OWRUG and Federated Farmers, who considers that stock access *"can cause water quality issues but they also control aggressive pasture species and weeds – enhancing natural character and hydrology"*. From the evidence, we accept that sheep grazing in certain circumstances can be a useful tool for managing pasture and weed species, and we do not consider that the door should be shut to this. No wording has been proposed so we have recommended an amendment in line with the evidence.

1.2.4.1. Recommendation

79. We recommend deleting LF-FW-P9 and LF-FW-P10 as notified and replacing it with the following:

LF-FW-P10A – Managing wetlands

Otago's *wetlands* are managed:

(1) in the coastal environment, in accordance with the NZCPS in addition to (2) and (3) below,

(2) by applying clause 3.22(1) to (3) of the NPSFM to all wetlands, and

(3) to improve the ecosystem health, hydrological functioning and extent of wetlands that have been degraded or lost by promoting:
  (a) an increase in the extent and condition of habitat for indigenous species,
  (b) the restoration of hydrological processes,
  (c) control of pest species and vegetation clearance, and
  (d) the exclusion of stock, except where stock grazing is used to enhance wetland values.

1.2.5. LF-FW-O8 – Fresh water and LF-FW-P7 – Fresh water

80. As notified, LF-FW-O8 reads:

LF-FW-O8 – *Fresh water*

In Otago's *water bodies* and their catchments:

(1) the health of the wai supports the health of the people and thriving mahika kai,

(2) water flow is continuous throughout the whole system,

(3) the interconnection of *fresh water* (including *groundwater*) and *coastal waters* is recognised,

(4) native fish can migrate easily and as naturally as possible and taoka species and their habitats are protected, and

(5) the significant and outstanding values of Otago's *outstanding water bodies* are identified and protected.

81. Ms Boyd recommended deleting LF-FW-O8 and moving most of its content to LF-FW-O1A. We accepted the addition of LF-FW-O1A, albeit with some amendments, and agree that retaining LF-FW-O8, with the exception of clause (5), would result in unnecessary duplication. We therefore accept Ms Boyd's recommendation to delete LF-FW-O8.

82. As notified, LF-FW-P7 reads:

LF-FW-P7 – *Fresh water*

Environmental outcomes, attribute states (including target *attribute* states) and limits ensure that:

(1) the health and well-being of *water bodies* is maintained or, if *degraded,* improved,

(2) the habitats of indigenous species associated with *water bodies* are protected, including by providing for fish passage,

(3) *specified rivers and lakes* are suitable for primary contact within the following timeframes:

(a) by 2030, 90% of rivers and 98% of lakes, and

(b) by 2040, 95% of rivers and 100% of lakes, and

(4) mahika kai and *drinking water* are safe for human consumption,

(5) existing *over-allocation* is phased out and future *over-allocation* is avoided, and

(6) *fresh water* is allocated within environmental limits and used efficiently.

83. After considering the submissions and evidence, Ms Boyd recommended the following amendments in her s.42A report:

LF-FW-P7 – *Fresh water*

Environmental outcomes, attribute states (including target *attribute* states), environmental flows and levels, and limits ensure that:

(1) the health and well-being of *water bodies* is maintained or, if *degraded,* improved,

(2) the habitats of indigenous freshwater species ~~associated with *water bodies*~~ are protected and sustained, including by providing for fish passage,

(2A) the habitats of trout and salmon are protected insofar as this is consistent with (2),

(3) *specified rivers and lakes* are suitable for primary contact within the following timeframes:

(a) by 2030, 90% of *rivers* and 98% of *lakes*, and

(b) by 2040, 95% of *rivers* and 100% of *lakes*, and

(4) resources harvested from water bodies including *mahika kai* and *drinking water* are safe for human consumption, and

(5) existing *over-allocation* is phased out and future *over-allocation* is avoided.~~, and~~

(6) ~~*fresh water* is allocated within environmental *limits* and used efficiently.~~

84. A number of submitters raised concerns about the phrase 'protected and sustained' in clause (2). Meridian and Oceana Gold considered that this clause should only apply to 'significant indigenous species, with Oceana Gold also requesting that the protection requirement be replaced with 'maintain and enhance. Similarly, Horticulture NZ suggests 'maintain and improve'. Conversely, Fish and Game consider that restoration should be required as well as protection, and Contact and Kāi Tahu favour habitats to be sustained as well as protected.

85. We agree with Ms Boyd's assertion that use of the word 'protection' is consistent with the NPSFM, specifically Policy 9 which reads:

> ***Policy 9:*** *The habitats of indigenous freshwater species are protected.*

86. We do not accept the submitters' requests to remove reference to 'protected', as softening this policy would result in the PORPS being less stringent than Policy 9.

87. Continuing with clause (2), Ballance seeks an amendment to refer to 'indigenous freshwater species', rather than the broader reference to 'indigenous species associated with water bodies'. Ballance consider this terminology to be more consistent with Policy 9 and Clause 3.26 of the NPSFM, which we acknowledge that it is.

88. This proposed amendment was challenged in the evidence of Ms McIntyre from Kāi Tahu. Ms McIntyre considers that such a rewording "*could exclude species such as water and wading birds that do not spend all their time in the water but are still reliant on the health of the water body for some part of their life stages*".[9] We consider this is an important point and, similar to the view of Ms Boyd, irrespective of the wording in Policy 9 we favour Ms McIntyre's evidence. We support the amendment that Ms Boyd has recommended to clause (2) in this regard.

[9] *Evidence in chief of Ms McIntyre for Kāi Tahu, para 78(a).*

89. Considering other submissions, we adopt the recommendations and reasoning of Ms Boyd. There were a number of submissions on clauses (5) and 6) requesting additional direction on the allocation and use of water. Ms Boyd has recommended deleting these clauses and that an additional policy, LF-FW-P7A, be inserted to address water allocation and use. We support this recommendation and discuss LF-FW-P7A below.

1.2.6. LF-FW-P7A –Water allocation and use

90. LF-FW-7A was recommended by Ms Boyd in the Freshwater Hearing s.42A report as follows:[10]

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

(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.

91. As highlighted above, LF-FW-P7A was recommended in response to submissions on LF-FW-P7(5) and (6). Given its late introduction through the s42A report, there was substantial discussion on this policy at the hearing. Some of these submitters sought amendments that would prioritise allocation to specific uses or uses based on efficiency of water use. These submitters were essentially asking that LF-FW-P7A specify what uses would be considered as priority (2) of Te Mana o Te Wai. We have addressed this previously in the Legal Issues section where we determined that it is not appropriate for the PORPS to determine what activities are to be considered as priority (2) or (3). We therefore do not accept submissions for such determinations in LF-FW-P7A.

92. Ms Styles for Manawa Energy has requested additional recognition of the use of water for REG in LF-FW-P7A to give effect to the NPS-REG.[11] In response to questions from the Panel, Ms Styles amended her proposed wording in clause (1) as follows (amendments in addition to those in her EIC are in red):

(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 ***prioritising***

[10] *S.42A report prepared for the Freshwater Hearings, para 1417.*
[11] *Evidence in Chief of Ms Styles for Manawa Energy, para 8.21-8.27.*

***allocation of available fresh water** for:*

*(a) community drinking water supplies, **and***

*(b) **maintaining existing generation output and capacity and future generation from existing** renewable electricity generation **schemes**, and **then***

*(c) land-based primary production, **and then (d) other commercial and industrial uses, …***

93. We do not support including the phrase *"prioritising allocation of available fresh water"* in clause (1), as we consider that this is akin to the prioritisation that was discussed in the previous paragraph. In addition, such a phrase as proposed would apply to all uses listed in clause (1) and not just to REG. We note that LF-FW-P7A would need to considered alongside the provisions in the EIT chapter which give effect to the enabling stance of the NPS-REG for REG activities. We do support Ms Styles' amendments to clause (1)(b), as we consider that limiting this provision to existing REG is consistent with the visions.

94. The policy as proposed in the s.42A report did not address water harvesting and storage. In response to submissions by Horticulture NZ, the Chair invited them to file a memorandum that suggests policy wording to address this gap.[12] Mr Hodgson for Horticulture NZ proposed amendments to LF-FM-P7A, LF- VM-M3, and LF-FW-M6. However, LF-VM-M3 is not an FPI provision and Ms Boyd did not recommend a consequential amendment through the non-FPI process, as it occurred prior. Ms Boyd accepted Mr Hodgson's proposed amendments to LF-FM-P7A and LF-FW-M6, with some amendments to ensure consistency with other provisions. We accept these changes and the reasoning of Horticulture NZ and Ms Boyd. We consider that LF-VM-M3 should also be amended to ensure consistency and address this in relation to this method.

95. The Panel is unclear how water would be allocated for 'aspirations' in clause (2)(c). We consider that 'aspirations' does not provide sufficient certainty and recommend that this clause read as "mana whenua customary or cultural needs and activities". We consider that this amendment is consistent with the relief sought by Kāi Tahu ki Otago.

96. Ms Hunter for Oceana Gold requested that 'land based primary production' in clause (2)(d) be amended to 'primary production' so that it also includes mining and quarrying and associated processing and production.[13] Ms Boyd considers that in community feedback on the freshwater visions, such activities *"were not highlighted as being important region-wide in the way that pastoral, arable and horticultural activities were"*.[14] While we accept this, we acknowledge the importance of mining and quarrying at a regional level and the requirement of these activities for water. For these reasons, we accept Ms Hunter's proposed amendment.

1.2.6.1. Recommendation

97. We recommend the following wording for LF-FW-P7A:

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) managing over-allocation as set out in LF-FW-M6,

[12] *Memorandum of counsel for Horticulture NZ dated 13 September 2023.*
[13] *Evidence in Chief of Ms Hunter for Oceana Gold, paras 48-49.*
[14] *FPI Reply Report of Ms Boyd, para 144.*

(2) allocating *fresh water* efficiently to support the social, economic, and cultural well-being of people and communities, including for:

(a) community drinking water supplies,

(b) maintaining generation output and capacity from existing *renewable electricity generation schemes*,

(c) *mana whenua* customary or cultural needs and activities, and

(d) primary production,

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

(4) ensuring that the efficiency of *freshwater* abstraction, storage, and conveyancing *infrastructure* is improved,

(5) providing for the harvesting and storage of *fresh water* to meet increasing demand for *water*, to manage *water* scarcity conditions and to provide resilience to the *effects* of *climate change*, and

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

98. We recommend the follow consequential change to LF-FW-M6:

LF–FW–M6 – *Regional plans*

Otago Regional Council must publicly notify a Land and Water *Regional Plan* ~~no later than 31 December 2023~~ and, after it is made operative, maintain that *regional plan* to:

…

(5A) provide for the allocation and use of *fresh water* in accordance with LF-FW-P7A, including for *water* harvesting and storage,

…

1.3. Outstanding water bodies

1.3.1. LF–FW–P11 – Identifying outstanding water bodies

99. Outstanding water bodies are addressed through LF-FW-P11 and LF-FW-P12 and LF-FW-M5. LF-FW-P11 and LF-FW-M5 refer to the criteria for identifying outstanding water bodies that are provided in APP1. We discuss each of these provisions in turn below.

100. LF-FW-P11 was notified as follows:[15]

LF–FW–P11 – Identifying *outstanding water bodies*

Otago's *outstanding water bodies* are:

(1) the Kawarau River and tributaries described in the Water Conservation (Kawarau) Order 1997,

(2) Lake Wanaka and the outflow and tributaries described in the Lake Wanaka

[15] *S.42A report prepared for the Freshwater Hearings, para 1417.*

Preservation Act 1973,

(3) any *water bodies* identified as being wholly or partly within an outstanding natural feature or landscape in accordance with NFL–P1, and

(4) any other *water bodies* identified in accordance with APP1.

101. Once again confusion arises in this LF-FW area between the two processes in respect of these related water body provisions now under consideration here. LF-FW-P11 as to outstanding water bodies, LF-FW-P12 as to identifying and managing those water bodies, LF-FW-P13 as to protecting instream values, LF-FW-P14 as to instream values, and LF-FW-M5 as to outstanding water bodies are not shaded blue as FPI provisions. (Nor was the definition of 'effects management hierarchy' in the notified version shaded blue as part of the FPI, despite it specifically adopting the NPSFM definition in that respect.) These are so integrally freshwater issues located in the LF-FW chapter, (even the very title used is 'FW' i.e. freshwater), that we have dealt with the subject matter in this Appendix Two report. This is a classic illustration of the reason why, out of caution, because of the lack of shading, we have also formally included this consideration of those provisions in the non-freshwater report in Appendix One as well.

102. There were several submissions on LF-FW-P11, including three in support and several seeking amendments. Ms Boyd recommended deleting clause (3) in response to submissions by Beef + Lamb and DINZ and Federated Farmers. We consider this to be appropriate and agree with the submitters that being wholly or partly in an outstanding natural feature or landscape does not necessarily mean that a waterbody is outstanding. We agree with Ms Boyd's amendments and reasoning provided in her s.42A report and Reply Report and do not discuss LF-FW-P11 further.

1.3.1.1. Recommendation

103. We recommend the following amendments to LF-FW-P11:

LF-FW-P11 – ~~Identifying~~ Otago's *outstanding water bodies*

Otago's *outstanding water bodies* are:

(1) the Kawarau River and tributaries described in the Water Conservation (Kawarau) Order 1997,

(2) Lake Wanaka and the outflow and tributaries described in the Lake Wanaka Preservation Act 1973, and

~~(3) any *water bodies* identified as being wholly or partly within an outstanding natural feature or landscape in accordance with NFL-P1, and~~

(4) any other *water bodies* identified in accordance with APP1.

1.3.2. LF-FW-P12 – Protecting outstanding water bodies

104. Turning to LF-FW-P12, as notified this provision reads:

LF–FW–P12 – Protecting outstanding water bodies

The significant and outstanding values of outstanding water bodies are:

(1) identified in the relevant regional and district plans, and

(2) protected by avoiding adverse effects on those values.

105. Forest and Bird and Federated Farmers expressed concern that LF-FW-P12 was not well aligned with Policy 8 of the NPSFM, which reads:

Policy 8: *The significant values of outstanding water bodies are protected.*

106. As notified, LF-FW-P12 requires the significant and outstanding values of outstanding water bodies to be identified, rather than identifying outstanding water bodies and protecting their significant values. We agree with the submitters that there are differences between the two provisions. We also agree with Ms Boyd that *"if significant values must be protected then to my mind it is consistent to apply the same requirement to outstanding values"*.

107. We do not agree with Meridian Energy who considers there is no difference between outstanding values and significant values. They sought to delete references to "outstanding values" in LF-FW-P12 and LF-FW-M5. The Panel's view is that outstanding is a 'higher' classification than significant and therefore, by default, any value that is outstanding would also be significant and therefore requiring protection under Policy 8 of the NPSFM.

108. Several submitters sought a way through the 'protected' restriction in Policy 8 of the NPSFM, requesting varying relief to qualify the protection or manage effects to a certain level. Similarly, OWRUG, Aurora Energy, Waka Kotahi, and Transpower sought a pathway for infrastructure that may have an operational and functional need to operate in a way that would affect an outstanding waterbody. We consider that the 'protective' direction of Policy 8 of the NPSFM is clear and do not consider that we can 'water down' the requirements in the ways proposed by submitters.

109. Relevant to this, the NPSFM defined 'outstanding waterbody' as follows:

> ***outstanding water body*** *means a water body, or part of a water body, identified in a regional policy statement, a regional plan, or a water conservation order as having one or more outstanding values.*

110. It therefore follows that outstanding values have to be identified in order to determine whether a waterbody is outstanding. To achieve Policy 8 of the NPSFM, significant values would also have to be identified for such waterbodies to enable the protection of those significant values.

1.3.2.1. Recommendation

111. We accept Ms Boyd's final recommended wording for LF-FW-P12 in her Reply Report and recommend the following amendments:

LF-FW-P12 – ~~Protecting~~ Identifying and managing *outstanding water bodies*

~~The significant and outstanding values of *outstanding water bodies* are:~~

~~(1) identified in the relevant *regional* and *district plans*, and~~

~~(2) protected by avoiding adverse *effects* on those values.~~

Identify *outstanding water bodies* and their significant and outstanding values in the relevant *regional plans* and *district plans* and protect those values.

1.3.3. LF-FW-M5 – Outstanding water bodies

112. LF-FW-M5 sets out the process for identifying outstanding waterbodies and was notified as follows:

> **LF–FW–M5 – *Outstanding water bodies***
>
> No later than 31 December 2023, Otago Regional Council must:
>
> (1) undertake a review based on existing information and develop a list of *water bodies* likely to contain outstanding values, including those *water bodies* listed in LF-VM-P6,
>
> (2) identify the outstanding values of those *water bodies* (if any) in accordance with APP1,
>
> (3) consult with the public during the identification process,
>
> (4) map *outstanding water bodies* and identify their outstanding and significant values in the relevant *regional plan(s*), and
>
> (5) include provisions in *regional plans* to avoid the adverse effects of activities on the significant and outstanding values of *outstanding water bodies*.

113. We generally agree with the analyses of submissions and Ms Boyd's recommended amendments as per her Reply report and the 10 October 2023 version of the PORPS. We note that the date in the chapeau has not been recommended to change, and our understanding is that the work to identify outstanding waterbodies has largely been completed by ORC. That said, clauses (4) and (5) of LF-FW-M5 are to map outstanding waterbodies in the relevant regional plan and include provisions to protect the significant and outstanding waterbodies, respectively. Our understanding is that the date that the regional plan will be publicly notified is uncertain and we consider it appropriate to delete the date requirement in the chapeau to reflect this. This would be consistent with other references in the PORPS that refer to regional plan requirements, including LF-FW-M6.

1.3.3.1. Recommendation

114. We recommend the following amendments to LF-FW-M5:

> **LF-FW-M5 – *Outstanding water bodies***
>
> ~~No later than 31 December 2023,~~ Otago Regional Council must:
>
> (1) ~~in partnership with Kāi Tahu,~~ undertake a review based on existing information and develop a list of *water bodies* likely to contain outstanding values, including those *water bodies* listed in ~~LF-VM-P6~~ LF-FW-P11,
>
> (2) identify the outstanding values of those *water bodies* (if any) in accordance with APP1,
>
> (3) consult with the public and relevant local authorities during the identification process,
>
> (4) map *outstanding water bodies* and identify their outstanding and significant values in the relevant *regional plan(s),* and

(5) include provisions in *regional plans* <u>that protect</u> ~~to avoid the adverse effects of activities on~~ the significant and outstanding values of *outstanding water bodies*.

1.3.4. APP1 – Criteria for identifying outstanding waterbodies

115. Turning to APP1, several submissions were received on APP1 which sought to improve the clarity of the criteria. In her s.42A report Ms Boyd recommended accepting Manawa Energy's submission to replace the notified APP1 criteria with those adopted in Hawke's Bay Regional Council's Plan Change 7. Following responses by parties in evidence and at the hearing, Ms Boyd changed her recommendation to that of amending the notified APP1 criteria rather than adopting the Hawkes Bay criteria.

116. Concerns were raised by submitters in evidence about use of the Hawkes Bay criteria, particularly by the Director General for Conservation and Fish and Game. The evidence of Dr Richarson for the Director General considered that the notified APP1 provided for more expert evaluation and interpretation.[16] She expressed concern about the ecological considerations in the Hawke's Bay criteria and considered that aspects weren't relevant to the Otago region. Her recommendations were supported by Mr Brass for the Director General, who helpfully provided suggested amendments to APP1.

117. The evidence of Mr Couper and Mr Paragreen for Fish and Game discussed their concerns with the Hawke's Bay criteria for recreation[17] and, in his statement to the LF hearing, Mr Paragreen also helpfully provided tracked amendments to APP1 to address their concerns.[18]

118. As mentioned previously, Ms Boyd also explained to us, both at the hearing and in her Reply Report, that ORC staff have done a considerable amount of work to determine outstanding waterbodies against the notified criteria and that changing to the Hawkes Bay criteria would mean that at least some of this work would need to be redone. We support her recommendation to retain and modify the notified APP1, rather than adopting the Hawkes Bay criteria.

119. Of importance, Kāi Tahu ki Otago and Ngāi Tahu ki Murihiku sought that the reference to cultural and spiritual values be deleted, as ranking waterbodies does not reflect the relationship of Kāi Tahu with water. The two submitters sought different relief: Kāi Tahu ki Otago sought an addition to Table 4 to ensure that the cultural and spiritual values are recognised and protected for the waterbodies that are identified using APP1; while Ngāi Tahu ki Murihiku sought to separate the outstanding waterbody process from the process for developing wāhi tupuna relevant to waterbodies, noting that wāhi tūpuna should be identified through APP7 – identifying wāhi tūpuna.

120. The Hawkes Bay criteria do not include consideration of cultural and spiritual values and Ms McIntyre stated at the hearing that:

> *The s. 42A report recommendation to change the criteria for identification of outstanding waterbodies resolved this problem by adopting a set of criteria that does not include cultural and spiritual values … If the recommendation is reversed, then the Kai Tahu submissions on this matter will also need to be considered.*

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[16] *Dr Marine Richarson for DOC, para 123-127*
[17] *Jayde Couper for Fish and Game, paras [146]-[157]; Nigel Paragreen for Fish and Game, para [125]*
[18] *Opening statement of Nigel Paragreen for LF hearing, Appendix 2*

121. We note that in the absence of a values criterion for cultural and spiritual values, LF-FW-P12 (and NPSFM Policy 8) would still require that significant cultural and spiritual values are protected for each waterbody that is identified as outstanding – the criteria in APP1 are only for identifying outstanding waterbodies and are not to be used to identify the significant values of those outstanding waterbodies. It is Policy 8 of the NPSFM that requires that significant values of outstanding waterbodies are protected, i.e. there will be more significant values for a waterbody that is identified as outstanding through APP1. Therefore, while the absence of a criterion would mean that waterbodies would not be ranked according to their cultural and spiritual values, it would not mean that such values would go unprotected. We recognise the importance of APP7 in assisting to identify these significant values, as part of the process of identifying wāhi tūpuna.

122. Ms Boyd has recommended amendments to APP1 following consideration of submissions and evidence. We accept these recommendations, with the following amendments:

(a) For landscape values, deletion of 'high' in clause (2), as criteria should relate to outstanding rather than high values;

(b) Similarly, for natural character values, delete 'high' from the introductory sentence in the description.

1.3.4.1. Recommendation

123. We recommend the following amendments to APP1 – Criteria for outstanding waterbodies, which are consistent with those recommended in the 10 October 2023 version of the PORPS.

APP1 – Criteria for identifying *outstanding water bodies*

Outstanding water bodies include any *water body* with one or more of the following outstanding values, noting that sub-values are not all-inclusive:

Table 1 - Values of outstanding water bodies

Values	Description	Example sub-values
~~Cultural and spiritual~~	~~A *water body* which has outstanding cultural and spiritual values.~~	~~Wāhi tapu, wāhi taoka, wai tapu, rohe boundary, battle sites, pa, kāika, tauraka waka, mahika kai, pa tuna; and acknowledged in korero tuku iho, pepeha, whakatauki or waiata~~
Ecology	A *water body* which has outstanding ecological value as a habitat for: • Native birds • Native fish • ~~Salmonid fish~~ • Other aquatic species	Native birds, native fish, native plants, aquatic macroinvertebrates
Landscape	A *water body* that: (1) is an essential ~~which forms a key~~ component of a landscape or natural feature that is "conspicuous, eminent, remarkable or iconic" within the region, and ~~or is critical to an outstanding natural feature~~.	Scenic, association, natural characteristics (includes hydrological, ecological and geological features)

	(2) has landscape, wild and/or scenic values that contain distinctive qualities which are outstanding in the context of the region.	
Natural character	A *water body* with ~~high~~ naturalness that: (1) exhibits a~~n exceptional~~ combination of natural processes, natural patterns and natural elements ~~with low levels of modification to its form, ecosystems and the surrounding landscape~~ that is exceptional in the context of the region, and (2) has little to no human modification to its form, ecosystems, and the surrounding landscape.	Natural characteristics (includes hydrological, ecological and geological features)
Recreation	A *water body* which is recognised as providing an outstanding recreational experience for an activity which is directly related to the *water*.	Angling, fishing, kayaking, rafting, jetboating
Physical	A *water body* which has an outstanding geomorphological, geological or hydrological feature which is dependent on the *water body's* condition and functioning.	Science

1.4. Natural character and instream values

124. Natural character and instream values are addressed through LF-FW-P13 and LF-FW-P14. We discuss each of these provisions in turn below.

1.4.1. LF-FW-P13 – Preserving natural character and in stream values

125. LF-FW-P13 was notified as follows:

LF–FW–P13 – Preserving natural character

Preserve the natural character of *lakes* and *rivers* and their *beds* and margins by:

(1) avoiding the *loss of values* or extent of a *river*, unless:

(a) there is a *functional need* for the activity in that location, and

(b) the *effects* of the activity are managed by applying:

(i) for *effects* on indigenous *biodiversity*, either ECO-P3 or ECO-P6 (whichever is applicable), and

(ii) for other effects, the effects management hierarchy,

(2) not granting resource consent for activities in (1) unless Otago Regional Council is satisfied that:

(a) the application demonstrates how each step of the *effects management hierarchies* in (1)(b) will be applied to the *loss of values* or extent of the *river*, and

(b) any consent is granted subject to conditions that apply the *effects management hierarchies* in (1)(b),

(3) establishing environmental flow and level regimes and *water* quality standards that support the health and well-being of the *water body,*

(4) wherever possible, sustaining the form and function of a *water body* that reflects its natural behaviours,

(5) recognising and implementing the restrictions in Water Conservation Orders,

(6) preventing the impounding or control of the level of Lake Wanaka,

(7) preventing modification that would reduce the braided character of a *river*, and

(8) controlling the use of *water* and *land* that would adversely affect the natural character of the *water body.*

126. This provision attracted over 40 submission points which have some common themes. These include:

(a) That the policy should recognise instream values alongside natural character;

(b) Concerns about clause (1)(b) which refers to 'functional need';

(c) How the effects management hierarchy is referred to in clause (2);

(d) Exclusions for regionally significant infrastructure;

(e) Requests to have a separate policy for environmental flows and levels (clause (3));

(f) Providing for some modification of natural character, particularly if it is associated with mitigating risks to health and safety; and

(g) An additional clause that addresses the values of riparian margins.

127. Ms Boyd recommended a number of amendments to LF-FW-P13, which are presented in the PORPS version dated 10 October 2023 and with reasoning in her s42A report, supplementary evidence and reply report.[19] Barring one exception which we address below, we agree with her recommendations and reasons and recognise that some of the amendments are discussed elsewhere in our report. These include amendments to the reference to the effects management hierarchy in clause (2), which we address in Legal Issues section, and the provision for regional infrastructure which we address in the EIT section of our report.

128. Kāi Tahu ki Otago's requested addition of a new clause that specifically related to riparian margins was discussed in Ms Boyd's Reply Report.[20] Ms Boyd recommended:

… I am not convinced that listing the specific outcomes to be achieved from maintaining or enhancing the values of riparian margins is necessary. In my view, there are many

[19] *S42A Report 1: Introduction and general themes, para 1095-1124; Fourth brief of supplementary evidence of Felicity Ann Boyd, LF – Land and freshwater (NPSFM amendments), dated 24 February 2023; Reply Report from para170.*
[20] *Paras 174-175 and 178-179*

reasons to implement this action and they are not necessary to specify in this policy. I recommend ending this clause after 'riparian margins.'[21]

129. This recommendation is not incorporated into the recommended amendment to clause (9) in Ms Boyd's Reply Report or in the PORPS version dated 10 October 2023. In any event, we prefer the additional phrase 'supporting natural flow behaviour' that Ms McIntyre for Kāi Tahu proposed at the hearing.[22] We consider that the addition of this phrase, and retaining the proposed wording after 'riparian margins', will assist to clarify the intent of the clause.

130. We have considered the appropriateness of LF-FW-P13(2)(c) referring to 'Appendix 6 and 7 of the NPSFM' rather than these appendices being included as appendices in the PORPS. Our view is that these should be included as PORPS appendices, both to provide additional certainty to the policy and to be consistent with the ECO chapter, where Appendix 3 and 4 of the NPSIB are included as APP3 and APP4 of the PORPS. Therefore we have recommended that Appendix 6 and 7 of the NPSFM are included in the PORPS as APP4A and APP4B, with the wording of LF-FW-P13(2)(c) amended accordingly.

1.4.1.1. Recommendation

131. We recommend the following amendments to LF-FW-P13:

LF-FW-P13 – Preserving natural character and instream values

Preserve the natural character and instream values of *lakes* and *rivers* and the natural character of their *beds* and margins by:

(1) avoiding the *loss of values* or extent of a *river*, unless:

(a) there is a *functional need* for the activity in that location, and

(b) the *effects* of the activity are managed by applying~~:~~

~~(i) for *effects* on indigenous *biodiversity*, either ECO-P3 or ECO-P6 (whichever is applicable), and~~

~~(ii) for other *effects*~~ the *effects management hierarchy* *(in relation to natural inland wetlands and rivers)*,

(2) not granting *resource consent* for activities in (1) unless ~~Otago Regional Council~~ the consent authority is satisfied that:

(a) the application demonstrates how each step of the ~~*effects management hierarchies* in (1)(b)~~ *effects management hierarchy (in relation to natural inland wetlands and rivers)* will be applied to the *loss of values* or extent of the *river*, and

(b) any consent is granted subject to conditions that apply the ~~*effects management hierarchies* in (1)(b)~~ *effects management hierarchy (in relation to natural inland wetlands and rivers)* in respect of any *loss of values* or extent of the *river*,

[21] *Para 178*

[22] *Sandra McIntyre for Kāi Tahu ki Otago, Appendix 2*

(c) if *aquatic offsetting* or *aquatic compensation* is applied, the applicant has complied with principles 1 to 6 in APP4A and APP4B, and has had regard to the remaining principles in APP4A and APP4B, as appropriate, and

(d) if *aquatic offsetting* or *aquatic compensation* is applied, any consent granted is subject to conditions that will ensure that the offsetting or compensation will be maintained and managed over time to achieve the conservation outcomes,

(3) establishing environmental flow and level regimes and *water* quality standards that support the health and well-being of the *water body,*

(4) ~~wherever possible~~ to the extent practicable, sustaining the form and function of a *water body* that reflects its natural behaviours,

(5) recognising and implementing the restrictions in Water Conservation Orders,

(6) preventing the impounding or control of the level of Lake Wanaka,

(7) preventing modification that would permanently reduce the braided character of a *river*, ~~and~~

(8) controlling the use of *water* and *land* that would adversely affect the natural character of the *water body*~~.~~, and

(9) maintaining or enhancing the values of riparian margins to support habitat and biodiversity, reduce *contaminant* loss to *water bodies* and support natural flow behaviour.

132. We also recommend that Appendix 6 of the NPSFM is included in the PORPS as APP4A and Appendix 7 of the NPSFM is included in the PORPS as APP4B.

1.4.2. LF-FW-P14 – Restoring natural character and instream values

133. LF-FW-P14 was notified as follows:

LF–FW–P14 – Restoring natural character

Where the natural character of *lakes* and *rivers* and their margins has been reduced or lost, promote actions that:

(1) restore a form and function that reflect the natural behaviours of the *water body*,

(2) improve *water* quality or quantity where it is *degraded*,

(3) increase the presence, *resilience* and abundance of indigenous flora and fauna, including by providing for fish passage within *river* systems,

(4) improve *water body* margins by naturalising bank contours and establishing indigenous vegetation and habitat, and

(5) restore *water* pathways and natural connectivity between *water* systems.

134. Submissions on LF-FW-P14 varied from support for the notified provision, to requests to make the provision more directive by replacing 'promote' with 'require', to relaxing the provision by replacing 'promote' with 'support' or 'encourage' or adding 'where practicable'.

135. We consider that 'promoting' is appropriate for a restoration policy such as LF-FW-P14. Instances where restoration is required should be determined through the regional plan, for example where restoration is needed to meet desired environmental outcomes. We do not have the information before us to determine such requirements and do not consider that a blanket requirement is appropriate. Conversely, we do not see a material difference between 'promoting' and 'supporting' or 'encouraging', and consider that 'where practicable' is more appropriate for directive provisions.

136. Many of the submission points have been accepted by Ms Boyd, either in full or in part, and we consider that these amendments strengthen the intent and clarity of the policy. The submission points that have not been accepted seek, in many instances, to soften the policy. For example, Contact and OWRUG consider that restoring some waterbodies would result in significant adverse effects. We acknowledge that restoring a highly modified waterway such as the Clutha-Mata-au would not be a feasible proposition, however the policy is not determinative and there would likely be actions that could improve the natural character and instream values of the Clutha-Mata-au. We discussed this earlier in relation to LF-VM-O2 – Clutha Mata-au vision.

1.4.2.1. Recommendation

137. We recommend the following amendments to LF-FW-P14:

LF-FW-P14 – Restoring natural character and instream values

Where the natural character or instream values of *lakes* and *rivers* ~~and~~ or the natural character of their margins has been reduced or lost, promote actions that, where practicable:

(1) restore a form and function that reflect the natural behaviours of the *water body*,

(2) improve *water* quality or quantity where it is *degraded*,

(3) increase the presence, *resilience* and abundance of indigenous flora and fauna, including by providing for fish passage within *river* systems and, where necessary and appropriate, creating fish barriers to prevent incursions from undesirable species,

(4) improve *water body* margins by naturalising bank contours and establishing *indigenous vegetation* and habitat, and

(5) restore ~~*water* pathways and~~ natural connectivity between and within *water* systems.

1.5. Stormwater, animal effluent and wastewater

138. LF-FW-P15 was notified as follows:

LF–FW–P15 – *Stormwater* and *wastewater* discharges

Minimise the adverse *effects* of direct and indirect *discharges* of *stormwater* and *wastewater* to *fresh water* by:

(1) except as required by LF–VM–O2 and LF–VM–O4, preferring *discharges* of *wastewater* to *land* over *discharges* to *water,* unless adverse *effects* associated with a *discharge* to *land* are greater than a *discharge* to *water*, and

(2) requiring:

(a) all sewage, industrial or trade waste to be *discharged* into a reticulated *wastewater* system, where one is available,

(b) all *stormwater* to be *discharged* into a reticulated system, where one is available,

(c) implementation of methods to progressively reduce the frequency and volume of wet weather overflows and minimise the likelihood of dry weather overflows occurring for reticulated *stormwater* and *wastewater* systems,

(d) on-site *wastewater* systems to be designed and operated in accordance with best practice standards,

(e) *stormwater* and *wastewater discharges* to meet any applicable water quality standards set for *FMUs* and/or rohe, and

(f) the use of water sensitive urban design techniques to avoid or mitigate the potential adverse *effects* of *contaminants* on receiving *water bodies* from the *subdivision,* use or development of *land,* wherever practicable, and

(3) promoting the reticulation of stormwater and wastewater in urban areas.

139. DOC, Fonterra, DCC, Ravensdown, and Kāi Tahu ki Otago sought that LF-FW-P15 be split into two policies. The submitters' requests varied, with Fonterra considering that industrial and trade waste should be included in the direction on stormwater, while DCC, Ravensdown, and Kāi Tahu ki Otago considering that it should be included with wastewater. Ms Boyd's s.42A report recommended that LF-FW-P15 address stormwater, while a new policy LF-FW-P16 be included to address animal effluent, sewage and industrial and trade waste.[23] Ms Tait for Fonterra considered that this split was appropriate but sought that the title and wording of LF-FW-P16 should also include greywater.

140. We agree with the general proposition that stormwater and wastewater should be the subject of separate policies. Ms Boyd's s.42A report directed us to the National Planning Standards definition of industrial and trade waste, which reads:

> *liquid waste, with or without matter in suspension, from the receipt, manufacture or processing of materials as part of a commercial, industrial or trade process, but excludes sewage and greywater.*

141. We agree with Ms Boyd that the contaminants and treatment associated with industrial and trade waste are more closely aligned with wastewater than stormwater and support their inclusion in LF-FW-P16.

[23] *At para 1552.*

142. Turning to greywater, we note that 'wastewater' is defined by the National Planning Standards and in the PORPS as follows:

> *Means any combination of two or more the [sic] following wastes: sewage, greywater or industrial and trade waste.*

143. The proposed policy split sees LF-FW-P16 addressing animal effluent, sewage, and industrial and trade waste, in place of wastewater that was included alongside stormwater in the notified LF-FW-P15.

144. Industrial and trade waste is defined in the National Planning Standards, and in the pORPS, as:

> *liquid waste, with or without matter in suspension, from the receipt, manufacture or processing of materials as part of a commercial, industrial or trade process, <u>but excludes sewage and greywater.</u>*
>
> [Panel's emphasis]

145. Sewage is defined in the National Planning Standards, and in the pORPS, as:

> *Means human excrement and urine.*

146. The definition of sewage therefore also excludes greywater.

147. We consider that Ms Tait for Fonterra has a justified concern that greywater is excluded. We support her recommended amendments to include greywater in the heading and in the chapeau of LF-FW-P16.[24] We note that greywater would be addressed by the policy wording by its inclusion in the definition of 'wastewater', a term which is used in clauses (2)(d) to (e) and clause (3). We agree with Ms Tait that a consequential change is required to include greywater in LF-FW-M6(8). A further consequential change is needed to insert the National Planning Standard definition of greywater into the Interpretation section of the PORPS.

148. Unsurprisingly, there was considerable discussion in evidence and at the hearing about whether there should be some provision for direct wastewater overflows to surface water. We heard from Kāi Tahu ki Otago witnesses that direct discharges of human or animal effluent to surface water are unacceptable, with Mr Ellison stating that:

> *The discharge of human waste to water is contrary to tikaka and kawa and renders affected waterways inaccessible for customary practices such as harvesting and eating mahika kai or using water for cultural purposes and rituals.*[25]

149. Mr Ellison provided the example of wastewater discharging from the Waihola wastewater treatment plant into the Waihora (Lake Waihola) outflow channel. Ms McIntyre for Kāi Tahu told us that change in practice away from direct discharge has been slow in Otago and she considers that the qualifier "to the greatest extent possible" in clause (1) of LF-FW-P16 "does not recognise the strength of the concern about the impact of these discharges on mauri".[26] She sought that this phrase be deleted from clause (1).

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[24] *Evidence in chief of Ms Susannah Tait for Fonterra, para 7.15.*
[25] *Evidence in chief of Mr Edward Ellison for Kāi Tahu ki Otago, para. 71.*
[26] *Evidence in chief of Ms Sandra McIntyre for Kāi Tahu ki Otago, para. 73.*

150. We heard from DCC about the degraded state of their three waters infrastructure, with Ms Moffat (DCC 3 Waters Planning Manager) providing a useful overview. [27] She stated that over 50 per cent of DCC's infrastructure is expected to require renewal by 2060. She discussed the Council's 3 Waters Strategic Direction Statement 2010-2060 and told us that $3.6 billion would need to be invested in the next 30 years to maintain the existing levels of service.

151. The DCC operates seven wastewater treatment plants and hold four resource consents to discharge wastewater overflow to waterways or the coast. These overflows operate during heavy rain when stormwater and/or groundwater enters wastewater pipes. The overflows are part of the system design, with the alternative being the back-up of wastewater onto private property. While Ms Moffat outlined the Council's commitment to reducing direct discharges to freshwater, we acknowledge that this is a long-term project.

152. Mr Simon Mason from QLDC informed us that the four wastewater plants in the Queenstown district discharge to land, although he acknowledged that the Shotover treatment plant discharges into gravels in close proximity to the river. Waitaki District Council, Clutha District Council and Central Otago District Council did not submit on the FPI however Ms Boyd's Table 1 of her Opening Statement provided a useful summary of municipal wastewater discharges in the Otago Region.[28] It shows that these smaller councils all have consented wastewater discharges to freshwater, with Clutha and Central Otago District Councils each having several.

153. We also heard from Fonterra about the importance of their Stirling processing plant and the difficulties they have disposing of wastewater. Mr Watt's evidence stated that Fonterra are consented to discharge up to 3,700 m3/day of treated wastewater from the plant into the Clutha Mata-Au, with the consent expiring in 2043.[29] Mr Watt told us that, while discharge volumes and contaminant concentrations have reduced with upgrades to the plant and Fonterra continue to investigate improvement options, the steep topography and wet soils surrounding the site make land disposal challenging.[30]

154. We support phasing out direct discharges of wastewater to surface water and acknowledge the impact that these discharges have on Kāi Tahu values. Ms McIntyre pragmatically acknowledged at the hearing that only a certain amount of progress can be made in 10 years and, from the evidence that we have received from DCC and Fonterra, we have concluded that full removal of such discharges is not feasible within the lifetime of this RPS.

155. That said, we consider that the PORPS should send a clear signal that such discharges are to be phased out. We consider that this is achieved by clause (1). Some submitters suggested that 'to the greatest extent possible' be replaced with 'to the greatest extent practicable'. We consider that the use of 'to the extent practicable' is appropriate, primarily to ensure consistency with LF-FW-O1A(8) which we have discussed earlier.

156. Turning to the LF-FW-M6, our understanding is that the date that the regional plan is to be publicly notified is uncertain and we consider it appropriate to delete the date requirement in the chapeau to reflect this. This is consistent with our approach to LF-FW-M5 and LF-LS-M11.

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[27] Evidence in chief of Ms Zoe Moffat for DCC, paras. 47-52.
[28] Opening Statement of Ms Felicity Boyd, 28 August 2023.
[29] Evidence in chief of Mr Morgan Watt for Fonterra, para. 18.
[30] Evidence in chief of Mr Morgan Watt for Fonterra, para. 29

1.5.1. Recommendation

157. Other than the points discussed above, we adopt the recommendations and reasoning of Ms Boyd. We recommend the following amendments to LF-FW-P15:

LF-FW-P15 – *Stormwater* ~~and wastewater~~ *discharges*

Minimise the adverse *effects* of direct and indirect *discharges* of *stormwater* ~~and wastewater~~ to *fresh water* by:

~~(1) except as required by LF-VM-O2 and LF-VM-O4, preferring discharges of wastewater to land over discharges to water, unless adverse effects associated with a discharge to land are greater than a discharge to water, and~~

(2) requiring:

~~(a) all sewage, industrial or trade waste to be discharged into a reticulated wastewater system, where one is available,~~

(ab) integrated catchment management plans for management of *stormwater* in *urban areas*,

(b) all *stormwater* to be discharged into a reticulated system, where one is made available by the operator of the reticulated system, unless alternative treatment and disposal methods will result in the same or improved outcomes for *fresh water*,

(c) implementation of methods to progressively reduce unintentional stormwater inflows to ~~the frequency and volume of wet weather overflows and minimise the likelihood of dry weather overflows occurring for reticulated stormwater and~~ wastewater systems,

~~(d) on-site wastewater systems to be designed and operated in accordance with best practice standards,~~

(e) that any *stormwater* ~~and wastewater~~ *discharges* do not prevent *water bodies* from ~~to~~ meeting any applicable water quality standards set for *FMUs* and/or rohe, and

(f) the use of water sensitive ~~urban~~ design techniques ~~to avoid or mitigate the potential adverse effects of contaminants on receiving water bodies from the subdivision, use or development of land~~, wherever practicable, and

(3) promoting the reticulation of *stormwater* ~~and wastewater~~ in *urban areas* where appropriate~~.~~, and

(4) promoting source control as a method for reducing *contaminants* in *discharges* and the use of good practice guidelines for managing *stormwater*.

1.5.2. Recommendation

158. We recommend the following amendments to new LF-FW-P16 recommended in the Reply Report:

LF-FW-P16 – *Discharges* containing animal effluent, *sewage*, *greywater* and *industrial and trade waste*

Minimise the adverse *effects* of direct and indirect *discharges* containing animal effluent, *sewage*, *greywater* and *industrial and trade waste* to *fresh water* by:

(1) phasing out existing *discharges* containing *sewage* or *industrial and trade waste* directly to water to the extent practicable,

(2) requiring:

 (a) new *discharges* containing *sewage* or *industrial and trade waste* to be to *land*,

 (b) *discharges* of animal effluent from *land-based primary production* to be to *land*,

 (c) that all *discharges* containing *sewage* or *industrial and trade waste* are discharged into a reticulated *wastewater* system, where one is made available by its owner, unless alternative treatment and disposal methods will result in improved outcomes for *fresh water*,

 (d) implementation of methods to progressively reduce the frequency and volume of wet weather overflows and minimise the likelihood of dry weather overflows occurring from reticulated *wastewater* systems,

 (e) on-site *wastewater* systems and animal effluent systems to be designed and operated in accordance with best practice standards,

 (f) that any *discharges* do not prevent *water bodies* from meeting any applicable water quality standards set for FMUs and/or rohe,

(3) to the greatest extent practicable, requiring the reticulation of *wastewater* in *urban areas*, and

(4) promoting source control as a method for reducing *contaminants* in *discharges*.

1.5.3. Recommendation

159. We recommend a consequential change to include the definition of greywater in the Interpretation section as follows:

Greywater	has the same meaning as in Standard 14 of the National Planning Standards 2019 (as set out in the box below) means liquid waste from domestic sources including sinks, basins, baths, showers and similar fixtures, but does not include *sewage*, or *industrial and trade waste*.

1.5.4. Recommendation

160. We recommend a further consequential change is required to include 'greywater' in LF-FW-M6(8) as follows:

LF-FW-M6 – *Regional plans*

Otago Regional Council must publicly notify a Land and Water *Regional Plan* ~~no later than 31 December 2023~~ and, after it is made operative, maintain that *regional plan* to:

…

(8) manage the adverse *effects* of *stormwater* and ~~*wastewater*~~ *discharges* containing animal effluent, *sewage*, *greywater* or *industrial and trade waste* in accordance with LF-FW-P15 and LF-FW-P16, and~~.~~

…

1.6. LF-VM-M3 – Community involvement

161. LF-VM-M3 was notified as follows:

LF–VM–M3 – Community involvement

Otago Regional Council must work with communities to achieve the objectives and policies in this chapter, including by:

(1) engaging with communities to identify *environmental outcomes* for Otago's *FMUs* and rohe and the methods to achieve those outcomes,

(2) encouraging community stewardship of *water* resources and programmes to address *freshwater* issues at a local catchment level,

(3) supporting community initiatives that contribute to maintaining or improving the health and well-being of *water bodies*, and

(4) supporting industry-led guidelines, codes of practice and environmental accords where these would contribute to achieving the objectives of this RPS.

162. This method is intended to implement provisions that are part of the freshwater process, including the vision objectives, LF-FW P7, LF-FW-P7A and some wetland provisions, and non-freshwater process, for example natural character and outstanding water body provisions.

163. Some submitters sought amendments to clause (1) to more directly reference the requirements of the NPSFM National Objectives Framework, including in identifying attributes, target attribute states, timeframes for achieving target attribute states, limits, and action plans. The notified clause (1) refers to environmental outcomes, which are defined in the NPSFM and the PORPS as follows:

means, in relation to a value that applies to an FMU or part of an FMU, a desired outcome that a regional council identifies and then includes as an objective in its regional plan.

164. Environmental outcomes are expressed in Clause 3.9 of the NPSFM, whereby regional councils must identify values that apply to an FMU or part of an FMU (clauses (1) and (2)) and identify an environmental outcome for each of these values (clause 3). These are to be expressed as an objective(s) in the regional plan (clause (4). Once the values and environmental outcomes are determined, the NPSFM requires attributes and their baseline states to be identified

(clause 3.10), target attribute states set (clause 3.11), limits set (clause 3.12) and action plans prepared (clause 3.15).

165. We agree with Ms Boyd that there is no need to specify these requirements, but that reference to 'values' in clause (1) alongside 'environment outcomes' is appropriate. This better reflects clause 3.9 of the NPSFM which then applies to the next steps in the NOF process.

166. The Panel is in agreement with Ms Boyd's recommended amendments and reasons for LF-VM-M3.

167. We also addressed LF-VM-M3 in the FPI report in our discussion on LF-FW-P7A. We considered that a consequential amendment to LF-VM-M3 to add clause (4A) is appropriate for consistency with recommended amendments to freshwater provisions LF-FW-P7A and LF-FW-M6. These amendments were in response to a request by Mr Hodgson for Horticulture NZ as part of the freshwater process.

1.6.1. Recommendation

168. We therefore recommend the following consequential change to LF-VM-M3.

LF-VM-M3 – Community involvement

Otago Regional Council must work with Kāi Tahu and communities to achieve the objectives and policies in this chapter, including by:

(1) engaging with Kāi Tahu, communities and stakeholders to identify values and *environmental outcomes* for Otago's *FMUs* and rohe and the methods to achieve those outcomes,

(2) encouraging community stewardship of *water* resources and programmes to address *freshwater* issues at a local catchment level, including through catchment groups,

(3) supporting community initiatives, industry-led guidelines, codes of practice and environmental accordsthat contribute to maintaining or improving the health and well-being of *water bodies*, and

~~(4) supporting industry-led guidelines, codes of practice and environmental accords where these would contribute to achieving the objectives of this RPS.~~

(4A) education, advocacy and co-ordination to encourage efficient use of freshwater, including water harvesting, use of storage and consideration of alternative water supply.

1.7. LF-FW-M6 – Regional plans

169. LF-FW-M6 was notified as follows:

LF–FW–M6 – Regional plans

Otago Regional Council must publicly notify a Land and Water *Regional Plan* no later than 31 December 2023 and, after it is made operative, maintain that *regional plan* to:

(1) identify the compulsory and, if relevant, other values for each *Freshwater*

Management Unit,

(2) state *environmental outcomes* as objectives in accordance with clause 3.9 of the NPSFM,

(3) identify *water bodies* that are *over-allocated* in terms of either their *water* quality or quantity,

(4) include environmental flow and level regimes for *water bodies* (including *groundwater*) that give effect to *Te Mana o te Wai* and provide for:

   (a) the behaviours of the *water body* including a base flow or level that provides for variability,

   (b) healthy and resilient mahika kai,
   (c) the needs of indigenous fauna, including taoka species, and aquatic species associated with the *water body*,

   (d) the hydrological connection with other *water bodies*, estuaries and coastal margins,

   (e) the traditional and contemporary relationship of Kāi Tahu to the *water body*, and

   (f) community *drinking water* supplies, and

(5) include limits on resource use that:
   (a) differentiate between types of uses, including *drinking water*, and social, cultural and economic uses, in order to provide long-term certainty in relation to those uses of available *water*,

   (b) for *water bodies* that have been identified as *over-allocated*, provide methods and timeframes for phasing out that *over-allocation*,

   (c) control the *effects* of existing and potential future development on the ability of the *water body* to meet, or continue to meet, *environmental outcomes*,

   (d) manage the adverse *effects* on *water bodies* that can arise from the use and development of *land*, and

(6) provide for the off-stream storage of surface *water* where storage will:
   (a) support Te Mana o te Wai,

   (b) give effect to the objectives and policies of the LF chapter of this RPS, and

   (c) not prevent a surface *water body* from achieving identified *environmental outcomes* and remaining within any limits on resource use, and

(7) identify and manage *natural wetlands* in accordance with LF–FW–P7, LF– FW–P8 and LF–FW–P9 while recognising that some activities in and around *natural wetlands* are managed under the NESF, and

(8) manage the adverse *effects* of *stormwater* and *wastewater* in accordance with LF–FW–P15.

170. This method pertains to the regional plan which is the main regulatory document that will implement the land and water provisions in the PORPS. A number of amendments were requested through submissions and evidence, many of which are consequential to requested changes to objective and/or policy wording, to plug gaps in references to policies, or to improve consistency with the NPSFM. We have discussed many of these matters already in this section. The s.42A recommended changes in response include:

(a) Deleting notified clauses (1), (2), (4) and (5) and replacing them with a new clause (1A) to *"implement the required steps in the NOF process in accordance with the NPSFM"*;

(b) Amending clause (3) to better reflect the methods to address over-allocation;

(c) Adding a new clause (5A) to implement the new recommended policy LF-FW-P7A regarding allocation and use of water;

(d) Amending the policy references in clause (7) to delete LF-FW-P8 and include LF-FW-P10, and include reference to the NPSPF in this clause; and

(e) Consequential amendments to clause (8) to add reference to LF-FW-P16 to reflect the splitting of LF-FW-P15.

171. Some submitters, for example McArthur Ridge and COWA, sought amendments that would result in allocation priority for certain water use activities based on water use efficiency or industry type. We consider that such considerations are better addressed through the NOF process with resulting provisions included in a regional plan. Such submissions are also dangerously close to seeking what uses would be considered as priority (2) of Te Mana o Te Wai. We have addressed this previously in this section in relation to LF-FW-P7A and in the Legal Issues section, where we determined that it is not appropriate for the PORPS to determine what activities are to be considered as priority (2) or (3). We therefore do not accept submissions for such determinations in LF-FW-M6.

1.7.1. Recommendation

172. We recommend the following amendments to LF-FW-M6:

LF-FW-M6 – *Regional plans*

Otago Regional Council must publicly notify a Land and Water *Regional Plan* ~~no later than 31 December 2023~~ and, after it is made operative, maintain that *regional plan* to:

(1A) implement the required steps in the NOF process in accordance with the NPSFM,

~~(1) identify the compulsory and, if relevant, other values for each *Freshwater Management Unit*,~~

~~(2) state *environmental outcomes* as objectives in accordance with clause 3.9 of the NPSFM,~~

(3) identify *water bodies* that are *over-allocated* ~~in terms of either their *water* quality or quantity~~ and the methods and timeframes for phasing out that *over-*

allocation (including through environmental flows and levels and *limits*) within the timeframes required to achieve the relevant *freshwater* vision,

~~(4) include environmental flow and level regimes for *water bodies* (including *groundwater*) that give effect to *Te Mana o te Wai* and provide for:~~

~~(a) the behaviours of the *water body* including a base flow or level that provides for variability,~~

~~(b) healthy and resilient mahika kai,~~

~~(c) the needs of indigenous fauna, including taoka species, and aquatic species associated with the *water body*,~~

~~(d) the hydrological connection with other *water bodies*, estuaries and coastal margins,~~

~~(e) the traditional and contemporary relationship of Kāi Tahu to the *water body*, and~~

~~(f) community *drinking water* supplies, and~~

(5A) provide for the allocation and use of *fresh water* in accordance with LF-FW-P7A, including by providing for off-stream water storage,

~~(5) include *limits on resource use* that:~~

~~(a) differentiate between types of uses, including *drinking water*, and social, cultural and economic uses, in order to provide long-term certainty in relation to those uses of available *water*,~~

~~(b) for *water bodies* that have been identified as *over-allocated*, provide methods and timeframes for phasing out that *over-allocation*,~~

~~(c) control the *effects* of existing and potential future development on the ability of the *water body* to meet, or continue to meet, *environmental outcomes*,~~

~~(d) manage the adverse *effects* on *water bodies* that can arise from the use and development of *land*, and~~

~~(6) provide for the off-stream storage of surface *water* where storage will:~~

~~(a) support *Te Mana o te Wai*,~~

~~(b) give effect to the objectives and policies of the LF chapter of this RPS, and~~

~~(c) not prevent a surface *water body* from achieving identified *environmental outcomes* and remaining within any *limits on resource use*, and~~

(7) identify and manage *natural wetlands* in accordance with LF-FW-P7, ~~LF-FW-P8 and~~ LF-FW-P9 and LF-FW-P10 while recognising that some activities in and around *natural wetlands* are managed under the NESF and the NESPF, ~~and~~

(8) manage the adverse *effects* of *stormwater* and ~~*wastewater*~~ *discharges* containing animal effluent, *sewage*, or *industrial and trade waste* in accordance with LF-FW-P15 and LF-FW-P16, and~~.~~

(9) recognise and respond to Kāi Tahu cultural and spiritual concerns about mixing of water between different catchments.

1.8. LF-FW-M7 –District plans

173. LF-FW-M7 was notified as follows:

LF-FW-M7 – District plans

Territorial authorities must prepare or amend and maintain their *district plans* no later than 31 December 2026 to:

(1) map *outstanding water bodies* and identify their outstanding and significant values using the information gathered by Otago Regional Council in LF-FW-M5, and

(2) include provisions to avoid the adverse *effects* of activities on the significant and outstanding values of *outstanding water bodies*,

(3) require, wherever practicable, the adoption of water sensitive urban design techniques when managing the *subdivision,* use or development of *land*, and

(4) reduce the adverse *effects* of *stormwater discharges* by managing the *subdivision,* use and development of *land* to:

(a) minimise the peak volume of *stormwater* needing off-site disposal and the load of *contaminants* carried by it,

(b) minimise adverse *effects* on *fresh water* and *coastal water* as the ultimate receiving environments, and the capacity of the *stormwater* network,

(c) encourage on-site storage of rainfall to detain peak *stormwater* flows, and

(d) promote the use of permeable surfaces.

174. Similar to LF-FW-M6 for regional plans, LF-FW-M7 is the method for district councils to implement the policies in the LF-FW section through their district plans. Similar to LF-FW-M6, some of the issues raised by submitters are consequential to submissions on other provisions in this section and have been addressed previously. For example, submissions requesting amendments to clauses (1) and (2) have been addressed above in our discussion of the outstanding waterbody provisions.

175. The Panel agrees with Ms Boyd's proposed amendments and her reasons. While some of the requested amendments have merit, we agree that they are too detailed for an RPS and should be left for the district plan to address. The key recommended amendment to LF-FW-M7 is the addition of a new clause (2A) that addresses the natural character of the margins and surface of lakes and rivers. We consider that this addresses a gap in this method and reflects the functions of territorial authorities. It also implements LF-FW-P13 which is part of the non-freshwater process.

1.9. LF-FW-M8 –Action plans

176. LF-FW-M8 was notified as follows:

LF-FW-M8 – Action plans

Otago Regional Council:

(1) must prepare an action plan for achieving any target *attribute* states for *attributes* described in Appendix 2B of the NPSFM,

(2) may prepare an action plan for achieving any target *attribute* states for *attributes* described in Appendix 2A of the NPSFM, and

(3) must prepare any action plan in accordance with clause 3.15 of the NPSFM.

177. This method reflects the NPSFM requirement to prepare action plans as part of the NOF process, specifically clause 3.15. Action plans can be appended to a regional plan or published separately, and so are not necessarily covered by LF-FW-M6 – Regional plans.

178. LF-FW-M8 largely reflects the requirements of the NPSFM and, for that reason, DairyNZ sought that it be deleted. We can understand the reasons for this request, however action plans are a key requirement under the NPSFM in some circumstances and sit alongside regional plans as the ORC's means to achieve target attribute states. The requirements of the NPSFM are reflected through other provisions in this section and we consider it appropriate to include a method to reflect the requirement for action plans.

179. This method sits alongside LF-VM-M3 which provides for community involvement and reflects the requirements of clause 3.7(1) to engage with communities and tangata whenua.

180. The Panel considers that this method should be retained, with the addition of clause (2A) sought by The Fuel Companies to better reflect clause 3.15 of the NPSFM, as recommended by the Reply Report.

1.10. New method –Identifying and managing species interactions between trout and salmon and indigenous species

181. Fish and Game sought the addition of a new method to manage the interactions between trout and salmon and indigenous species through both the freshwater and non-freshwater processes. Such a method would give effect to LF-FW-P7 as well as Policies 9 and 10 of the NPSFM.

182. The legal submissions of Ms Baker-Galloway, Fish and Game's counsel, addressed this method through both processes however expressed a preference for the provision to be included as a freshwater provision. Ms Baker-Galloway submitted that the new method would implement LF-FW-O8 and LF-FW-P7 which are freshwater provisions, and that the full suite of trout and salmon habitat provisions should be considered together.

183. Ms Boyd considered the proposed method in her non-freshwater s.42A report and reply report. She recommended that such a method be included in the PORPS and recommended

wording based on that proposed by Mr Paragreen from Fish and Game. Ms Boyd considered the requested method again in her freshwater s.42A report, where she stated:[31]

> *Fish and Game made a similar request in its submission on the non-FPI part of the pORPS. Legal advice confirmed that was the appropriate process for including the new method, therefore I have recommended the method sought be included in the non-FPI part of the pORPS.*

184. We respectfully disagree with the ORC's advice and consider that the appropriate place for such a method to be considered is through the freshwater process. We have found the split between freshwater and non-freshwater provisions particularly difficult to decipher where related provisions are split between the two processes. In our view, the proposed method would qualify for inclusion as a freshwater provision and we consider that there are distinct advantages of it being in the same process as its associated objectives and policy, in particular if these provisions should be appealed.

185. We support the wording proposed and acknowledge the collaborative way in which it was developed with input from Fish and Game, ORC, DoC and Kāi Tahu.

1.10.1. Recommendation

186. We recommend that a new LF-FW-M8A be included as a freshwater provision:

LF-FW-M8A – Identifying and managing species interactions between trout and salmon and indigenous species

(1) When making decisions that might affect the interactions between trout and salmon and indigenous species, *local authorities* will have particular regard to the recommendations of the Department of Conservation, the Fish and Game Council for the relevant area, Kāi Tahu, and the matters set out in LF-FW-M8A(2)(a) to (c), and

(2) Otago Regional Council will work with the Department of Conservation, the relevant Fish and Game Council and Kāi Tahu to:

(a) describe the habitats required to provide for the protection of indigenous species for the purposes of (2)(a), (b), and (c),

(b) identify areas where the protection of the habitat of trout and salmon, including fish passage, will be consistent with the protection of the habitat of indigenous species and areas where it will not be consistent,

(c) for areas identified in (b), develop provisions for any relevant action plans(s) prepared under the NPSFM, including for fish passage, that will at minimum:

(i) determine information needs to manage the species,

(ii) set short, medium and long-term objectives for the species involved,

(iii) identify appropriate management actions that will achieve the objectives determined in (ii), including measures to manage the

[31] *Freshwater s.42A report, para 1654.*

adverse effects of trout and salmon on indigenous species where appropriate, and

(iv) consider the use of a range of tools, including those in the Conservation Act 1987 and the Freshwater Fisheries Regulations 1983, as appropriate.

1.11. LF-FW-M9 – Monitoring

187. LF-FW-M9 attracted three submissions, with QLDC in support and DCC and Kāi Tahu seeking amendments. Ms Boyd discussed these requests at paragraphs 1315 to 1316 of her s.42A report and recommended amendments to address the submitters' concerns. We agree with Ms Boyd's recommendations and consider that they address the submitters' concerns.

1.12. LF-FW-M10 – Other methods

188. QLDC and Kāi Tahu ki Otago submitted in support of LF-FW-M10, while the Director General of Conservation sought amendments to recognise that the methods in the ECO chapter also apply. As notified, the LF chapter comprised four sections. This has been reduced to three, LF-WAI, LF-FW and LF-LS, and LF-FW-M10 aims to ensure that the three sections are treated as a coherent whole. We agree with Ms Boyd that referring to the ECO chapter methods is not consistent with the intent of this method. There are a number of methods in other chapters that would assist with achieving the policies in the LF chapter and which would need to be considered if we were to refer to the ECO chapter.

189. We support Ms Boyd's recommendation in the 10 October 2023 reply version of the PORPS to delete the reference to LF-VM, the provisions of which we are recommending be incorporated into the LF-FW section.

1.13. LF-VM-E2 - Explanation and LF-FW-E3 - Explanation

190. We recommended that the LF-VM and LF-FW sections be combined, as recommended by Ms Boyd. As a consequence, LF-VM-E2 and LF-FW-E3 were recommended to be combined in the 10 October 2023 reply version of the PORPS with the combined version being numbered LF-VM-E2. We agree with this recommendation.

191. OWRUG sought consequential amendments to LF-VM-E2 to reflect relief sought elsewhere that we have not accepted.[32] Similarly, Ngāi Tahu ki Murihiku sought consequential amendments to LF-FW-E3 to reflect relief sought to LF-FW-M5. We did not accept the relief sought elsewhere by either of these submitters, therefore we do not accept the relief they seek for this explanation.

192. Ms Boyd recommended accepting what we consider to be reasonably minor amendments requested by Kāi Tahu ki Otago. We agree that these better reflect the policy direction and aid in consistency with the remainder of the PORPS.

193. Some of the paragraphs in this explanation are shaded blue as freshwater provisions and some are non-freshwater. We consider this to be a good example of the nonsensical way that the freshwater and non-freshwater provisions are split. The amendments that we are recommending are all in the third paragraph of the 10 October 2023 version of the PORPS, which is a freshwater paragraph. However for ease of digestion, we are duplicating the

[32] *For example, Uncoded submission point – p.54 of submission by OWRUG*

discussion and recommendation for LF-VM-E2 (that is, the combined LF-VM-E2 and LF-FW-E3) in both the freshwater and non-freshwater sections of our recommendation report. Those paragraphs that are part of the freshwater planning instrument are shaded blue.

1.13.1. Recommendation

194. We recommend that LF-FW-E3 is incorporated into LF-VM-E2 and that the combined LF-VM-E2 is amended as follows:

LF-VM-E2 – Explanation

This section of the LF chapter outlines how the Council will manage *fresh water* within the region. To give effect to *Te Mana o te Wai*, the *freshwater* visions, and the policies set out the actions required in the development of *regional plan* provisions to implement the NPSFM. *[Note to reader: originally LF-FW-E3 para 1]*

Implementing the NPSFM requires Council to identify *Freshwater Management Units* (*FMUs*) that include all *freshwater bodies* within the region. Policy LF-VM-P5 identifies Otago's five *FMUs*: Clutha Mata-au *FMU*, ~~Taieri~~ Taiari *FMU*, North Otago *FMU*, Dunedin & Coast *FMU* and Catlins *FMU*. The Clutha Mata-au *FMU* is divided into five sub-*FMUs* known as 'rohe'. Policy LF-VM-P6 sets out the relationship between *FMUs* and rohe which, broadly, requires rohe provisions to be no less stringent than the parent *FMU* provisions. This is to avoid any potential for rohe to set lower standards than others which would affect the ability of the *FMU* to achieve its stated outcomes.

The outcomes sought for *natural wetlands* are implemented by requiring identification, protection and restoration. The first two policies reflect the requirements of the NPSFM for identification and protection but apply that direction to all *natural wetlands*, rather than only inland natural wetlands (those outside the *coastal marine area*) as the NPSFM directs. This reflects the views of ~~*takata*~~ *mana whenua* and the community that *fresh* and *coastal water*, including *wetlands*, should be managed holistically and in a consistent way. While the NPSFM requires promotion of the restoration of natural inland wetlands, the policies in this section take a stronger stance, requiring improvement where *natural wetlands* have been *degraded* or lost. This is because of the importance of restoration to Kāi Tahu and in recognition of the historic loss of *wetlands* in Otago and the indigenous biodiversity and hydrological values of wetland systems. *[Note to reader: originally LF-FW-E3 para 2]*

The policies respond to the NPSFM by identifying a number of *outstanding water bodies* in Otago that have previously been identified for their significance through other processes. Additional *water bodies* can be identified if they are wholly or partly within an outstanding natural feature or landscape or if they meet the criteria in APP1 which lists the types of values which may be considered outstanding: cultural and spiritual, ecology, landscape, natural character, recreation and physical. The significant values of *outstanding water bodies* are to be identified and protected from adverse *effects*. *[Note to reader: originally LF-FW-E3 para 3]*

Preserving the natural character of *lakes* and *rivers*, and their *beds* and margins, is a matter of national importance under section 6 of the RMA 1991. The policies in this section set out how this is to occur in Otago, reflecting the relevant direction from the

NPSFM but also a range of additional matters that are important in Otago, such as recognising existing Water Conservation Orders, the Lake Wanaka Act 1973 and the particular character of braided *rivers*. Natural character has been reduced or lost in some *lakes* or *rivers*, so the policies require promoting actions that will restore or otherwise improve natural character. *[Note to reader: originally LF-FW-E3 para 4]*

The impact of *discharges* of *stormwater* and *wastewater* on *freshwater bodies* is a significant issue for *mana whenua* and has contributed to *water* quality issues in some *water bodies*. The policies set out a range of actions to be implemented in order to improve the quality of these *discharges* and reduce their adverse *effects* on receiving environments.

1.14. LF-VM-PR2 – Principal reasons and LF-FW-PR3 – Principal reasons

195. For the same reasons as LF-VM-E2 and LF-FW-E3, Ms Boyd recommended that LF-FW-PR3 be incorporated into LF-VM-PR2. We agree with amalgamation of these principal reasons and also with the amendments and reasons recommended by Ms Boyd. Some of these amendments are in response to direct submissions while others are consequential to amendments to other provisions in the LF chapter.

196. Similar to the explanation discussed previously, two of the paragraphs in LF-VM-PR2 are shaded blue as freshwater provisions and one is non-freshwater, LF-FW-PR3 is solely freshwater and the resulting combined principal reason comprises both freshwater and non-freshwater provisions. Again, for ease of digestion, we are duplicating the discussion and recommendation for LF-VM-PR2 (that is, the combined LF-VM-PR2 and LF-FW-PR3) in both the freshwater and non-freshwater sections of our recommendation report. Those paragraphs that are part of the freshwater planning instrument are shaded blue.

1.14.1. Recommendation

197. We recommend that LF-FW-PR3 is incorporated into LF-VM-PR2 and that the combined LF-VM-PR2 is amended as follows:

LF-VM-PR2 – Principal reasons

To support the implementation of the NPSFM, the Council is required to develop long-term visions for *fresh water* across the Otago region. *Fresh water* visions for each *FMU* and rohe have been developed through engagement with Kāi Tahu and communities. They set out the long-term goals for the *water bodies* (including *groundwater*) and *freshwater* ecosystems in the region that reflect the history of, and environmental pressures on, the *FMU* or rohe. They also establish ambitious but reasonable timeframes for achieving these goals. The Council must assess whether each *FMU* or rohe can provide for its long-term vision, or whether improvement to the health and well-being of *water bodies* (including *groundwater*) and *freshwater* ecosystems is required to achieve the visions. The result of that assessment will then inform the development of *regional plan* provisions in the *FMU*, including *environmental outcomes, attribute* states, target *attribute* states and *limits* <u>*(in relation to freshwater)*</u>.

> Otago's *water bodies* are significant features of the region and play an important role in Kāi Tahu beliefs and traditions. They support people and communities to provide for their social, economic, and cultural well-being. A growing population combined with increased *land* use intensification has heightened demand for *water,* and increasing nutrient and sediment contamination impacts *water* quality. The legacy of Otago's historical mining privileges, coupled with contemporary urban and rural *land* uses, contribute to ongoing *water* quality and quantity issues in some *water bodies*, with significant cultural effects. *[Note to reader: originally LF-FW-PR3 para 1]*
>
> This section of the LF chapter ~~contains more specific direction on managing *fresh water* to give effect to *Te Mana o te Wai* and contributes to achieving the long-term *freshwater* visions for each *FMU* and rohe. It also~~ reflects key direction in the NPSFM for managing the health and well-being of *fresh water*, including *wetlands* and *rivers* in particular, and matters of national importance under section 6 of the RMA 1991. The provisions in this section will underpin the development of the Council's *regional plans* and provide a foundation for implementing the requirements of the NPSFM, including the development of *environmental outcomes*, *attribute* states, target *attribute* states and limits. *[Note to reader: originally LF-FW-PR3 para 2]*

1.15. Anticipated environmental results: LF-VM-AER3

198. LF-VM-AER3 is the only anticipated environmental result that is not part of the freshwater planning instrument. This seems highly unusual and counter-intuitive to us given that the freshwater visions to which it refers are all part of the freshwater planning instrument. Thankfully we do not wish to make any consequential amendments to LF-VM-AER3 resulting from changes to the freshwater vision objectives – concerningly, we would have been unable to do so had this been the case.

199. We support the recommendation and reasoning provided by Ms Boyd at paragraph 696 of her s.42A report to amend LF-VM-AER3 in response to a submission by Ngāi Tahu ki Murihiku.

200. The remaining anticipated environmental result provisions, LF-FW-AER4 to LF-FW-AER11, are part of the freshwater planning instrument and are discussed in the freshwater planning instrument section of our report.

1.16. Anticipated environmental results: LF-FW-AER4 to LF-FW-AER11

201. LF-FW-AER4 to LF-FW-AER11 are all part of the freshwater planning instrument, with LF-VM-AER3 being the sole non-freshwater anticipated environmental result. LF-FW-AER4 to LF-FW-AER11 were notified as follows:

> **LF-FW-AER4** *Fresh water* is allocated within limits that contribute to achieving specified *environmental outcomes* for *water bodies* within timeframes set out in *regional plans* that are no less stringent than the timeframes in the LF–VM section of this chapter.
>
> **LF-FW-AER5** *Specified rivers* and *lakes* are suitable for primary contact within the timeframes set out in LF-FW-P7.

LF-FW-AER6 *Degraded water* quality is improved so that it meets specified *environmental outcomes* within timeframes set out in *regional plans* that are no less stringent than the timeframes in the LF–VM section of this chapter.

LF-FW-AER7 *Water* in Otago's aquifers is suitable for human consumption, unlessthat *water* is naturally unsuitable for consumption.

LF-FW-AER8 Where *water* is not *degraded*, there is no reduction in *water* quality.

LF-FW-AER9 The frequency of *wastewater* overflows is reduced.

LF-FW-AER10 The quality of *stormwater discharges* from existing *urban areas* is improved.

LF-FW-AER11 There is no reduction in the extent or quality of Otago's *natural wetlands*.

202. There were few submissions on these AERs and many of these were to ensure consistency with other requested relief. We agree with the amendments recommended by Ms Boyd and her reasoning in paragraphs 1688 to 1696 of her freshwater s.42A report, including the addition of a new AER, labelled LF-FW-AER11A in the 10 October 2023 version of the PORPS.

203. The one exception to this is in relation to LF-FW-AER11 where, in response to Silver Fern Farms' submission, Ms Boyd has recommended the following amendment:

LF-FW-AER11 There is ~~no reduction~~ an improvement in the extent or ~~quality~~ condition of Otago's *natural wetlands*.

204. With the replacement of 'no reduction' with 'an improvement', the 'or' should change to 'and'. It was appropriate for there to be no reduction 'in the extent or condition', but to be consistent with the objectives and policies in the LF chapter, improvement should be sought in both.

1.16.1. Recommendation

205. We recommend the following amendments and the addition of a new AER, as follows:

LF-FW-AER4 *Fresh water* is allocated within limits that contribute to achieving specified *environmental outcomes* for *water bodies* within timeframes set out in *regional plans* that are no less stringent than the timeframes in the LF-VM section of this chapter.

LF-FW-AER5 *Specified rivers* and *lakes* are suitable for primary contact within the timeframes set out in LF-FW-P7.

LF-FW-AER6 *Degraded water* quality is improved so that it meets specified *environmental outcomes* within timeframes set out in *regional plans* that are no less stringent than the timeframes in the ~~LF-VM~~ objectives in the LF-FW section of this chapter.

LF-FW-AER7 *Water* in Otago's aquifers is suitable for human consumption, unless that *water* is naturally unsuitable for consumption.

LF-FW-AER8 Where *water* is not *degraded*, there is no reduction in *water* quality.

LF-FW-AER9	Direct *discharges* of *wastewater* to *water* are phased out to the greatest extent practicable and the ~~The~~ frequency of *wastewater* overflows is reduced.
LF-FW-AER10	The quality of *stormwater discharges* from existing *urban areas* is improved.
LF-FW-AER11	There is ~~no reduction~~ an improvement in the extent and ~~or quality~~ condition of Otago's ~~*natural*~~ *wetlands*.
LF-FW-AER11A	The economic, social, and cultural well-being of communities is sustained.

2. LF-LS – Land and soils

2.1. Introduction

206. This section of the LF – Land and freshwater chapter is focused on the management of land and soils, including for soil quality and conservation purposes as well as in relation to the management of fresh water. The Otago region contains a land area of 31,186 square kilometres (Stats NZ, 2022). The region has a diverse and varied range of land types and landscapes, from mountains and drylands in the western and central parts of the region to coastline and rainforests in the east.

207. This section of the report addresses the following provisions:

LF-LS-O11 – Land and soil

LF-LS-O12 – Use of land

LF-LS-P16 – Integrated management

LF-LS-P17 – Soil values

LF-LS-P18 – Soil erosion

LF-LS-P19 – Highly productive land

LF-LS-P20 – Land use change

LF-LS-P21– Land use and freshwater

LF-LS-P22 – Public access

LF-LS-M11– Regional plans

LF-LS-M12 – District plans

LF-LS-M13 – Management of beds and riparian margins

LF-LS-AER14 – Other methods

LF-LS-E4 – Explanation

LF-LS-PR4 – Principal reasons

LF-LS-AER12

LF-LS-AER13

LF-LS-AER14

2.2. Objectives: LF-LS-O11 – Land and soil and LF-LS-O12 – Use of land

2.2.1. Discussion

208. As notified, the Land and Soil chapter had two objectives as follows:

LF–LS–O11 – *Land* and soil

The life-supporting capacity of Otago's soil resources is safeguarded and the availability and productive capacity of highly productive land for *primary production* is maintained now and for future generations.

LF–LS–O12 – Use of *land*

The use of *land* in Otago maintains soil quality and contributes to achieving *environmental outcomes* for *fresh water*.

209. The submissions on these provisions addressed a range of issues including how productivity is provided for, including highly productive land; provision for supporting activities; the links to achieving freshwater outcomes; the balance with urban development; and the biophysical capacity of soils. New objectives in relation to biodiversity were also sought.

210. A number of these issues were addressed by the restructuring of the UFD chapter. This led to amendments to UFD-O4 and the recommendation that it is included in the LS chapter, which we accepted in our decision on the UFD chapter. The focus of UFD-O4 is on development (including urban) that occurs in the rural area, and it reads as follows:

UFD-O4 – Development in rural areas

Development in Otago's *rural areas* occurs in a way that:

(4) provides for the ongoing use of *rural areas* for *primary production* and *rural industry*, and

(4A) does not compromise the *productive capacity* and long-term viability of *primary production* and rural communities.

211. The 'highly productive land' issue was complicated by the fact the pORPS was notified in 2021, well before the NPSHPL was gazetted in September 2022. Several of the reporting officers, in particular Ms White and Ms Boyd, prepared supplementary evidence on the content of the NPSHPL and its implications for the pORPS. A number of amendments were recommended as a result. This matter is dealt with later in this decision.

212. The objectives above went through a number of iterations through the hearings process, including a standalone objective dealing specifically with highly productive land. A final consideration of these provisions was undertaken in Ms Boyd's 'Introduction and General Themes' reply report, dated 23 May 2023.

213. In that report, Ms Boyd advised that some submitters still sought additions to the objectives. She identified these as follows:

a. The availability of rural land for primary production (Fulton Hogan),

b. Recognition of the role of resource use and development in the region and its contribution to enabling people and communities to provide for their social, economic, and cultural well-being (Oceana Gold),

c. Land environments support healthy habitats for indigenous species and ecosystems (DOC), and

d. Manage land use activities to recognise and protect terrestrial, freshwater, and coastal values which may be affected by these activities (DOC).

214. In addressing these matters, Ms Boyd took the approach of re-drafting the "objectives to address these matters in a more integrated way …preferable to simply inserting a range of additional objectives". In her opinion, "*listing a series of separate objectives does not assist with attempting to address … tension and runs the risk of 'trading off' objectives against one another.*" In addition to recommending the inclusion of the amended UFD-O4 (which we have previously accepted), she recommended the two existing objectives be redrafted as follows:

LF-LS-O11 – *Land* and soil

~~The life-supporting capacity of Otago's soil resources is safeguarded and the availability and productive capacity of highly productive land for *primary production* is maintained now and for future generations.~~

Otago's *land* and soil resources support healthy habitats for indigenous species and ecosystems.

LF-LS-O12 – Use, development, and protection ~~of land~~

~~The use of *land* in Otago maintains soil quality and contributes to achieving *environmental outcomes* for *fresh water*.~~

The use, development, and protection of *land* and soil:

(1) safeguards the life-supporting capacity of soil,

(2) contributes to achieving *environmental outcomes* for *fresh water*, and

(3) recognises the role of these resources in providing for the social, economic, and cultural well-being of Otago's people and communities.

215. Ms Boyd considered that Fulton Hogan's request was provided for by UFD-O4(1) while the concerns of Oceana Gold and other submitters with an interest in mineral and aggregate extraction are addressed in the amended LF-LS-O12 and its reference to the importance of resource use to well-being. While she initially considered DOC's requested objectives to be inappropriate in this chapter, given these matters are specifically addressed in the ECO chapter, Ms Boyd specifically provided for them within the amended LF-LS-O11. She also recommended deleting reference to 'highly productive land' in LF-LS-O11 as she considers it to be adequately addressed in her recommended LF-LS-P19.

216. While we do not necessarily agree with Ms Boyd that 'separate' objectives will run the risk of creating scenarios where objectives are traded off against one another, the drafting style of this RPS is particularly broad and it is difficult to now adopt a different approach of including objectives relating to specific activities. In the Panel's view, the changes proposed to the issues by the inclusion of SRMR-I10A and now these provisions, corrects the balance of the pORPS by providing recognition that resource use is essential to the wellbeing of people and communities, where previously the provisions tended to have a more protectionism focus.

217. Hence, we are comfortable with amended LF-LS-O12. However, as with Ms Boyd in her s42A report, we do not agree that the new LF-LS-O11 is appropriate in this chapter. In managing the use of land and soil, regard will need to be given to the provisions of the ECO chapter. Hence, the new LF-LS-O11 provision is not required in this chapter.

218. As we will discuss in section 2.4 below, nor we are comfortable with the deletion of that part of LF-LS-O11 which deals with highly productive land.

2.2.2. Recommendation

219. Our recommendation is therefore to delete the notified LF-LS-O12 and the reference to life supporting capacity of soil in LF-LS-O11, and replace both of those provisions with the following objective:

> **LF-LS-O12 – Use, development, and protection ~~of land~~**
>
> ~~The use of *land* in Otago maintains soil quality and contributes to achieving *environmental outcomes* for *fresh water*.~~
>
> The use, development, and protection of *land* and soil:
>
> (1) safeguards the life-supporting capacity of soil,
>
> (2) contributes to achieving *environmental outcomes* for *fresh water*, and
>
> (3) recognises the role of these resources in providing for the social, economic, and cultural well-being of Otago's people and communities.

2.3. LF-LS-P18 – Soil erosion

2.3.1. Introduction

220. As notified LF-LS-P18 reads:

> **LF–LS–P18 – Soil erosion**
>
> Minimise soil erosion, and the associated risk of sedimentation in water bodies, resulting from *land* use activities by:
>
> (1) implementing effective management practices to retain topsoil in situ and minimise the potential for soil to be *discharged* to *water bodies*, including by controlling the timing, duration, scale and location of soil exposure,
>
> (2) maintaining vegetative cover on erosion-prone *land*, and
>
> (3) promoting activities that enhance soil retention.

221. While no submitters opposed LF-LS-P18 in its entirety, there were a range of amendments requested as follows:

- changes to chapeau of the policy to include an element of 'practicability' (Oceana Gold, Contact, Ravensdown).
- clause (1): removal of the term "effective" (DairyNZ); addition of reference to "appropriate and effective management practices" (Ravensdown); and clarity around "scale" (Fed Farmers).
- clause (2): include reference to re-establishing, as well as maintaining, vegetative cover (Silver Fern Farms), and add reference to enhancing (QLDC) to
- clause (3): reference to soil structure alongside soil retention (Wise Response).

222. Ms Boyd did not support the introduction of a practicability test on the basis that the notified wording provides flexibility for resource users to adopt practices based on the activity being undertaken. She was also of the opinion that the use of "appropriate" as well as "effective"

would introduce uncertainty into the policy. Ms Boyd did agree that maintaining vegetative cover as required by (2) will not always be possible or practicable. Her solution was to reverse the order of clauses (1) and (2) so that maintaining vegetative cover is the first step (current clause (2)), and where that is not possible, effective management practices (current clause (1)) are required to be implemented.

223. That initial amendment still required topsoil to be retained in-situ, which Ms. Hunter for both Contact and Oceana Gold took issue with at the hearing, highlighting the fact that it this is not always possible. She also considers the changes made did not make grammatical sense and suggested an amendment to remove the reference to 'retain topsoil in situ'.

224. We note that in the final recommended version of this policy, 'in situ' has been removed by Ms Boyd as a 'minor' change in response to Ms Hunter's evidence. However, we agree with Ms. Hunter that the rest of that phrase should also be removed. This provision is about minimising soil erosion and loss of soil to water, not retaining topsoil per se. Not all activities will retain topsoil and it is not always possible to completely reinstate topsoil once an activity is finished (for example, Oceana Gold's mining operation). With this phrase removed, there is no need to include Ms Boyd's proposed change.

225. We also agree with DairyNZ that the word 'effective' is unnecessary in this provision. The management practice is required to minimise the potential soil for loss to water. It is Implicit that this be 'effective'.

226. We do agree with Ms Boyd that the amendment sought by QLDC to include reference to enhancement is not needed as clause (2) does not prevent this from occurring. We would also note that 'enhancement' may be promoted under clause (3). We also agree with Ms Boyd's response to the Wise Response's submission. Improving soil structure is also an activity that can be promoted under clause (3) to enhance soil retention.

2.3.2. Recommendation

227. We recommend that LF-LS-P18 be amended as follows:

LF–LS–P18 – Soil erosion

Minimise soil erosion, and the associated risk of sedimentation in water bodies, resulting from *land* use activities by:

(2) maintaining vegetative cover on erosion-prone *land*, to the extent practicable, ~~and~~

(1) implementing ~~effective~~ management practices to ~~retain topsoil in situ and~~ minimise the potential for soil to be *discharged* to *water bodies,* including by controlling the timing, duration, scale and location of soil exposure, and

(3) promoting activities that enhance soil retention.

2.4. Highly Productive Land

2.4.1. Discussion

228. As notified, highly productive land was referenced in LF-LS-O11 (as discussed above) and LF-LS-P19 which, as notified, reads as follows:

LF–LS–P19 – Highly productive *land*

Maintain the availability and productive capacity of highly productive *land* by:

(1) identifying highly productive *land* based on the following criteria:

(a) the capability and versatility of the *land* to support primary production based on the Land Use Capability classification system,

(b) the suitability of the climate for primary production, particularly crop production, and

(c) the size and cohesiveness of the area of *land* for use for primary production, and

(2) prioritising the use of highly productive *land* for primary production ahead of other *land* uses, and

(3) managing urban development in rural areas, including rural lifestyle and rural residential areas, in accordance with UFD–P4, UFD–P7 and UFD–P8.

229. As noted in the previous discussion, the NPSHPL came into force after the pORPS was notified. Section 62(3) of the RMA requires that a regional policy statement must give effect to a national policy statement. However, as Mr Logan for the ORC advised, the ability to make changes to the RPS is constrained by the submissions received as the NPSHPL has been introduced 'mid-process'.

230. Ms Boyd carefully reviewed the submissions received and identified where the NPSHPL can be given effect to, within the scope of those submissions. She advised that:

> *"several submitters acknowledged the proposed NPSHPL in their submissions and sought that the provisions of the pORPS better align with the (then draft) NPSHPL. The New Zealand Cherry Corp sought any further relief necessary to give effect to the NPSHPL when it is gazetted while Beef and Lamb + DINZ sought that the LF Chapter be better aligned with the NPSHPL when it is made operative."*

231. While the Panel considers this particular NPS to be a very blunt instrument, which creates a number of issues with the inclusion of LUC 3 land (particularly in the Clutha District context, where most of their flat land is LUC 3), along with its lack of flexibility and recognition of reality, we consider we are obligated to give effect to it as far as possible. The new government has signalled that there will be changes to the national planning framework, and we anticipate any review that precedes those change may include this NPS. Hence, the issues that concern us may well be addressed in due course but not in time for this process.

232. To align these provisions as closely as possible with the NPS, Ms Boyd has proposed a range of amendments, where submissions allow. Some of those amendments were supported by submitters and some were not. Ms Boyd advised that the key matters still in contention are as follows:

a. *whether the 'interim' identification of highly productive land in the NPSHPL will protect land in Otago valued for horticulture and viticulture and, if not, whether (and how) the pORPS should 'fill the gap'.*

b. *Whether highly productive land is to be maintained or protected,*

c. *Use of the term 'productive capacity'.*

233. We first discuss the matter of 'maintain' or 'protect', which is also relevant to LF-LS-O11. Horticulture NZ sought that "the outcome related to the protection of [highly productive land] is focused on protecting the productive capacity of highly productive land from inappropriate subdivision, use and development" and Ms Wharfe provided some amendments to achieve that. In her initial s42A report, Ms Boyd agreed that it would be preferable to adopt the same wording as the NPSHPL but did not consider there is scope to make this amendment. However, in her final reply she accepted there was scope and recommended the following change to the title and chapeau of the policy:

> **LF-LS-P19 – Rural land and h~~*H*~~*ighly productive land***
>
> ~~Maintain~~ Protect the availability of rural land and the *productive capacity* of *highly productive land* by:

234. In her supplementary evidence on the NPSHPL, she recommended the standalone objective "the availability and productive capacity of highly productive land for land-based primary production is maintained now and for future generations", which is the second part of the original LF-LS-O11. Her final reply amendments recommended deleting this phrase altogether.

235. The changes recommended, however, do not reflect what HortNZ requested. Ms Wharfe's use of 'protection' was in relation to highly productive land (not rural land in general) in the previously recommended LF-LS-O11A and she did not request a change to the chapeau of LS-LS-P19. Furthermore, the change to that chapeau proposed by Ms Boyd significantly widens the application of the policy because it captures all rural land for protection.

236. We believe Ms Boyd's recommended LF-LS-O11A, with the changes proposed by Ms Wharfe, more appropriately reflects the NPS and we have adopted them accordingly. We note this approach to splitting the original LF-LS-O11 was also requested by Fulton Hogan. In terms of Fulton Hogan's other concerns, the request to maintain the availability of rural land for primary production is addressed by UFD-O4 while the reference to the NPS-HPL in LF-LS-P19 (2) (and UFD-P7(3)) acknowledges the consent pathway for mining activities.

237. With this change to LF-LS-O11, no change is required to the chapeau of LF-LS-P19.

238. In relation to the interim identification criteria, the issue related to the view of several submitters that some land in Otago valued for horticulture and viticulture will not be considered 'highly productive land' in the interim period because it is not located on LUC 1, 2, or 3. Ms Boyd agreed that this is problematic and was of the opinion that productive land outside LUC classes 1, 2, and 3 should be protected until such time as the mapping process is undertaken. Ms Boyd stated "that many of these areas are under pressure from urban development, which makes their protection even more important" although no evidence was produced to back up this statement.

239. However, Horticulture NZ raised concern with the amendments recommended in Ms Boyd's supplementary evidence. They felt that land valued for horticulture and viticulture that would have been identified as highly productive land using notified LF-LS-P19, would not be identified as such under the recommended amendments.

240. Ms Boyd took this onboard in her reply but was reluctant to support either of Ms Wharfe's proposed amendments. Being mindful of Mr Logan's legal submissions, she did not attempt to redefine criteria or definitions from the NPSHPL, but rather recommended a simpler

amendment to LF-LS-P19 to protect additional areas of land that are valuable for horticulture and viticulture as follows:

> (2A) until clause 3.5(1) of the NPSHPL has been implemented, protecting land that is suitable for horticulture or viticulture from uses that are not *land-based primary production* or *rural industry*.[35]

241. We were presented with a significant volume of evidence throughout the hearings from Otago's agriculture, horticulture, and viticulture industry about the importance of the region as a primary producer. We have accepted that and have made changes to the pORPS to provide more recognition of what a significant contributor this sector is to not only the local economy, but also the national economy as the country's most significant export.

242. However, as with our concern over the inclusion of LUC 3 land in the NPS, we are now being asked to widen a protectionist/prioritisation approach further, through the proposed amendment. Mr Ford for HortNZ went so far as suggesting LUC 4 and 5 land should be included in the definition of HPL, while Mr Dicey for OWRUG stated that grapevines flourish on LUC 1 to LUC 6 land. Ms Wharfe's first suggested amendments would have had a region wide effect although her supplementary evidence restricted its application to central Otago (a restriction that would be difficult to define).

243. Our concern is that while submitters spoke broadly about urban and lifestyle encroachment on this land, very limited evidence was provided as to any reality about such a threat, where it was occurring, and what form it was taking. Nor was any cost benefit analysis provided on the effect of widening this restriction as requested, in terms of the impact it may have on other land uses (for example, the activities of Matakanui Gold) that look to operate, or can only operate, in rural areas. Furthermore, the issue does not appear to be a regional issue, being confined to certain parts of central Otago (in the geographic sense as opposed to local authority boundaries) so it does not seem to meet the threshold test of being a significant resource management issue for the region.

244. We do not necessarily agree with Ms Wharfe and Ms Boyd that it can be said, with any certainty, that the notified provision would provide protection for LUC 4 and 5 land, as that has not historically been seen as highly productive land (and we observe in passing the same can be said about LUC 3 land). Hence, the Panel does not think it appropriate to extend interim RPS protection this far, when the implications of it are unclear to us. However, there is nothing stopping the relevant District Council from initiating its own process to address the issue raised by HortNZ and the viticulture industry, if they think it is significant in the context of their district.

245. We do, however, accept Ms Boyd's recommendations in relation Ms Wharfe's concerns about the use of the term 'productive capacity' in the pORPS and where it should be deleted.

246. We also agree with the consequential amendments to the methods proposed by Ms Boyd in her supplementary evidence on the NPSHPL which require the identification and mapping of highly productive land.

2.4.2. Recommendation

247. As a consequence of the foregoing, the Panel recommend the following amendments:

    1. In SRMR-I10 – Economic, replacing 'productive capacity of agricultural land' with 'the ability of land to support primary production'.

2. Amend LF-LS-O11 to read as follows:

LF–LS–O11 – *Land* and soil

~~The life-supporting capacity of Otago's soil resources is safeguarded and~~ The availability and productive capacity of highly productive land for land based *primary production* is ~~maintained~~ protected-now and for future generations.

3. Amend LF-LS-P19 as follows:

LF-LS-P19 –~~H~~ighly productive land

Maintain the availability and the *productive capacity* of *highly productive land* by:

(1) identifying *highly productive land* based on the following criteria:

~~(a) the capability and versatility of the *land* to support primary production based on the Land Use Capability classification system,~~

~~(b) the suitability of the climate for primary production, particularly crop production, and~~

~~(c) the size and cohesiveness of the area of *land* for use for primary production, and~~

(d) land must be identified as *highly productive land* if:

(i) it is in a general rural zone or rural production zone, and

(ii) it is predominantly *LUC 1, 2, or 3 land*, and

(iii) it forms a large and geographically cohesive area,

(e) land may be identified as *highly productive land* if:

(i) it is in a general rural zone or rural production zone, and
(ii) it is not *LUC 1, 2, or 3 land*, and
(iii) it is or has the potential to be highly productive for *land-based primary production* in Otago, having regard to the soil type, the physical characteristics of the land and soil, and the climate.

(f) land must not be identified as *highly productive land* if it was *identified for future urban development* on or before 17 October 2022, and

(2) prioritising the use of *highly productive land* for *land-based primary production* in accordance with the NPSHPL ~~ahead of other *land* uses~~, ~~and~~

(3) ~~managing urban development in rural areas, including rural lifestyle and rural residential areas, in accordance with UFD-P4, UFD-P7 and UFD-P8.~~

4. Add a new method as follows:

LF-LS-M11A – Identification of *highly productive land*

(1) In collaboration with *territorial authorities* and in consultation with *mana whenua*, Otago Regional Council must identify *highly productive land* in Otago in accordance with LF-LS-P19(1), and

(2) Otago Regional Council must include maps of the *highly productive land*

identified in accordance with (1) in the Regional Policy Statement by the date specified in the National Policy Statement for Highly Productive Land.

5. Add the following new clause to LF-LS-M12:

    (4) maintain the availability and *productive capacity* of *highly productive land* identified and mapped under LF-LS-M11A in accordance with LF-LS-P19, and

2.5. LF-LS-P16 – Integrated management

2.5.1. Discussion

248. As notified, LF-LS-P16 reads:

> **LF–LS–P16 – Integrated management**
>
> Recognise that maintaining soil quality requires the integrated management of *land* and *freshwater* resources including the interconnections between soil health, vegetative cover and *water* quality and quantity.

249. While most submitters supported this policy, Ravensdown opposes the provision in its entirety, because of duplication. Kāi Tahu ki Otago submitted that the policy direction should be stronger. Ms Boyd originally rejected the submissions of both Ravensdown and Kāi Tahu, but after further discussion with them, she recommended changes to ensure there is no duplication, and that maintaining soil quality requires managing land and freshwater was specifically highlighted as suggested by Kāi Tahu.

250. We agree with her changes and recommend them accordingly.

2.5.2. Recommendation

251. That LF-LS-P16 be amended as follows:

> **LF-LS-P16 – ~~Integrated management~~ Maintaining soil quality**
>
> ~~Recognise that maintaining~~ Maintain soil quality ~~requires the integrated management of~~ by managing both *land* and *freshwater* resources, including the interconnections between soil health, vegetative cover and *water* quality and quantity.

2.6. LF-LS-P17 – Soil values

2.6.1. Introduction

252. As notified, LF-LS-P17 reads:

> **LF–LS–P17 – Soil values**
>
> Maintain the mauri, health and productive potential of soils by managing the use and development of *land* in a way that is suited to the natural soil characteristics and that sustains healthy:

(1) soil biological activity and *biodiversity*,

(2) soil structure, and

(3) soil fertility.

253. No submitters oppose the provision in its entirety with several supporting it. The DCC submitted that urban development cannot avoid effects on soil and also requested clarity on how forestry fits within this. They suggested replacing the term 'maintain' with "minimise to the degree practical, considering other objectives in the RPS". OWRUG sought the reference to 'mauri' be replaced with well-being, and that the word "natural" is deleted. Tōitu Te Whenua seeks that the soil characteristics and values listed in the policy are replaced with the national soil quality indicators, and soil biology. J Griffin requested that the policy promote management systems that build soil carbon, which will in turn improve soil biodiversity, structure and fertility, and provide some degree of climate remediation.

254. In relation to the DCC submission, Ms Boyd considered the policy provides flexibility for a range of actions to occur, so no changes were required. She recommended rejecting the OWRUG submission because clauses (1)-(3) of LF-LS-P17 are considered to provide clear guidance on this. With respect to the Toitū Te Whenua and Griffin submissions, she felt the factors they discuss are already provided for under the three clauses of the policy as notified. In addition, she was of the view that specific details relating to target ranges, if any, are best placed in a regional plan.

255. While the DCC did not address their submission at the hearing, the Panel has some sympathy for their position. Quite clearly, many activities that people and communities carry out will not maintain the productive potential of soils. Urban development is one such example, but mining is another. Hence, we consider the phrase to 'the extent reasonably practical' is also appropriate in this policy.

256. While we agree with Ms Boyd in relation to the Toitū Te Whenua and Griffin submissions, we do not agree with her position in relation to 'mauri'. We have discussed this elsewhere in our decision, and the same reasoning applies here. As we said there, "'mauri' is not readily definable as it relates to a combination of physical and ecological elements which are scientifically demonstrable, as well as amenity aspects which are far less capable of precise description. In addition, it can involve a range of te ao Māori concepts, both physical and metaphysical." We agree with OWRUG that the focus should be on the health and productive potential of soil which, if taken care of, will maintain mauri.

257. We also agree with OWRUG that the reference to 'natural' should be removed as this suggests soils that might have improved fertility compared to their natural state, would need to revert back. It also suggests any improvement in fertility may not be possible.

2.6.2. Recommendation

258. The Panel recommends that LF-LS-P17 be amended as follows:

LF-LS-P17 – Soil values

Maintain the ~~mauri,~~ health and productive potential of soils, to the extent reasonably practicable by managing the use and development of *land* in a way that is suited to the ~~natural~~ soil characteristics and that sustains mauri through healthy:

(1) soil biological activity and *biodiversity*,

(2) soil structure, and

(3) soil fertility.

2.7. LF-LS-P20 – Land use change

2.7.1. Discussion

259. As notified, LF-LS-P20 reads:

> **LF–LS–P20 – *Land* use change**
>
> Promote changes in *land* use or *land* management practices that improve:
>
> (1) the sustainability and efficiency of *water* use,
>
> (2) resilience to the impacts of *climate change,* or
>
> (3) the health and quality of soil.

260. There were several submissions on this policy, including two in support and one seeking its deletion. Several submitters sought amendments ranging from minor adjustments to the addition of new clauses addressing a range of matters.

261. Ms Boyd made two small changes to the policy in her s42A report. We agree with her response to the submissions and have accepted her recommendations accordingly.

2.7.2. Recommendation

262. The Panel recommends LF-LS-P20 be amended as follows:

> **LF-LS-P20 – *Land* use change**
>
> Promote changes in *land* use or *land* management practices that support and improve:
>
> (1) the sustainability and efficiency of *water* use,
>
> (2) resilience to the impacts of *climate change,* ~~or~~
>
> (3) the health and quality of soil,~~.~~ or
>
> (4) *water* quality.

2.8. LF-LS-P21 – Land use and fresh water

2.8.1. Introduction

263. As notified LF-LS-P21 reads:

> **LF–LS–P21 – *Land* use and *fresh water***
>
> Achieve the improvement or maintenance of fresh water quantity or quality to meet environmental outcomes set for Freshwater Management Units and/or rohe by:

(1) reducing direct and indirect discharges of contaminants to water from the use and development of land, and

(2) managing land uses that may have adverse effects on the flow of water in surface water bodies or the recharge on groundwater.

264. A wide range of submissions were received on this provision, with Beef + Lamb and DINZ seeking that the policy be deleted, or moved to the LF-FW chapter, on the basis that it is in the wrong subchapter. Ms. Boyd disagreed with this, and we accept her position as the policy is addressing land use activities.

265. Several submitters sought changes to the chapeau of the policy and Ms Boyd agreed that the chapeau wording of the could be simplified. She adopted the amendment sought by Contact and others, as she considered this consistent with the wording of LF-FW-P7 and that gives effect to policy 5 of the NPSFM. This amendment also included changing 'fresh water' to 'water bodies'. This was in response to the DairyNZ submission to ensure 'coastal water' is not addressed within this policy, as that would be inconsistent with the NPSFM.

266. The amendment promoted did not include the request from Kāi Tahu ki Otago and DOC which seeks to include reference to ecosystem values. While she agreed with their reasoning for the change, she was unsure what is meant by the term 'ecosystem values'. In response to this, Ms McIntyre for Kai Tahu noted that *"other amendments recommended to the chapeau align wording more closely to that in the sole NPSFM objective, but without the reference to freshwater ecosystems included in that sole objective."* In her view including reference to freshwater ecosystems in this policy would give better effect to the NPSFM objective.

267. We agree with Ms McIntyre and have included reference to 'freshwater ecosystems' in the chapeau. This change will also better reflect Policy 5 of the NPSFM.

268. Several submitters also sought amendments to clause (1) to recognise that it is not necessary to reduce discharges of contaminants to water, and that there are often circumstances where management of discharges may be more appropriate than their reduction or avoidance. Ms Boyd agreed with these submitters and promoted a change to the wording to include "or otherwise managing" after "reducing". This wording was generally accepted by submitters who presented evidence at the hearing, with the exception of Kai Tahu who felt this change does not provide clear guidance. We disagree with Ms McIntyre as the reason for the management of adverse effects is clear – it is to maintain the health and well-being of water bodies and freshwater ecosystems. Hence, we agree with Ms Boyd's approach to this matter and recommend her changes accordingly.

269. Ms Boyd did not recommend any changes to clause (2). In relation to DairyNZ's request to delete "may" from clause (2), she considered a more cautious approach to managing those activities is required on the basis that it may not be certain if some land uses will have adverse effects on freshwater. Given such land uses could be for long time periods (e.g. production forestry), the Panel agrees that caution is warranted in catchments that may be susceptible to this.

270. Three submitters sought the addition of a new clause regarding the maintenance and enhancement of riparian margins. Ms Boyd agreed that healthy riparian margins contribute to the wider health and well-being of freshwater bodies and that this should be recognised in the policy. However, she did not consider it necessary to identify specific reasons for this in the policy (such as reducing sedimentation, improving the functioning of catchment processes

etc. as requested) because there may be many reasons for this action. We agree and have accepted her recommended amendment as appropriate.

271. In the Reply Report, a recommended subclause (2A) was advanced which we believe may have emanated from DOC's submission on the FMU Vision objectives. We are comfortable with the recommended wording in that subclause say for the wording being amended to refer to some catchments. o avoid any issues about scope for its inclusion, we rely upon clause 49(2)(b) of the First Schedule.

2.8.2. Recommendation

272. We recommend that LF-LS-P21 is amended as follows:

LF-LS-P21 – *Land* use and *fresh water*

~~Achieve the improvement or maintenance of *fresh water* quantity, or quality~~ The health and well-being of *water bodies* and freshwater ecosystems is maintained to meet *environmental outcomes* set for *Freshwater Management Units* and/or rohe by:

(1) reducing or otherwise managing the adverse effects of direct and indirect *discharges* of *contaminants* to *water* from the use and development of *land*, ~~and~~

(2) managing *land* uses that may have adverse *effects* on the flow of *water* in surface *water bodies* or the recharge of *groundwater*~~.~~, and

(2A) recognising the drylands nature of some of Otago's catchments and the resulting low *water* availability, and

(3) maintaining or, where degraded, enhancing the values of riparian margins.

2.9. LF-LS-P22 – Public access

2.9.1. Discussion

273. As notified, LF-LS-P22 reads:

LF–LS–P22 – Public access

Provide for public access to and along *lakes* and *rivers* by:

(1) maintaining existing public access,

(2) seeking opportunities to enhance public access, including by *mana whenua* in their role as kaitiaki and for gathering of mahika kai, and

(3) encouraging landowners to only restrict access where it is necessary to protect:

(a) public health and safety,

(b) significant natural areas,

(c) areas of outstanding natural character,

(d) outstanding natural features and landscapes,

(e) places or areas with special or outstanding *historic heritage* values, or

(f) places or areas of significance to *takata whenua*, including wāhi tapu and wāhi tūpuna.

274. This policy was supported by four submitters while several others sought amendments to, and clarification of, the notified wording. A number of submitters sought the addition of sub-clauses in (3) to include other values or circumstances where access should be restricted. These included:

- Areas of establishing vegetation/restoration projects, on the basis that access should be restricted to avoid or minimise damage to young and establishing vegetation,
- Against negative impacts of public access on farming business, to ensure negative impacts from public access on farming businesses can be mitigated.
- Protect against interruption of business operations, for health and safety matters, and for animal welfare issues, in order to provide for landowner's interests.
- Critical farming activities including lambing, fawning, mustering and the movement of stock.
- Biosecurity.
- To ensure a level of security with the operational requirements of a lawfully established activity.

275. Ms Boyd recommended several changes to the policy including an addition to clause (3) to restrict access to reflect the operational requirements of an activity. Overall, we are comfortable with the recommendations made by Ms Boyd and have adopted them accordingly.

2.9.2. Recommendation

276. The Panel recommends that LF-LS-P22 be amended as follows:

LF-LS-P22 – Public access

Provide for public access to and along *lakes* and *rivers* by:

(1) maintaining existing public access,

(2) seeking opportunities to enhance public access, including access by *mana whenua* in their role as kaitiaki and for gathering of ~~mahika kai~~ *mahika kai*, and

(3) encouraging landowners to ~~only~~ avoid restricting access ~~where~~ unless it is necessary to protect:

(a) ~~public~~ health and safety,

(b) significant natural areas,

(c) areas of outstanding natural character,

(d) outstanding natural features and landscapes,

(e) places or areas with special or outstanding *historic heritage* values, ~~or~~

(f) places or areas of significance to ~~*takata whenua*~~ Kāi Tahu, including wāhi taoka, wāhi tapu and wāhi tūpuna,~~.~~

(g) establishing vegetation, or

(h) a level of security consistent with the operational requirements of a lawfully established activity.

2.10. Pest species (including wilding conifers)

2.10.1. Discussion

277. As notified, the pORPS contains two policies focused on managing the impacts of wilding conifers on outstanding natural features and landscapes and significant natural areas through NFL-P5 and ECO-P9. These were as follows:

ECO-P9 – *Wilding conifers*

Reduce the impact of *wilding conifers* on indigenous *biodiversity* by:

(1) avoiding *afforestation* and *replanting* of *plantation forests* with *wilding conifer* species listed in APP5 within:

(a) areas identified as *significant natural areas,* and

(b) buffer zones adjacent to *significant natural areas* where it is necessary to protect the *significant natural area*, and

(2) supporting initiatives to control existing *wilding conifers* and limit their further spread.

NFL-P5 – *Wilding conifers*

Reduce the impact of *wilding conifers* on outstanding and *highly valued natural features and landscapes* by:

(1) avoiding *afforestation* and *replanting* of *plantation forests* with *wilding conifer* species listed in APP5 within:

(a) areas identified as outstanding natural features or landscapes, and

(b) buffer zones adjacent to outstanding natural features and landscapes where it is necessary to protect the outstanding natural feature or landscape, and

(2) supporting initiatives to control existing *wilding conifers* and limit their further spread.

278. A number of submitters sought inclusion of new provisions, or amendments to existing provisions, to provide clear policy direction on pest control. DOC sought a new policy in the ECO chapter addressing pests to complement ECO-P9. However, their planning witness, Mr Brass, suggested this would be better placed in LF-LS section. Ms Lynette Baish for Ernslaw One also sought a new policy, focused specifically on wilding conifers. At the hearing, many of the witnesses who appeared for OWRUG, Federated Farmers, and DairyNZ noted the impacts of pests on productive land while Mr Brass for DOC also highlighted the need to enable pest control activities such as the use of pesticides. Associated with this issue was the request from some submitters to include in the pORPS, the definition of 'pest' from the Biosecurity Act 1993.

279. In her opening statement for the LF hearing, Ms Boyd addressed this issue, stating that she "was not opposed to incorporating this type of direction in the pORPS and that the LF-LS section was the appropriate place for this given its focus on land resources." After hearing the evidence presented at the various hearings, Ms Boyd's final assessment of the matter was carried out in her reply report on 'Introduction and General Theme' matters. She noted that the evidence confirmed that "biodiversity has been lost or degraded due to human activities and the presence of pests and predators" and that "the direction on managing pest species in the pORPS is unnecessarily narrowed to only managing the effects of specific wilding conifer species on outstanding natural features and landscapes and significant natural areas." As a consequence, she recommended a new policy for inclusion in the LS chapter that addressed both pests and wilding conifers, which incorporate the direction from ECO-P9 and NFL-P5, as generally supported by submitters.

280. A number of submitters sought to expand the scope of ECO-P9 and APP5, which currently just lists conifers prone to spread, to apply to all invasive/wilding tree species, not only wilding conifers. Others sought the restriction of such plantings in not just plantation forests but in shelterbelts and amenity plantings also.

281. While Ms Boyd accepted that there are other tree species that may result in wilding spread, she did not make any changes to the policy or APP5. Nor did she recommend widening the framework to include smaller plantings. While she considered it appropriate for the pORPS to contain broader direction on the management of pests, she was concerned that this should not duplicate the requirements of the Biosecurity Act 1993 or the Otago Regional Pest Management Plan 2019-2029 (Otago PMP). Furthermore, she was unsure if this was a region wide concern. Despite this, she felt that her recommendation to incorporate additional direction on pest species will assist with addressing the concerns of the submitters. As a part of that, she accepted the need for the definition of pest as requested.

282. Having reviewed Ms Boyd's recommended policy, and other evidence the Panel is of the view that pest species, particularly wilding conifers, are a region-wide issue. The Panel are comfortable that Ms Boyd's recommended wording addresses the issue appropriately. While the policy framework does not identify other wilding tree species, there is nothing stopping local authorities from addressing these concerns in lower order planning documents. That is in fact what currently occurs in District Plans.

2.10.2. Recommendation

283. The Panel recommends as follows:

(1) the deletion of ECO-P9 and NFL-P5 and their replacement with the following new policy in the LF-LS chapter:

LF-LS-P16A – Managing pests

Reduce the impact of *pests*, including *wilding conifers*, by:

(1) avoiding *afforestation* and *replanting* of *plantation forests* with *wilding conifer* species listed in APP5 within:

(a) areas identified as outstanding natural features, outstanding natural landscapes, or *significant natural areas*, and

(b) buffer zones adjacent to the areas listed in (a) where it is necessary to protect those areas,

(2) outside *plantation forests*, avoiding the planting of *wilding conifer* species listed in APP5 and any other *pests* in a way that is consistent with the Otago Regional Pest Management Plan 2019-2029,
(3) enabling the control of *pests* on *land,* and
(4) supporting initiatives to control *pests* and limit their further spread.

(2) Include the following new clause in LF-LS-M12 (District plans):

LF–LS–M12 – *District plans*

(1) manage *land* use change by:

(aa) avoiding the planting of *pest* plants in accordance with LF-LS-P16A,

(3) Include reference to the policies of the LF chapter seeking to 'reduce the impacts of pests' in the first line of LF-LS-E4 (Explanation).

(4) Including the following new paragraph at the beginning of LF-LS-PR4 (Principal Reasons):

Pests, including *wilding conifers*, pose a range of threats to Otago's environment. While the regional pest management plan is the primary tool for controlling *pests* under the Biosecurity Act 1993, it is important that the management of land works alongside that tool to reduce the impacts of *pests*.

2.11. LF-LS-M12, LF-LS-M13, Explanation and Principal Reasons

284. In addition to the consequential amendments already discussed, Ms Boyd has recommended several other relatively minor amendments to these provisions, generally to reflect amendments in the policy approach. We have reviewed the submissions and Ms Boyd's final response to those, and are generally comfortable with the position she reached, with one exception in relation to LF-LS-M12.

285. City Forests Limited opposes clause 1(a), which requires "controlling the establishment of new or any spatial extension of existing plantation forestry activities or permanent forestry activities where necessary to give effect to an objective developed under the NPSFM" and requested that it be deleted. Rayonier and Ernslaw One also raised concern with this provision while the Waitaki DC sought two new sub-clauses that would provide guidance for managing water short catchments.

286. Mr Peter Oliver for City Forests and Ms Lynette Baish for Ernslaw One addressed this issue at the hearing. Mr Oliver and Ms Baish did not consider the evidence was as clear as Ms Boyd suggested in her s42A report when she said that afforestation can affect water yield and *"given the dry nature of some of Otago's catchments and recent increases in forestry expansion, it may be necessary to control forestry activities in order to give effect to environmental outcomes established under the NPSFM."*

287. In this context, Ms Boyd highlighted regulation 4(1)(a) of the NESPF that specifically allows plan rules to be more stringent than the NES if those rules give effect to an objective

developed to give effect to the NPSFM. However, we note that LF-LS-P21 (2) requires the management of land uses that may have adverse effects on the flow of water in surface water bodies or the recharge of groundwater. This provision does not identify specific activities and in our view, nor should the method.

288. Hence, we agree with Ms Baish that the method "is overly directive and narrowly targeted" and as a consequence, we prefer her recommended amendment, as follows:

> *"controlling the establishment of new or any spatial extension of existing <u>land use activities</u> where necessary to give effect to an objective developed under the NPSFM;"*

2.12. LF-LS-M11 – Regional plans

2.12.1. Discussion

289. As notified LF-LS-M11 reads:

> **LF–LS–M11 – *Regional plans***
>
> Otago Regional Council must publicly notify a Land and Water *Regional Plan* no later than 31 December 2023 and then, when it is made operative, maintain that *regional plan* to:
>
> (1) manage *land* uses that may affect the ability of *environmental outcomes* for *water* quality to be achieved by requiring:
>
> (a) the development and implementation of *certified freshwater farm plans* as required by the RMA and any regulations,
>
> (b) the adoption of practices that reduce the *risk* of sediment and nutrient loss to *water*, including by minimising the area and duration of exposed soil, using buffers, and actively managing critical source areas,
>
> (c) effective management of effluent storage and applications systems, and
>
> (d) *earthworks* activities to implement effective sediment and erosion control practices and setbacks from *water bodies* to reduce the *risk* of sediment loss to *water*, and
>
> (2) provide for changes in *land* use that improve the sustainable and efficient allocation and use of *fresh water*, and
>
> (3) implement policies LF–LS–P16 to LF–LF–P22.

290. There were several submissions received on this provision, with Beef + Lamb and DINZ again seeking that it be deleted, or moved to the LF-FW chapter, on the basis that it is in the wrong subchapter. Ms. Boyd disagreed with this, and we again accept her position given the policy is addressing land use activities.

291. Ms Boyd agreed with Fish & Game and Kāi Tahu ki Otago that the clause (1)(a) reference to the 'RMA and any regulations' is not necessary and recommended its removal. She did not recommend any further amendments to the method in her s42A report except in relation to a consequential amendment to enable implementation of a new policy (LF-LS-P16A) that was recommended during the non-freshwater process.

292. The proposed sub-clause 2A addition by way of an amendment to LF-LS-M11 is required because this method specifies how the full suite of LF-LS policies will be implemented in regional plans, and therefore needs to reflect any amendments to non-FPI provisions as well as FPI provisions. The proposed wording is "enable the discharge of contaminants to land for pest control". Ms Boyd notes that "although arising from the non-FPI part, I consider this also responds to DOC's FPI submission." We agree the amendment is appropriate and have recommended the change accordingly.

293. Ms. Boyd did, however, make some further amendments in response to submissions in her opening statement. However, these were not discussed but were merely referred to as 'minor' changes. We do not consider them to be minor as they broaden the impact of the provisions. One such change was to clause (1)(b), where 'reduce' was deleted and replaced with 'avoid or minimise' in response to a submission from Fish & Game, who sought reference to avoiding land uses which result in any pugging in critical source areas and limiting high risk activities on steep slopes. Given the direction in LF-LSP18 and 21 (which refer to 'minimising' and 'reducing'), we consider 'reduce' to be the appropriate word in this instance so have not recommended that change.

294. Ms Boyd initially rejected Kāi Tahu ki Otago's request to amend clause (2) to delete 'efficient allocation' and instead reference reducing demand on freshwater resources to give effect to objectives developed under the NPSFM. She subsequently made this amendment as a 'minor' change. While we do not agree that it is a minor change, we do agree that the change is appropriate based on Ms McIntyre's' reasoning in her evidence for Kai Tahu. She advised that Kai Tahu sought that:

> *this method refer to the ability for regional plans to provide for changes in land use that reduce demand for water by methods other than simply improving efficiency of use. This has not been accepted in the section 42A report, but no~~r~~ clear reason is given for this. I consider that in areas where there is a need to reverse over-allocation, a broad range of tools must be available to ORC to achieve this. In some areas I consider that improvements in water use efficiency alone are unlikely to achieve this. In such circumstances, controls on water demanding land uses should be a tool that ORC can consider in development of the LWRP.*

295. We agree with Ms McIntyre so have recommended the change accordingly.

296. As discussed above in relation to LF-FW-M5 and LF-FW-M6, our understanding is that the date that the regional plan is to be publicly notified is uncertain and we consider it appropriate to delete the date requirement in the chapeau to reflect this.

297. The Panel has carefully considered Ms Boyd's response to the other submissions made on this provision. We are comfortable with her conclusions so adopt them accordingly.

2.12.2. Recommendation

298. We recommend that LF-LS-M11 is amended as follows:

LF-LS-M11 – Regional Plans

Otago Regional Council must publicly notify a Land and Water Regional Plan ~~no later than 31 December 2023~~ and then, when it is made operative, maintain that *regional plan* to:

(1) manage *land* uses that may affect the ability of *environmental outcomes* for *water* quality to be achieved by requiring:

(a) the development and implementation of *certified freshwater farm plans,* ~~as required by the RMA and any regulations,~~

(b) the adoption of practices that reduce the *risk* of sediment and nutrient loss to *water,* including by minimising the area and duration of exposed soil, using buffers, and actively managing critical source areas,

(c) effective management of effluent storage and application systems, and

(d) *earthworks* activities to implement effective sediment and erosion control practices and setbacks from *water bodies* to reduce the *risk* of sediment loss to *water,* and

(2) provide for changes in *land* use that improve the sustainable and efficient ~~allocation and~~ use of *fresh water* and that reduce water demand where there is existing over-allocation, and

(2A) enable the *discharge* of *contaminants* to *land* for *pest* control, and

Section 9: Ecosystems and indigenous biodiversity (ECO)

1. Introduction

1. This chapter presents our recommendations on the Indigenous Ecosystems and Biodiversity (ECO) chapter of the PORPS. All of the provisions of this chapter are part of the non-freshwater process.

2. The *"protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna"* is a matter of national importance under section 6(c) of the RMA. Also of relevance are sections 7(d), (f) and (g) which require the panel to have particular regard to the 'intrinsic values of ecosystems', maintenance and enhancement of the quality of the environment', and 'any finite characteristics of natural and physical resources' respectively. Section 30(1)(ga) requires regional council to establish *"objectives, policies and methods for maintaining indigenous biological diversity"*. The directions in the RMA underpinned the development of the PORPS and the evidence we received.

3. Biodiversity means the variability among living organisms, and the ecological complexes of which they are a part, including diversity within species, between species, and of ecosystems. The Otago region contains a varied biological diversity, from albatrosses and yellow-eyed penguins on the Otago Peninsula to endangered skinks of Central Otago and kea of the Southern Alps, as well as internationally rare, braided rivers. The Otago region, like other areas in New Zealand, has experienced significant loss of indigenous biodiversity, including mahika kai and taoka species, and continues to be subject to significant pressure.

4. Indigenous biodiversity is present in terrestrial, freshwater and marine environments. Section 62(1)(i)(iii) of the RMA requires that the RPS sets out which local authority is responsible for specifying provisions that control the use of land to maintain indigenous biodiversity. Local authorities have duties under sections 30 and 31 of the RMA 1991 to have objectives, policies and methods to maintain indigenous biological biodiversity. This creates a need to be clear about the responsibilities for each local authority, as well as ensuring an integrated approach is taken across the policy statement.

1.1 The National Policy Statement for Indigenous Biodiversity

5. After many years of gestation and two draft iterations, the National Policy Statement for Indigenous Biodiversity 2023 (NPSIB) was gazetted on 7 July 2023 and came into force on 4 August 2023. The hearings on the non-freshwater parts of the pORPS were adjourned on 29 May 2023, so there was no opportunity during the formal hearing process for parties to address the NPSIB.

6. The Panel issued Minute 15 on 13 July 2023 which directed a timetable (later amended by Minute 19 issued on 13 September 2023) for the circulation of material by ORC and submitters to address the implications of the NPSIB for the non-freshwater process. ORC officers were invited to provide evidence and supporting submissions, with submitters then provided time to respond, and the ORC officers provided a final response. The Panel considered this material

on the papers and the hearing was not reconvened. Any implications for the freshwater process were addressed through those hearings.

7. Over 416 submission points were received on the ECO chapter provisions and related appendices. Many of the submission points have since become redundant by the gazettal of the NBSIB, which has complicated some matters and simplified others. It is important to note that the Panel can only amend a provision to be consistent with the NPSIB if a submission provides the scope to do so.

8. In response to the NPSIB, the ORC officers have recommended substantial changes to the ECO chapter, the PORPS definitions and related Appendices 2, 3 and 4. Some of the key issues addressed at the hearing have been superseded by the NPSIB, and the Panel has had to reconcile the information presented in submissions and evidence with the subsequent NPSIB and supporting material.

9. In addition to the NPSIB, the NZCPS and the NPSFM contain direction relating to the management of indigenous biodiversity in coastal and freshwater environments respectively.

10. There are commonalities between many of the submission points, as there are between some of the provisions. We have grouped topics and provisions where appropriate for ease of discussion, after first addressing the general themes. We discuss below where key matters that arose during the submissions and hearing have been superseded by the NPSIB.

11. The Panel received a helpful s42A report and reply report from Ms Melanie Hardiman, with statements on the implications of the NPSIB being prepared by Mr Andrew Maclennan. Given the technical nature of this chapter, we received technical advice from a number of ecologists and we acknowledge their efforts at caucusing on Appendix 2 of the RPS, on identifying significant biodiversity. To say that the ECO chapter has been complicated is an understatement and we particularly thank Mr Maclennan and Dr Lloyd for ORC for their advice and recommendations on the implications of the NPSIB, and the submitters who provided supplementary submissions or evidence on this matter.

2. General themes

12. The following general themes emerged:

- Maintaining and protecting
- Effects management hierarchies, biodiversity offsetting and biodiversity compensation;
- Nationally and regionally significant infrastructure; and
- Significant natural areas.

13. We address these matters below prior to considering definitions and the specific provisions.

2.1 Maintaining and protecting

14. This was the subject of much debate and the legal position was discussed in detail in our Legal Issues section. We revisit this briefly here, as it is an integral part of the position we take in our recommendations. As stated above, we interpreted s 30(1)(ga) as requiring the regional council to maintain the region-wide values of indigenous biodiversity. This means that the PORPS provisions cannot have the result of worsening the region-wide state of indigenous biodiversity. The emphasis here is on region-wide, which does not mean that activities cannot have some level of adverse effect on indigenous biodiversity. It means that, if they do, an equivalent improvement needs to be made elsewhere.

15. The concept of protection fits within the region-wide requirement to maintain, whereby s6(c) directs specific protection of *"significant indigenous vegetation and significant habitats of indigenous fauna".* This applies to areas or circumstances where the values mark them apart from the general indigenous values in the region, and the level of significance warrants protection.

16. We also note here the sole objective of the NPSIB, which is as follows:

> *The objective of this National Policy Statement is:*
>
> *(a) to maintain indigenous biodiversity across Aotearoa New Zealand so that there is* <u>*at least no overall loss*</u> *in indigenous biodiversity after the commencement date; and*
>
> *(b) to achieve this:*
>
> *(i) through recognising the mana of tangata whenua as kaitiaki of indigenous biodiversity; and*
>
> *(ii) by recognising people and communities, including landowners, as stewards of indigenous biodiversity; and*
>
> *(iii) by protecting and restoring indigenous biodiversity as necessary to achieve the overall maintenance of indigenous biodiversity; and*
>
> *(iv) while providing for the social, economic, and cultural wellbeing of people and communities now and in the future.*
>
> [Panel's emphasis]

17. The PORPS must therefore maintain indigenous biodiversity to ensure that there is no overall loss, as per clause (a), while also protecting significant natural areas (SNAs) as required by s.6(c) and Policy 7 of the NPSIB. This protection in s.6(c) is definitive, and it is important to note that s.6(c) does not have the qualifier of protection 'from inappropriate subdivision, use and development'. Policy 7 requires that 'SNAs are protected by avoiding or managing adverse effects from new subdivision, use and development'.

18. This is addressed in the PORPS in ECO-O1, which we consider reflects well the direction outlined above. ECO-O1 was notified as follows:

ECO–O1 – Indigenous *biodiversity*

> Otago's indigenous *biodiversity* is healthy and thriving and any decline in quality, quantity and diversity is halted.

19. This evolved through the process to the final recommended ECO-O1 which reads:

ECO-O1 – Indigenous *biodiversity*

> Otago's indigenous *biodiversity* is healthy and thriving and any overall decline in ~~quality~~ condition, quantity and diversity is halted.

20. The addition of 'overall' reflects the direction of the NPSIB. We note that 'indigenous biodiversity' is defined in the NPSIB and that the Panel later recommend that this definition is included in the PORPS. We therefore recommend that 'indigenous' should also be italicised to refer to this definition.

21. The NPSIB also includes a definition of 'maintenance of indigenous biodiversity' which is relevant to ECO-P6 – Maintaining indigenous biodiversity. Mr Maclennan's NPSIB Reply Report recommends that this definition be included and referenced in ECO-P6. We agree that this is appropriate to give effect to the NPSIB.

2.1.1 Recommendation

22. We recommend that the following definition be inserted into the Interpretation section of the PORPS:

Maintenance of indigenous biodiversity	has the same meaning as in the National Policy Statement for Indigenous Biodiversity 2023 (as set out in the box below): means: (a) the maintenance and at least no overall reduction of all the following: (i) the size of populations of *indigenous species*: (ii) indigenous species occupancy across their natural range: (iii) the properties and function of ecosystems and *habitats* used or occupied by *indigenous biodiversity*: (iv) the full range and extent of ecosystems and *habitats* used or occupied by *indigenous biodiversity*: (v) connectivity between, and buffering around, ecosystems used or occupied by *indigenous biodiversity*: (vi) the resilience and adaptability of ecosystems; and (b) where necessary, the restoration and enhancement of ecosystems and *habitats*.

23. We recommend that ECO-O1 be amended as follows:

ECO-O1 – Indigenous *biodiversity*

> Otago's *indigenous* *biodiversity* is healthy and thriving and any overall decline in condition, ~~quality~~ quantity and diversity is halted.

2.2 The effects management hierarchy, biodiversity offsetting and biodiversity compensation

24. The legal aspects of biodiversity offsetting and compensation were also addressed in our Legal Issues section. Mr. Christensen, for Oceana Gold, had submitted that there is a mandatory need to provide a consent pathway involving the s.104(1)(ab) methodology of offsetting or compensation. We did not accept this, considering that "*the mandatory aspect is only triggered at resource consent stage, and is a mandatory requirement to give genuine consideration to the offsetting or compensation which has been proposed as part of the application for resource consent. That does not convert it into a mandatory matter at the regional policy statement stage*".

25. Principles for biodiversity offsetting and compensation are provided in Appendix 3 and Appendix 4 of the NPSIB respectively, and these are applied through the application of an effects management hierarchy. The effects management hierarchy is defined in the NPSIB as follows and directions for its applications are in clauses 3.10, 3.11 and 3.16:

> ***effects management hierarchy*** *means an approach to managing the adverse effects of an activity on indigenous biodiversity that requires that:*
>
> *(a) adverse effects are avoided where practicable; then*
>
> *(b) where adverse effects cannot be avoided, they are minimised where practicable; then*
>
> *(c) where adverse effects cannot be minimised, they are remedied where practicable; then*
>
> *(d) where more than minor residual adverse effects cannot be avoided, minimised, or remedied, biodiversity offsetting is provided where possible; then*
>
> *(e) where biodiversity offsetting of more than minor residual adverse effects is not possible, biodiversity compensation is provided; then*
>
> *(f) if biodiversity compensation is not appropriate, the activity itself is avoided.*

26. Appendix 3 and Appendix 4 of the PORPS also provide for biodiversity offsetting and compensation. These attracted considerable debate through submissions and evidence, which we consider has been superseded by the NPSIB. Mr Maclennan recommended that these appendices be replaced with those in the NPSIB. In his reply report relating to additional evidence as to the NPSIB (the NPSIB Reply Report), he accepted amendments requested by the Director General of Conservation and Oceana Gold to amend the heading from 'criteria' to 'principles' and clarify the requirements of clause 3.10(4)(b) of the NPSIB to comply with principles (1) to (6) and have regard to the remaining principles.

27. We accept these amendments and consider that in the case of biodiversity offsetting and compensation, the clearest way to implement the requirements of the NPSIB is through replicating its requirements.

28. The notified PORPS defined 'effects management hierarchy' in the Interpretation section, and effectively replicated it in ECO-P6, which was then cross-referenced in ECO-P3 and ECO-P4. The notified PORPS applied the NPSFM definition of effects management hierarchy to the ECO chapter. Through submissions, the NPSIB and subsequent evidence, the NPSIB Reply Report recommended adopting the definition of 'effects management hierarchy' in the NPSIB. While we consider there to be little difference between this definition and the NPSFM definition, we consider it to be a preferable and more appropriate approach to implement the NPSIB definition which is specifically aimed at this aspect of the general environment rather than the NPSFM which has a prioritised base to it.

29. As a consequence, the Reply Report version of the PORPS recommends that

- The NPSIB definition of 'effects management hierarchy' be included in the Interpretation section titled 'effects management hierarchy (in relation to indigenous biodiversity)' to distinguish it from the NPSFM definition which is also included;
- ECO-P6 refers to the definition in the Interpretation section rather than replicating the definition; and
- ECO-P3 and ECO-P4 utilise the definition rather than referring to ECO-P6.

30. We consider that this approach is simpler, clearer and better reflects the requirements of the NPSIB.

2.2.1 Recommendation

31. We recommend that:

- The versions of APP3 – Principles for biodiversity offsetting and APP4 – Principles for biodiversity compensation contained in the PORPS reply version dated 10 October 2023 be adopted; and
- The NPSIB definition of 'effects management hierarchy' be included in the Interpretation section titled 'effects management hierarchy (in relation to indigenous biodiversity)'.

32. Amendments to ECO-P3, ECO-P4 and ECO-P6 are discussed later in this section.

33. Considering s.32AA, we consider that these amendments are necessary to implement the NPSIB.

2.3 Nationally and regionally significant infrastructure

34. A number of submitters raised concerns about the implications of the ECO chapter provisions for nationally and regionally significant infrastructure. These included extensive submissions

and evidence from Waka Kotahi, Oceana Gold, Contact Energy and Manawa Energy. Provisions ECO-P3, ECO-P4 and ECO-P6 are relevant here, and we also note that EIT-INF-P13 directs new nationally and regionally significant infrastructure to avoid locating in SNAs as a first priority.

35. Clause 1.3(3) of the NPSIB is of particular relevance to renewable electricity generation and electricity transmission networks and states:

> *Nothing in this National Policy Statement applies to the development, operation, maintenance or upgrade of renewable electricity generation assets and activities and electricity transmission network assets and activities. For the avoidance of doubt, renewable electricity generation assets and activities, and electricity transmission network assets and activities, are not "specified infrastructure" for the purposes of this National Policy Statement.*

36. The Government is preparing replacements for the current NPSREG and NPSET and we understand that the draft releases of these documents each contained an effects management hierarchy for these activities. As these documents are draft, they have no weight in these proceedings, and we have not considered them further.

37. In response to clause 1.3(3) of the NPSIB, Mr Maclennan recommended a new ECO-P6A to address renewable electricity generation and electricity transmission networks. This in effect amended the effects management hierarchy for these activities. This approach was not supported by submitters for varying reasons, and in response, Mr Maclennan recommended in his NPSIB Reply Report to delete ECO-6A and references to it. He recommended to amend the definition of 'effects management hierarchy (in relation to indigenous biodiversity)' to reflect the direction in clause 1.3(3) and add an additional clause to ECO-P6 to reflect the different approach for renewable electricity generation and electricity transmission networks.

38. We agree with Mr Maclennan's recommended approach and consider it preferable to what was a complex ECO-P6A. We consider that the exclusion in brackets in the introductory sentence of ECO-P6 should be part of the main text.

39. We return to nationally and regionally significant infrastructure that is not for renewable electricity generation or electricity transmission networks in relation to the specific relevant provisions.

2.3.1 Recommendation

40. We recommend that the following definition is inserted into the Interpretation section of the PORPS:

Effects management hierarchy (in relation to indigenous biodiversity)	means an approach to managing the adverse effects of an activity on *indigenous biodiversity* that requires that: (a) adverse effects are avoided where practicable; then (b) where adverse effects cannot be avoided, they are minimised where practicable; then

(c) where adverse effects cannot be minimised, they are remedied where practicable; then

(d) where more than minor residual adverse effects cannot be avoided, minimised, or remedied, *biodiversity offsetting* is provided where possible; then

(e) where *biodiversity offsetting* of more than minor residual adverse effects is not possible, *biodiversity compensation* is provided; then

(f) if *Biodiversity compensation* is not appropriate, the activity itself is avoided, unless the activity is *regionally significant infrastructure* and *nationally significant infrastructure* that is either *renewable electricity generation* or the *National Grid* then:

(g) if compensation is not appropriate to address any residual adverse effects:

(i) the activity must be avoided if the residual adverse effects are significant; but

(ii) if the residual adverse effects are not significant, the activity must be enabled if the national significance and benefits of the activity outweigh the residual adverse effects.

41. We recommend that ECO-P6 be amended as follows:

ECO-P6 – Maintaining indigenous *biodiversity*

Outside the coastal environment and excluding areas ~~managed~~ protected under ECO-P3, ~~Maintain~~ manage Otago's *indigenous biodiversity* ~~(excluding the coastal environment and areas managed under ECO–P3)~~ by:

(1) applying the ~~following *biodiversity*~~ *effects management hierarchy (in relation to indigenous biodiversity)* to manage significant adverse *effects* on *indigenous biodiversity*, and

(2) requiring the *maintenance of indigenous biodiversity* for all other adverse *effects* of any activity, and

(3) notwithstanding (1) and (2) above, for *regionally significant infrastructure* and *nationally significant infrastructure* that is either *renewable electricity generation* or the *National Grid* avoid, remedy, or mitigate adverse *effects* to the extent practicable.

~~in decision-making on applications for *resource consent*, and notices of requirement:~~

~~(1) avoid adverse *effects* as the first priority,~~

~~(2) where adverse *effects* demonstrably cannot be completely avoided, they are remedied,~~

~~(3) where adverse *effects* demonstrably cannot be completely avoided or remedied, they are mitigated,~~

~~(4) where there are residual adverse *effects* after avoidance, remediation, and mitigation, then the residual adverse *effects* are offset in accordance with APP3, and~~

~~(5) if *biodiversity* offsetting of residual adverse *effects* is not possible, then:~~

~~(a) the residual adverse *effects* are compensated for in accordance with APP4, and~~

~~(b) if the residual adverse *effects* cannot be compensated for in accordance with APP4, the activity is avoided.~~

2.4 Significant natural areas

42. As stated above, s.6(c) of the RMA provides for the *"protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna"* as a matter of national importance. This is implemented through the following NPSIB policies:

> ***Policy 6:*** *Significant indigenous vegetation and significant habitats of indigenous fauna are identified as SNAs using a consistent approach.*
>
> ***Policy 7:*** *SNAs are protected by avoiding or managing adverse effects from new subdivision, use and development.*
>
> ***Policy 9:*** *Certain established activities are provided for within and outside SNAs.*

43. Part 3 Subpart 2 of the NPSIB sets out how to identify and manage SNAs and Appendix 1 provides the criteria for identifying SNAs. Mr Maclennan's evidence on the implications of the NPSIB helpfully summarises the relevant provisions in Part 3 Subpart 2 and we do not repeat these here.

44. Clause 3.8 requires territorial authorities to assess land to identify areas that qualify as SNAs, and clause 3.9 dictates how these areas are to be included in district plans. These clauses are given effect to in the PORPS by ECO-P2 and ECO-M2 which were notified as follows:

ECO–P2 – Identifying *significant natural areas* and taoka

Identify:

(1) the areas and values of *significant natural areas* in accordance with APP2, and

(2) indigenous species and ecosystems that are taoka in accordance with ECO–M3.

ECO–M2 – Identification of *significant natural areas*

Local authorities must:

(1) in accordance with the statement of responsibilities in ECO–M1, identify the areas and values of *significant natural areas* as required by ECO–P2, and

(2) map the areas and include the values identified under (1) in the relevant *regional* and *districtplans*,

(3) recognise that indigenous *biodiversity* spans jurisdictional boundaries by:

(a) working collaboratively to ensure the areas identified by different *local authorities* are not artificially fragmented when identifying *significant natural areas* that span jurisdictional boundaries, and

(b) ensuring that indigenous *biodiversity* is managed in accordance with this

RPS,

(4) require ecological assessments to be provided with applications for resource consent and noticesof requirement that identify whether affected areas are *significant natural areas* in accordance with APP2,

(5) in the following areas, prioritise identification under (1) no later than 31 December 2025:

(a) intermontane basins that contain indigenous vegetation and habitats,

(b) areas of dryland shrubs,

(c) braided *rivers*, including the Makarora, Mātukituki and Lower Waitaki Rivers,

(d) areas of montane tall tussock grasslands, and

(e) limestone habitats.

45. There were 15 submissions on ECO-P2, ranging from Fish and Game who sought that the policy is retained as notified, to Fulton Hogan who sought its deletion. Concerns about APP2 emerged here as well, with concerns expressed that ECO-P2 combined with APP2 could see large areas of Otago classified as SNAs. The NPSIB requirements largely override these submissions and, in response, the NPSIB Reply Report of Mr Maclennan recommended a substantial rewording of clause (1) to refer to the SNA assessment criteria in APP2. We consider this to be appropriate, with minor amendments to correct italicising.

46. Additional clauses were recommended to be added to ECO-M2 and amendments made to existing clauses to obtain consistency with clauses 3.8 and 3.9 of the NPSIB. We have reviewed the supplementary submissions and evidence received from submitters, along with Mr Maclennan's recommendations and consider that the recommended amendments are appropriate, with minor amendments to correct italicising.

47. NPSIB clause 3.10 sets out the requirements for managing adverse effects of new subdivision, use or developments on SNAs. Adverse effects specified in clause 3.10(2) must be avoided unless provided for by the exceptions in clause 3.11 whereby the effects are to be managed by applying the effects management hierarchy.

48. In the PORPS ECO-P3 is to protect SNAs and taoka and ECO-P4 provides the exemptions for new activities. ECO-P3 and ECO-P4 were notified as follows:

ECO–P3 – Protecting *significant natural areas* and taoka

Except as provided for by ECO–P4 and ECO–P5, protect *significant natural areas* and indigenous species and ecosystems that are taoka by:

(1) avoiding adverse *effects* that result in:

(a) any reduction of the area or values (even if those values are not themselves significant)identified under ECO–P2(1), or

(b) any loss of Kāi Tahu values, and

(2) after (1), applying the *biodiversity effects management hierarchy* in ECO–P6, and

(3) prior to *significant natural areas* and indigenous species and ecosystems that are taoka being identified in accordance with ECO–P2, adopt a precautionary approach towards activities in accordance with IM–P15.

ECO–P4 – Provision for new activities

Maintain Otago's indigenous *biodiversity* by following the sequential steps in the effects management hierarchy set out in ECO–P6 when making decisions on plans, applications for resource consent or noticesof requirement for the following activities in *significant natural areas*, or where they may adversely affectindigenous species and ecosystems that are taoka:

(1) the development or upgrade of *nationally* and *regionally significant infrastructure* that has a *functional* or *operational need* to locate within the relevant *significant natural area(s)* or where they may adversely affect indigenous species or ecosystems that are taoka,

(2) the development of *papakāika*, marae and ancillary facilities associated with customary activities on Māori land,

(3) the use of Māori land in a way that will make a significant contribution to enhancing the social, cultural or economic well-being of *takata whenua*,

(4) activities that are for the purpose of protecting, restoring or enhancing a *significant natural area* or indigenous species or ecosystems that are taoka, or

(5) activities that are for the purpose of addressing a severe and immediate *risk* to public health or safety.

49. Again, substantial amendments were recommended to these policies. The supplementary evidence from Mr Brass for the Director General of Conservation recommended that the adverse effects listed in clause 3.10(2) be included in clause (1) of ECO-P3. These contain more prescriptive ecological criteria, and we agree that these are necessary inclusions to ensure consistency with the NPSIB. Mr Maclennan recommended accepting Mr Brass's addition and we consider that the resulting amended ECO-P3 is appropriate with the following exception.

50. ECO-P3 as notified excluded those matters covered by ECO-P4 and ECO-P5. As we soon discuss, we consider it appropriate to delete ECO-P5 and we support a replacement ECO-P5A to implement the requirements of the NPSIB. We consider that ECO-P5A should be referred to as an exclusion in ECO-P3, replacing the reference to ECO-P5.

51. It is important to note the 'except as provided for by ECO-P4…' in the chapeau of ECO-P3 as this provides for the exemptions in ECO-P4 to apply.

52. Turning to ECO-P4, again substantial amendments were recommended to ensure that the exemptions are consistent with those in clause 3.11 of the NPSIB, and the approach to managing effects is consistent with clause 3.10(3) and (4). We note here that clause 3.11(1)(a)(i) includes the term 'specified infrastructure' which is defined as:

specified infrastructure means any of the following:

(a) infrastructure that delivers a service operated by a lifeline utility (as defined in the Civil Defence Emergency Management Act 2002):

(b) regionally or nationally significant infrastructure identified as such in a National Policy Statement, the New Zealand Coastal Policy Statement, or a regional policy statement or plan:

(c) infrastructure that is necessary to support housing development, that is included in a proposed or operative plan or identified for development in any relevant strategy document (including a future development strategy or spatial strategy) adopted by a local authority, in an urban environment (as defined in the National Policy Statement on Urban Development 2020):

(d) any public flood control, flood protection, or drainage works carried out:

(i) by or on behalf of a local authority, including works carried out for the purposes set out in section 133 of the Soil Conservation and Rivers Control Act 1941; or

(ii) for the purpose of drainage, by drainage districts under the Land Drainage Act 1908:

(e) defence facilities operated by the New Zealand Defence Force to meet its obligations under the Defence Act 1990.

52. This new definition of specified infrastructure is broader than the definitions of regionally significant infrastructure and nationally significant infrastructure in the PORPS. Mr Maclennan has appropriately recommended that this definition be included, and we consider that the breadth of submissions on this policy provide the scope for this amendment.

53. A new ECO-P5A is recommended to replace notified ECO-P5. Concerns were raised by submitters as to whether ECO-P5 would conflict with activities which had existing use rights under s.10 of the RMA. We shared the submitters' concerns and were pleased to see that Ms Hardiman recommended in her reply report to delete ECO-P5. This left a gap for managing the effects of existing activities on SNAs.

54. **Policy 9** of the NPSIB states that:

> Certain established activities are provided for within and outside SNAs.

This policy is implemented within SNAs through clause 3.15 of the NPSIB which manages the effects of activities established within or affecting an SNAs. Clause 3.15(2) requires that local authorities include provisions in policy statements and plans:

> *…to enable specified established activities, or specified types of established activities, to continue where the effects of the activity on an SNA (including cumulative effects):*
>
> *(a) are no greater in intensity, scale, or character over time than at the commencement date; and*
>
> *(b) do not result in the loss of extent, or degradation of ecological integrity, of an SNA.*

55. It is a mandatory requirement to include provisions in a policy statement in accordance with clause 3.15 and, with the deletion of ECO-P5, this requirement was not met. ECO-P5A was therefore recommended by Mr Maclennan as follows:

ECO-P5A – Managing adverse effects of established activities on *significant natural areas*

Enable the maintenance, operation, and upgrade of established activities (excluding activities managed under ECO-P3 and ECO-P4), where the *effects* of the activity, including cumulative *effects*, on a *significant natural area*:

(1) are no greater in intensity, scale, or character over time than at 4 August 2023, and

(2) do not result in the loss of extent or degradation of *ecological integrity* of an *significant natural area*.

56. We consider that the wording of proposed ECO-P5A appropriately reflects the requirements of clause 3.15 of the NPSIB however, consistent with the approach taken to managing activities through ECO-P3, ECO-P4 and ECO-P6, we consider that it should not apply to the coastal environment. Accordingly, we do not accept the addition of the officer's proposed clause (3A).There were broad submissions requesting amendments to ECO-P5 which provide scope for the addition of ECO-P5A.

57. APP2 of the PORPS as notified contained 'significant criteria for indigenous biodiversity' which were referenced through ECO-P2 and ECO-M2. While not labelled as such, these criteria were essentially to be used to determine SNAs. They were the subject of a large number of submissions and expert evidence, with some submitters requesting that the criteria for identifying SNAs that was included in the draft NPSIB be included in the PORPS. These matters were largely but not completely resolved through expert caucusing and a joint witness statement. We thank the submitters' respective ecological experts for their engagement in this process.

58. Appendix 1 of the NPSIB contains criteria for identifying SNAs and clause 3.8(2) provides a set of six principles that must be used for SNA assessments. Mr Maclennan has recommended that the Appendix 1 NPSIB criteria replace APP2 and that the principles in clause 3.8(2) are included in APP2 prior to the criteria. He notes that a key distinction between Appendix 1 of the NPSIB and APP2 of the PORPS is that APP2 applies not only to ecological districts but also to freshwater and marine bioregions.

59. One key amendment to the criteria is recommended by Dr Lloyd and supported by Mr Maclennan. Dr Lloyd recommended that an additional criterion for Otago addressing fauna habitat be added as an attribute to the Ecological Context Criterion. Dr Lloyd stated at paragraph 28 of his evidence:[1]

> *Both the PORPS and NPS-IB criteria sets contain attributes for buffering and connectivity, but the NPS-IB criterion does not capture important indigenous fauna habitats. The PORPS criterion for indigenous fauna habitats is particularly important in an Otago context, providing a basis for the recognition and protection of indigenous*

[1] *Prepared for ORC and dated 8 September 2023.*

fauna habitats across many species groups.[2] *The joint witness statement includes the following agreed fauna habitat criterion:*

> *An area that is important for a population of indigenous fauna during a critical part of their life cycle, either seasonally or permanently, e.g. for feeding, resting, nesting, breeding, spawning, or refuges from predation.*[3]

60. This recommended addition was not supported by Ms Justice for the EDBs or by Mr Christensen for Oceana Gold. Mr Christensen's view is informed by clause 3.1(2) of the NPSIB which, states:

> *Nothing in this Part:*
>
> *(a) prevents a local authority adopting more stringent measures than required by this National Policy Statement…"*

Mr Christensen maintains that this clause *"does not allow a local authority to include more stringent matters in a RPS or plan, and cannot override a statutory requirement in the RMA to "give effect to the NPS"*.[4]

61. While we acknowledge the distinction between these clauses in the NPSFM and NPSIB, we struggle to agree with Mr Christensen that clause 3.1(2) of the NPSIB prevents us from including a more stringent and Otago-focussed addition. If this were the intent, we would have expected it to be explicitly stated. In our view the wording of clause 3.1(2) is permissive, i.e. if a local authority for a particular reason in a particular contextual setting saw it as its duty to protect the maintenance of indigenous biodiversity by use of a particular provision applicable to that setting, it is open to it to adopt such a provision even if it is not in the NPSIB.

62. We acknowledge the conclusions reached in the joint witness statement and agree that the additional criterion proposed by Dr Lloyd is appropriate in the Otago context.

2.4.1 Recommendations

63. We recommend the following amendments to ECO-P2:

ECO-P2 – Identifying *significant natural areas* and taoka

Identify and map:

(1) the areas of significant *indigenous vegetation* or significant *habitat* of indigenous fauna that qualify as *significant natural areas* using the assessment criteria in APP2 and in accordance with ECO-M2,~~ and values of significant natural areas in accordance with APP2~~ and

(2) where appropriate, *indigenous species* and ecosystems that are taoka, including those identified by *mana whenua* as requiring protection, in accordance with ECO-M3.

64. We recommend the following amendments to ECO-M2:

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[2] *Paragraphs 13, 14 and 20 of Dr Lloyd's evidence, dated 8 September 2023.*
[3] *Joint Witness Statement of Ecologists dated 31 March 2023 at page 10*
[4] *Submissions on behalf of Oceana Gold prepared by Mr Stephen Christensen, paragraph 13*

ECO-M2 – Identification of *significant natural areas*

Local authorities must:

(1) in accordance with the statement of responsibilities in ECO-M1, identify the areas and *indigenous biodiversity* values of *significant natural areas* as required by ECO-P2, and

(2) map and verify the areas and include the *indigenous biodiversity* values identified under (1) in the relevant *regional plans* and *district plans*~~,~~ no later than 31 December 2030,

(3) recognise that *indigenous biodiversity* spans jurisdictional boundaries by:

  (a) working collaboratively to ensure the areas identified by different *local authorities* are not artificially fragmented when identifying *significant natural areas* that span jurisdictional boundaries, and

  (b) ensuring that *indigenous biodiversity* is managed in accordance with this RPS,

(4) until *significant natural areas* are identified and mapped in accordance with (1) and (2), require ecological assessments to be provided with applications for *resource consent*, plan changes and notices of requirement that identify whether affected areas are *significant natural areas* in accordance with APP2, and

(5) in the following areas, prioritise identification under (1) ~~no later than 31 December 2025~~:

  (a) intermontane basins that contain *indigenous vegetation* and habitats,

  (b) areas of dryland shrubs,

  (c) braided *rivers*, including the ~~Makarora~~ Makarore, ~~Mātukituki~~ Mātakitaki and Lower Waitaki Rivers,

  (d) areas of montane tall tussock grasslands, and

  (e) limestone habitats.

(6) when identifying *significant natural area*s, ensuring that:

  (a) if the values or extent of a proposed *significant natural area* are disputed by the landowner, the local authority:

    (i) conducts a physical inspection of the area,

    (ii) or, if a physical inspection is not practicable, uses the best information available to it at the time, and

  (b) if requested by a *territorial authority*, the *regional council* will assist the *territorial authority* in undertaking its district-wide assessment, and

  (c) where a *territorial authority* has identified a *significant natural area* prior to 4 August 2023, and prior to 4 August 2027, a suitably qualified ecologist is engaged by the *territorial authority* to confirm that the methodology originally used to identify the area as a *significant natural area*, and its application, is consistent with the assessment approach in APP2, and

(d) if a *territorial authority* becomes aware (as a result of a resource consent application, notice of requirement or any other means) that an area may be an area of significant *indigenous vegetation* or significant *habitat* of indigenous fauna that qualifies as a *significant natural area*, the *territorial authority*:

(i) conducts an assessment of the area in accordance with APP2 as soon as practicable, and

(ii) if a new *significant natural area* is identified as a result, includes it in the next appropriate plan or plan change notified by the *territorial authority*, and

(e) when a *territorial authority* does its 10-yearly plan review, it assesses its district in accordance with ECO-P2 and APP2 to determine whether changes are needed, and

(7) allow an area of Crown-owned land to qualify as a *significant natural area* without the need for the assessment required by ECO-P2, using APP2, if:

(a) the land is managed by the Department of Conservation under the Conservation Act 1987 or any other Act specified in Schedule 1 of that Act, and

(b) the *territorial authority* is reasonably satisfied, after consultation with the Department of Conservation, that all or most of the area would qualify as a *significant natural area* under APP2, and

(c) the area is:

(i) a large and more-or-less contiguous area managed under a single protection classification (such as a national park), or

(ii) a large, compact, and more-or-less contiguous area under more than one classification (such as adjoining reserves and a conservation park), or

(iii) a well-defined landscape or geographical feature (such as an island or mountain range), or

(iv) a scientific, scenic or nature reserve under the Reserves Act 1977, a sanctuary area, ecological area, or wildlife management area under the Conservation Act 1987, or an isolated part of a national park.

65. We recommend the following amendments to ECO-P3:

ECO-P3 – Protecting *significant natural areas* and taoka

Outside the coastal environment, and ~~E~~except as provided for by ECO-P4 and ~~ECO-P5~~ ECO-P5A, protect *significant natural areas* and *indigenous species* and ecosystems that are taoka by:

(1) first avoiding adverse *effects* that result in:

~~(a) any reduction of the area or values (even if those values are not themselves significant identified under ECO–P2(1), or~~

(aa) loss of ecosystem representation and extent,

(ab) disruption to sequences, mosaics, or *ecosystem function*,

(ac) fragmentation of *significant natural areas* or the loss of buffers or connections within an SNA,

(ad) a reduction in the function of the *significant natural area* as a buffer or connection to other important habitats or ecosystems, ~~or~~

(ae) a reduction in the population size or occupancy of *Threatened or At Risk (declining) species* that use an *significant natural area* for any part of their life cycle, or

(b) any loss of ~~Kāi Tahu~~ taoka values identified by *mana whenua* as requiring protection under ECO-P2(2), and

(2) after (1), applying the ~~biodiversity~~ *effects management hierarchy (in relation to indigenous biodiversity)* ~~in ECO-P6~~ to areas and values other than those covered by ECO-P3(1), and

(3) prior to *significant natural areas* and *indigenous species* and ecosystems that are taoka being identified and mapped in accordance with ECO-P2, adopt a precautionary approach towards activities in accordance with ~~IM–P15~~IM-P6(2).

66. We recommend the following amendments to ECO-P4:

ECO-P4 – Provision for new activities

Outside of the coastal environment, ~~M~~maintain Otago's *indigenous biodiversity* by following the sequential steps in the *effects management hierarchy (in relation to indigenous biodiversity)* ~~set out in ECO-P6~~ when making decisions on plans, applications for *resource consent* or notices of requirement for the following activities in *significant natural areas*, or where they may adversely affect *indigenous species* and ecosystems that are taoka that have been identified by *mana whenua* as requiring protection:

(1) the development, operation, maintenance or upgrade of *specified infrastructure* ~~*nationally significant infrastructure* and *regionally significant infrastructure*~~ that provides significant national or regional public benefit that has a *functional need* or *operational need* to locate within the relevant *significant natural area(s)* or where they may adversely affect *indigenous species* or ecosystems that are taoka, and there are no practicable alternative locations,

(1A) the development, operation and maintenance of *mineral* extraction activities that provide a significant national public benefit that could not otherwise be achieved within New Zealand and that have a *functional need* or *operational need* to locate within the relevant *significant natural area(s)* or where they may adversely affect *indigenous species* or ecosystems that are taoka, and there are no practicable alternative locations,

(1B) the development, operation and maintenance of aggregate extraction activities that provide a significant national or regional benefit that could not otherwise be achieved within New Zealand and that have a *functional need* or *operational need* to locate within the relevant *significant natural area(s)* or where they may adversely affect *indigenous species* or ecosystems that are taoka,

(1C) the operation or expansion of any coal mine that was lawfully established before August 2023 that has a *functional need* or *operational need* to locate within the relevant *significant natural area(s)* or where they may adversely affect *indigenous species* or ecosystems that are taoka, and there are no practicable alternative locations; except that, after 31 December 2030, this exception applies only to such coal mines that extract coking coal,

(2) the development of *papakāika*, marae and ancillary facilities associated with customary activities on Native reserves and *Māori land*,

(2A) the sustainable use of *mahika kai* and kaimoana (seafood) by *mana whenua*,

(3) the use of Native reserves and *Māori land* ~~in a way that will make a significant contribution~~ to enable *mana whenua* to maintain their connection to their whenua and enhance~~ing~~ ~~the~~ social, cultural or economic well-being, ~~of *takata whenua*,~~

(4) activities that are for the purpose of protecting, maintaining, restoring or enhancing a *significant natural area* or *indigenous species* or ecosystems that are taoka, ~~or~~

(5) activities that are for the purpose of addressing a severe ~~and~~ or immediate risk to public health or safety~~.~~,

(6) activities that are for the purpose of a developing a single residential dwelling on an allotment that was created before 4 August 2023, and can demonstrate there is no practicable location within the allotment where a single residential dwelling and essential associated on-site infrastructure can be constructed, or

(7) activities that are for the purpose of harvesting indigenous tree species from an *significant natural area* carried out in accordance with a forest management plan or permit under Part 3A of the Forests Act 1949.

67. We recommend that notified ECO-P5 be deleted and that an additional policy, ECO-P5A, be inserted as follows:

ECO-P5A – Managing adverse effects of established activities on *significant natural areas*

Outside of the coastal environment, ~~E~~enable the maintenance, operation, and upgrade of established activities (excluding activities managed under ECO-P3 and ECO-P4), where the *effects* of the activity, including cumulative *effects*, on a *significant natural area*:

(1) are no greater in intensity, scale, or character over time than at 4 August 2023, and

(2) do not result in the loss of extent or degradation of *ecological integrity* of a *significant natural area*.

68. We recommend that APP2 be amended as per the Reply Report version of the PORPS dated 10 October 2023.

3. Definitions

69. There are a range of submissions relating to the terms defined in the ECO chapter. There are also a number of terms that are defined in the NPSIB that are used in the PORPS. Officers have recommended that definitions be amended to reflect the NPSIB, or that NPSIB definitions be included for terms used in the PORPS that were not defined. We consider that this is an appropriate approach and note that, in some cases, submitters requested definitions be introduced that are now defined by the NPSIB. It is important to note that were NPSIB-defined terms not to be included in the PORPS, the definitions would apply anyway.

70. We recommend below that NPSIB definitions are adopted in the PORPS. In some cases, this means an amendment to refer to the NPSIB rather than any material change to the definition.

3.1 Recommendation

71. We recommend that the NPSIB definitions of the following terms are included in the Interpretation section of the PORPS, in addition to those discussed and recommended previously. Where terms are already included in the PORPS, they are to be replaced with the NPSIB definition of these terms:

- Biodiversity compensation
- Biodiversity offset
- Depositional landform
- Ecological district
- Ecosystem function
- Exotic pasture species
- Habitat
- Improved pasture
- Indigenous biodiversity
- Maintenance of improved pasture
- Restoration (in relation to indigenous biodiversity)
- SNA or significant natural area, but with the reference to "Appendix 1" changed to "APP2"
- Specified infrastructure
- Threatened or At Risk, and Threatened or At Risk (declining)

4. ECO-O2 – Restoring or enhancing and ECO-P8 – Enhancement

72. ECO-O2 seeks an increase in Otago's indigenous biodiversity through restoration and enhancement, while ECO-P8 sets out the actions to achieve this. These provisions were notified as follows:

> **ECO–O2 – Restoring or enhancing**
>
> A net increase in the extent and occupancy of Otago's indigenous *biodiversity* results from restoration or enhancement.
>
> **ECO–P8 – Enhancement**
>
> The extent, occupancy and condition of Otago's indigenous *biodiversity* is increased by:
>
> (1) restoring and enhancing habitat for indigenous species, including taoka and mahika kai species,
>
> (2) improving the health and *resilience* of indigenous *biodiversity*, including ecosystems, species,important ecosystem function, and *intrinsic values*, and
>
> (3) buffering or linking ecosystems, habitats and ecological corridors.

73. These two provisions implement Policy 13 and Policy 14 of the NPSIB which are included below:

> **Policy 13:** Restoration of indigenous biodiversity is promoted and provided for.
>
> **Policy 14:** Increased indigenous vegetation cover is promoted in both urban and non-urban environments.

74. We also note here Policy 8:

> **Policy 8:** The importance of maintaining indigenous biodiversity outside SNAs is recognised and provided for.

75. Ngāi Tahu ki Murihiku and Fulton Hogan were unsure what the term 'occupancy' meant in ECO-O2 and requested either that it be deleted or defined.[5] In response, Ms Hardiman recommended the following definition of occupancy be included in the Interpretation section:

> *Means, in relation to measuring indigenous biodiversity, the number of units per area occupied by a species or taxa.*

76. Other submitters, including QLDC and Forest and Bird, sought additional clarity with Forest and Bird requesting consistency with the language used in ECO-O1. We note that the final recommended version of ECO-O1 refers to the 'condition, quality and diversity' of indigenous biodiversity, whereas ECO-P2 uses 'extent and occupancy'.

[5] Refer p25 of s.42A

77. We also observe that the final recommendation for ECO-O1 uses the term 'overall decline' while ECO-O2 uses 'net increase'. 'Net' was recommended by Ms Hardiman in her reply report prior to the release of the NPSIB, and this was recommended to be replaced by 'overall' to ensure consistency with the objective of the NPSIB.

78. We consider that consistency of language between provisions is important unless there is a good reason not to. This is primarily to avoid future debates about what different phrases mean and whether the difference in phraseology is significant. It also makes regulatory documents much easier to digest.

79. While we acknowledge Forest and Bird's desire for consistency, we accept Ms Hardiman's position in her Reply Report that 'extent' and 'occupancy' are ecological terms that relate to restoration outcomes. We accept that in this instance it is appropriate to use different terms and, as we discuss below, we also consider it appropriate to use these terms in ECO-P8.

80. We consider that 'overall increase' is a suitable phrase to use in ECO-O2 to ensure consistency with the NPSIB and ECO-O1. In our view it has the same meaning as net in this context and we recommend that this is a consequential amendment from ECO-P1.

81. Restoration is defined in the NPSIB and we have earlier recommended that this definition be included in the PORPS. This is not reflected in the recommended ECO-O2 through italicising 'restoration' and we recommend this as a consequential amendment. Similarly, we consider that 'indigenous' should be italicised to reflect the new definition of 'indigenous biodiversity'.

82. Clause 3.21 of the NPSIB promotes the restoration of indigenous biodiversity and is relevant to ECO-P8. Sub-clause (1) of clause 3.21 of the NPSIB requires the PORPS to include provisions *"to promote the restoration of indigenous biodiversity, including through reconstruction of areas"* and sub-clause (2) states that:

> *The objectives, policies and methods must prioritise all the following for restoration:*
>
> *(a) SNAs whose ecological integrity is degraded:*
> *(b) threatened and rare ecosystems representative of naturally occurring and formerly present ecosystems:*
> *(c) areas that provide important connectivity or buffering functions:*
> *(d) natural inland wetlands whose ecological integrity is degraded or that no longer retain their indigenous vegetation or habitat for indigenous fauna:*
> *(e) areas of indigenous biodiversity on specified Māori land where restoration is advanced by the Māori landowners:*
> *(f) any other priorities specified in regional biodiversity strategies or any national priorities for indigenous biodiversity restoration.*

83. Sub-clause (2)(d) is implemented through LF-FW-P10, whereas the remaining sub-clauses are implemented through the ECO chapter. As notified, ECO-P8 falls short of achieving the above directive through setting out actions but not prioritising areas for restoration. Mr Maclennan recommends that the above prioritised areas in clause 3.21(2) of the NPSIB be included in ECO-P8. We agree that this is necessary with the exception of clause (2)(d) which is addressed in the LF chapter through LF-FW-P10.

84. Turning to submissions on ECO-P8, we agree with the submission of Kāi Tahu ki Otago and Forest and Bird to include the term 'restoration' in the heading. Forest and Bird consider the term 'enhancement' to be too subjective and preferred 'improving'. We agree with Ms Hardiman that 'enhancement' is a well understood term that is used throughout the PORPS in a similar context.

85. QLDC requested that 'intrinsic values' be added to the chapeau of ECO-P8 to more clearly link to clause (2). Ms Hardiman recommended accepting this amendment but we consider that this is unnecessary duplication with clause (2).

4.1 Recommendation

86. We recommend that ECO-O2 be amended as follows:

ECO-O2 – Restoring ~~or~~ and enhancing

Restoration and enhancement activities result in an ~~A~~ ~~net~~ overall increase in the extent and *occupancy* of Otago's *indigenous biodiversity* ~~results from restoration or enhancement~~.

87. We recommend the following amendments to ECO-P8:

ECO–P8 – Restoration and e~~E~~nhancement

The extent, *occupancy* and condition of Otago's *indigenous biodiversity* is increased by:

(1) restoring and enhancing *habitat* for *indigenous species*, including taoka and *mahika kai* species,

(2) improving the health and *resilience* of *indigenous biodiversity*, including ecosystems, species, ~~important~~ ecosystem function, and *intrinsic values*, ~~and~~

(3) buffering or linking ecosystems, habitats and ecological corridors~~.~~, ki uta ki tai and

(4) prioritising all the following for *restoration*:

(a) *significant natural areas* whose *ecological integrity* is degraded,

(b) threatened and rare ecosystems representative of naturally occurring and formerly present ecosystems,

(c) areas that provide important connectivity or buffering functions,

(d) areas of *indigenous biodiversity* on native reserves and *Māori land* where *restoration* is advanced by the Māori landowners,

(e) any other priorities specified in regional biodiversity strategies or any national priorities for *indigenous biodiversity restoration*.

5. ECO-O3 – Kaitiakitaka stewardship and ECO-P1 - Kaitiakitanga

88. ECO-O3 and ECO-P1 were notified as follows:

ECO–O3 – *Kaitiakiaka* and stewardship

Mana whenua are recognised as kaitiaki of Otago's indigenous *biodiversity*, and Otago's communities are recognised as stewards, who are responsible for:

(1) te hauora o te koiora (the health of indigenous *biodiversity*), te hauora o te taoka (the health of species and ecosystems that are taoka), and te hauora o te taiao (the health of the wider *environment*), while

(2) providing for te hauora o te takata (the health of the people).

ECO–P1 – Kaitiakitaka

Recognise the role of Kāi Tahu as kaitiaki of Otago's indigenous *biodiversity* by:

(1) involving Kāi Tahu in the management of indigenous *biodiversity* and the identification of indigenous species and ecosystems that are taoka,

(2) incorporating the use of mātauraka Māori in the management and monitoring of indigenous *biodiversity*, and

(3) providing for access to and use of indigenous *biodiversity* by Kāi Tahu, including mahika kai, according to tikaka.

89. We note that NPSIB Policy 2 contains similar direction to ECO-O3 and ECO-P1, stating:

Tangata whenua exercise kaitiakitanga for indigenous biodiversity in their rohe, including through:

(a) managing indigenous biodiversity on their land; and

(b) identifying and protecting indigenous species, populations and ecosystems that are taonga; and

(c) actively participating in other decision-making about indigenous biodiversity.

90. We have considered the submissions and amendments recommended by Ms Hardiman and Mr Maclennan. We have put particular weight on the NPSIB and the submissions of Te Rūnanga o Ngāi Tahu and Kāi Tahi ki Otago. We found the supplementary evidence of Mr Bathgate for iwi submitters on the NPSIB particularly helpful, as was the discussion in the NPSIB Reply Report of Mr Maclennan. We do not repeat the key points of those discussions here and support the final recommendations for these provision, with minor amendments to italicise 'indigenous' and 'biodiversity' in ECO-P1(3).

5.1 Recommendation

91. We recommend that ECO-O3 be amended as follows:

> **ECO-O3 – ~~*Kaitiakiaka*~~ *Kaitiakitaka* and stewardship**
>
> *Mana whenua* exercise their role ~~are recognised~~ as kaitiaki of Otago's *indigenous biodiversity*, and Otago's communities are recognised as stewards, who are responsible for:
>
> (1) te hauora o te koiora (the health of *indigenous biodiversity*), te hauora o te taoka (the health of species and ecosystems that are taoka), and te hauora o te taiao (the health of the wider *environment*), while
>
> (2) providing for te hauora o te takata (the health of the people).
>
> **ECO-P1 – Kaitiakitaka**
>
> ~~Recognise the role of~~ Enable Kāi Tahu to exercise their role as kaitiaki of Otago's *indigenous biodiversity* by:
>
> (1) ~~involving~~ partnering with Kāi Tahu in the management of *indigenous biodiversity* to the extent desired by *mana whenua*,
>
> (1A) working with Kāi Tahu to identify ~~and the identification of~~ *indigenous species* and ecosystems that are taoka,
>
> (2) incorporating the use of mātauraka Māori in the management and monitoring of *indigenous biodiversity*, and
>
> (3) ~~providing for~~ facilitating access to and use of *indigenous biodiversity* by Kāi Tahu, including *mahika kai*, according to tikaka.

6. Coastal indigenous biodiversity

92. The PORPS as notified contained ECO-P7 as follows:

> ECO–P7 – Coastal indigenous *biodiversity*
>
> Coastal indigenous *biodiversity* is managed by CE–P5, and implementation of CE–P5 also contributes to achieving ECO–O1.

93. The final recommendation from the officers was to move CE-P5 to the ECO chapter and delete ECO-P7. We considered this in the CE chapter where we rejected that change, recommending that CE-P5 remain in the CE chapter. Part of our consideration in this regard was clause 9 of the National Planning Standards, which states:

> *8. Excluding the provisions in Part 2, provisions that apply to the coastal marine area must be located in the Coastal marine area section.*

94. The NPSIB applies to indigenous biodiversity in the terrestrial environment. 'Terrestrial environment' is described as follows:

> ***terrestrial environment*** *means land and associated natural and physical resources above mean high-water springs, excluding 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.*

95. We interpret this as meaning that the NPSIB applies to land in the coastal environment that is above mean high water springs and is not covered by water, water bodies and freshwater ecosystems. Therefore, there may potentially be some overlap with the provisions of the NZCPS where Policy 11 starts with:

> To protect indigenous biological diversity in the coastal environment

and 'coastal environment' is given a rather broad and indistinct description of its extent and characteristics in Policy 1 of the NZCPS.

96. Any potential for conflict between the provisions of the NPSIB and the NZCPS is helpfully resolved by clause 1.4(2) of the NPSIB which states:

> *If there is a conflict between the provisions of this National Policy Statement and the New Zealand Coastal Policy Statement 2010 (or any later New Zealand Coastal Policy Statement issued under the Act), the New Zealand Coastal Policy Statement prevails.*

97. CE-P5 is intended to implement Policy 11 of the NZCPS in an Otago context. If there is any conflict between the provisions of the ECO and CE chapters, it is likely that this will be resolved through consideration of the higher order NZCPS and NPSIB, where the NZCPS will prevail.

98. Of note, some provisions in the ECO chapter do not apply to the coastal environment, including ECO-P3, ECO-P4 and ECO-P6. The identification of SNAs under ECO-P2 does apply to the coastal environment and we consider that this is consistent with the NPSIB and CE-P5.

99. This takes us back to considering ECO-P7 and whether such a policy that cross-references to CE-P5 is necessary. We consider that it is, especially due to the close association and, on occasion, potentially overlapping provisions of the ECO and CE chapters. We consider that the s.42A recommended wording of ECO-P7 should be reinstated with amendments to reflect ECO-P5A replacing ECO-P5. Some submitters, including Port Otago, considered the CE-ECO split unclear. We agree and hope that the recommended version aids users by specifying which provisions apply and which are excluded from consideration in the coastal environment.

6.1 Recommendation

100. We recommend that ECO-P7 be amended as follows:

> ECO–P7 – Coastal indigenous *biodiversity*
>
> ~~Coastal i~~Indigenous *biodiversity* in the coastal environment is managed by CE-P5~~,~~ in addition to all objectives and policies of the ECO chapter except ECO-P3, ECO-P4, ECO-P5A and ECO-P6 ~~and implementation of CE–P5 also contributes toachieving ECO–O1~~.

7. Wilding conifers

101. We heard from submitters, including the Director General of Conservation and DCC, who requested broader policy direction on pest species recognising that their impacts are not only on indigenous biodiversity but also on other matters including primary production and landscape values. This also linked with submissions we received from OWRUG and other primary sector groups who sought increased recognition and direction for impacts on primary production.

102. This was addressed in the reply report with Ms Hardiman and Ms Boyd recommending that ECO-P9 be replaced with a new policy in the LF-LS chapter which also incorporates NFL-P5. We accepted this recommendation and discuss the new policy and associated changes in the LF-LS section of this report. As a consequence ECO-M5(6), paragraph 3 of ECO-E1, and ECO-AER4 become redundant.

7.1 Recommendation

103. We recommend that the following are deleted: ECO-P9, ECO-M5(6), paragraph 3 of ECO-E1, and ECO-AER4.

8. ECO-P10 – Integrated management and ECO-M6 – Engagement

104. Subpart 1 of Part 2 of the NPSIB details the approach to implementing the objective and policies. Of relevance here is clause 3.4 which requires local authorities *"to manage indigenous biodiversity and the effects on it from subdivision, use and development in an integrated way, which means:*

    (a) recognising the interconnectedness of the whole environment and the interactions between the terrestrial environment, freshwater, and the coastal marine area; and

    (b) providing for the coordinated management and control of subdivision, use and development, as it affects indigenous biodiversity across administrative boundaries; and

    (c) working towards aligning strategies and other planning tools required or provided for in legislation that are relevant to indigenous biodiversity.

105. This is implemented in part in the PORPS through ECO-P10 and ECO-M6 which were notified as follows:

ECO–P10 – Integrated management

Implement an integrated and co-ordinated approach to managing Otago's ecosystems and indigenous *biodiversity* that:

(1) ensures any permitted or controlled activity in a *regional* or *district plan* rule does not compromisethe achievement of ECO–O1,

(2) recognises the interactions ki uta ki tai (from the mountains to the sea)

between the terrestrial *environment*, *fresh water*, and the *coastal marine area*, including the migration of fish species between *fresh* and *coastal waters*,

(3) promotes collaboration between individuals and agencies with *biodiversity* responsibilities,

(4) supports the various statutory and non-statutory approaches adopted to manage indigenous *biodiversity*,

(5) recognises the critical role of people and communities in actively managing the remaining indigenous *biodiversity* occurring on private *land,* and

(6) adopts regulatory and non-regulatory regional pest management programmes.

ECO–M6 – Engagement

Local authorities, when implementing the policies in this chapter, will:

(1) work collaboratively with other *local authorities* to adopt an integrated approach to managing
Otago's *biodiversity* across administrative boundaries,

(2) engage with individuals (including landowners and *land* occupiers), community groups, government agencies and other organisations with a role or an interest in *biodiversity* management, and

(3) consult directly with landowners and *land* occupiers whose properties potentially contain or are part of *significant natural areas*.

106. ECO-P10 goes a long way to implement clause 3.4 of the NPSIB but focuses on managing ecosystems and indigenous biodiversity rather than *"indigenous biodiversity and the effects on it from subdivision use and development"*. We agree with Mr Maclennan that the chapeau of ECO-P10 should be amended to reflect the broader scope of clause 3.4.

107. Similarly, Mr Maclennan recommends amending clauses (3) and (4) of ECO-P10 to reflect the wording in subclauses (b) and (c) of clause 3.4 of the NPSIB. We consider this to be appropriate.

108. Turning to submissions, there were 11 submissions on ECO-P10 with two submitters seeking it be retained as notified. Some of the submission points have been superseded by the requirements of the NPSIB. Kāi Tahu ki Otago sought that clause (2) better reflects the connection between the terrestrial and coastal environments. Ms Hardiman has recommended amendments in response to that submission and, while we consider that these strengthen the intent of the policy, we also note that these matters are addressed in a more general sense in the IM chapter.

109. Kāi Tahu ki Otago also sought an additional clause to acknowledge the effects of climate change on indigenous biodiversity and we agree with Ms Hardiman that this is an important consideration in this policy. We recommend a minor wording change below to refer to activities which 'may' exacerbate the effects of climate change and also note that this assists to implement Policy 4 and clause 3.6 of the NPSIB.

110. We note that the final recommended reply report version of the PORPS has an amendment to the title of ECO-P10 from 'integrated management' to 'Co-ordinated approach'. This was requested by Kāi Tahu ki Otago. Given the focus of the policy is on integration rather than co-ordination, we are reluctant to accept this change. Our preference is for a hybrid title of 'Integrated approach' which reflects the title of clause 3.4 of the NPSIB.

111. Turning to ECO-M6, we agree with Mr Maclennan's assessment that this method is consistent with clause 3.4(1)(b) of the NPSIB and that no amendments are required to ensure consistency with the NPSIB.

112. There were seven submissions on ECO-M6 with five of these seeking that it be retained as notified. Kāi Tahu ki Otago sought that the provision be clarified with respect to how Kāi Tahu will be involved in the management of indigenous biodiversity. Ms Hardiman considered that this was addressed in the MW chapter, specifically MW-M3 and MW-M4. We consider that this matter should also be addressed in the ECO chapter methods and note the recommended addition of ECO-M4D – Native reserves and Māori land and ECO-M7A – Kāi Tahu kaitiakitaka in response to the NPSIB. We consider that these address Kāi Tahu's concerns.

8.1 Recommendation

113. We recommend that ECO-P10 be amended as follows:

ECO-P10 – Integrated ~~management~~ <u>approach</u>

<u>Manage *indigenous biodiversity* and the *effects* on it from subdivision, use and development in an integrated way, which means:</u> ~~Implement an integrated and co-ordinated approach to managing Otago's ecosystems and indigenous *biodiversity* that:~~

(1) ensur~~es~~<u>ing</u> any permitted or controlled activity in a *regional* <u>*plan*</u> or *district plan* rule does not compromise the achievement of ECO-O1,

(2) recognis~~es~~<u>ing</u> the interactions ki uta ki tai (from the mountains to the sea) between the terrestrial *environment*, *fresh water*, and the *coastal marine area*, including<u>:</u>

<u>(a)</u> the migration of fish species between *fresh* and *coastal waters*, <u>and</u>

<u>(b) the effects of land-use activities on coastal biodiversity and ecosystems,</u>

<u>(2A) acknowledging that *climate change* will affect *indigenous biodiversity* and managing activities which may exacerbate the *effects* of *climate change*,</u>

(3) <u>providing for the coordinated management and control of subdivision, use and development, as it affects *indigenous biodiversity* across administrative boundaries,</u> ~~promotes collaboration between individuals and agencies with *biodiversity* responsibilities,~~

(4) <u>working towards aligning strategies and other planning tools required or provided for in legislation that are relevant to *indigenous biodiversity*,</u> ~~supports the various statutory and non-statutory approaches adopted to manage indigenous *biodiversity*,~~

(5) recognis~~es~~ing the critical role of people and communities in actively managing the remaining *indigenous biodiversity* occurring on private *land,* and

(6) adopt~~s~~ing regulatory and non-regulatory regional *pest* management programmes.

114. We recommend that ECO-M6 be retained as notified.

9. New policies ECO-P11 and ECO-P12

115. In his NPSIB evidence Mr Maclennan recommended two new policies to address matters in the NPSIB that are not addressed in the PORPS.

116. The first of these is resilience to climate change. Policy 4 of the NPSIB states:

> **Policy 4:** Indigenous biodiversity is managed to promote resilience to the effects of climate change.

117. Clause 3.6 of the NPSIB addresses resilience to climate change and implements Policy 4. It reads as follows:

> *(1) Local authorities must promote the resilience of indigenous biodiversity to climate change, including at least by:*
>
> *(a) allowing and supporting the natural adjustment of habitats and ecosystems to the changing climate; and*
>
> *(b) considering the effects of climate change when making decisions on:*
>
> *(i) restoration proposals; and*
>
> *(ii) managing and reducing new and existing biosecurity risks; and*
>
> *(c) maintaining and promoting the enhancement of the connectivity between ecosystems, and between existing and potential habitats, to enable migrations so that species can continue to find viable niches as the climate changes.*
>
> *(2) Local authorities must recognise the role of indigenous biodiversity in mitigating the effects of climate change.*

118. Mr Maclennan has recommended wording for ECO-P11 that closely mirrors that above and we consider his recommendation is appropriate and that there is scope in submissions to include this additional policy.

119. The second matter is the management of the effects of plantation forestry activities on SNAs. This is addressed in the NPSIB through Policy 12 and clause 3.14. Policy 12 reads as follows:

> **Policy 12:** Indigenous biodiversity is managed within plantation forestry while providing for plantation forestry activities.

120. Clause 3.14 reads as follows:

> *(1) Except as provided in subclause (2), the adverse effects of plantation forestry activities in any existing plantation forest on any SNA must be managed in a manner that:*

(a) maintains indigenous biodiversity in the SNA as far as practicable; while

(b) providing for plantation forestry activities to continue.

(2) Despite clause 3.10, any part of an SNA that is within an area of an existing plantation forest that is planted, or is intended to be, replanted in trees for harvest must be managed over the course of consecutive rotations of production in the manner necessary to maintain the long-term populations of any Threatened or At Risk (declining) species present in the area.

(3) Every local authority must make or change its policy statements and plans to be consistent with the requirements of this clause.

121. Similar to his recommendation for ECO-P11, Mr Maclennan has recommended wording for ECO-P12 that closely mirrors the wording of clause 3.14. We consider that this is appropriate and that there is scope in submissions to include this additional policy.

9.1 Recommendation

122. We recommend the addition of two new policies, numbered ECO-P11 and ECO-P12 as follows:

ECO-P11 – Resilience to *climate change*

Promote the resilience of *indigenous biodiversity* to *climate change*, including at least by:

(1) allowing and supporting the natural adjustment of *habitats* and ecosystems to the changing climate, and

(2) considering the *effects* of *climate change* when making decisions on:

(a) *restoration* proposals, and

(b) managing and reducing new and existing biosecurity risks, and

(3) maintaining and promoting the enhancement of the connectivity between ecosystems, and between existing and potential *habitats*, to enable migrations so that species can continue to find viable niches as the climate changes, and

(4) recognising the role of *indigenous biodiversity* in mitigating the *effects* of *climate change*.

ECO-P12 – Plantation forestry activities

Manage**:**

(1) the adverse *effects* of *plantation forestry* activities in any existing *plantation forest* on any *significant natural area* in a manner that:

(a) maintains *indigenous biodiversity* in the *significant natural area* as far as practicable, while

(b) provides for *plantation forestry* activities to continue, and

(2) over the course of consecutive rotations of production, any part of a *significant natural area* that is within an area of an existing *plantation forest* that is planted, or is intended to be, replanted in trees for harvest in the manner necessary to maintain the long-term populations of any *Threatened or At Risk (declining) species* present in the area.

10. Other provisions

123. We have reviewed the submissions and recommendations of the officers for the following remaining methods that have not been addressed above:

- ECO-M1 – Statement of responsibilities
- ECO-M3 – Identification of taoka
- ECO-M4 – Regional plans
- New recommended ECO-M4A – Increasing indigenous vegetation cover in response to Policy 14 and clause 3.22 of the NPSIB
- New recommended ECO-M4B – Specified highly mobile fauna in response to Policy 15 and clause 3.20 of the NPSIB
- New recommended ECO-M4C – Maintenance of improved pasture for farming in response to clause 3.17 of the NPSIB
- New recommended ECO-M4D – Native reserves and Māori land in response to clause 3.18 of the NPSIB
- ECO-M5 – District plans
- New recommended ECO-M7A – Kāi Tahu kaitiakitaka in response to clause 3.3 of the NPSIB
- New recommended ECO-M7B – Information requirements in response to Policy 17 and clause 3.24 of the NPSIB
- ECO-M7 – Monitoring
- ECO-M8 – Other incentives and mechanisms
- New recommended ECO-M9 – Regional Biodiversity Strategy in response to clause 3.23 and Appendix 5 of the NPSIB

124. There are several new methods proposed to implement the requirements of the NPSIB and, similar to those discussed earlier, the proposed wording generally mirrors that of the respective NPSIB provisions. We consider that the amendments in response to the NPSIB are appropriate and support the additional recommendations and reasoning in the reply report for those amendments that are not in response to the NPSIB.

125. Turning to ECO-E1 – Explanation, there are consequential amendments which follow from our recommendations above. We have not accepted moving CE-P5 to the ECO chapter and therefore do not accept Ms Hardiman's recommendation to amend ECO-P1 to reflect this. We

are referring to her recommendation to add a sentence referring to protecting coastal indigenous biodiversity at the end of the first paragraph, and her recommendation to delete the first sentence of the second paragraph. We consider that the first and second paragraphs should remain as notified.

126. The third paragraph of ECO-E1 refers to wilding conifers, which we addressed earlier in our discussion and recommendation to delete ECO-P9.

127. ECO-PR1 – Principal reasons is recommended to remain largely as notified, with a minor correction to italicise 'Mahika kai' and an additional reference to 'coastal indigenous biodiversity' at the end of the second bullet point. As for ECO-E1 and given that we have not accepted the recommendation to move CE-P5 to the ECO chapter, we do not support this addition. We also recommend a minor amendment to italicise 'indigenous' when referring to 'indigenous biodiversity'.

128. Ms Hardiman has recommended minor amendments to ECO-AER1 and ECO-AER2 to replace 'quality' with 'condition'. This is consistent with our recommended wording for ECO-O1 as well as other provisions in the ECO chapter. We therefore accept this recommendation. Ms Hardiman has also recommended deleting ECO-AER4 which addressed wilding pines and which we have addressed earlier in relation to the deletion of ECO-P9.

10.1 Recommendation

129. Adopt the Reply version of the PORPS dated 10 October 2023 for the following provisions:

- ECO-M1 – Statement of responsibilities
- ECO-M3 – Identification of taoka
- ECO-M4 – Regional plans
- ECO-M4A – Increasing indigenous vegetation cover
- ECO-M4B – Specified highly mobile fauna
- ECO-M4C – Maintenance of improved pasture for farming
- ECO-M4D – Native reserves and Māori land
- ECO-M5 – District plans
- ECO-M7A – Kāi Tahu kaitiakitaka
- ECO-M7B – Information requirements
- ECO-M7 – Monitoring
- ECO-M8 – Other incentives and mechanisms
- ECO-M9 – Regional Biodiversity Strategy

130. We recommend that ECO-E1 be retained as notified except for the deletion of the third paragraph commencing "*Wilding conifers are a particular issue…*".

131. We recommend that ECO-PR1 be retained as notified with minor corrections to italicise 'indigenous' when referring to 'indigenous biodiversity', and the italicisation of 'Mahika kai'

132. We recommend that the anticipated environmental results are amended as follows:

ECO-AER1 There is no further decline in the condition ~~quality~~, quantity or diversity of Otago's indigenous *biodiversity*.

ECO-AER2 The condition ~~quality~~, quantity and diversity of indigenous *biodiversity* within Otago improves over the life of this Regional Policy Statement.

ECO-AER3 Kāi Tahu are involved in the management of indigenous *biodiversity* and able to effectively exercise their *kaitiakitaka*.

~~**ECO-AER4** Within *significant natural areas*, the area of *land* vegetated by *wilding conifers* is reduced.~~

Section 10: Energy, Infrastructure and Transport (EIT)

1. Introduction

1. The Otago region includes nationally and regionally significant renewable energy resources, infrastructure, and transport networks, as well as other infrastructure that is important at a local level. There are overlapping responsibilities between regional and district councils for managing the effects from energy, infrastructure, and transport networks in accordance with their functions under the RMA. In addition, there is a suite of regulations under several other statutes which interface with RMA functions. Many of the energy, transport and infrastructure matters also traverse the coastal environment, both within the coastal marine area and adjacent to it and interact with urban form and development.

2. The EIT chapter addresses these matters in three sub-chapters as follows:

   - Energy,
   - Infrastructure, and
   - Transport.

3. The original reporting officer on the EIT chapter was Mr Peter Stafford, who was at the time a Senior Policy Analyst at the Otago Regional Council. Mr Stafford left the Council before the hearing on the EIT chapter. Mr Marcus Langman, an independent planning consultant, was engaged by the Council to take over the reporting on the EIT chapter. Mr Langman produced several supplementary reports, including a final reply report that addressed outstanding matters.

4. This Recommendation Report largely follows the format of Mr Langman's reply report although not entirely. We also address a number of other matters that were not considered in Mr Langman's reply. As has been our approach in other chapters, we have not addressed provisions where we agree with the recommendation of the officer, although we have made some recommendations in the SODR table on some minor changes requested by submitters.

2. Chapter structure

5. As we noted above, Mr Langham was not the author of the s42A report but became involved prior to the pre-hearing meetings on the EIT chapter. In his supplementary evidence, he addressed the structure of the EIT chapter. He advised that the format of the chapter followed the specific order of the National Planning Standards, being Energy, then Infrastructure, then Transport. Mr Langham considered this to be a mandatory chapter in the National Planning Standards, although we note it must only be included if it is relevant to the regional policy statement. Quite obviously it is relevant to this RPS as these matters are significant resource management issues for the region, particularly the management of renewable energy resources and the activities that utilise them.

6. After reviewing the chapter, he came to the conclusion it would be better arranged if it began with the general infrastructure provisions followed by the more specific provisions relating to energy and transport. This has resulted in the structure of the chapter changing significantly, but the Panel agrees that it is a more logical layout.

7. As a part of that review, Mr Langman also agreed with the electricity transmission and distribution companies that better alignment could be achieved by including the electricity distribution and transmission activities in the EIT-EN – Energy sub-chapter (alongside renewable electricity generation), rather than in the EIT-INF – Infrastructure section. Again, we agree given that distribution and transmission are solely associated with energy.

8. In response to submissions from the REGs, Mr Langman also considered whether standalone provisions (or "carve out" provisions) are required to address separately the management of the effects of REG infrastructure and of electricity transmission and distribution infrastructure. In his opinion, there would need to be a clear justification for treating this type of infrastructure differently from other regionally or nationally significant infrastructure, particularly if EIT-INF-P13 was not to apply. He concluded that standalone or carve-out provisions for this infrastructure is not appropriate and would not give effect to or address the various bottom-line approaches of the relevant NPSs or other section 6 matters.

9. We largely deal with this issue in the next section of this report, but given the style of this particular RPS, we agree that standalone provisions are not necessary for these types of infrastructure. However, throughout the PORPS we have strengthened the recognition of how important this infrastructure will be in addressing the climate change issue.

3. Definition of regionally significant infrastructure

3.1. Discussion

10. As notified, the definition of Regionally significant infrastructure reads:

Regionally significant infrastructure	means: (1) roads classified as being of regional importance in accordance with the One Network Road Classification (2) electricity sub-transmission infrastructure, (3) renewable electricity generation facilities that connect with the local distribution network but not including renewable electricity generation facilities designed and operated principally for supplying a single premise or facility, (4) telecommunication and radiocommunication facilities (5) facilities for public transport, including terminals and stations, (6) the following airports: Dunedin, Queenstown, Wanaka Alexandra, Balclutha, Cromwell, Oamaru, Taieri. (7) navigation *infrastructure* associated with airports and commercial ports which are nationally or regionally significant, (8) defence facilities (9) community drinking water abstraction, supply treatment and distribution *infrastructure* that provides no fewer than 25 households with drinking water for not less than 90 days each calendar year, and community water supply abstraction, treatment and distribution *infrastructure* (excluding delivery systems or infrastructure primarily deployed for the delivery of

water for irrigation of land or rural agricultural drinking-water supplies)

(10) community stormwater *infrastructure*,

(11) *wastewater* and sewage collection, treatment and disposal *infrastructure* serving no fewer than 25 households, ~~and~~

(12) Otago Regional Council's hazard mitigation works including flood protection infrastructure and drainage schemes.

11. A number of submitters requested the addition of other types of infrastructure, or amendments to the definitions of regionally significant infrastructure (RSI), or nationally significant infrastructure (NSI). The s42A report author accepted a number of these requests which led to the inclusion of Dunedin's oil terminals and bulk fuel storage facilities in the RSI list along with some other amendments for clarification.

12. Those submitters whose submission points were not recommended for acceptance, addressed their concerns at the hearing. A number of other submitters were concerned with the recommendations that were made to broaden the definition because the framework for RSI and NSI is more enabling than for general infrastructure, which they believe could lead to an inappropriate level of effects on s6 matters.

13. Mr Langman revisited this issue in his reply report. In reviewing the submissions, he applied a number of qualitative matters that he considered would qualify the infrastructure for inclusion into the definition of RSI. These were:

    a. The infrastructure serves a regional or national benefit;

    b. There will often be operational or functional constraints in terms of the location of the infrastructure;

    c. The infrastructure may include lifeline utilities;

    d. The infrastructure is at a scale that could result in the potential for significant adverse effects on significant environmental values;

    e. The infrastructure is generally of a physical nature, being 'hard infrastructure' and does not support living, social or commercial activities; and

    f. Similar activities are provided for in the definition of RSI in adjacent regions, in particular where there are cross boundary issues where different management regimes may give rise to difficulties with implementation.

14. These matters are wider than the opinion expressed by Ms McIntyre for Kai Tahu that RSI should be limited to infrastructure that has a lifeline utility function. To broaden the definition would, in Ms McIntyre's view, *"give inappropriate priority to the needs of infrastructure over the life-supporting capacity of the environment and the matters to be recognised and provided for in section 6 of the RMA"*. While we agree that lifeline utilities will be RSI, and most RSI will be lifeline utilities, we do not agree that RSI should be solely restricted to lifeline utilities. Hence, we agree with Mr Langman that the matters he identifies provide useful guidance in this context.

15. Assessing the submissions against this criteria, Mr Langman recommended changes in respect to the following activities:

    a. Significant electricity distribution infrastructure (SEDI) (RSI);

    b. Municipal landfills (RSI);

    c. Established community scale irrigation and stockwater infrastructure (RSI);

    d. Ski area infrastructure (RSI);

    e. The expression of facilities for public transport (RSI); and

    f. Changes to how airports might be included within the definition of regionally significant infrastructure (RSI).

16. He advised that those additions/amendments sought by a submitter that he did not address was on the basis that he did not recommend any change for the reasons stated in the s42A report.

17. In relation to municipal landfills, both the DCC and QLDC sought the inclusion of these within the RSI definition. This was initially rejected by the s42A report author, but Mr Langman accepted the amendment proposed by Mr Barr to be appropriate and consistent with the matters outlined above. The amendment links the landfill to a local authority ownership or operation. While we accept that landfills are regionally significant infrastructure, we do have some apprehension around the qualifier as landfills are now often privately owned facilities even though they may serve a region. A good example of that is the AB Lime landfill near Winton, Southland. That facility is privately owned but takes most of the waste from the Southland region. It is also the only Class 1 landfill south of Christchurch.

18. However, no evidence was provided that dealt with this issue, so we are comfortable with Mr Langman's final recommendation.

19. In relation to SEDI, Mr Langman recommended in his supplementary evidence the inclusion of this infrastructure in the RSI definition, along with a framework for electricity distribution. We agree. The evidence from Ms Justice, Mr Zweis, and Ms Dowd on behalf of distribution companies was significant in this regard. They outlined some of the practical challenges to the network in light of growth and increased demand for electricity. These challenges are compounded by the fact that such infrastructure often needs to locate within sensitive environments. While we understand the concern expressed by HortNZ, we do not think it outweighs the need to recognise such critical infrastructure. Reverse sensitivity issues can still be dealt with, regardless of the infrastructure classification.

20. Mr Langman was also comfortable with including established community-scale stockwater and irrigation infrastructure as RSI (sought by Federated Farmers and Waitaki Irrigators), largely on the basis of the cross-boundary issue with the Canterbury RPS, which classifies them as RSI. We were swayed by the evidence of Ms Soal (for Waitaki Irrigators) on this matter, who highlighted the fact that a number of water schemes in Otago serve a dual purpose (community water supply and irrigation) but that the notified definition would mean that only part of the system was RSI. We agree that this addition should be made to the RSI definition.

21. With respect to the inclusion of ski area infrastructure, we agree with Mr Langman's approach of aligning the definition with that included in the NPSFM. That definition is confined to the

actual infrastructure required for the operation of the ski area as opposed to the ski field itself, or commercial activities associated with it. We note that Ms Galloway-Baker's legal submission highlighted the addition of this definition to the NPSFM and did not address the definition sought by Trojan and Wayfare.

22. With respect to Ms McIntyre's (for Kāi Tahu ki Otago) requested amendments to the definition of public transport facilities, Mr Langman agreed with the suggested deletions but not to the insertion of "rail lines". That was because the rail network is identified as nationally significant infrastructure (NSI), and as a result, is also automatically identified as RSI.

23. We therefore question why the definition of 'airport' needs to be amended to recognise other airports that are serviced by aeroplanes capable of carrying more than 30 passengers. Such airports are recognised as NSI and are also automatically identified as RSI. With the exception of the Dunedin and Queenstown, the listed airports would not meet the nationally significant threshold but are regionally important.

24. Hence, while we agree with Mr Langman in relation to public transport, we do not agree with the amendment proposed to the airport clause within the RSI definition. It is already provided for in the appropriate definition, as it is included in the NSI definition.

25. One issue that Mr Langman did not address in his reply was the DCC's concern with the amendment made to the 'road' entry in the RSI definition. In his evidence on behalf of the DCC, Mr Taylor was concerned that the use of the 'One Network' terminology required consequential adjustment to refer to which of the specific One Network categories are Regionally Significant Infrastructure. In Mr Taylor's opinion the variability and flexibility of classifications within the One Network Framework mean that it is possible that some roads that have regional importance are not classified with a sufficiently high road order. He gave examples of lower order roads that provide lifeline connections to communities to illustrate this concern.

26. To overcome this issue, he recommended an amendment to recognise *"roads which provide a lifeline connection for a community"* within the RSI definition. In the Panel's opinion, this raises an issue similar to that explained to us by the distribution companies in relation to some of their lines that service remote communities such as Makarora and Glenorchy. Accordingly, we recommend that Mr Taylor's submission be accepted on this point.

3.2. Recommendation

27. The Panel recommends that the definition of RSI is amended as follows:

Regionally significant infrastructure	(1) roads which provide a lifeline connection for a community OR roads classified as being of regional importance in accordance with the ~~One Network Road Classification~~ One Network Framework, (2) electricity sub-transmission infrastructure, (2A) significant electricity distribution infrastructure, (3) renewable electricity generation facilities that connect with the local distribution network but not including renewable electricity generation facilities designed and operated principally for supplying a single premise or facility,

(4) telecommunication and radiocommunication ~~facilities,~~ networks,

(5) ~~facilities for~~ public transport~~, including~~ terminals and stations,

(6~~)~~ the following airports: Dunedin, Queenstown, ~~Wanaka~~ Wānaka, Alexandra, Balclutha, Cromwell, ~~Oamaru~~ Ōamaru, ~~Taieri~~, Taiari,

(7) navigation *infrastructure* associated with airports and commercial ports which are nationally or regionally significant,

(8) defence facilities for defence purposes in accordance with the Defence Act 1990,

(8A) established community-scale irrigation and stockwater *infrastructure,*

(9) community drinking water abstraction, supply treatment and distribution *infrastructure* that provides no fewer than 25 households with drinking water for not less than 90 days each calendar year, and community water supply abstraction, treatment and distribution *infrastructure* (excluding delivery systems or infrastructure primarily deployed for the delivery of water for irrigation of land or rural agricultural drinking-water supplies)

(10) community stormwater *infrastructure*,

(11) *wastewater* and sewage collection, treatment and disposal *infrastructure* serving no fewer than 25 households, ~~and~~

(11A) oil terminals, bulk fuel storage and supply *infrastructure*, and ancillary pipelines at Port Chalmers and Dunedin,

(12) Otago Regional Council's hazard mitigation works including flood protection *infrastructure* and drainage schemes~~.~~,

(13) landfills and associated solid waste sorting and transfer facilities which are designated by, or are owned or operated by a local authority,

(14) *ski area infrastructure,* and

(15) any *infrastructure* identified as *nationally significant infrastructure*.

Ski area infrastructure	has the same meaning as in the clause 3.21(1) of the National Policy Statement for Freshwater Management 2020 (as set out in the box below)

infrastructure necessary for the operation of a ski area and includes: transport mechanisms (such as aerial and surface lifts, roads, and tracks); facilities for the loading or unloading of passengers or goods; facilities or systems for *water*, sewerage, electricity, and gas; communications networks; and snowmaking and snow safety systems

4. EIT-INF-P11

4.1. Discussion

28. As notified, EIT-INF-P11 reads:

EIT–INF–P11 – Operation and maintenance

Except as provided for by ECO–P4, allow for the operation and maintenance of existing *nationally* and *regionally significant infrastructure* while:

(1) avoiding, as the first priority, significant adverse *effects* on the *environment*, and

(2) if avoidance is not practicable, and for other adverse *effects,* minimising adverse *effects*.

29. There were a range of submissions on EIT-INF-P11, with some seeking it be retained as notified and others seeking its deletion. Others sought amendments to clarify its intent, and to make it more enabling.

30. In relation to those who sought deletion of the policy or amendment to merely 'allow' infrastructure (Contact, Network Waitaki and PowerNet and NZIC), Mr Stafford (the original s42A report author) was of the view that:

> "the present policy wording provides better direction for the treatment of adverse effects. **Removal of the wording as proposed would effectively permit development of infrastructure without consideration of its effects** and would not represent sustainable management of natural and physical resources or recognise and provide for the matters set out in s6 RMA. The alternative provided through the amendments requested would have a similar effect. I also refer to my consideration of the Aurora submission in relation to removal of reference of ECO-P4...". **(Panel emphasis)**

31. In her evidence for the EDBs, Ms Justice raised concern about the implementation of the policy (as did others), particularly with the fact that it only relates to existing nationally and regionally significant infrastructure. This, too, is of concern to the Panel. Mr Stafford's statement repeated above suggests that it would apply in a consenting scenario. However, we agree with Ms Justice's interpretation, and struggled to understand the intention of the policy, when existing use rights will as a matter of law allow for operation and maintenance of existing activities without the qualifier in this policy. The only benefit we can see is the recognition of 'maintenance' but again that is all part of operating an existing, consented activity.

32. As a consequence of the forgoing, we recommend that the policy be deleted as requested by Contact, Network Waitaki and PowerNet and NZIC.

4.2. Recommendation

33. The Panel recommends that EIT-INF-P11 be deleted.

5. REG Policy Framework

5.1. Discussion

34. The Panel notes that a similar provision to EIT-INF-P11 is included in the Energy sub-chapter. EIT-EN-P1 reads "the operation and maintenance of existing renewable electricity generation activities is provided for while minimising its adverse effects". We have similar concerns about this provision although we note in this context, Policy E2 of the NPS-REG requires plans to include objectives, policies, and methods to provide for the operation of these facilities as well as their development, maintenance and upgrading. The likely application of the policy is when REGs that utilise water are being re-consented.

35. There are a number of submissions on this provision, with some requesting upgrading and expansion be included in its scope while the DCC request that it be combined with P3 (Development and upgrade of REG activities) and P4 (Identifying new sites or resources), and that the management of effects clause is moved into EIT-EN-P6. As recommended, P3 and P4 read as follows:

> **EIT-EN-P3 – Development and upgrade of renewable electricity generation activities**
>
> The security of renewable electricity supply is maintained or improved in Otago through appropriate provision for the development or upgrading of *renewable electricity generation activities* and diversification of the type or location of *renewable electricity generation activities*.
>
> **EIT-EN-P4 – Identifying new sites or resources**
>
> Provide for activities associated with the investigation, identification and assessment of potential sites and energy sources for *renewable electricity generation* and, when selecting a site for new *renewable electricity generation,* prioritise those where adverse *effects* on highly valued *natural and physical resources* and *mana whenua* values can be avoided or, at the very least, minimised.

36. Similar submissions have been made on EIT-EN-P3 but the s42A report author advised that the focus of this policy is on security and diversification, which is consistent with Policy A(a) of the NPSREG. While we accept that, we do agree with submitters that EIT-EN-P1 (and EIT-EN-02) require amendment to better reflect the NPSREG around the maintenance and increase of electricity generation capacity. We have commented numerous times throughout our recommendation reports on the importance of REGs in addressing the climate issue. As a consequence, we agree with the REG submitters that the policy framework should not only provide for the protection of generation capacity but also for its increase where appropriate.

37. We also accept the DCC's submission that these provisions do not need to address effects management as that is dealt with in EIT-EN-P6 and P13. In the same context, we agree with the REG submitters who sought to remove the 'prioritisation' requirements of EIT-EN-P4 and other similar provisions. As the Contact Energy submission noted, *"it is not clear whether this policy is targeted towards resource developers, district and regional plan developers or decision makers."* The Panel is also unsure how the policy will be implemented and who will be responsible for that prioritisation. We agree with Contact that it would not be appropriate for the RPS (or any other local authority for that matter) to have a role in site selection given the range of locational, operational, environmental, commercial, and economic considerations involved in that process. We also agree that the second part of the policy is a duplication and is not necessary given the requirements of EIT-EN-P6 and P13.

38. In relation to EIT-EN-P6, Meridian Energy request a number of amendments that we consider appropriate. However, we do not agree that alternatives should not at least be considered when there are potentially significant or irreversible effects. A consequential amendment is required to the third paragraph of EIT-EN-E1 to change 'residual adverse effects' to 'significant residual adverse effects'.

39. A number of submitters also sought the deletion or clarification of this requirement in EIT-INF-M4 and M5 of the INF sub-chapter (for example, the DCC, Jim Hopkins, Trojan, and Wayfare) for similar reasons. We also agree that is not necessary in these provisions given they already contain provisions to manage effects of infrastructure.

40. We also take the opportunity at this point to discuss EIT-INF-M5(6) which was essentially opposed by the DCC, in particular the 'avoid' approach which they say could be read as requiring a plan to prohibit any development that cannot connect to infrastructure. They also questioned the broad definition of 'infrastructure' and its use in this clause, presumably because not all development will need all types of infrastructure. They also highlight the fact that there are various ways infrastructure is funded, including by the developer. Kai Tahu also opposed this clause given that marae and whanau housing is often located in unreticulated areas. They requested that this provision be deleted.

41. The s42A report author disagreed with both Kai Tahu and the DCC submission as in his view the clause does not preclude the use of private on-site provision of infrastructure and nor does it determine methods of funding. However, the Panel shares the concern of both the Kai Tahu and the DCC given this provision is broadly worded to apply to all development and uses the 'avoid' directive. We do not consider that appropriate in the context of what is largely a rural region, but more importantly as we discussed in the Legal section of the Introduction to this report, such a broad-sweeping prioritisation does not accord with Supreme Court decisions. The Panel also notes that the provisions of both the UFD and LF chapters contain provisions that address the servicing of development with infrastructure and EIT-INF-P17 directly refers to the relevant UFD policies in this regard.

42. In our view, EIT-INF-M5(6) merely needs to ensure that development is adequately served with infrastructure. We have recommended such a change accordingly.

43. The Panel also notes that QLDC sought amendment to EIT-EN-2(7) so that it is not a requirement in all instances, rather it is required when there is an opportunity to connect with an existing transport infrastructure network. The DCC seek clarification on what is being 'required'. We agree with the approach proposed by QLDC. It is highly unlikely that it will be possible to provide multi-nodal transport options in rural lifestyle areas.

44. QLDC also request that EIT-EN-2(7) be located to either the infrastructure or transport sub-sections. We are of the view that it should be relocated to EIT-TRAN-M8 in the transport sub-section.

5.2. Recommendation

45. As a consequence of the foregoing, the Panel recommends the following amendments to the REG provisions:

EIT-EN-O2 – Renewable electricity generation

The generation capacity of *renewable electricity generation activities* in Otago:

(1) is protected and maintained, and, ~~if practicable maximised, within environmental limits~~, where appropriate, increased, and

(2) contributes to meeting New Zealand's national target for *renewable electricity generation*.

EIT-EN-P1 – Operation,~~ and~~ maintenance and upgrade

The operation, ~~and~~ maintenance, and upgrade of existing *renewable electricity generation activities* is provided for including the maintenance of generation output and protection of operational capacity ~~while minimising its adverse *effects*.~~

EIT-EN-P3 – ~~Development and upgrade of~~ The security of renewable electricity generation ~~activities~~ supply

The security and installed capacity of renewable electricity supply is maintained or improved in Otago through appropriate provision for the development or upgrading of *renewable electricity generation activities* and diversification of the type or location of *renewable electricity generation activities.*

EIT-EN-P4 – Identifying new sites or resources

Provide for activities associated with the investigation, identification and assessment of potential sites and energy sources for *renewable electricity generation*. ~~and, when selecting a site for new *renewable electricity generation,* prioritise those where adverse *effects* on highly valued *natural and physical resources* and *mana whenua* values can be avoided or, at the very least, minimised~~.

EIT–EN–P6 – Managing *effects*

Manage the adverse *effects* of *renewable electricity generation activities* by:

(1) applying EIT–INF–P13,

(2) having particular regard to:

(a)the *functional need* to locate *renewable electricity generation activities* where resources are available,

(b) the *operational need* to locate where it is possible to connect to the *National Grid* or *electricity sub-transmission infrastructure*, and

(3) having regard to ~~(c)~~ the extent and magnitude of adverse *effects* on the *environment* and the degree to which unavoidable adverse *effects* can be remedied or mitigated, or significant residual adverse *effects* are offset or compensated for; and

(4) requiring consideration of alternative sites, methods and designs, and offsetting or compensation measures (in accordance with any specific requirements for their use in this RPS), where adverse *effects* are potentially significant or irreversible.

EIT-EN-M1 – Regional plans

Otago Regional Council must prepare or amend and maintain its *regional plans* to:

(1) provide for activities associated with the investigation, identification and assessment of potential sites and energy sources for *renewable electricity generation*,

~~(2) require the prioritisation of sites for new *renewable electricity generation activities* where adverse *effects* on highly valued *natural and physical resources* and *mana whenua* values can be avoided or, at the very least, minimised,~~

(3) manage the adverse *effects* of developing or upgrading *renewable electricity generation activities*, including identifying activities that qualify as minor upgrades, that:

(a) are within the *beds* of *lakes* and *rivers* and the *coastal marine area*, or

(b) involve the taking, use, damming or diversion of *water* and *discharge* of *water* or *contaminants*,

(4) provide for the operation and maintenance of existing *renewable electricity generation activities*, including their *natural and physical resource* requirements, along with opportunities to increase the installed capacity of renewable electricity generation assets ~~within the environmental limits,~~ and

(5) restrict the establishment of activities that may adversely affect the efficient functioning of *renewable electricity generation* *activities* ~~*infrastructure*~~ (including impacts on generation capacity).

EIT-EN-M2 – District plans

Territorial authorities must prepare or amend and maintain their *district plans* to:

(1) provide for activities associated with the investigation, identification and assessment of potential sites and energy sources for *renewable electricity generation*,

(2) ~~require the prioritisation of sites for new *renewable electricity generation activities* where adverse *effects* on highly valued *natural and physical resources* and *mana whenua* values can be avoided or, at the very least, minimised,~~

(3) manage the adverse *effects* of developing or upgrading *renewable electricity generation activities* and ~~electricity transmission~~ *National Grid infrastructure*, including identifying activities that qualify as minor upgrades, that:

(a) are on the surface of *rivers* and *lakes* and on *land* outside the *coastal marine area*, or

(b) the *beds* of *lakes* and *rivers*,

(4) provide for the continued operation and maintenance of *renewable electricity generation activities* on the surface of *rivers* and *lakes* and on *land* outside the *coastal marine area* and the *beds* of *lakes* and *rivers*,

(5) restrict the establishment or occurrence of activities that may adversely affect the efficient functioning of *renewable electricity generation infrastructure,*

(5A) enable planning for *National Grid*,

(5B) map the *National Grid*, and identify a buffer corridor within which *sensitive activities* shall generally not be allowed,

(5C) map *significant electricity distribution infrastructure* and, where necessary, provide controls on activities to ensure that the *functional needs* of the *significant electricity distribution infrastructure* are not compromised,

(5D) where necessary, establishing controls for *buildings*, *structures* and other activities adjacent to electricity *infrastructure*, to ensure the *functional needs* of that *infrastructure* are not compromised based on NZECP34:2001 Electrical Code of Practice for Electrical Safe Distances and the Electricity (Hazards from Trees) Regulations 2003 (prepared under the Electricity Act 1992),

(6) require the design of *subdivision* development to optimise solar gain, including through roading, lot size, dimensions, layout and orientation, and

46. And amend EIT-EN-M2(7) as follows and relocate it to EIT-TRAN-M8:

(7) require the design of transport *infrastructure* to ~~that~~ provide~~s~~ for multi-modal transport options in urban areas, and in rural lifestyle locations where there is a practical opportunity to connect with an existing transport infrastructure network ~~.and rural residential locations~~.

EIT-INF-M4 – Regional plans

Otago Regional Council must prepare or amend and maintain its *regional plans* to:

(1) manage the adverse *effects* of *infrastructure* activities, including, where appropriate, identifying activities that qualify as minor upgrades, that:

(a) are in the *beds* of *lakes* and *rivers*, or

(b) are in the *coastal marine area*, or

(c) involve the taking, use, damming or diversion of *water* or,

(d) involve the *discharge* of *water* or *contaminants*, and

~~(2) require the prioritisation of sites for *infrastructure* where adverse *effects* on highly valued *natural and physical resources* and *mana whenua* values can be avoided or, at the very least, minimised.~~

EIT-INF-M5 – District plans

Territorial authorities must prepare or amend and maintain their *district plans* to:

(1) require a strategic approach to the integration of *land* use and *nationally <u>significant infrastructure</u>* or *regionally significant infrastructure*,

~~(2) enable planning for the electricity transmission network and *National Grid* to achieve efficient distribution of electricity,~~

~~(3) map the electricity transmission network, and in relation to the *National Grid*, identify a buffer corridor within which *sensitive activities* shall generally not be allowed, and~~

(4) manage the *subdivision*, use and development of *land* to ensure *nationally <u>significant infrastructure</u>* or *regionally significant infrastructure* can develop to meet increased demand,

(5) manage the adverse *effects* of developing, operating, maintaining, or upgrading *nationally <u>significant infrastructure</u>* or *regionally significant infrastructure*, <u>including, where appropriate, identifying activities that qualify as minor upgrades,</u> that are on:

(a) the surface of *rivers* and *lakes* and on *land* outside the *coastal marine area*, and

(b) the *beds* of *lakes* and *rivers*,

(6) ensure that development is ~~avoided where:~~

~~(a) it cannot be~~ adequately served with *infrastructure*,

~~(b) it utilises *infrastructure* capacity for other planned development, or~~

~~(c) the required upgrading of *infrastructure* is not funded, and~~

~~(7) require the prioritisation of sites where adverse *effects* on highly valued *natural and physical resources* and *mana whenua* values can be avoided or, at the very least, minimised.~~

6. Structure of EIT-INF-P13 and the application of the effects management regime, and EIT-INF-P16

6.1. Discussion

47. Proposed policy EIT-INF-P13 relates to the development of new infrastructure, regardless of its type or significance. As notified, it requires avoidance of sensitive environments as a first priority. If avoidance is not possible because of the functional or operational needs of nationally or regionally significant infrastructure, then the effects management hierarchies in

other policies for particular resources (for example, indigenous biodiversity) apply. Where these do not exist, adverse effects on the values that contribute to the area's significance are to be minimised. For all other infrastructure, where it has a functional or operational need to locate within the areas specified, the direction is to avoid adverse effects on the values that contribute to the area's significance.

48. The provision attracted a large number of submissions from a wide range of organisations. Nearly all submitters seek amendment to, or exclusion from, this policy, including through the provision of bespoke effects management provisions for particular types of infrastructure such as for REG, the electricity distribution network, and the National Grid (although acknowledging that Ms McLeod for Transpower had a preference for amendment of EIT-INF-P13 and P13A). These submitters all sought effects be managed following an effects management hierarchy, but that the process is not "bookended" with an "avoid the activity" approach if significant residual adverse effects remain.

49. The basis of many of the infrastructure providers' submissions was that a more flexible approach was necessary given the importance of certain infrastructure activities in achieving climate targets. We have accepted this throughout our recommendations on the various provisions of the PORPS, in particular in relation to new renewable electricity generation and infrastructure. However, we do not think there is anything to be gained by providing a separate effects management hierarchy for each type of infrastructure. We now have a situation where there are National Policy Statements for indigenous biodiversity and freshwater, each with their own mandatory effects management hierarchy. We cannot override or amend their impact in any way.

50. We are also conscious of the fact that draft national policy statements on REGs and the National Grid have been released for consultation. While we do not know when (or if) these will be gazetted, both propose an effects management hierarchy where adverse effects on areas with significant environmental values are managed according to an effects management hierarchy, similar to what is required in the other NPSs referred to in this policy. The drafts also note that if there is a conflict between the NPSFM and NZCPS, then those documents shall prevail. As with other NPSs, changes will be required to lower order documents without using the Schedule 1 process. Hence, we agree with Mr Langman that there is little point in trying to predetermine the outcome of the NPSs or provide separate effects management hierarchies for these activities now, given that the changes can be made directly to the planning instrument.

51. In relation to the sensitive environments listed in the policy that do not already have an NPS effects management hierarchy, these are the section 6 matters where protection is qualified by the phrase "from inappropriate subdivision, use and development". In these environments, we prefer the effects management hierarchy approach proposed by Manawa Energy, Meridian, Contact Energy, and other submitters (including Forest and Bird). Manawa and Contact Energy both opposed EIT-INF-P13 and promoted alternatives that adopted the 'avoid, remedy or mitigate' approach rather than the use of 'minimise'. An activity may be considered appropriate in such locations, when all other policies are considered, but not be able to minimise effects i.e. to reduce those effects to the lowest possible level.

52. We do agree with the report writers that it is not appropriate to limit the 'avoid as a first priority' approach to scheduled areas only. While lower order documents will be required to identify and map these areas, that may take some time. If an area meets the criteria for significance, it should be treated as such regardless of whether it is scheduled in a plan or not.

53. A number of submitters were concerned about the use of the word 'possible' in clause 2 as it is always "possible" to avoid locating within those areas by not undertaking development of the infrastructure. The New Zealand Infrastructure Commission requested the use of 'reasonably practicable' in its place while Queenstown Airport requested just the use of 'practicably'.

54. Mr Langman recommended the phrase "demonstrably practicable" on the basis that it "provides a high test to be met before infrastructure locates within one of these areas, but enables an evaluative process to take place (which should include assessment of the route, method or site selection process)" and that it "clearly outlines that the providers are able to demonstrate that infrastructure cannot practicably be located in an area outside of those resources listed."

55. The Panel does not favour the use of 'demonstrably', which is not a phrase commonly used in RMA plans. The 'reasonably practicable' test, as requested by New Zealand Infrastructure Commission, also requires the proponent of a project to demonstrate that infrastructure cannot practicably be located to avoid a sensitive environment. The use of 'demonstrably' is largely superfluous in this context.

56. Mr Langman also addressed the inclusion of areas of "high recreational value" alongside high amenity value in EIT-INF-P13(1)(h). Manawa Energy sought that this clause be deleted while Mr Barr for QLDC recommended it be replaced with "highly valued natural features and landscapes"[50]. Mr Langman accepted Mr Barr's assessment as set out in his evidence and recommended that phrase. However, the Panel has recommended deletion of 'amenity landscapes' from the NFL chapter for a number of reasons, including that it is not a significant regional issue. We specifically acknowledged the difficulty identifying such landscapes will have for the REG development necessary to address the climate change issue.

57. Manawa and Queenstown Airport Corporation also sought the removal of high' natural character from clause 1(e) for similar reasons. We agree as a 'high' natural character landscape is also an amenity landscape issues, and its use here has only been adopted to address the NPSET, which does not apply to all infrastructure. That reference should be included in EIT-INFP16, which applies to the National Grid. Transpower sought an amendment to that effect when promoting a new policy specifically for the National Grid.

58. The reference to areas of 'high recreation value and amenity' is also recommended to be relocated to EIT-INFP16 to reflect Policy 8 of the NPSET, again as requested by Transpower. Because Policy 8 only 'seeks' to avoid, we think it appropriate that the management of effects is addressed by the application of EIT-INF-P13(2)(a)(vi) as recommended below.

59. The reference to outstanding natural character has also been deleted from EIT-INF-P13 as a consequential amendment because it is already reflected in clause 1(b).

56. We also note that Mr Stafford has recommended the inclusion of "areas of significance to mana whenua such as wāhi tupuna" to clause (5) of this policy in response to a submission from Kai Tahu. This is not needed as this matter is addressed in EIT-INF-P13(1) (g), which applies in both an urban and rural setting whereas EIT-EN-P16(5) only applies in an urban setting.

6.2. Recommendation

57. Amend EIT-INF-P13 and EIT-INF-P16 as follows:

EIT-INF-P13 – Locating and managing effects of infrastructure, *nationally significant infrastructure* and *regionally significant infrastructure* outside the coastal environment

When providing for new *infrastructure*, *nationally significant infrastructure* and *regionally significant infrastructure* outside the coastal environment:

(1) avoid, as the first priority, locating *infrastructure* in all of the following:

(a) *significant natural areas*,

(b) outstanding natural features and landscapes,

(c) *natural wetlands*,

(d) *outstanding water bodies*,

(e) ~~areas of high or outstanding natural character,~~

(f) areas or places of significant or outstanding *historic heritage*, and

(g) *wāhi tupuna,* ~~wāhi tapu, wāhi taoka,~~ ~~and areas with protected customary rights,~~ and

(h) ~~areas of high recreational and high amenity value, and~~

(2) if it is not ~~possible~~ reasonably practicable to avoid locating in the areas listed in (1) above because of the *functional needs* or *operational needs* of the *infrastructure, nationally significant infrastructure* and *regionally significant infrastructure* manage adverse *effects* as follows:

(a) for *nationally significant infrastructure* or *regionally significant infrastructure*:

(i) in *significant natural areas*, in accordance with ECO-P4 and ECO-P6,

(ii) in *natural wetlands*, in accordance with the relevant provisions in the NESF,

(iii) in *outstanding water bodies*, in accordance with LF-FW-P12,

(iiia) in relation to *wāhi tūpuna*, in accordance with HCV-WT-P2,

(iv) in other areas listed in EIT-INF-P13(1) above, ~~minimise~~ the adverse *effects* of the *infrastructure* on the values that contribute to the area's importance~~, and~~ shall be:

(I) remedied or mitigated to the extent practicable,

(II) where they cannot be practicably remedied or mitigated, regard shall be had to offsetting and/or compensation of more than minor residual adverse effects.

(b) for all *infrastructure* that is not *nationally significant infrastructure* or *regionally significant infrastructure*, avoid adverse *effects* on the values that contribute to the area's outstanding nature or significance except in relation to historic heritage, which is not significant or outstanding, then HCV-HH-P5(3) will apply.

EIT-INF-P16 – Providing for ~~electricity transmission and~~ the *National Grid*

Maintain a secure and sustainable electricity supply in Otago by:

(1) providing for the effective operation, maintenance, upgrading and development of the *National Grid* ~~development of, and upgrades to, the electricity transmission network~~ and requiring, as far as reasonably practicable, its integration with *land* use,

(2) considering the ~~requirements of and~~ constraints associated with the *functional* and *operational needs* of the ~~electricity transmission network~~ *National Grid* in its management,

(3) ~~providing for the efficient and effective development, operation, maintenance, and upgrading of the *National Grid*,~~

(4) enabling the reasonable operation, maintenance and minor upgrade requirements of established ~~electricity transmission~~ *National Grid* assets, ~~and~~

(5) minimising the adverse *effects* of the ~~electricity transmission network~~ *National Grid* on urban amenity, and avoiding adverse *effects* on town centres, areas of high amenity or recreational value and existing *sensitive activities*~~.~~,

(6) in rural areas, seek to avoid adverse effects in areas of high natural character and areas of high recreation value and amenity, and, where this is not practicable, apply EIT-INF-P13(2)(a)(iv), and

(7) in addition to clause (6), apply EIT-INF-P13 where relevant.

7. Application of EIT-INF-P5 relating to non-renewable energy generation activities

7.1. Discussion

58. As notified, EIT-EN-P5 was reads:

EIT-EN-P5 – Non-renewable energy generation

Avoid the development of non-renewable energy generation activities in Otago and facilitate the replacement of non-renewable energy sources, including the use of fossil fuels, in energy generation.

59. As Mr Langman noted in his reply report, a number of submitters raise concerns regarding the approach in EIT-EN-P5 to avoiding development of non-renewable energy generation

activities. This concern mainly centred around the lack of recognition of backup sources required for lifeline services, or where alternatives are not available for industrial processes. Submitters requested that more flexibility be provided where power resilience is required, with some submitters requesting the 'avoid' approach be subject to a test of practicality.

60. Mr Langman acknowledged in his reply that "the wording is very tight and directive, and given the examples provided by the submitters in evidence and at the hearing, that there are likely to be necessary exceptions." To address the issue, he recommended including the words "unless no other renewable energy options exist" as in his opinion this still provides a pathway for new non-renewable energy generation, but the circumstances are very restricted.

61. The Panel agrees with submitters that an 'avoid' policy in these circumstances is too onerous and does not reflect reality. We do not think the wording proposed by Mr Langman assists in addressing the issues raised by submitters. That is because the example given by submitters illustrate that there is generally likely to be a renewable energy source existing at a site. Most, if not all, sites are connected to the national grid. The issue the EDSs illustrated is the need for resilience in a system when that connection fails. Ms Dowd, for Aurora, advised that in Glenorchy, for example, a generator running on non-renewable fuel is often required when this occurs. Ms Taylor, on behalf of Ravensdown, gave an example of how non-renewable energy is required as part of an industrial process, for which no alternative has yet been found even though a renewable energy source does exist at a site (i.e. they are connected to the national grid).

62. Hence, we favour an amended version of the approach proposed by Ravensdown in their submission. We have moved the 'where practicable' phrase to relate to the restriction on developing non-renewable energy. It is not needed in relation to the second part of the policy, which is about facilitating the replacement of non-renewable. That does not direct replacement but indicates the regulatory path to achieve it will be made easier.

63. We also note that this policy has been amended to reflect a new NPS and NES on Greenhouse Gases from Industrial Process Heat, as recommended by Mr Langman in the memorandum received on this matter dated 16 August 2023.

7.2. Recommendation

64. Our final recommended amendments to the notified version of the pORPS are:

a. The following amendments to Policy EIT-EN-P5:

EIT-EN-P5 – Non-renewable energy generation

In relation to non-renewable energy generation:

(1) except as provided for in (2) below, ~~Avoid~~ restrict the development of non-renewable energy generation activities in Otago, where practicable, and facilitate the replacement of non-renewable energy sources, including the use of fossil fuels, in energy generation~~.~~, and

(2) in relation to *new heat devices* for *industrial process heat*:

(a) avoid discharges from *new heat devices* that burn coal and deliver heat at or above 300 degrees Celsius, unless there is no technically feasible and financially viable lower emissions alternative,

(b) avoid discharges from *new heat devices* that burn coal and deliver heat below 300 degrees Celsius, and

(c) avoid discharges from *new heat devices* that burn any *fossil fuel* other than coal, unless there are no technically feasible and financially viable lower emissions alternative, and

(3) in relation to *existing heat devices* for *industrial process heat*:

(a) restrict *discharges* from existing *heat devices* that burn coal and deliver heat at or above 300 degrees Celsius,

(b) restrict and phase out *discharges* from *existing heat devices* that burn coal and deliver heat below 300 degrees Celsius, and

(c) restrict *discharges* from *existing heat devices* that burn any *fossil fuel* other than coal.

b. Adding the following new definitions to the Interpretation section as defined in the National Environmental Standards for Greenhouse Gas Emissions from Industrial Process Heat to assist with the interpretation of Policy EIT-EN-P5:

- Existing, for a heat device (for the interpretation of EIT-EN-P5)
- Fossil fuel
- Heat device
- Industrial process heat
- New, for a heat device (for the interpretation of EIT-EN-P5)

8. Reverse sensitivity effects on infrastructure

8.1. Discussion

65. As notified, EIT-INF-P15 reads as follows:

> 'Seek to avoid the establishment of activities that may result in reverse sensitivity *effects* on *nationally* or *regionally significant infrastructure*, and/or where they may compromise the *functional* or *operational needs* of *nationally* or *regionally significant infrastructure'*.

66. As a consequence of changes proposed in response to a submission from Queenstown Airport, EIT-INF-P15 was recommended by the s42A report authors to read as follows:[1]

EIT-INF-P15 – Protecting nationally significant infrastructure ~~or~~ and regionally significant infrastructure

~~Seek to avoid the establishment of activities that may result in reverse sensitivity *effects on nationally or regionally significant infrastructure*, and/or where they~~

[1] This version includes the recommendations from the hearing reports prepared under s42A of the RMA, all supplementary evidence, and the opening statements.

~~may compromise the *functional* or *operational needs* of *nationally* or *regionally significant infrastructure.*~~

Protect the efficient and effective operation of *nationally significant infrastructure* and *regionally significant infrastructure* by:

(1) avoiding activities that may give rise to an adverse effect on the *functional needs* or *operational needs* of *nationally significant infrastructure* or *regionally significant infrastructure*,

(2) avoiding activities that may result in reverse sensitivity effects on *nationally significant infrastructure* or *regionally significant infrastructure*, and

(3) avoiding activities and development that foreclose an opportunity to adapt, upgrade or develop *nationally significant infrastructure* or *regionally significant infrastructure* to meet future demand.

67. A number of submitters raised concern with the recommended provision, with Ms Wharfe for Horticulture NZ considering the wording to be tighter than that provided for under the NPSET. She offered alternative wording along with amendments to the chapeau. For Kai Tahu, Ms McIntyre raised concerns that the amendments could create an uncertain 'sterilisation' of areas where there may be the possibility of infrastructure being developed in the future.[2] DCC seeks amendments to the reverse sensitivity provisions in EIT-TRAN-P21, which addresses reverse sensitivity effects on the transport system, by seeking to remove the use of 'avoid', and replacing it with "mitigate" or "minimise as far as practicable". No evidence was provided to support this change. QLDC also sought amendments, including the replacement of "protecting" with an alternative. Mr Barr, for QLDC, was concerned that the addition of clause (3) in the policy could stifle residential expansion promoted by a local authority to give effect to the NPSUD, and that the level of protection is disproportionate given that the majority of NSI and RSI operators are requiring authorities and can designate for future development.[3]

68. In his response to the submitters, while not accepting all the submission points, Mr Langman did consider the policy too directive in nature. He recommended amendments to clause (1) and (2) to incorporate the concept of "avoiding activities to the extent reasonably possible". He also noted that this also aligns with Policy 7 of the proposed NPSREG and proposed NPSET which both seek that reverse sensitivity effects on REG and electricity transmission are avoided or mitigated where practicable.

69. However, he did not agree with Ms Wharfe's recommendation to change "protect" to "recognising and providing" as the policy is about protecting the efficient and effective operation of NSI and RSI. Nor did he agree with Mr Barr that protecting existing infrastructure, and possible future extensions to it, would be inconsistent with the NPSUD.

70. The Panel agrees with Mr Langman for the most part but notes that the policy applies all *nationally significant infrastructure* and *regionally significant infrastructure*, not just those provided for by an NPS. Having said that, we note that current Policy 10 of the NPSET only uses the phrase "avoiding activities to the extent reasonably possible" in relation to reverse sensitivity. We prefer the use of the word 'practicable' in clause (2) given it applies to all such infrastructure.

[2] Sandra McIntyre for Kāi Tahu ki Otago, para [127]

[3] Craig Barr for QLDC), para [5.41]-[5.44]

71. We also note that the remainder of Policy 10 of the NPSET addresses the "operation, maintenance, upgrading, and development of the electricity transmission" and only requires local authorities to ensure those things are not "compromised". Hence, we consider the 'avoid' approach in clause (3) to be more restrictive than the NPSET and nor is it appropriate in respect to other infrastructure not covered by the NPSET. We consider a better phrase here is to use "avoid or minimise the effects of activities and development so that the opportunity …to meet future demand is not compromised". This gives better effect to Policy 10 of the NPSET and should address to a degree at least, the concerns raised by both Ms McIntrye and Mr Barr.

72. In relation to the first clause (1) of the policy, we again recommend that 'possible' be replaced with 'practicable'. With respect to the NPSET, we note that this clause is not addressing reverse sensitivity as such so there is no inconsistency with the NPSET.

73. In relation to EIT-TRAN-P21, Mr Langman noted that the transport system is wider than just NSI and RSI, so accepted the DCC submission to make similar changes to this provision. We agree with that, but we prefer the wording we have recommended for EIT-INF-P15 for the reasons we outlined in relation to that provision.

74. EIT-EN-P7 addresses reverse sensitivity in the context of REGs. Mr Langman considers the final amended form of that policy gives effect to the NPSREG and does not recommend any changes. We agree.

8.2. Recommendation

75. The Panel recommends the following amendments of EIT-INF-P15 and EIT-TRAN-P21:

EIT-INF-P15 – Protecting nationally significant infrastructure ~~or~~ and regionally significant infrastructure

~~Seek to avoid the establishment of activities that may result in reverse sensitivity *effects* on *nationally or regionally significant infrastructure*, and/or where they may compromise the *functional* or *operational needs* of *nationally* or *regionally significant infrastructure.*~~

Protect the efficient and effective operation of *nationally significant infrastructure* and *regionally significant infrastructure* by:

(1) avoiding activities, to the extent reasonably practicable, that may give rise to an adverse effect on the *functional needs* or *operational needs* of *nationally significant infrastructure* or *regionally significant infrastructure*,

(2) avoiding activities, to the extent reasonably practicable, that may result in *reverse sensitivity effects* on *nationally significant infrastructure* or *regionally significant infrastructure*, and

(3) avoid or minimise the effects of activities and development so that the opportunity to adapt, upgrade or extend existing *nationally significant infrastructure* or *regionally significant infrastructure* to meet future demand is not compromised.

EIT-TRAN-P21 – Operation of the transport system

The efficient and effective operation of the transport system is maintained by:

(1) avoiding or mitigating adverse *effects* of activities on the functioning of the transport system,

(2) avoiding the impacts of incompatible activities, to the extent reasonably practicable, including those that may result in *reverse sensitivity effects*,

(3) avoiding or minimising the effects of activities and development so that the opportunity to adapt, upgrade or develop the transport system to meet future transport demand, is not compromised,

(4) promoting the development and use of transport hubs that enable an efficient transfer of goods for transport and distribution across different freight and people transport modes,

(5) promoting methods that provide more efficient use of, or reduce reliance on, private motor vehicles, including ridesharing, park and ride facilities, bus hubs, bicycle facilities, demand management and alternative transport modes, and

(6) encouraging a shift to using renewable energy sources.

9. Consideration of provisions related to Commercial Port Activities

9.1. Discussion

76. In his reply report, Mr Langman addressed a number of concerns raised by Mr Brass for DOC, Ms O'Callahan for Port Otago, and Ms Taylor for Ravensdown. He recommended accepting the submissions to remove limits and Ms Taylor's request for consequential changes to EIT-TRAN-M8.

77. He also recommended adopting one of Ms O'Callahan's two drafting options to provide a pathway for activities essential to the efficient and safe operation of the port. The option chosen would depend on the outcome of the Supreme Court decision regarding Port Otago's appeal on the ORPS 2019, which had not been decided at the time of the preparation of Mr Langman's reply evidence.

78. However, the Port Otago decision was released prior to the close of the hearings and addressed how the NZCPS should be reconciled where there are potential conflicts between the ports policy, and the avoidance policies of the NZCPS. Ms O'Callahan and Mr Langman considered the implications of that decision and produced a joint witness statement that provided agreed amendments to EIT-TRAN-O10 and EIT-TRAN-P23. Counsel for the Port, Mr Garbett, advised that *"the wording has adopted the wording recommended by the Supreme Court as closely as possible, while incorporating it into the current framework of the proposed RPS."*

79. The Panel has reviewed the proposed wording and is comfortable with what has been recommended. We consider that it fits well with the amendments we have made to 'IM-P1 – Integrated approach to decision-making' to reflect the Port Otago case, and with our amended 'IM-P6 Managing uncertainties', which introduces the 'adaptive management' concept.

9.2. Recommendation

80. The Panel recommends that EIT-TRAN-O10, EIT-TRAN-P23, and EIT-TRAN-M8 be amended as follows:

EIT-TRAN-O10 – Commercial port activities

Commercial port activities operate safely and efficiently~~, and within environmental limits~~.

EIT-TRAN-P23 – Commercial port activities

Recognise the national and regional significance of~~ the~~ *commercial port activities* ~~associated with the ports at Port Chalmers and Dunedin (respectively)~~ by:

(1) ~~within environmental limits as set out in Policies CE-P3 to CE-P12,~~ providing for the efficient and safe operation of ~~these~~ the ports and efficient connections with other transport modes,

(2) ~~within the environmental limits set out in Policies CE-P3 to CE-P12,~~ providing for the development of the ports' capacity for national and international shipping in and adjacent to existing port activities, ~~and~~

(3) ensuring that development in the coastal environment does not adversely affect the efficient and safe operation of these ports, or their connections with other transport modes~~.~~, and

(4) if any of policies CE-P3 to CE-P12 cannot be achieved while providing for the safe and efficient operation or development of *commercial port activities,* then resource consent for such activities may be sought where:

(a) the proposed work is required for the safe and efficient operation of *commercial port activities*, and

(b) the adverse effects from the operation or development are established to be the minimum necessary to achieve the safe and efficient operation of the *commercial port activities*.

EIT-TRAN-M8 – *District plans*

Territorial authorities must prepare or amend and maintain their *district plans* to:

(1) …

…

(6) include policies and methods that provide for *commercial port* activities ~~associated with the operations at Otago Harbour and the ports at Port Chalmers and Dunedin~~ and avoid encroachment of activities which give rise to reverse sensitivity *effects*.

Section 11: Hazards and Risks (HAZ)

1. Introduction

1. The Hazards and Risks chapter of the PORPS is split into two sections: natural hazards (HAZ-NH) and contaminated land (HAZ-CL). This chapter of our recommendation report addresses the provisions in the HAZ chapter and associated APP6 – Methodology for natural hazard risk assessment.

2. The Otago Region is prone to a wide range of natural hazards, from coastal erosion, tsunami, flooding, wildfires, an earthquake (particularly on the alpine fault), and extreme weather events. Climate change has the potential to exacerbate the frequency or severity of these hazards. These risks of natural hazards are set out in SRMR-I1, along with their environmental, economic and social impacts. The ORC must manage the significant risks from natural hazards as a matter of national importance under s.6(h) of the RMA.

3. Contaminated land is also the subject of this chapter of the PORPS, applying to land in Otago that is either on the Hazardous Activities and Industries List (HAIL) or likely to have had a HAIL activity undertaken on it.

4. Relevant to this chapter, the ORC's functions under the RMA include:

    a. Controlling "the use of land for the purpose of the avoidance of natural hazards" (s.30(1)(c)(iv));

    b. Investigating "land for the purposes of identifying and monitoring contaminated land" (s.30(1)(ca)); and "

    c. Controlling "discharges of contaminants into or onto land, air, or water…"(s.30(1)(f).

5. Of particular relevance to this chapter, the PORPS must give effect to the following national documents:

    a. The New Zealand Coastal Policy Statement under s.62(3) of the RMA, which requires councils to avoid increasing risk in coastal hazard areas and encourage development that reduces the risk of effects from hazards in the coastal environment;

    b. The National Adaptation Plan[1], under s.61(2)(e) of the RMA, which requires the PORPS to apply minimum climate change scenarios; and

6. The Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 (NESCS), which regulates activities on contaminated or likely to be contaminated land and provides guideline soil contaminant values.

7. In addition, there is a suite of regulations under several other statutes which interface with RMA functions, including the Civil Defence Emergency Management Act 2002, the Building

[1] Ministry for the Environment, 2022. Aotearoa New Zealand's first national adaptation plan. Published by the Minister of Climate Change under section 5ZT of the Climate Change Response Act 2002.

Act 2004, Climate Change Response (Zero Carbon) Amendment Act 2019, the Waste Minimisation Act 2008, and the Hazardous Substances and New Organisms Act 1996.

8. The hearing of the Hazards and Risks chapter of the PORPS was held on 26 and 27 April 2023. The s.42A report was prepared by Mr Andrew Maclennan, who also prepared a supplementary statement of evidence updating a number of recommendations, and a reply report. A technical report prepared by GNS Science was appended to the s.42A report which addressed the technical aspects of submissions on natural hazards. We acknowledge the work of Mr Maclennan and submitters to engage to resolve outstanding issues. Their constructive approach to conferencing has resulted in agreement on a number of key matters and has made our job considerably easier.

9. As a result, we consider that many of the matters raised have been resolved through the final recommendations of Mr Maclennan. In this report we only cover what we consider to be the key points of contention or provisions that we consider require further amendment. Where provisions are not addressed, we have accepted the recommendations and reasons in the Reply Report, with the amended provision wording in the 10 October 2023 Reply Report version of the PORPS.

2. Definitions

10. Several terms used in this chapter are not used elsewhere in the PORPS. The following terms were discussed in Mr Maclennan's s.42A report:

- Hard protection structure
- Major hazard facility
- Resilient or resilience
- Residual risk
- Vulnerability

11. Mr Maclennan recommended restructuring the definition of 'hard protection structure' which we consider strengthens the definition. Waka Kotahi requested that rip rap be added to the examples listed in the definition. While we agree with Mr Maclennan that the list of hard protection structures in the definition is not exclusive, the evidence and hearing presentation of Ms McMinn from Waka Kotahi made it clear that rip rap is commonly used by Waka Kotahi for erosion protection. To avoid any future confusion, we consider that 'rip rap' should be included in the list of example hard protection structures in the definition.

12. Turning to the other definitions listed above and discussed in paragraphs 20-42 of the s.42A report, we make the following observations:

    a. We agree with Mr Maclennan that a new definition of 'major hazard facility' is not required.

    b. We support the recommendation to clarify the definition of risk to only apply to natural hazards.

    c. We agree that the definitions of 'resilient or resilience' and 'residual risk' should be retained as notified.

d. Forest and Bird requested that the definition of 'vulnerability' is clarified to only apply to natural hazards. We agree with Mr Maclennan that this is sufficiently clear in the definition but that the term should be removed from SRMR-I8.

2.1. Recommendation

13. We recommend amending the definition of 'hard protection structure' as follows:

Hard protection structure

> …outside the coastal environment, means any kind of structure which is specifically established for the purpose of natural hazard risk mitigation, including ~~any~~ dams, weirs, stopbanks, carriageways, groynes, ~~or~~ reservoirs and rip rap ~~and any structure or appliance of any kind which is specifically established for the purpose of natural hazard risk mitigation~~.

14. We recommend that SRMR–I8 is amended by replacing 'vulnerability' with 'susceptibility' in the second paragraph of the environmental impact snapshot.

3. HAZ-NH – Natural hazards

3.1. Introduction

15. This section of the HAZ chapter establishes the framework for natural hazards management within regional and district plans. Both regional and district councils have responsibilities for managing activities as they relate to hazards and risks under the RMA. There are also additional statutes which interact with RMA functions, including:

- Civil Defence Emergency Management Act 2002;
- Building Act 2004; and
- Climate Change Response (Zero Carbon) Amendment Act 2019.

16. Unlike many other chapters in the PORPS, hazard and risk matters also traverse the coastal environment. The interface between the CE chapter and this chapter becomes important, as is consistency with the NZCPS.

17. More than 250 submission points were received on this section of the pORPS. In response, a number of amendments were recommended in the s.42A report and supplementary evidence, meaning that the breadth of issues addressed at the hearing was considerably more limited.

18. Mr Maclennan's Reply Report identified the following key matters of contention at the hearing, which we consider to be accurate:

a. Management of coastal hazards.

b. Infrastructure located in areas subject to natural hazards.

c. Amendments to APP6.

d. Kaitiaki decision making.

19. Kaitiaki decision making was addressed by HAZ-NH-P11 in the notified version of the PORPS. Mr Maclennan recommended deleting this in his s.42A report but, following discussions with Kāi Tahu ki Otago planners, has recommended a replacement HAZ-NH-P11 titled Kāi Tahu rakatirataka. We thank the parties for their constructive engagement on this matter and consider that the replacement policy is appropriate and well-aligned with the MW chapter.

20. We address the first three points in turn below. Note that we do not address the objectives HAZ-NH-O1 and HAZ-NH-O2 below. We agree with the recommendation and reasoning of Mr Maclennan and do not consider that there are any material issues remaining in relation to these provisions that require further discussion.

3.2. Management of coastal hazards

21. Submitters sought additional clarity as to which provisions apply in the coastal environment, with Port Otago seeking a number of amendments in this regard.[2] Specifically, Ms O'Callahan for Port Otago considered that HAZ-NH-P1A and HAZ-NH-P10 apply to the management of coastal hazard risk, and sought that additional notes be added to policies HAZ-NH-P2 to HAZ-NH-P4 and to clarify that these provisions do not apply to any area subject to coastal hazard risk. She also suggested an amendment to HAZ-NH-P10(2) to address non-coastal hazard risks such as earthquakes affecting the coastal environment. Specifically, she suggested that 'and mitigate any other natural hazard risk' be added to HAZ-NH-P10. [3]

22. Ms McIntyre for Kāi Tahi ki Otago expressed concern over the uncertainty as to when HAZ-NH-P3 and HAZ-NH-P4 apply and when the approach for coastal hazards in HAZ-NH-P10 would apply.[4] This could be an issue in coastal communities where river flooding and coastal storm surges combine.

23. We acknowledge the work of the submitters and Mr Maclennan to resolve the uncertainty in the drafting as to which provisions would apply to coastal hazards. As a result, Mr Maclennan recommended amendments in his opening statement to the hearing, which were further refined in his Reply report.[5] His view is that, to ensure a consistent approach, hazards that may be both coastal and non-coastal, such as fault lines, should be managed by HAZ-NH-P2, HAZ-NH-P3, and HAZ-NH-P4.

24. We agree that a consistent approach should be taken to managing such hazard risks. We also note that the use of the term 'coastal hazards' in HAZ-NH-P10 is intended to refer to hazards generated in the coastal environment. This is clearly articulated through Policy 24 of the NZCPS, which states:

> *There are a number of potential sources of inundation in the coastal environment, including:*
>
> - *storm tides (comprising storm surges, high tides and short-term fluctuations in mean sea level at timescales of seasons to years);*
> - *high spring or larger 'king' tides*

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[2] *For example, 00301.047 00301.051 Port Otago*
[3] *Mary O'Callahan for Port Otago, para [104]*
[4] *Sandra McIntyre for Kāi Tahu ki Otago, paragraph [141]*
[5] *HAZ Reply Report of Andrew Maclennan, para 19.*

- *wave set-up and run-up;*
- *short-term fluctuations in mean sea level (seasons to years);*
- *river flooding (which can also be influenced by storm surge and tide conditions);*
- *groundwater (from rising water tables with tidal connectivity);*
- *sea-level rise; and*
- *tsunami (which ride on the back of the sea level at the time of the event).*

Therefore, the combined effect of these sources will need to be considered, including the combined, cumulative effects of sea, river/stream catchment and groundwater influences.

25. As such, we are satisfied that non-coastal hazard risks that may affect the coastal environment can be managed by HAZ-NH-P2, HAZ-NH-P3, and HAZ-NH-P4, with hazard risks generated in the coastal environment being managed by HAZ-NH-P10. We agree with Mr Maclennan's recommendation in his Reply Report to include a definition of 'coastal hazard' in the PORPS, and with the inclusion of HAZ-NH-P1A which requires the identification of areas potentially affected by coastal hazards. These amendments should ensure that there is no confusion in the application of these policies.

3.2.1.Recommendation

26. We recommend the addition of a new policy, HAZ-NH-P1A as follows:

HAZ-NH-P1A – Identifying areas subject to *coastal hazards*

Identify areas that are potentially affected by *coastal hazards* (including tsunami), giving priority to the identification of areas at high *risk* of being affected.

27. We recommend that HAZ-NH-P1 be amended as follows:

HAZ-NH-P1 – Identifying areas subject to *natural hazards*

For *hazards* not identified in accordance with HAZ-NH-P1A, ~~U~~using the best available information, ~~I~~identify areas where *natural hazards* may adversely affect Otago's people, communities and property, by assessing:

(1) …

28. We recommend that HAZ-NH-P2 be amended as follows:

HAZ-NH-P2 – *Risk* assessments

Within areas identified under HAZ-NH-P1 as being subject to *natural hazards*, ~~A~~assess ~~the level of~~ *natural hazard risk* as significant, tolerable, or acceptable by determining a range of *natural hazard* event scenarios and their potential consequences in accordance with the criteria set out within APP6.

29. We recommend that HAZ-NH-P4 be amended as follows:

HAZ-NH-P4 – Existing *natural hazard risk* ~~activities~~

In areas identified under HAZ-NH-P1 as subject to *natural hazards*, ~~R~~reduce existing *natural hazard risk* to a tolerable or acceptable level by:

…

30. Note that HAZ-NH-P4 is discussed further below in relation to other matters.

31. We recommend that HAZ-NH-P10 be amended as follows:

HAZ-NH-P10 – *Coastal hazards*

~~In addition to HAZ-NH-P1 to HAZ-NH-P9 above, o~~On any *land* that is potentially affected by *coastal hazards* over at least the next 100 years:

(1) avoid increasing the *risk* of social, environmental and economic harm from *coastal hazards*,

(2) ensure no *land* use change or redevelopment occurs that would increase the *risk* to people and communities from that *coastal hazard*,

(3) encourage *land* use change or redevelopment that reduces the *risk* from that *coastal hazard*, ~~and~~

(4) ensure decision making about the nature, scale and location of activities considers the ability of Otago's people and communities to adapt to, or mitigate the *effects* of, sea level rise and *climate change*~~.~~, and

(5) apply HAZ-NH-P5 to HAZ-NH-P9.

32. We recommend a new definition of 'coastal hazard' as follows:

means a subset of *natural hazards* covering tidal or coastal storm inundation, rising sea level, tsunami or meteorological tsunami inundation, coastal erosion (shorelines or cliffs), rise in *groundwater* levels from storm tides and sea-level rise (plus associated liquefaction), and salinisation of surface *fresh waters* and *groundwater* aquifers

33. Turning to s32AA, we agree with Mr Maclennan that *"the suggested amendments setting out which provisions apply to coastal hazards, and which apply to other hazards will be more efficient and effective in achieving both HAZ-NH-O1 and HAZ-NH-O2. I consider they will create greater clarity as to which management approach will be used".*[6]

3.3. Infrastructure located in areas subject to natural hazards

34. A number of submitters, including Transpower, Contact Energy, Oceana Gold and Waka Kotahi, were concerned that the natural hazards provisions would restrict key infrastructure in potentially high-risk hazard environments. A number of policies are relevant here and are discussed below.

[6] *HAZ Reply Report of Mr Andrew Maclennan, para 21.*

35. HAZ-NH-P3 and HAZ-NH-P4, which cover new and existing activities respectively, were of particular concern. These provisions were notified as follows:

HAZ-NH-P3 – New activities

Once the level of *natural hazard risk* associated with an activity has been determined in accordance with HAZ–NH–P2, manage new activities to achieve the following outcomes:

(1) when the *natural hazard risk* is significant, the activity is avoided,

(2) when the *natural hazard risk* is tolerable, manage the level of *risk* so that it does not become significant, and

(3) when the *natural hazard risk* is acceptable, maintain the level of *risk*.

HAZ-NH-P4 – Existing activities

Reduce existing *natural hazard risk* by:

(1) encouraging activities that reduce *risk*, or reduce community vulnerability,

(2) restricting activities that increase *risk*, or increase community vulnerability,

(3) managing existing *land* uses within areas of significant *risk* to people and communities,

(4) encouraging design that facilitates:

(a) recovery from *natural hazard* events, or

(b) relocation to areas of acceptable *risk*, or

(c) reduction of *risk*,

(5) relocating *lifeline utilities*, and facilities for essential and emergency services, away from areas of significant *risk*, where appropriate and practicable, and

(6) enabling development, upgrade, maintenance and operation of *lifeline utilities* and facilities for essential and emergency services.

36. Submitters sought varying relief to provide for activities to occur in areas of significant natural hazard risk, where there is a functional or operational need. Relief sought for HAZ-NH-P3 includes:

a. Ms McLeod for Transpower seeking that HAZ-NH-P3(1) focuses on avoiding significant risk rather than avoiding activities where the risk is significant.[7]

b. Ms McMinn for Waka Kotahi sought that nationally significant infrastructure be excluded from HAZ-NH-P3; and[8]

[7] *Ainsley McLeod for Transpower, para [8.82]-[8.86]*
[8] *Julie McMinn for Waka Kotahi, para [7.3]-[7.5]*

37. Ms Hunter for Contact Energy sought an amendment to HAZ-NH-P3(1) for the risk to be appropriately managed for nationally significant infrastructure that has a functional need or operational need for its location.[9]

38. Mr Maclennan, in his s.42A report, was not convinced that an exemption is required, stating at paragraph 132:

> *"I note that APP6 requires an assessment of the likelihood and consequence of an event occurring. This assessment takes place through plan reviews, plan changes, or resource consents. If an infrastructure project was considered a 'significant' risk, it would mean that the consequences of undertaking that project would be considerable. In this instance I consider it is appropriate that the significant risk is avoided. Given the nature of nationally or regionally significant infrastructure, I consider most if not all new infrastructure projects would likely have an 'Insignificant' or 'Minor' consequence when assessed in accordance with APP9 [sic] (or even reduce the risk of natural hazards) and therefore would not trigger the 'significant' risk threshold."*

39. This was not accepted by the submitters, with Ms McLeod for Transpower stating when considering HAZ-NH-P3 that:

> *"the Policy does not directs* [sic] *the avoidance of 'significant risk, but instead directs the avoidance of an activity. In my opinion the expression used in this Policy may have unintended consequences in its implementation, particularly in the context of plan making. This is because, the HAZ-NH-M3 – Regional plans and HAZ-NH-M4 – District plans directs that plans manage activities to achieve, amongst other matters, Policy HAZ-NH-P 3 and it follows that, to achieve the 'avoidance' required by the Policy, the future regional and district plans would likely set out areas where activities are avoided, rather than allowing for the consideration of a specific new activity or level of risk."*

40. We consider this is a valid point and also acknowledge Ms Hunter's evidence for Contact Energy, which noted the complexity of APP6 and the discussed the uncertainty as to how the Clutha Hydro Scheme would be assessed against the APP6 criteria. She considered that "*activities can be managed in a way that significant risks are reduced to a lower risk level and that the potential consequences can be mitigated. Accordingly, APP6 should not prevent resource users from undertaking activities where a conservative hazard risk management approach is employed."*

41. Mr Maclennan's Reply Report accepted that the alternative drafting of Ms McLeod for clause (1) provides more certainty that the intent is to avoid significant natural hazard risk. We agree with this recommendation and consider that it should provide sufficient certainty that activities may be appropriate where the natural hazard risks have been sufficiently mitigated or managed. We will discuss APP6 later in this chapter.

42. Turning to HAZ-NH-P4 which applies to existing activities, there was a high level of support for this policy which should enable work to reduce risk for existing activities and enable lifeline utilities to locate away from areas of significant risk. A number of amendments were sought

[9] *Claire Hunter for Contact Energy, para [12.1]-[12.5]*

in the submission of QLDC and the subsequent evidence of Mr Place. Mr Maclennan recommended accepting the majority of these, with some amendments to reduce complexity, and including amending the heading of the policy to clarify that it applies to 'existing natural hazard risk' rather than 'existing activities'. We consider that these amendments add clarity and certainty to the policy. We do not consider that any additional amendments are necessary.

43. HAZ-NH-P5 is also relevant here, applying a precautionary approach to natural hazard risk. There was support for this policy from parties including Waka Kotahi, Graymont and QLDC, however others such as DCC and Ravensdown were concerned about the use of the 'precautionary approach' in this context and, in particular for DCC, the interaction with the UFD chapter. We acknowledge these concerns and agree that, to some extent uncertainty is addressed through APP6. However, we consider that this policy is broader than APP6 and relevant for consideration of natural hazard risks. We accept Mr Maclennan's recommendation in his reply report and do not discuss this policy further.

44. HAZ-NH-P6 is to protect existing features and systems that provide hazard mitigation, whether natural or modified, and sits alongside HAZ-NH-P7 which addresses new risk management approaches. In response to submissions, Mr Maclennan recommended amendments to clarify that the policy is not to *"protect natural or modified features and systems that contribute to mitigating the effects of natural hazards and climate change"* but to *"protect <u>the ability of</u> natural or modified features and systems…".* We consider this to be an important distinction that clarifies the intent of the policy. We agree with Mr Maclennan's reply report recommendation for HAZ-NH-P6.

45. HAZ-NH-P7 and HAZ-NH-P9, which relate to mitigating natural hazards and protection from hazards respectively, are also relevant here. These were notified as follows:

HAZ–NH–P7 – Mitigating *natural hazards*

Prioritise *risk* management approaches that reduce the need for *hard protection structures* or similarengineering interventions, and provide for *hard protection structures* only when:

(1) *hard protection structures* are essential to manage *risk* to a level the community is able to tolerate,

(2) there are no reasonable alternatives that result in reducing the *risk* exposure,

(3) *hard protection structures* would not result in an increase in *risk* to people, communities andproperty, including displacement of *risk* off-site,

(4) the adverse *effects* of the *hard protection structures* can be adequately managed, and

(5) the mitigation is viable in the reasonably foreseeable long term or provides time for futureadaptation methods to be implemented, or

(6) the *hard protection structure* protects a *lifeline utility*, or a facility for essential or emergency services.

HAZ–NH–P9 – Protection of hazard mitigation measures

Protect the *functional needs* of hazard mitigation measures, *lifeline utilities*, and essential or emergencyservices, including by:

(1) avoiding significant adverse *effects* on those measures, utilities or services,

(2) avoiding, and only where avoidance is not practicable, remedying or mitigating other adverse *effects* on those measures, utilities or services,

(3) maintaining access to those measures, utilities or services for maintenance and operational purposes, and

(4) restricting the establishment of other activities that may result in reverse sensitivity *effects* on those measures, utilities or services.

46. Turning to HAZ-NH-P7, submissions covered a wide range of matters:

a. Clause (1) was considered to overlap with clause (2) and was considered unnecessary;

b. there was support for providing for hard protection structures to protect lifeline utilities in clause (6) but a request to widen this to cover other types of significant infrastructure;

c. Port Otago considered that hard protection structures may be necessary for the Port's commercial port activities and were concerned that clauses (1) to (3) may not allow this;

47. Ngāi Tahu ki Murihiku and Kāi Tahu ki Otago support limitations on the use of hard protection structures, with Ngāi Tahu ki Murihiku suggesting the word 'and' be inserted after each subclause. In response to submissions, evidence and pre-hearing discussions, Mr Maclennan recommended deleting clause (1) and restructuring the policy so that clause (6) becomes stand-alone, with clauses (2) to (5) connected with 'and'. This is consistent with the approach requested by Ngāi Tahu ki Murihiku and is a sound one in our view. Like Mr Maclennan, we agree with the suggested wording of Mr Brass for the Director General of Conservation to amend clause (2) to provide certainty as to which alternatives should be considered. Similarly, we support the amendment requested by Ms O'Callahan to clause (3) to provide for hard protection structures that result in a 'more than minor' increase in risk.

48. Ms McIntyre for Kāi Tahi ki Otago requested amending clause (4) to clarify the types of effects that should be considered. She stated that *"where there is a clear acknowledgement that a particular effect is relevant, it would be more helpful, efficient and effective to include reference to that effect in the policy than to rely on general reference to adverse effects"*.[10] We respectfully disagree that this is necessary and agree with Mr Maclennan that the relevant effects can be managed on a case-by-case basis. We do not recommend any amendments to the Reply Report version of NH-HAZ-P7.

49. We have considered the submissions, evidence and recommendations of Mr Maclennan for NH-HAZ-P9. In response to a submission by DCC, Mr Maclennan has recommended

[10] *EIC of Ms Sandra McIntyre for Kāi Tahui ki Otago, para 153.*

broadening the title of the policy to include 'lifeline utilities, and essential or emergency services'. We agree that this better reflects the intent of the policy. On other matters raised, we agree with the recommendations and reasoning of Mr Maclennan, and consider that his recommendation in the Reply Report version of the PORPS is appropriate.

3.3.1.Recommendation

50. We recommend adopting the versions of HAZ-NH-P3 in the Reply Report version of the PORPS dated 10 October 2023, as follows:

HAZ-NH-P3 – New activities

Once the level of *natural hazard risk* associated with an activity has been determined in accordance with HAZ-NH-P2, manage new activities to achieve the following outcomes:

(1) significant ~~when the~~ *natural hazard risks* are avoided ~~is significant, the activity is avoided~~,

(2) when the *natural hazard risk* is tolerable, manage the level of *risk* so that it does not ~~become significant~~ exceed tolerable, and

(3) when the *natural hazard risk* is acceptable, maintain the level of *risk*.

50. We recommend adopting the version of HAZ-NH-P4 on the Reply Report version of the PORPS dated 10 October 2023, as follows:

HAZ-NH-P4 – Existing *natural hazard risk* ~~activities~~

In areas identified under HAZ-NH-P1 as subject to *natural hazards*, ~~R~~reduce existing *natural hazard risk* to a tolerable or acceptable level by:

(1) encouraging activities that reduce *risk*, or reduce community *vulnerability*,

~~(2) restricting activities that increase *risk*, or increase community vulnerability,~~

(3) managing existing activities ~~*land* uses~~ within areas of significant *risk* to people, ~~and~~ communities and property,

(4) encouraging design that facilitates:

~~(a) recovery from *natural hazard* events, or~~

(b) relocation to areas of acceptable *risk*, or

(c) reduction of *risk*,

(5) relocating *lifeline utilities*, and facilities for essential and emergency services, away from areas of significant *risk*, where appropriate and practicable, and

(6) enabling development, upgrade, maintenance and operation of *lifeline utilities* and facilities for essential and emergency services.

51. We recommend adopting the version of HAZ-NH-P7 in the Reply Report version of the PORPS dated 10 October 2023, with a minor correction to the numbering of clause (6), as follows:

HAZ-NH-P7 – Mitigating *natural hazards*

Prioritise *risk* management approaches that reduce the need for *hard protection structures* or similar engineering interventions, and provide for *hard protection structures* only when:

~~(1) *hard protection structures* are essential to manage *risk* to a level the community is able to tolerate,~~

(1A) the following apply:

(~~2~~a) there are no reasonable alternatives that ~~result in reducing~~ manage or reduce the *risk* exposure to a level the community is able to tolerate,

(~~3~~b) *hard protection structures* would not result in ~~an~~ a more than minor increase in *risk* to people, communities and property, including displacement of *risk* off-site,

(~~4~~c) the adverse *effects* of the *hard protection structures* can be adequately managed, and

(~~5~~d) the mitigation is viable in the reasonably foreseeable long term or provides time for future adaptation methods to be implemented, or

(~~6~~1B) the *hard protection structure* protects a *lifeline utility*, or a facility for essential or emergency services.

52. We recommend adopting the version of HAZ-NH-P9 in the Reply Report version of the PORPS dated 10 October 2023, as follows:

HAZ-NH-P9 – Protection of hazard mitigation measures, *lifeline utilities*, and essential or emergency services

Protect the *functional* needs and *operational* *needs* of hazard mitigation measures, *lifeline utilities*, and essential or emergency services, including by:

(1) avoiding significant adverse *effects* on those measures, utilities or services,

(2) avoiding, and only where avoidance is not practicable, remedying or mitigating other adverse *effects* on those measures, utilities or services,

(3) maintaining access to those measures, utilities or services for maintenance and operational purposes, and

(4) restricting the establishment of other activities that may result in *reverse sensitivity effects* on those measures, utilities or services.

3.4. APP6 – Methodology for natural hazard risk assessment

53. APP6 prescribes the four-step process to be used for determining natural hazard risk and is referenced in HAZ-NH-P2 – Risk assessments, which informs a number of other provisions. Mr Maclennan describes the purpose of APP6 as follows:

> *First and foremost, it is a framework that will be used to inform future plan review processes where community input will ensure that the risk thresholds in district and regional plans are appropriate for those communities. Prior to that occurring, APP6 provides a framework for undertaking a risk assessment within resource consent processes.*[11]

54. Mr Maclennan has recommended substantial changes to the notified version of APP6 through his s.42A report, supplementary evidence and reply report. We acknowledge those who participated in pre-hearing discussions in relation to APP6 and also Mr Place from QLDC and Mr Kelly representing ORC for their clear presentations to the Panel on what is a technical matter.

55. We have reviewed the submissions and responses on APP6 and recommend the following:

    a. Amend clause (3) of Step 1 to direct which Shared Socio-Economic Pathway (SSP) scenarios or Representative Concentration Pathways (RCP) scenarios should be used as part of the APP6 assessment. This was requested by QLDC and recommended to be accepted both by Mr Kelly at the hearing and Mr Maclennan in his reply report, but was omitted in the reply report version of APP6.

    b. Replace 'territorial authorities' with 'local authorities' in Note 1 and Note 2 of Step 2 to better reflect the collaborative approach required of regional councils and territorial authorities to managing natural hazard risk, which is reflected in the HAZ-NH methods.

    c. Amend paragraph 2 of Step 4 to ensure consistency with the quantitative risk assessment requirements indicated in Table 8. As recommended, Table 8 would require that a quantitative risk assessment be undertaken for a tolerable risk with a major consequence. The wording in paragraph 2 of Step 4 only requires a quantitative risk assessment be undertaken for a tolerable risk with a catastrophic consequence.

3.4.1. Recommendation

56. We recommend the following amendments:

    a. Amend clause (3) of Step 1 as follows:

    (3) The likelihood assessment shall include consideration of the *effect* of *climate change* and should use the Shared Socio-Economic Pathway (SSP) scenarios or Representative Concentration Pathways (RCP) scenarios provided in the National Adaptation Plan.

[11] *Reply Report of Mr Andrew Maclennan, para 158.*

b. Replace 'territorial authorities' with 'local authorities' in Note 1 and Note 2 of Step 2.

c. Amend paragraph 2 of Step 4 as follows:

If the assessment undertaken in Steps 1-3 determines that one of the three *natural hazard* scenarios generate *risk* that is significant, or a tolerable risk with a major or catastrophic consequence, undertake a quantitative *risk* assessment utilising the following methodology:[12]

4. Other provisions

57. Related to the HAZ objectives and policies are methods HAZ-NH-M1 to HAZ-NH-M5, explanation HAZ-NH-E1, principal reason HAZ-NH-PR1 and anticipated environmental results HAZ-NH-AER1 to HAZ-NH-AER5. We have reviewed the submissions and evidence on those provisions and Mr Maclennan's responses. The Panel has not identified any matters of concern with these provisions as finally recommended and adopt them accordingly.

4.1. HAZ-CL – Contaminated land

58. Approximately 60 submissions were received on the contaminated land or HAZ-CL section of the PORPS. Many of the submission points addressed alignment with the NESCS or other legislation. Before we proceed further, it is worth reiterating the definition of 'contaminated land' in s.2 of the RMA, which is as follows:

> ***contaminated land*** *means land that has a hazardous substance in or on it that—*
>
> *(a) has significant adverse effects on the environment; or*
>
> *(b) is reasonably likely to have significant adverse effects on the environment*

59. Mr Maclennan summarised the approach to the HAZ-CL provisions as follows:

> *As the NESCS sets out a nationally consistent set of planning controls and soil contaminant values, the provisions within the pORPS avoid duplication by managing the adverse effects of contaminants on other receptors, including ecology, water quality or amenity values. Similarly, the management of waste is largely managed by local authorities under the Waste Minimisation Act 2008. Therefore, the focus of the provisions within the pORPS is to provide overarching direction on the waste minimisation hierarchy and the management of waste materials in the context of the RMA.*
>
> *The PORPS 2019 includes provisions managing the use, storage and disposal of hazardous substances. However, the Resource Legislation Amendment Act 2017 removed the explicit function of regional and territorial authorities under section 30 and 31 to control hazardous substances so that RMA controls would not duplicate controls in the HSNO and the HSWA. As such, the pORPS has removed the provisions*

[12] *This methodology has been developed in general accordance with the Australian Geomechanics Society, 2007 methodology, which may usefully provide additional guidance.*

managing hazardous substances and now relies on the HSNO and the HSWA controls to manage hazardous substances.[13]

60. We find no fault in this approach.

61. No submissions sought amendments to HAZ-CL-P16, HAZ-CL-P17, HAZ-CL-E2, HAZ-CL-AER6 and HAZ-CL-AER7. We do not consider that any consequential amendments are required to these provisions and we recommend that they are retained as notified.

62. We acknowledge the work of Mr Maclennan and the submitters to resolve the issues raised in submissions through pre-hearing discussions. As such, few issues relating to the HAZ-CL section were raised at the hearing and, of those, some of the requested amendments were recommended by Mr Maclennan in his reply report. As a result, this section of our report will be brief and, where we do not discuss a provision, this means that we have accepted the recommendation of Mr Maclennan in his reply report. This applies to the following provisions:

    a. HAZ-CL-P13 – Identifying contaminated land;

    b. HAZ-CL-M6 -Regional plans;

    c. HAZ-CL-M7 – District plans;

    d. HAZ-CL-M8 – Waste management and minimisation plans;

    e. New recommended HAZ-CL-M8A – Prioritisation and action plans;

    f. HAZ-CL-M9 – Other incentives and mechanisms

4.2. HAZ-CL-O3 – Contaminated land

63. HAZ-CL-O3 is the sole objective in the HAZ-CL section and was notified as follows:

HAZ-CL-O3 – Contaminated land

Contaminated land and *waste* materials are managed to protect human health, *mana whenua* values and the *environment* in Otago.

64. Six submissions were received with DCC, Ravensdown and The Fuel Companies in support.

65. We support Kāi Tahu ki Otago's request that 'mana whenua' is replaced with 'Kāi Tahu' as this is consistent with our approach elsewhere in the pORPS.

66. Horticulture NZ and Federated Farmers sought to replace 'protecting' with 'not harming' in relation to human health, mana whenua values and the environment. Mr Maclennan considered in his s.42A report and reply report that 'protecting' is consistent with the NESCS, however Ms Wharfe for Horticulture NZ pointed out that 'protect' in the NESCS only applies to human health and not Kāi Tahu values and the wider environment. While her evidence requested that 'protect' be replaced with 'do not harm', she amended this in her presentation to the panel such that 'do not harm' only relates to Kāi Tahu values.

[13] *S.42AOfficer's Report of Mr Andrew Maclennan, paras 473-474.*

67. We consider that this is an important point and agree with Ms Wharfe that HAZ-CL-P14(2) is to protect human health but clause (3) of this policy does not seek to protect other values. We accept the submission of Horticulture NZ.

4.2.1. Recommendation

68. We recommend that HAZ-CL-O3 is amended as follows:

> *Contaminated land* and waste material are managed to protect human health and do not harm Kāi Tahu~~,~~ ~~mana whenua~~ values and the *environment* in Otago.

4.3. HAZ-CL-P14 – Managing contaminated land, HAZ-CL-P15 – New contaminated land and HAZ-CL-P18 – Waste facilities and services

69. HAZ-CL-P14, HAZ-CL-P15 and HAZ-CL-P18 were notified as follows:

> **HAZ-CL-P14 – Managing contaminated land**
>
> Actively manage contaminated or potentially contaminated land so that it does not pose an unacceptable risk to people and the environment, by:
>
> (1) assessing and monitoring contaminant levels and environmental risks,
>
> (2) protecting human health in accordance with regulatory requirements,
>
> (3) avoiding, as the first priority, and only where avoidance is not practicable, mitigating or remediating, adverse effects of the contaminants on the environment, and
>
> (4) requiring closed landfills to be managed in accordance with a closure plan that sets out monitoring requirements and, where necessary, any remedial actions required to address ongoing risks.
>
> **HAZ-CL-P15 – New *contaminated land***
>
> Avoid the creation of new *contaminated land* or, where this is not practicable, minimise adverse *effects* on the *environment* and *mana whenua* values.
>
> **HAZ-CL-P18 – *Waste* facilities and services**
>
> When providing for the development of facilities and services for the storage, recycling, recovery, treatment and disposal of *waste* materials:
>
> (1) avoid adverse *effects* on the health and safety of people,
>
> (2) minimise the potential for adverse *effects* on the *environment* to occur,
>
> (3) minimise *risk* associated with *natural hazard* events, and
>
> (4) restrict the establishment of activities that may result in reverse sensitivity *effects* near *waste* management facilities and services.

70. A new recommended cause (5) for HAZ-CL-P14 relating to closed landfills was recommended in Mr Maclennan's supplementary evidence following the pre-hearing meeting as follows:

(5) prioritising the identification and management of closed landfills and *contaminated land* at risk from the *effects* of *climate change*.

71. We consider this to be a sound addition.

72. Submissions from Ravensdown and the Fuel Companies sought to delete HAZ-CL(3) or amend clause (3) to remove the reference to "avoid". Ms Taylor, in her evidence for Ravensdown, accepted the s.42A report's reasons for retaining clause (3). We are of the same view although, in line with our discussions and recommendations for other provisions in the PORPS, we recommend that 'is not practicable' be replaced with 'is not reasonably practicable'.

73. Turning to HAZ-CL-P15 and on a similar note, in response to a submission by Queenstown Airport Mr Mclennan has recommended adding 'to the greatest extent practicable' before 'adverse effects'. We recommend that this be amended to 'to the extent reasonably practicable' and consider that this is consistent with the submission of Queenstown Airport.

74. Similarly, 'to the greatest extent practicable' was recommended to be added to clause (2) of HAZ-CL-P18. We support the intent of this amendment in response to submissions by Forest and Bird and Kāi Tahu ki Otago but consider that this should be reworded to read 'to the extent reasonably practicable' for reasons discussed earlier in our report.

75. In relation to other submissions on both of these policies, we support the reasoning and recommendations of Mr Maclennan.

4.3.1.Recommendation

76. We recommend that HAZ-CL-P14 be amended as follows:

HAZ-CL-P14 – Managing *contaminated land*

~~Actively~~ ~~m~~Manage contaminated or potentially *contaminated land* so that it does not pose an unacceptable *risk* to people and the *environment*, by:

(1) assessing and, if required, monitoring *contaminant* levels and environmental *risks*,

(2) protecting human health in accordance with regulatory requirements,

(3) avoiding, as the first priority, and only where avoidance is not reasonably practicable, mitigating or remediating, adverse *effects* of the *contaminants* on the *environment*, ~~and~~

(4) requiring closed *landfills* to be managed in accordance with a closure plan that sets out monitoring requirements and, where necessary, any remedial actions required to address ongoing *risks*, and~~.~~

(5) prioritising the identification and management of closed *landfills* and *contaminated land* at risk from the *effects* of *climate change*.

77. We recommend that HAZ-CL-P15 be amended as follows:

HAZ-CL-P15 – New *contaminated land*

Avoid the creation of new *contaminated land* or, where this is not practicable, minimise <u>to the extent reasonably practicable</u> adverse *effects* <u>of contamination</u> on the *environment* and ~~*mana whenua*~~ <u>Kāi Tahu</u> values.

78. We recommend that HAZ-CL-P18 be amended as follows:

HAZ-CL-P18 – *Waste* facilities and services

When providing for the development of facilities and services for the storage, recycling, recovery, treatment and disposal of *waste* materials:

(1) avoid adverse *effects* on the health and safety of people,

(2) <u>to the extent reasonably practicable,</u> minimise the potential for adverse *effects* on the *environment* to occur,

(3) minimise *risk* associated with *natural hazard* events, and

(4) restrict the establishment of activities that may result in *reverse sensitivity effects* near *waste* management facilities and services.

Section 12: Historical and Cultural Values (HCV)

1. Introduction

1. This section of the recommendation report assesses the provisions of the pORPS which establish the planning framework for the management of historic heritage within the Otago region. The National Planning Standards require a chapter entitled 'Historical and Cultural Values' 'if relevant to the regional policy statement'. The Otago region is rich in historic heritage, with a wide range of important cultural and historic heritage places and areas, and hence the ORC has included such a chapter.

2. Section s6(f) of the RMA requires the protection of historic heritage from inappropriate subdivision, use and development as a matter of national importance. Included within the RMA definition of 'historic heritage' is reference to "sites of significance to Māori, including wāhi tupuna". The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga are also identified as a matter of national importance by s6(e) of the RMA.

3. A large number of submission points have been received on the HCV provisions. The submissions address a number of themes and seek specific amendments to the provisions.

4. The Chair excused himself from consideration of provisions addressed by the submission lodged by Central Otago Heritage Trust because of a close friendship with Mr D.G Shattky of the trust. Commissioner Cubitt chaired the hearing on those submission points.

5. In addressing these submissions, we are indebted to the efforts of the Section 42A report writer, Ms Angela Fenemor. She identified a number of common topics across the provisions which guided the preparation of her s42A report. We have essentially used the format of her report as the basis for our recommendation report, although in some instances we have taken the grouping of the provisions a step further given the interconnectedness of many of the issues in play. As a consequence, not all of the sections of Ms Fenemor's report appear in this document.

6. The HCV chapter has two sections:

   - HCV-WT – Wāhi tupuna
   - HCV-HH – Historic heritage

2. General Themes

7. There were 14 general submissions on the HCV chapter, with two submitters seeking the chapter be retained as notified. A number of submitters raise issues with the wording of the chapter, specifically regarding the use of the terms 'historic' and 'heritage,' and the need for improved integration between the two sections of the chapter, WT – Wāhi tūpuna and the HH – Historic heritage.

8. With respect to the Heritage NZ request to change the chapter title to "HHCV – Historic heritage and cultural values" (along with consequential amendments), the officer acknowledged the use of "historic heritage" in s6(f) of the RMA but noted that the title of the chapter is determined by the National Planning Standards.

9. In response to the Waitaki Whitestone Geopark Trust request to replace "Historic Heritage" with "Cultural & Natural Heritage" throughout the document, the officer noted that the terms are not synonymous and that there would be "significant repercussions for the meaning of several pORPS policies, including creating unexplored overlaps with the provisions for Natural Features and Landscapes."

10. The Central Otago Heritage Trust ('The Trust') made several submissions providing overall support to the section but made a number of specific requests. In relation to the need to cross reference between HCV-WT and HCV-HH to acknowledge they are not to be interpreted in isolation[6], she did not believe there is anything in the section to suggest they are exclusive and felt cross-referencing was best left to the IM chapter. Mr Shattky and Ms Rusher, on behalf of the Trust, addressed this matter at the hearing in the context of the PORPS being provided online in a series of isolated sections. They stressed the importance of ensuring these sections are appropriately cross referenced online.

11. The Trust also requested that the objectives and policies be adjusted to prioritise the recording and sharing of information concerning heritage values, particularly where the Council is considering proposals for the modification or destruction of heritage sites. They also requested that the RPS provide a description or summary of Otago's heritage legacy.

12. In response to these requests, the officer noted that recording is part of the identification and protection of values and is already provided for. With no suggested wording provided, she recommended that this submission be declined. The Trust discussed this matter at the hearing, suggesting that the online heritage section of PORPS have electronic links to heritage databases.

13. In relation to the Trust's request that the RPS provide a description or summary of Otago's heritage legacy, the officer noted that no drafting or suggestions was provided and as a consequence, she was not in a position to propose content that might satisfy the submitter's concerns.

14. Mr Shattky and Ms Rusher addressed their concerns in this respect at the hearing. They also traversed what they referred to as 'the intangible cultural heritage values of a number of other cultures' who have contributed to the fabric of the Otago region. They felt that more historical context needed to be included in the PORPS, along with recognition of the contributions of all ethnicities to Otago's distinctive heritage legacy. However, no wording was provided to address their concerns.

15. The officer recommended accepting submissions that support the chapter in part, as some provisions have been modified.

2.1. Recommendation

16. The Panel essentially agrees with the position of the officer in relation to these general submissions and do not recommend any amendments. However, we were of the opinion that the Central Otago Heritage Trust raised several valid points about how the PORPS should be posted online, along with links to heritage data bases and further content on Otago's heritage legacy. These matters are outside the scope of our role, but we suggest that the Trust liaise with ORC staff around this matter.

3. Definition of Historic Heritage

17. The definition of historic heritage, as notified, states:

> "has the same meaning as in section 2 of the Resource Management Act 1991 (as set out in the box below)
>
> (a) means those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities:
> (i) archaeological:
> (ii) architectural:
> (iii) cultural:
> (iv) historic:
> (v) scientific:
> (vi) technological; and
>
> (b) includes—
> (i) historic sites, structures, places, and areas; and
> (ii) archaeological sites; and
> (iii) sites of significance to Māori, including wāhi tapu; and
> (iv) surroundings associated with the natural and physical resources

18. There are two submissions on the definition of historic heritage. Gerald Carter requests that "historic heritage" is replaced with "cultural and natural heritage", which the submitter notes is used by UNESCO. The Central Otago Heritage Trust sought the following addition of the term "historic heritage":

"(b) Includes – … heritage values associated with natural and physical resources"
The officer did not recommend any change to the definition, noting "that the term "historic heritage" is defined by the RMA, and those definitions have been used in the PORPS. This approach is consistent with the National Planning Standards."

3.1. Recommendation

19. We agree with the officer that no change should be made to the definition given it is defined by the RMA.

4. New Definition – Archaeological site

20. Heritage New Zealand Pouhere Taonga request that a definition of "archaeological site" from the HNZPTA 2014 is included in the definitions list for consistency.

21. The officer agreed that including such a definition provides certainty to users, and that consistency with the HNZPTA 2014 appears to be a sensible solution. The officer was initially concerned that the definition from the HNZPTA 2014 is "subject to section 42(3)" of that Act and was unclear how this would affect the use of this definition in the context of the PORPS 2021. This was discussed at the pre-hearing conferencing, which confirmed that s.42(3) of the HNZPTA 2014 refers to the requirement for an archaeological authority, so is not relevant to

the definition of an 'archaeological site'. Based on this clarification, the officer agreed it was appropriate to include the definition.

4.1. Recommendation

22. The Panel agrees that including a definition of archaeological site provides certainty to users, and that having a definition consistent with the HNZPTA 2014 appropriate. Hence, we recommend the following definition be included in the PORPS:

> **Archaeological site:** means
>
> a. any place in New Zealand, including any building or structure (or part of a building or structure), that—
>   i. was associated with human activity that occurred before 1900 or is the site of the wreck of any vessel where the wreck occurred before 1900; and
>   ii. provides or may provide, through investigation by archaeological methods, evidence relating to the history of New Zealand; and
>
> b. includes a site for which a declaration is made under section 43(1) of the Heritage New Zealand Pouhere Taonga Act 2014.

23. The officer carried out the following s32AA evaluation with respect to the inclusion of the definition:

> "The recommendation to include a definition of "archaeological site" will provide certainty for the users of the RPS on the meaning of archaeological site and will not affect the meaning or application of any provisions in the document. While the suggested amendments will not result in any changes to the implementation of the RPS, including a definition will likely result in improved effectiveness of the relevant provisions, compared to the effectiveness or efficiency assessment contained in the Section 32 Evaluation Report."

24. We agree and adopt that assessment accordingly.

5. Additional Definitions

25. Central Otago Heritage Trust (The Trust) requests the addition of new definitions, including:

- Heritage
- Cultural heritage value/s
- Tangible value
- Intangible value
- Cultural landscape
- Mana whenua

26. The Trust's concern was that PORPS uses various terms when referencing heritage matters without clearly defining or reflecting their specific meanings in the context they are used. They noted that UNESCO and ICOMOS NZ classify historic heritage qualities as 'tangible' or 'intangible' and consider a greater understanding of these qualities will contribute to achieving the objectives and policies. They sought amendments to clearly express that priority

be given to the protection of heritage values, as well as heritage sites (as emphasised in HCV-WT).

27. The officer noted that the term "mana whenua" is defined by the RMA, and that the terms "cultural heritage values", "tangible values" and "intangible values" are not used within the text of the *PORPS* and therefore do not need to be defined.

28. Nor did she consider that a separate definition of "heritage" is necessary, in addition to the definition of "historic heritage". With respect to "cultural landscape", she has recommended elsewhere in her report that this term be removed.

29. In response to the oral submissions from Mr Shattky and Ms Rusher on behalf of the Trust, the officer stated that she understood 'historic heritage' to be directly referencing tangible items (such as structures and facades). She went on to state that "without the tangible item", the historic heritage value is removed – historic heritage is an explicitly visual value" and that "by focusing only on protecting the intangible elements of historic heritage and neglecting the tangible, HCV-HH-O3 will not be attained".

5.1. Recommendation and Reasons

30. The panel agrees that the proposed definitions do not need to be included in the PORPS. However, we accept the essence of what the submitter was saying but believe this is again a matter that could be usefully explored through the use of electronic links to heritage data bases as previously discussed.

6. Historical and Cultural Values – Wāhi Tūpuna (HCV-WT)

31. The Historical and cultural values chapter 13 in the PORPS is divided into two parts with the first being entitled HCV-WT Wāhi tupuna. It essentially addresses Kāi Tahu's aspirations to protect their significant sites. In that regard this part of the PORPS is squarely addressing one of the identified factors requiring recognition in s.6(e) of the RMA:

> *6. Matters of national importance*
>
> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:*
>
> *….*
>
> *(e) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga: …*

32. The primary issues raised by the submission process in respect of the WT section of the HCV chapter related first to identification and then the management of effects on areas or sites identified as having wāhi tupuna values. In large part the conclusions reached by the s.42A report writer were regarded as sound by the panel. However, because of their importance some discussion is required by us. We will address the issues of management of effects first.

6.1. Management of effects

33. In respect of the issue of 'management' of effects on values some issues of concern were raised by submitters such as Federated Farmers that wāhi tupuna could be identified as being located on privately owned land and that the relevant policies and methods were worded in too restrictive a manner. Instead, a request was made to limit the severity of such an approach by instead requiring the level of protection to be from *"inappropriate subdivision, use and development".* The s.42A report recommended against that amendment on the basis that the phrase did not appear in s.6(e) of the RMA.

34. In other areas of this report, particularly as to the level of protection of indigenous biodiversity, we have placed considerable weight on the fact that similarly s.6(c) RMA does not contain that qualifier whereas it does appear specifically s.6(a) as to natural character, and s.6(e) require that protection against adverse effects in the words of the Supreme Court is intended to be against material effects which are adverse to the values sought to be protected. Objective HCV-WT-O1 specified as an objective that *"Wāhi tupuna and their associated cultural values are identified and protected"* with HCV-WT-P1 as recommended being intended to sustain Kāi Tahu relationships with wāhi tūpuna by "*enabling Kāi Tahu to identify ad wāhi tūpuna any sites and areas of significance to mana whenua, along with the cultural values that contribute to each wāhi tūpuna being significant".*

35. In other words, identification at each stage is linked as to both location and values for the wāhi tūpuna involved. The same can be said of the relevant method HCV-WT-M3.

36. However most importantly as recommended the provisions of HCV-WT-P2 as to management of effects of wāhi tūpuna in the opening sub-clauses also refer specifically to managing of effects on the cultural values of the identified wāhi tupuna.

37. Accordingly, we agree with the s.42A recommendation not to insert the qualifier sought which has been uplifted from other subsections of s.6. We are satisfied that the PORPS as finally recommended in 10 October 2023 contains objectives, policies and methods which ensure that is wāhi tūpuna envisaged by the PORPS is specified in descriptive terms in Appendix 7.

38. However, in the course of considering the manner of treatment of effects on wāhi tūpuna we have formed the view that HCV-WT-P2 as recommended really conflates two distinct issues which are better separated. As recommended it provides:

HCV-WT-P2 – Management of wāhi tūpuna

Wāhi tūpuna are protected by:

(1) avoiding significant adverse effects on the cultural values ~~associated with~~ of identified wāhi tūpuna,

(1A) avoiding, as the first priority, other adverse effects on the cultural values of identified wāhi tūpuna,

(2) where other adverse effects demonstrably cannot be completely avoided, then either remedying or mitigating adverse effects in a manner that maintains the values of the wāhi tūpuna,

(3) managing identified wāhi tūpuna in accordance with tikaka Māori, and

~~(4) avoiding any activities that may be considered inappropriate in wāhi tūpuna as identified by Kāi Tahu, and~~

(5) encouraging the enhancement of access to wāhi tūpuna to the extent compatible with the particular wāhi tūpuna.

39. As can be seen sub-clauses (1), (1A) and (2) all address effects on the values of wāhi tūpuna. Sub-clauses (1A) and (2) in essence provide a simplified effects management hierarchy aimed at ensuring maintenance of the values of the wāhi tūpuna. In our view that meets the approach of the Supreme Court in the *Port Otago* case.

40. However, the heading to HCV-WT-P2 is "*Management of wāhi tūpuna"* which is not what sub-clauses (1), (1A) and (2) are about.

41. By contrast, sub clauses (3) and (4) are directly concerned with the management of wāhi tupuna themselves.

42. In our view there are two different purposes of the various sub-clauses of HCV-WT-P2 and those should be separate into different policies. HCV-WT-P2 requires a new heading of 'Management of effects on wāhi tūpuna values' and it should contain only sub-clauses (1), (1A) and (2). Then a new policy should retain the heading of 'Management of wāhi tūpuna' and include sub-clauses (3) and (4).

43. In terms of s.32AA the outcome will be greater clarity between the manner of treatment of effects on the protected values of wāhi tūpuna as compared to the actual management of the physical wāhi tūpuna themselves.

6.1.1. Recommendation

44. We recommend that the present policy HCV-WT-P2 be divided into two policies as follows:

HCV-WT-P2 – Management of effects on wāhi tūpuna

Wāhi tūpuna are protected by:

(1) avoiding significant adverse effects on the cultural values ~~associated with~~ of identified wāhi tūpuna,

(1A) avoiding, as the first priority, other adverse effects on the cultural values of identified wāhi tūpuna,

(2) where other adverse effects demonstrably cannot be completely avoided, then either remedying or mitigating adverse effects in a manner that maintains the values of the wāhi tūpuna,

And

HCV-WT-P2A – Management of *wāhi tūpuna*

Wāhi tūpuna are protected by:

(3) managing identified wāhi tūpuna in accordance with tikaka Māori, and

~~(4) avoiding any activities that may be considered inappropriate in wāhi tūpuna as identified by Kāi Tahu, and~~

(5) encouraging the enhancement of access to wāhi tūpuna to the extent compatible with the particular wāhi tūpuna.

6.2. Identification of wāhi tupuna and their associated cultural values

45. Initially these identification provisions had led to a number of submission points being raised by Kāi Tahu parties. A common concern was to try to ensure that Kāi Tahu interests were always under their control as to whether to identify locations of significance as wāhi tūpuna and the nature of the values involved, by inserting the word 'appropriate' in relation to Kāi Tahu input. The s.42 report writer expressed a repeated concern that use of a word such as 'appropriate' introduced a level of uncertainty and vagueness that was best avoided. The report writer made the point that protection could only be gained if identification occurred, or an area or site regarded by Kāi Tahu as significant and that if it was to be so identified then protection of values could only occur if those were also identified at the same time.

46. We agree. And we also agree with the end result recommended by the report writer which ensures that local authorities under HCV-WT-M3 have to include Kāi Tahu in the identification process of both significant wāhi tūpuna and its associated values. Moreover, HCV-WT-M4 then enables Kāi Tahu to identify in accordance with its tikaka wāhi tūpuna sites, areas and values using the guidance in APP 7. Finally, HCV-WT-M4(4) enables mana whenua to determine the method of recording and whether that is to be by map or not. As to concerns being expressed by other submitters that they may leave them exposed to concerns as to effects which are not recorded, our response is that values of wāhi tūpuna are protected they will have to ensure that is done in co-operation with the relevant local authority in a manner that is transparent to all if it is to be effective.

47. However, a consequent amendment for consistency is needed in our view to recommend HCV-WT-AER1 which was recommended to read:

> **HCV-WT-AER1** *Wāhi tūpuna* areas and sites ~~The areas and places of wāhi tūpuna~~ are identified in the relevant *regional* *plans* and *district plans* using mechanisms deemed appropriate by Kāi Tahu.

48. This wording uses the term 'appropriate' where we do not think it should be used. The recommended HCV-WT-M1(1) enabled Kāi Tahu to identify sites in accordance with tikaka using the guide in APP 7. HCV-WT-M1(4) then allowed for Kāi Tahu to determine the recording method to be used. We agreed with those outcomes. This recommended wording in HCV-WT-AER1 is not consistent with those outcomes. It needs to be reworded to be consistent and we record that as our s.32AA analysis for this change.

6.2.1. Recommendation

49. That HCV-WT-AER1 is amended to read:

> **HCV-WT-AER1** *Wāhi tūpuna* areas and sites ~~The areas and places of wāhi tūpuna~~ are identified in the relevant *regional* *plans* and *district plans* using tikaka for identification of wāhi tūpuna and their values and the manner of recording those being determined by Kāi Tahu.

50. We are otherwise satisfied with the protective regime outcome that has resulted from the submission process in the recommended 10 October 2023 version save for two other methods.

51. Those methods are HCV-WT-M2(2) and HCV-WT-M2(3) which as recommended would require regional and district plans to include methods which:

> *(2) require cultural impact assessments where activities have the potential to adversely affect values of wāhi tūpuna and Kāi Tahu have identified the need for an assessment,*
>
> *(3) require ~~including~~ conditions on resource consents or designations to ~~provide buffers or setbacks between~~ protect wāhi tūpuna ~~and~~ from incompatible activities,*

52. In each case the protection of 'values' has been omitted and needs to be included to be consistent with the overall approach underpinning this section of the PORPS. Again it is that need for consistency which provides the s.32AA analysis for these changes.

6.2.2. Recommendation

53. We recommend that HCV-WT-M2(2) and HCV-WT-M2(3) are amended to read:

> *(2) require cultural impact assessments where activities have the potential to adversely affect values of wāhi tūpuna and Kāi Tahu have identified the need for an assessment to protect particular values,*
>
> *(3) require ~~including~~ conditions on resource consents or designations to ~~provide buffers or setbacks between~~ protect wāhi tūpuna values ~~and~~ from incompatible activities,*

6.3. HCV-HH-03 – Historic heritage resources

6.3.1. Discussion

54. As notified, HCV-HH-03 reads:

> **HCV-HH-O3 – Historic heritage resources**
>
> Otago's unique historic heritage contributes to the region's character, sense of identity, and social, cultural and economic well-being, and is preserved for future generations.

55. There are five submissions on HCV-HH-03 with four of those submitters supporting its retention as notified. The Dunedin City Council sought amendments to the objective to clarify that not every item of historic heritage must be preserved. They submitted the focus should be on retention of places and areas with special or outstanding historic heritage values or qualities with other heritage values being retained where not in conflict with other objectives.

56. In the initial s42A report, the officer agreed with the DCC that there may be some tension between heritage protection objectives and those that enable development. The officer considered that "*there are benefits in amending the wording of the objective to alleviate any concerns that all historic heritage sites and features are to be preserved in totality*" but was of the opinion that the submitter's wording did not provide sufficient protection of historic heritage. As a consequence, no change was initially recommended.

57. Discussion during the pre-hearing conference led to alternative wording being promoted that replaced 'preserved' with 'protection and enhancement'. This was accepted as appropriate by

the officer although she considered enhancement should be used in the context of people's understanding and appreciation of heritage.

58. At the hearing, however, Mr Freeland on behalf of Dunedin City Council, was still concerned with the fact that the objective provides protection for every item of historic heritage, regardless of competing objectives in the PORPS. He suggested some wording to address this. The reporting officer did not recommend adopting this wording as she considered the objective to be "*the relevant place for setting a clear outcome and expectation for the protection of historic heritage, while the policies provide the guidance on how that is to be done effectively while being cognisant of other PORPS objectives".*

59. The Panel had some sympathy for the DCC's submission given that s.6(f) does not envisage absolute protection of historic heritage. Rather that protection is from "*inappropriate subdivision, use, and development."* In his closing, Mr Anderson reminded us that the Supreme Court stated in *King Salmon*[1], "*inappropriate' should be interpreted in s.6(a), (b) and (f) against the backdrop of what is sought to be protected or preserved."* He went on to note that "HCV-HH-P5(2) requires avoidance of adverse effects on areas or places with <u>special or outstanding</u> historic heritage, whereas section 6(f) refers to all historic heritage."

60. While we understand the Supreme Court's position in relation to s.6(a) and (b), the resources addressed in (f) are largely human made physical resources, often located in built up urban areas, as opposed to naturally occurring features such as landscapes. By its very nature, historic heritage is from an earlier time so there are challenges around maintaining it, particularly when it comes to built heritage, which is often no longer fit for purpose and/or located in strategically important areas within a city. This is the concern Mr Freeland was addressing.

61. In this context, what is considered 'appropriate' may well involve completely removing or heavily modifying '*what is sought to be protected or preserved*'. This is quite often the case with heritage building that have become derelict due to them no longer being fit for purpose and therefore no longer commercially viable. By contrast, we cannot envisage any circumstances where a landscape would be 'removed'.

62. The PORPS historic heritage policy framework seems to us to merely focus on adverse effects without the context of what may or may not be appropriate. This causes concern when historic heritage may, for example, need to be removed for health and safety reasons or to make way for strategically significant projects.

63. While the DCC submission did not specifically request use of the 'inappropriate' phrase from the RMA, they did request that the objective be amended to "so it is clear that not every item of historic heritage must be preserved...". We believe the s.6 qualifier is there to recognise that point. As a consequence, we have included it in the objective to address Mr Freeland's concern.

[1] *King Salmon [2014] 1 NZLR 593 at [105]*

6.3.2. Recommendation

64. Amend HCV-HH-O3 as follows:

> **HCV-HH-03 – *Historic heritage* resources**
>
> Otago's unique historic heritage contributes to the region's character, sense of identity, and social, cultural and economic well-being, and ~~is preserved for future generations.~~ <u>people's understanding and appreciation of it is enhanced, and that it is protected for future generations against inappropriate subdivision, use and development.</u>

6.4. HCV-HH-P3 – Recognising historic heritage

6.4.1. Discussion

65. As notified, HCV-HH-P3 reads:

> **HCV-HH-P3 – Recognising *historic heritage***
>
> Recognise that Otago's *historic heritage* includes:
>
> (1) Māori cultural and *historic heritage* values,
>
> (2) archaeological sites,
>
> (3) residential and commercial *buildings*,
>
> (4) pastoral sites,
>
> (5) surveying equipment, communications and transport, including *roads*, bridges and routes,
>
> (6) industrial *historic heritage,* including mills and brickworks,
>
> (7) gold and other mining systems and settlements,
>
> (8) dredge and ship wrecks,
>
> (9) ruins,
>
> (10) coastal *historic heritage*, particularly Kāi Tahu occupation sites and those associated with early European activities such as whaling,
>
> (11) memorials, and
>
> (12) trees and vegetation.

66. There are twelve submissions on HCV-HH-P3. Four submitters support the retention of HCV-HH-P3 as notified while two submitters seek that it be deleted because it is too vague and could lead to the identification of historic heritage features regardless of whether they are worthy of protection. These submitters consider a directive list unnecessary because historic heritage is defined in the RMA.

67. The remaining submitters seek a range of additions to the policy, including "Geological Heritage" and various infrastructure and mining relics. The Director General of Conservation

seeks recognition of the Heritage New Zealand Pouhere Taonga Act, which they say is directly relevant to the purpose of the policy. Federated Farmers and Waitaki DC sought consistency and clarification in relation to Kāi Tahu heritage while Federated Farmers proposed the deletion of 'vegetation' from the list. Toitū Te Whenua sought changes around how farming activities are identified.

68. In response to the request to delete the policy, the officer advised that "HCV-HH-P3 provides important regional context to the policy framework, to assist with understanding and acknowledging the types of values, sites and features that form part of Otago's historic heritage." She also noted that the list is non-exhaustive, and accepted several of the suggested amendments on the basis that they describe additional sites and features that are reflective of the types of historic heritage in Otago. The officer also recommended changes in relation to the reference to Māori values. In relation to geological heritage, she felt this was more appropriately managed in the NFL chapter.

69. The Director General of Conservation's submission regarding the Heritage New Zealand Pouhere Taonga Act was not addressed in the original s42 Report but was recommended for inclusion in the officers opening statement. How this was incorporated into the policy was amended in the officers reply to address the disjunct noted by the Panel between section 6 of the Heritage New Zealand Pouhere Taonga Act and the policy itself.

70. In response to the recommendations, Mr Bathgate for Kāi Tahu ki Otago noted that that there may be Māori historic heritage of non-Kāi Tahu origin and that reference to 'places and areas' as opposed to 'sites' is more consistent with HCV-HH-P4 and APP8[2]. The officer agreed with this in her reply and recommended those changes accordingly.

71. The Panel acknowledges that there is some logic to the submissions of Alluvium and Stoney Creek, Danny Walker and others as the RMA does indeed contain a definition of historic heritage. However, that definition is very generic, and we accept the officer's position that the resources identified in the policy illustrate what specific items in Otago may fall within that definition. For that reason, we also agree with the changes she has recommended to the list with the exception of cemeteries as requested by the Waitaki District Council. Cemeteries are managed under the Burial and Cremation Act 1964 and we do not think it appropriate that they be subject to heritage provisions

6.4.2. Recommendation

72. That HCV-HH-P3 be amended as follows:

HCV-HH-P3 – Recognising historic heritage

Recognise that Otago's historic heritage includes:

(1) Māori cultural and historic heritage values and sites, and places and areas,

(2) archaeological sites,

(3) residential and commercial buildings,

(4) pastoral sites,

[2] *Michael Bathgate for Kāi Tahu (Appendix 1), page [23]*

(5) surveying equipment, communications and transport, including roads, bridges, railway infrastructure and routes,

(6) industrial historic heritage, including mills, quarries, limekilns, grain stores, water supply infrastructure and brickworks,

(7) gold, limestone and other mining systems and settlements,

(8) dredge and ship wrecks, and coastal structures and buildings, including breakwaters, jetties, and lighthouses,

(9) ruins,

(10) coastal historic heritage, particularly Kāi Tahu occupation sites and those associated with early European activities such as whaling,

(11) memorials ~~and~~

(12) trees ~~and vegetation~~,

(13) military structures or remains, and

(14) Historic places within the meaning under section 6 of the Heritage New Zealand Pouhere Taonga Act 2014.

6.5. HCV-HH-P4 – Identifying historic heritage and APP8

6.5.1. Discussion

73. Policy HCV-HH-P4 and APP8 deal with the identification of historic heritage. The s42A report dealt with these provisions separately, at section 13.6.5 and section 13.6.17 respectively. Because they work in conjunction with each other, we have dealt with them together.

74. As notified, HCV-HH-P4 reads:

HCV-HH-P4 – Identifying *historic heritage*

Identify the places and areas of *historic heritage* in Otago in accordance with APP8 and categorise them as:

(1) places and areas with special or outstanding *historic heritage* values or qualities, or

(2) places and areas with *historic heritage* values or qualities.

75. As notified, APP8 reads:

APP8 – Identification criteria for places and areas of *historic heritage*

A place or area is considered to have *historic heritage* if it meets any one or more of criteria below:

Aesthetic The place has, or includes aesthetic qualities that are considered to be especially pleasing, particularly beautiful, or overwhelming to the senses,

eliciting an emotional response. These qualities are demonstrably valued, either by an existing community or the general public, to the extent that they could be expected to experience a sense of loss if the qualities which evoke the aesthetic value were no longer there.

Archaeological	The place provides, or is demonstrably likely to provide, physical evidence of human activity that could be investigated using archaeological methods. Evidence obtained from an archaeological investigation could be expected to be of significance in answering research questions, or as a new or important source of information about an aspect of New Zealand history.
Architectural	The place reflects identifiable methods of construction or architectural styles or movements. When compared with other similar examples, or in the view of experts or relevant practitioners, it has characteristics reflecting a significant development in this country's architecture. Alternatively, or in conjunction with this, the place is an important or representative example of architecture associated with a particular region or the wider New Zealand landscape.
Cultural	The place reflects significant aspects of an identifiable culture and it can be demonstrated that the place is valued by the associated cultural group as an important or representative expression of that culture.
Historic	The place contributes to the understanding of a significant aspect of New Zealand history and has characteristics making it particularly useful for enhancing understanding of this aspect of history, especially when compared to other similar places.
Scientific	The place includes, or is demonstrably likely to include, fabric expected to be of significance in answering research questions or a new or important source of information about an aspect of New Zealand's cultural or historical past through the use of specified scientific methods of enquiry.
Social	The place has a clearly associated community that developed because of the place, and its special characteristics. The community has demonstrated that it values the place to a significant degree because it brings its members together, and they might be expected to feel a collective sense of loss if they were no longer able to use, see, experience or interact with the place.
Spiritual	The place is associated with a community or group who value the place for its religious, mystical or sacred meaning, association or symbolism. The community or group regard the place with reverence, veneration and respect, and they might be expected to feel a collective sense of loss if they were no longer able to use, see, experience or interact with the place.
Technological	The place includes physical evidence of a technological advance or method that was widely adopted, particularly innovative, or which made a significant contribution to New Zealand history OR

The place reflects significant technical accomplishment in comparison with other similar examples or, in the view of experts or practitioners in the field, has characteristics making the place particularly able to contribute towards our understanding of this technology.

Traditional	The place reflects a tradition that has been passed down by a community or culture for a long period, usually generations and especially since before living memory, and has characteristics reflecting important or representative aspects of this tradition to a significant extent.

The significance of areas and places with *historic heritage* will be assessed having regard to the following criteria:

(1) the extent to which the place reflects important or representative aspects of Otago or New Zealand history,

(2) the association of the place with events, persons, or ideas of importance in Otago or New Zealand history,

(3) the potential of the place to provide knowledge of Otago or New Zealand history,

(4) the importance of the place to *takata whenua*,

(5) the community association with, or public esteem for, the place,

(6) the potential of the place for public education,

(7) the technical accomplishment, value, or design of the place,

(8) the symbolic or commemorative value of the place,

(9) the importance of identifying historic places known to date from an early period of Otago's or New Zealand's settlement,

(10) the importance of identifying rare types of historic places, and

(11) the extent to which the place forms part of a wider historical and cultural area.

76. There were eight submissions on HCV-HH-P4. CODC, Kāi Tahu ki Otago, and QLDC sought that the policy be retained as notified. The Director General of Conservation submitted that there was not enough certainty or clarity around determining whether values, places or areas are special or outstanding (under the policy or the associated APP8) and requested clearer criteria or guidance. For similar reasons, Trojan and Wayfare both sought the deletion of the two clauses of the policy. The DCC submission highlighted the resourcing implications of having to identify two categories of heritage items and noted the potential inconsistency between the policy and their 2nd Generation District Plan. Ngāi Tahu ki Murihiku sought recognition of wāhi tūpuna as part of historic heritage and that clause (2) provides appropriate description for wāhi tūpuna.

77. In respect to APP8, thirteen submissions were received, with the Director General of Conservation and QLDC seeking that it be retained as notified. Two submitters sought the removal of the 'Aesthetic, Social, Spiritual and Traditional' criteria from APP8, as well as all other references to those criteria. Two other submitters sought the addition of a new geological significance criteria to the list. One submitter sought clarification on why the identification criteria has changed from that recently resolved in the partially operative RPS.

Heritage New Zealand Pouhere Taonga(HNZPT) support the inclusion of historic heritage significance assessment criteria but stated they must be correctly presented while DCC submits reference should be made to the Heritage New Zealand Pouhere Taonga Significance Assessment Guidelines 2019.

78. In response to the DCC concerns, the officer noted that a two-tiered classification system is not a new requirement, but a refinement of the approach set out in the PORPS 2019. That RPS requires the identification of historic heritage of regional and national significance. The officer also drew our attention to the s32 evaluation report[3] stating that there will be an increase in cost for the territorial authorities, but that cost will be lower than the status quo for district councils that have not undertaken a plan review. For those councils that have already undertaken a plan review she, noted that while there will be additional costs, it is not anticipated that their plans will be reviewed ahead of a 10-year planning cycle response to the HCV-HH chapter.

79. The officer recommended rejecting the DCC submission and that of Trojan and Wayfare to delete clauses (1) and (2), which she advised are important for retaining the two-tiered classification approach, as APP8 does not provide the distinction between the special or outstanding. The officer also recommended rejection of the Ngāi Tahu ki Murihiku submission as it lacked clarity.

80. In response to the Federated Farmers submission questioning the rationale for change in approach from the PORPS 2019, the s42A author report referred to the s32 report at paragraph 665, which states:

> *The PORPS 2019 provisions related to historic values have been implemented through various district planning processes, which has highlighted issues with the direction related to areas of "regional or national significance" and the ability of councils to apply a consistent approach to identifying and managing historic heritage.*

81. No change was recommended in response to this submission. However, she did agree that reference to, and consistency with, the guidelines in APP 8 was appropriate and recommended some minor amendments accordingly. Further changes were made to APP8 in her supplementary report, so that the two types of historic heritage can be distinguished, which will enable the application of the effects management hierarchy in HCV-HH-P5.

82. In relation to the listed criteria in APP8, the officer agreed that the terms 'Aesthetic, Social, Spiritual and Traditional' are not included in the definition of section 2 of the RMA, but considered the use of these criteria "*a key component of a holistic, pragmatic and consistent approach to managing historic heritage in Otago, to best achieve the outcomes expressed in HH-HCV-O3*". With respect to geological heritage, she felt this was more appropriately managed in the NFL chapter.

83. The Panel largely agrees with the evidence of Mr Freeland for the DCC on this matter. He addressed the two-tiered approach at length in his evidence.[4] In his opinion, the cost associated with the two-tiered approach is unnecessary as District Plans currently manage all historic heritage in the same way, regardless of perceived historic importance, by a site-

[3] *Table 60, page 185*
[4] *EIC of Paul Freeland, paragraphs 78-84*

specific protection approach. In his opinion, there is "*little demonstrable advantage to protecting historic places by way of a two-tier classification as this will generally mean that the protection measures for some places are either generalised or reduced in comparison to others. The practise of managing heritage values requires an understanding of what makes the place significant and site-specific protection measures are considered to be the most effective way of identifying and protecting parts of the place that demonstrate these values".*

84. He expanded on the cost issue at the hearing, highlighting how significant it would be to confirm the categorisation in the context of the reassessment of approximately 760 existing heritage schedule items in the Dunedin City District Plan. Mr Freeland suggested an amendment to APP8 to address his concern which would only require two categories of historic heritage to be identified if the District Council chose an approach that treats them differently.

85. Mr Freeland's concerns with respect to the PORPS approach aligns with the experience of the Panel members. We agree with him that there is no demonstrable advantage of such an approach over the current approach adopted in most District Plans around the country. The Panel has reviewed the Section 32 Report on this issue and found it lacking on both these fronts. That Report does not seem to acknowledge, let alone quantify, the significant cost local authorities would be burdened with under this two-tiered approach.

86. While there is obviously a cost involved in identifying historic resources for inclusion in district plans, that cost increases dramatically if the actual historical significance of the resource must then be assessed. The officers reply report[5] referred to the 2020 report of Jeremy Moyle, an Archaeologist with Origin Consultants Ltd (the 'Origin Report') , which reviewed the approach taken by other councils to classifying historic heritage, but did not make any further comment on the findings. We have reviewed the Origin Report and note that it assessed the approach of 10 other councils to identifying geographic criteria (i.e. regionally or nationally important as opposed to 'significant or outstanding' as proposed here) and found that only three of them took that approach. While one of them was an Otago district council (being the Queenstown Lakes District Council), the other two were large urban authorities, being Auckland and Wellington City. Most other district plans, particularly smaller rural authorities, schedule heritage items and then use the resource consent process to manage effects on the item. Hence, the significance of the resource does not need to be determined as a part of the scheduling process - significance only needs to be addressed if it is likely that a development proposal may see a loss of these items, or their values. This approach also enables a framework that can permit activities where they will not affect the item or its values.

87. We cannot see how the two-tiered approach would change that or lead to an improvement in heritage protection. All it will do is impose a significant cost burden on local authorities, a cost that will be very difficult to bear for a number of Otago's smaller rural authorities. Under the current system, the cost of that assessment falls on those who will benefit from the proposal that may affect the item, not the general ratepayer.

88. We note that the Origin Report states that the current approach of the partially operative RPS 2019, which requires the identification of items of regional or national significance, would be "expected to be quite resource extensive" (page 6, 3rd paragraph). Yet we see little difference in the cost of what is proposed here, which is essentially Option C in that report, adopting the HNZPT approach to categorising historic heritage. The work involved in assessing historic heritage for 'special and outstanding' values is likely to be the same as assessing them for

[5] *paragraph 84*

'regional or national significance'. The obligations under the Heritage New Zealand Pouhere Taonga Act 2014, and the associated processes, fall on HNZPT, not local authorities. As a rule, we do not consider it appropriate that legislation, or the processes in it, that are specifically designed for a Crown Entity should apply to other organisations, that operate under different legislation and where resource funding is much more limited.

89. We agree that the incorporation of a list of criteria and a process to enable the assessment of significance will ensure that there is consistency across Otago. However, we consider the current approach to heritage management within district plans as outlined by Mr Freeland to be a far more efficient approach in managing activities that may impact on heritage.

90. However, that does not stop councils from adopting a two-tiered approach if they so wish. That is likely to come down to a funding issue.

91. We were not entirely comfortable with Mr Freeland's drafting solution to the problem, which relates to APP8. We suspect that this was perhaps related to a scope issue, but we note that Trojan and Wayfare provide the scope to remove the two-tiered reference in policy. The DCC submission, however, does allow consequential amendments to link the significance criteria and assessment method under APP8 to the resource consent process.

92. Turning to the criteria themselves, the Panel has some sympathy for the submission of Alluvium and Stoney Creek, and Danny Walker and others who sought the removal of the Aesthetic, Social, Spiritual and Traditional criteria. The basis for this request is that these terms are not included in the definition 'historic heritage' in the RMA. They also rightly note that the Heritage New Zealand Pouhere Taonga Significance Assessment Guidelines were based on the criteria which HNZPT are required to consider under the Heritage New Zealand Pouhere Taonga Act and do not consider it appropriate to use these criteria in an RMA context without comprehensive analysis of the implications of doing so.

93. On the other hand, Mr Mawdsley, the DCC Heritage advisor (in contrast to Mr Freeland as noted in the reply report), noted at the hearing that the criteria listed in APP8 are linked to the definition of historic heritage in the RMA. He also advised that similar criteria are used in the 2GP, and while the criteria may be phrased differently, the concepts remain the same.

94. While we could not find the similar criteria in the DCC 2GP, we tend to agree, for the most part, with Mr Mawdsley that the concepts encapsulated in the proposed criteria do reflect the definition of historic heritage in the RMA. While the criteria have specific meaning for 'cultural significance or value' and list 'Social, Spiritual and Traditional' values separately, with their own definitions, we consider these four criteria essentially form part of the wider reference to 'cultural' in the RMA definition of historic heritage. That definition begins with the chapeau "*means those natural and physical resources that* ***contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities…"*** (Panel's emphasis). We accept that 'Social, Spiritual and Traditional' values are cultural qualities that will contribute to '*an understanding and appreciation of New Zealand's history and cultures*'.

95. Where we have some difficulty, however, is with the 'aesthetic' value listed in the criteria. That criterion is:

> *The place has, or includes, aesthetic qualities that are considered to be especially pleasing, particularly beautiful, or overwhelming to the senses, eliciting an emotional response. These qualities are demonstrably valued, either by an*

existing community or the general public, to the extent that they could be expected to experience a sense of loss if the qualities which evoke the aesthetic value were no longer there.

96. The Panel considers this criterion to be out of place in a list of historic heritage criterion. It is more reflective of amenity or landscape values, as opposed to heritage values. The difficulty arises with the breath of what it can cover, being any 'place'. We note the examples included in the Heritage New Zealand Pouhere Taonga Significance Assessment Guideline include the following:

> *The bush-clad, sheltered coastal environment of* ***Meretoto/Ship Cove****, Tōtaranui/Queen Charlotte Sound (Category 1, List No. 9900) has not changed markedly since the late 18th century. Early reservation of the site and a consequent lack of development preserved the scenic qualities warmly appreciated by James Cook and his fellow voyagers. Thickly clustered trees surrounding the cove that spill down to the water's edge, and the regenerated forest on the now predator-free Motuara Island, provide a safe home for the numerous bird species whose music enchanted Joseph Banks in 1770. The positive sensory experience created by the trees, birds, water and topography in concert are reminders of why Meretoto/Ship Cove became Cook's favourite New Zealand anchorage*[6]

97. Because there is no reference in the definition to the 'place' needing to have a historical connection, while the Meretoto/Ship Cove 'place' clearly has historical significance and has a HNZPT listing, if it did not so, the definition of the 'aesthetic' value could still enable its listing as a 'historic heritage' site. That is because it would most likely meet the 'especially pleasing, particularly beautiful' criteria and is likely to be valued by the community. Much like the requested inclusion of a 'geological' value criterion, which the officer suggested was more of a 'natural feature' under s.6(b), sites that are 'especially pleasing, particularly beautiful' are more appropriately dealt with through landscape provisions.

98. As a consequence, we accept the submission of Alluvium and Stoney Creek, and Danny Walker and others in part and recommend the removal of the 'Aesthetic' criteria. Sites such as Meretoto/Ship Cove would still get identified under the 'historic' criteria, while buildings could get identified under the 'architectural' or 'historic' criteria. Those buildings that are not 'historic' as such, but that may be aesthetically pleasing and contribute to character of an area, can be addressed in a number of different ways by councils, if they so choose. For example, the DCC's 2GP identifies 'Character Contributing' buildings and requires consideration of townscape values in its policy provisions.

6.5.2. Recommendation

99. Amend HCV-HH-P4 as follows:

HCV-HH-P4 – Identifying historic heritage

Identify the places and areas of historic heritage in Otago in accordance with APP8. ~~and categorise them as:~~

~~*(1) places and areas with special or outstanding historic heritage values or qualities, or*~~

[6] *Page 14, Heritage New Zealand Pouhere Taonga Significance Assessment Guidelines*

~~(2) places and areas with historic heritage values or qualities.~~

100. Amend APP8 as follows:

APP8 – Identification criteria for places and areas of historic heritage

1. Identifying Areas and Places with Historic Heritage

A place or area is considered to have historic heritage if it meets any one or more of the criteria below:[7]

~~**Aesthetic**~~	~~The place has, or includes, aesthetic qualities that are considered to be especially pleasing, particularly beautiful, or overwhelming to the senses, eliciting an emotional response. These qualities are demonstrably valued, either by an existing community or the general public, to the extent that they could be expected to experience a sense of loss if the qualities which evoke the aesthetic value were no longer there.~~
	….

~~The significance of areas and places with *historic heritage* will be assessed having regard to the following criteria:~~

2. Identification of Special or Outstanding Heritage Values or Qualities

Where, for example, in a resource consent or notice of requirement process, a place or an area that has been identified as having historic heritage values or qualities, and is required to be assessed to determine whether those values or qualities are special or outstanding, that assessment must:

(1) utilise the following criteria:

(a) the extent to which the place reflects important or representative aspects of Otago or New Zealand history,

(b) the association of the place with events, persons, or ideas of importance in Otago or New Zealand history,

(c) the potential of the place to provide knowledge of Otago or New Zealand history,

(d) the importance of the place to takata whenua,

(e) the community association with, or public esteem for, the place,

(f) the potential of the place for public education,

(g) the technical accomplishment, value, or design of the place,

(h) the symbolic or commemorative value of the place,

(i) the importance of identifying historic places known to date from an early period of Otago's or New Zealand's settlement,

(j) the importance of identifying rare types of historic places, and

[7] *The identification criteria in APP8 follows O'Brian, R and Barnes-Wylie J, Guidelines for Assessing Historic Places and Historic Areas for the New Zealand Heritage List/Rārangi Kōrero (2019) which has been adopted by Heritage New Zealand Pouhere Taonga as its Significance Assessment Guidelines (00123.003 Heritage New Zealand Pouhere Taonga, 00139.239 DCC), with the exception that the 'Aesthetic value' has been removed this criterion.*

(k) the extent to which the place forms part of a wider historical and cultural area, and

(2) apply the method set out in “Part Two: Applying the section 66(3) criteria” of Assessing Historic Places and Historic Areas for the New Zealand Heritage List/Rārangi Kōrero (2019).

101. Amend HCV-HH-PR2 – Principal reasons

HCV-HH-PR2 – Principal reasons

Otago is a region rich in historic heritage, with a diversity of significant cultural and historic heritage places and areas that contribute to its special character and identity. Historic heritage encompasses historic sites, structures, places, and areas; archaeological sites; sites of significance to Māori (including wāhi tapu and wāhi taoka sites) and the broader surroundings and landscape in which they are situated. The heritage resources in Otago are reflective of the history that helped to shape the region, and is representative of the different cultures, industries and institutions that contributed to its development. Historic landscapes in the coastal environment are specifically recognised in Policy 17 of the NZCPS.

The provisions in this chapter assist in implementing section 6(f) of the RMA ~~1991~~ and the NZCPS by requiring:

- the identification of places and areas with historic heritage values and qualities ~~and places and areas with special or outstanding historic heritage values and qualities~~ using clear criteria ~~and methodology~~ that is regionally consistent. Where these resources need to be assessed to determine if they have special or outstanding values and qualities, regionally consistent criteria and methodology is to be followed.

...

6.6. HCV-HH-P5 – Managing Historic Heritage

6.6.1. Discussion

102. As notified, HCV-HH-P5 reads:

HCV-HH-P5 – Managing historic heritage

Protect *historic heritage* by:

(1) requiring the use of accidental discovery protocols,

(2) avoiding adverse *effects* on areas or places with special or outstanding *historic heritage* values or qualities,

(3) avoiding significant adverse *effects* on areas or places with *historic heritage* values or qualities,

(4) avoiding, as the first priority, other adverse *effects* on areas or places with *historic heritage* values or qualities,

(5) where adverse *effects* demonstrably cannot be completely avoided, remedying or mitigating them, and

(6) recognising that for *infrastructure*, EIT-INF-P13 applies instead of HCV-HH-P5(1) to (5).

103. There were 22 submissions on HCV-HH-P5, with only three (CODC, Meridian, and QLDC) seeking retention of it as notified. The remaining submissions sought a range of amendments including clarity on its effect, particularly around clause 4 and 5 and the accidental discovery protocols.

104. The Director General of Conservation sought amendments to enable consistency with their submission on HCV-HH-P4 while they also sought that clause 2 be amended to ensure there is no conflict with Policy HCV-HH-P7. Kāi Tahu ki Otago sought amendments to establish a clear hierarchy of effects management while Federated Farmers also sought changes to it.

105. Other submitters sought amendments to recognise infrastructure, in particular regionally and nationally significant infrastructure while the DCC submitted that there may be other projects (not just infrastructure) where significant positive effects may be 'worth' the loss of some historic heritage'. However, they considered the policy too onerous to allow for this. Oceana Gold and Toitū Te Whenua had similar concerns. Alluvium and Stoney Creek, and Danny Walker and others sought the deletion of clauses (2) and (3) for similar reasons, while Trojan and Wayfare sought the deletion of clause (2). Graymont sought amendments to ensure that existing activities can continue.

106. In the initial s42A report, the officer agreed with DoC that including a link to Policy HCV-HH-P7 (adaptive reuse and upgrade) is a clear way of providing for the integration of historic heritage values into new activities. However, she did not agree with submitters seeking what she termed a *"more enabling effects management hierarchy"* on the basis that *"Section 6 of the RMA provides clear guidance that historic heritage must be protected from inappropriate use, development or subdivision as a matter of national importance"*. She adopted a similar position in relation to the infrastructure submitters. In reference to sites or features that have special or outstanding historic heritage values, she recommended a strong policy position of avoiding adverse effects.

107. The officer adopted a similar position in relation to submissions seeking to weaken the avoidance approach and those seeking a pathway to either avoid, remedy or mitigate adverse effects. In relation to existing activities, she referred to section 10 of the RMA which provides protection for such activities. In her reply report, the officer did restructure the clauses related to other historic heritage, so it was clearer how the provisions worked.

108. In our discussion on Objective HCV-HH-O3 we noted that s.6(f) does not envisage absolute protection of historic heritage, but rather protection from "*inappropriate subdivision, use, and development*." As a consequence of the DCC submission, we included the s.6(f) qualifier in the objective.

109. In relation to the request by QLDC for its inclusion in the policy, the officer did acknowledge that s.6(f) was qualified but she did not accept the Queenstown Airport submission to incorporate this reference into the chapeau of the policy. The officer held the position that for special or outstanding historic heritage values, a strong policy position of avoiding adverse effects must be retained and that this should also be the first preference in relation to other historic heritage sites or features. She stated that:

"Upholding the proposed effects management hierarchy is integral for achieving HCV-HH-O2, and it is my view that suggested amendments to provide carve outs or exemptions for particular types of activities (including infrastructure that is not nationally or regionally significant) would erode the strong policy position presented in HCV-HH-P5 for managing historic heritage. Where there is a functional need for a particular activity to occur at a site, the activity must be managed in accordance with the policy, where there are options provided to mitigate or remedy some types of effects."

110. The difficulty the Panel has with the officer's position is that the policy is very directive, effectively requiring all adverse effects to be avoided (although we acknowledge the 'watering down' of this approach for 'other' historic heritage in the reply report), with little recognition, let alone a pathway, for activities that may be considered 'appropriate'. As we noted earlier in this decision, historic heritage resources are largely human made physical resources, often located in built up urban areas, as opposed to naturally occurring features such as landscapes.

111. As a consequence, there are significant challenges around maintaining historic heritage, particularly when it comes to built heritage. Heritage buildings are often not fit for modern day purposes so can become rundown and unsafe. An example of ensuring the ongoing viability of such buildings was raised with us by the Telecommunications submitters. They sought recognition of the fact *"that infrastructure service connections to heritage buildings support their ongoing use and therefore protection and upkeep"*.

112. However, their planning witness, Mr Horne, had significant concerns with HCV-HH-P5 (leaving aside the potential solution through the EI chapter) as service connections may fall foul of the 'avoid' approach, despite supporting the viability and ongoing use of such buildings. He stated that:[8]

'Given that district plans (as lower order planning documents) must give effect to the relevant Regional Policy Statement ("RPS") under the RMA, an "avoid" directive in the RPS may lead to outcomes such as non-complying activity status in district plans and/or notification. It also increases the risk that applications such as the Auckland Council City-Wide consent example be declined. In my opinion this may lead to unintended consequences and could make it difficult for telecommunications network operators to provide service connections to scheduled heritage buildings/buildings in heritage precincts, which would not be supporting their ongoing protection and use."

113. While infrastructure is dealt with in the EIT chapter, we agree with Mr Horne and think the issue is wider than just the provision of modern service infrastructure. Earthquake strengthening, firefighting capacity, and other modern health and safety requirements (including the install of lifts and restricted mobility access) may also fall foul of such a policy. Making such improvements to a building would not be 'inappropriate' in our view.

114. Such buildings may also be located in strategically important areas of a city. Mr Freeland addressed this issue in his evidence advising that this policy could have stopped the new Dunedin hospital because of the existence of historic heritage on its site.

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[8] EIC, Chris Horner paragraph 4.14

115. Ms Hunter, for Oceana Gold, drew our attention to another circumstance where human made historic heritage resources can constrain activities with significant public benefit, this time in the rural environment. She highlighted *"the long-standing nature of the mining activity within the Macraes"*, advising that there a number of historic mining sites within the Macraes Mining operation area that could be affected by the operation. When these situations arise, she advised that:

> *"OceanaGold seeks, where practicable, to adopt measures such as the removal of significant artefacts, remediation and/or enhancement of other historic areas and features as part of its overall and ongoing site management."*

116. The Graymont submission raised a similar issue, advising that their Makareao Plant and Quarry Site is classified as a Category 1 Historic Place, which provides insight into the history of the lime burning industry. While the site has a specific exclusion area over the quarry and plant that allows for its operations to take place (we assume from Heritage NZ), Graymont are seeking assurance that they can continue to operate, and maintain, develop and upgrade its facilities when necessary.

117. These are examples of activities that could potentially be 'appropriate use and development' which may impact on historic heritage values but are likely to face significant hurdles under the 'avoid' approach of this policy.

118. We also note that the DCC submission referenced policy 13.2.1.7 of their proposed District Plan, which also addresses safety concerns. The DCC sought the inclusion of something similar in the PORPS. That policy adopts an 'avoid unless' approach that would probably not be available under the current PORPS. The Policy reads as follows:

> ***Avoid the <u>demolition</u> of a <u>protected part</u> of a <u>scheduled heritage building</u> or <u>scheduled heritage structure</u>, unless the following criteria are met:***
>
> *a. …*
>
> *i. the <u>building</u> or part of the <u>building</u> poses a significant <u>risk</u> to safety or <u>property</u>; or*
>
> *ii. the <u>demolition</u> is required to allow for significant public benefit that could not otherwise be achieved, and the public benefit outweighs the adverse effects of loss of the <u>building</u>; and*
>
> *b. there is no reasonable alternative to <u>demolition</u>, including repair, <u>adaptive re-use</u>, relocation or stabilising the <u>building</u> for future repair; and*
>
> *c. for <u>buildings</u> and <u>structures</u> located within a heritage precinct:*
>
> *i. development post <u>demolition</u> will maintain or enhance the heritage streetscape character and amenity in accordance with Policy 13.2.3.6; and*
>
> *ii. conditions will be imposed which would give reasonable certainty that this will be completed within an acceptable timeframe.*

119. While we agree with the officer that as a s.6 matter, there should be a strong policy direction to avoid adverse effects on historic heritage, we feel the proposed policy goes too far in that direction and does not make provision for activities that may in fact be appropriate or

necessary. As a consequence, we consider it appropriate to include the s.6(f) qualifier in the chapeau as sought by Queenstown Airport. We have also accepted those submissions that seek recognition of those activities that may provide significant public benefit. Infrastructure is of course one of those activities and how that is treated in these circumstances will also be dealt with in the EI chapter but is also provided for in the exceptions here.

120. With respect to 'other' historic heritage, the Panel considers the 'avoid, remedy, mitigate' test is all that is necessary at an RPS level. The resource consent process will then determine what the appropriate response is in the context of the values being considered i.e. whether adverse effects need to be avoided, remedied or mitigated.

121. This recommended change also requires a consequential amendment to HCV-HH-E2.

6.6.2. Recommendation

122. That Policy HCV-HH-P5 be amended as follows:

HCV-HH-P5 – Managing *historic heritage*

Except as provided for in EIT-INF-P13, protect *historic heritage* from inappropriate subdivision, use and development by:

(1) requiring the use of accidental discovery protocols in accordance with APP11;

(2) avoiding adverse effects on areas or places which have been identified as having special or outstanding *historic heritage* values or qualities, except that in circumstances (a) to (f) below, they are remedied or mitigated to the extent practicable:

(a) where HCV-HH-P6 applies, or

(b) a project has significant public benefit that outweighs the loss of historic heritage; or

(c) the activity has functional or locational constraints and has a significant public benefit; or

(d) the area or place is already impacted by an existing, lawfully established activity; or

(e) there is a significant risk to safety or property; or

(f) any adverse effects are minor and relate to work necessary to adapt a historic heritage building to modern use.

(3) avoiding, remedying or mitigating ~~significant~~ adverse *effects* on other areas or places with *historic heritage* values or qualities.

~~(4) avoiding, as the first priority, other adverse *effects* on areas or places with *historic heritage* values or qualities,~~

~~(5) where adverse *effects* demonstrably cannot be completely avoided, remedying or mitigating them, and~~

~~(6) recognising that for *infrastructure*, EIT–INF–P13 applies instead of HCV–HH–P5(1) to (5).~~

123. Amend HCV-HH-E2 as follows:

> activities do not detract from the region's special character and sense of identity. This also includes ~~the enhancing places and areas of historic heritage by~~ encouraging the ongoing use and adaptive re-use of historic heritage. ~~integration of historic heritage values into new activities and enabling the adaptive reuse or upgrade of historic heritage places~~ in certain circumstances.

6.7. HCV-HH-P6 – Enhancing historic heritage and HCV-HH-P7 – Integration of historic heritage

6.7.1. Introduction

124. The s42A report addresses HCV-HH-P6 at section 13.6.7 and HCV-HH-P7 at section 13.6.8. We deal with them together as they relate to similar issues and at least two submitters have suggested that they are combined because of that.

125. As notified, HCV-HH-P6 and HCV-HH-P7 read as follows:

> **HCV–HH–P6 – Enhancing *historic heritage***
>
> Enhance places and areas of *historic heritage* wherever possible through the implementation of plan provisions, decisions on applications for *resource consent* and notices of requirement and non-regulatory methods.
>
> **HCV-HH-P7 – Integration of historic heritage**
>
> Maintain historic heritage values through the integration of historic heritage values into new activities and the adaptive reuse or upgrade of historic heritage places and areas.

126. Nine submissions were received on HCV-HH-P6 and six on HCV-HH-P7. CODC and QLDC sought HCV-HH-P6 be retained as notified while QLDC and the Waitaki DC sought HCV-HH-P7 be retained as notified. Kāi Tahu ki Otago also supported the direction of HCV-HH-P6 but submitted that HCV-HH-P7 could be amalgamated with it.

127. A number of submitters noted that it is not always possible or cost efficient to 'enhance' historic heritage as required by HCV-HH-P6 and sought amendments to include a qualifier (such as 'where practicable' and 'where reasonable). Manawa raised similar issues with the 'integration' required by HCV-HH-P7. The DCC sought clarity on what is meant by 'enhance' in the context of HCV-HH-P6 and recommended replacement wording focusing on encouraging maintenance and adaptive reuse. On the basis of their replacement wording, they submitted that HCV-HH-P7 could be deleted. Graymont sought a qualifier to HCV-HH-P6 to ensure existing activities can continue. Federated Farmers sought clarity regarding 'adaptive reuse or upgrade' within HCV-HH-P7 believing it should specifically refer to 'built' areas.

128. In relation to those submissions requesting that 'enhancement' be qualified in HCV-HH-P6, the officer considered the policy would be weakened. She had similar concerns in relation to the changes proposed to HCV-HH-P7. However, in response to the EIC of Ms Styles, on behalf of Manawa Energy, she agreed that 'where possible' HCV-HH-P6 sets a high bar. However, she was reluctant to accept 'where practicable' as in her opinion *"that allows for consideration of*

other factors, including cost implications of complying with the required provisions which could result in an environmental outcome (in this case, for historic heritage) that is at odds with the objectives (HCV-HH-O3)". As a consequence, she suggested the phrase "to the greatest extent practicable" as this would place the "onus on the resource user to demonstrate or show that the policy has been appropriately provided for."

129. The officer had similar concerns in relation to the changes proposed to HCV-HH-P7 and did not believe it needed clarification or amendment. She noted the proposed cross reference to HCV-HH-P7 in clause (2) of HCV-HH-P5, which she stated in her reply report *"effectively provides an exemption to meeting the requirement to avoid adverse effects on sites and places with outstanding or special historic heritage values or qualities*".

130. The officer was also unclear from the Federated Farmers submission on what the risks and/or benefits were of linking integration in HCV-HH-P7 to 'built' heritage only. She therefore recommended that the submission be rejected because it is unclear how this would improve the provision.

131. In the Panel's view, the two policies are essentially addressing the maintenance and enhancement components of 'protecting' heritage values through its ongoing use. In our view 'integration' in this context is a part of that ongoing, adaptive re-use of the resource. The goal is that the resource is maintained or enhanced (improved) and we agree that only one policy is required.

132. We accept that it is not always possible to incorporate or re-use historic heritage in developments so agree with the submitters that the words 'encourage' and 'practicable' should be used in this context. As a consequence, we have used 'as far as reasonably practicable'. We do not consider reference to the implementation of plan provisions, resource consents and notices or requirements is required in the policy. This is more appropriately addressed in the methods.

133. This recommended change also requires a consequential amendment to HCV-HH-E2, P2 and AER5.

6.7.2. Recommendation

134. Delete both HCV-HH-P6 and HCV-HH-P7 and replace with the following:

> **HCV-HH-P6A – Maintenance or enhancement of *historic heritage***
>
> Encourage the ongoing use and adaptive re-use of *historic heritage* in a way that, as far as reasonably practicable, maintains or enhances the identified heritage values.

135. Amend HCV-HH-E2 – Explanation as follows:

> The policies in this section are designed to ensure that Otago's unique historic heritage continues to contribute to the region's character, sense of identity, and social and economic well-being by requiring places and areas of significant historic heritage to be identified using regionally consistent methodology, then protecting or managing those sites or areas ~~in particular ways~~ to ensure that ~~other~~ activities do not detract from the region's special character and sense of identity. This also includes ~~the enhancing places and areas of historic heritage by~~ encouraging the ongoing use and adaptive re-use of historic heritage ~~integration of historic heritage~~

~~values into new activities and enabling the adaptive reuse or upgrade of historic heritage places~~ in certain circumstances.

136. Amend HCV-HH-PR2 – Principal reasons as follows:

> Otago is a region rich in historic heritage, with a diversity of significant cultural and historic heritage places and areas that contribute to its special character and identity. Historic heritage encompasses historic sites, structures, places, and areas; archaeological sites; sites of significance to Māori (including wāhi tapu and wāhi taoka <u>sites</u>) and the broader surroundings and landscape in which they are situated. The heritage resources in Otago are reflective of the history that helped to shape the region, and is representative of the different cultures, industries and institutions that contributed to its development. Historic landscapes in the coastal environment are specifically recognised in Policy 17 of the NZCPS.
>
> The provisions in this chapter assist in implementing section 6(f) of the RMA ~~1991~~ and the NZCPS by requiring:
>
> ...
>
> - the protection of historic heritage from inappropriate subdivision, use and development,
> - the <u>maintenance and</u> enhancement of historic heritage through <u>encouraging its ongoing use and adaptive re-use</u> ~~the integration~~ of historic heritage values into new activities and enabling the adaptive reuse or upgrade of historic heritage places and areas in certain circumstances, and
> - specified actions on the part of Otago's local authorities in managing historic heritage.

137. Amend HCV-HH-AER5 as follows:

> **HCV–HH–AER5** Otago's existing built *historic heritage* is maintained <u>and</u> enhanced ~~and integrated~~ through efficient use, or adaptive reuse, where appropriate.

6.8. HCV-HH-M4 – Regional Plans and HCV-HH-M5 – District Plans

6.8.1. Introduction

138. There were three submissions on HCV-HH-M4, with Waka Kotahi seeking it be retained as notified. Toitū Te Whenua seeks to amend the provision to include any 'other soil disturbance' as a sub-clause to clause (2). Kāi Tahu ki Otago supports the provision with amendments to enable Kāi Tahu to exercise their kaitiaki role be identifying historic heritage values for mana whenua in accordance with HCV-HH-P4.

139. The officer was unclear on why the reference to 'other soil disturbance' was necessary given no reasons were provided. Hence, she recommended rejection of that submission. However, she agreed with the addition of a new clause requested by Kāi Tahu as this would ensure consistency with HCV-WT – Wāhi tupuna.

140. Ten submissions were received on HCV-HH-M5, with three seeking its retention as notified. Gerald Carter, and Waitaki Whitestone Geopark Trust reiterate their concerns from earlier submissions that geological heritage is absent from the RPS as a whole, and that this is to be addressed.

141. DCC seeks amendments to address the fact that the location or presence of historic heritage is not always known, while Horticulture NZ s sought amendments to include further direction for the implementation of buffers or setbacks. Both Kāi Tahu ki Otago and Toitū Te Whenua requested the same amendments as they did to HCV-HH-M6.

142. The officer adopted the same position in relation to the Kāi Tahu ki Otago and Toitū Te Whenua submission as for HCV-HH-M6. In response to the Horticulture NZ submission, she did not consider further direction on this matter necessary and considered the requested amendments to be inconsistent with the effects management hierarchy. While she considered the submission of DCC appear to be pragmatic suggestion, she considered the structure of the provision should mean that known and unknown site are automatically considered.

143. In relation to HCV-HH-M4, we agree with the officer that it is unclear why a reference to 'other soil disturbance' is needed or in fact what it would cover. The definition of 'earthworks' is reasonably comprehensive so without any reasoning behind the request, we agree with the officer to reject this submission.

144. We also agree that it is appropriate, and consistent with the wāhi tupuna provisions, to add a new clause sought by Kāi Tahu to both methods.

145. With respect to HCV-HH-M5, while we acknowledge the issue raised by Toitū Te Whenua, we agree with the officer that the benefits of promoting public awareness of *historic heritage* values will outweigh the risk of any perverse outcomes. We also agree that the DCC amendment is not necessary, as the list is not exhaustive, and councils can offer whatever other financial incentives they with.

146. We are slightly confused over the submissions from Gerald Carter and Waitaki Whitestone Geopark Trust, who request '*historic'* be removed from clause (2). Their submission had identified the provision being "*(2) rates relief and resource consent fee waivers for activities that involve the retention of* ***historic heritage places or areas***". (Our emphasis). The notified provision does not include the word 'heritage' – it refers to 'historic places or areas' only. Deleting the word 'historic' would simply leave the phrase 'places and areas'. Deleting 'historic' would not be appropriate as a consequence. We assume here that the officer's comment that the existing reference is consistent with the RMA and New Zealand Planning Standards is because 'historic places and areas' are part of the definition of historic heritage in those documents.

6.8.2. Recommendation

147. We recommend HCV-HH-M4 and HCV-HH-M5 be amended to include the following

> (2A) <u>enable Kāi Tahu to identify places and areas with historic heritage values for mana whenua in accordance with HCV-HH-P4 that are located outside the beds of lakes and rivers, wetlands and the coastal marine.</u>

6.9. HCV-HH-M6 – Incentives and education

6.9.1. Introduction

148. As notified, HCV-HH-M6 reads:

HCV-HH-M6 – Incentives and education

Local authorities are encouraged to use other mechanisms or incentives to assist in achieving Policies HCV-HH-P3 to HCV-HH-P7, including:

(1) promoting public awareness of *historic heritage* values through providing information and education, and

(2) rates differentials and *resource consent* fee waivers for activities that involve the retention of *historic heritage* places or areas.

149. There were seven submissions on HCV-HH-M6, with two seeking that it be retained as notified. Toitū Te Whenua submitted that releasing information to the public regarding historical and cultural sites may result in perverse outcomes, such as the destruction or vandalism of those sites. There is no explicit amendment sought.

150. Gerald Carter, and Waitaki Whitestone Geopark Trust seek to replace the term 'historic' with 'heritage' while DCC seeks to amend the policy to include other 'economic instruments' as a means of broadening the scope of the policy. Kāi Tahu ki Otago, sought an amendment to include a clause specific to Kāi Tahu regarding interpretation of historic heritage values for mana whenua.

151. The officer accepted the Kai Tahu submission as they consistent with the direction set out in the MW and HCV-WT chapter while recommended rejection of the replacing the 'historic' terms as it is consistent the RMA and New Zealand Planning Standards. In relation to the DCC submission, she agrees that the list of mechanisms or incentives to assist in achieving Policies HCV-HH-P3 to HCV-HH-P7 is non-exhaustive and does not prevent councils from utilising other economic incentives or instruments. However, she considered the amendments sought by DCC to be unclear, and do not improve the meaning or application of the method.

152. In relation to the identification and recording of sites and places of historic heritage, she considered this to be an important step in being able to appropriately manage activities in and near these sites. In her view, the benefit of this outweighs the risk of any perverse outcomes.

153. While the Panel acknowledges the issue raised by Toitū Te Whenua, we agree with the officer that the benefits of promoting public awareness of *historic heritage* values will outweigh the risk of any perverse outcomes. We also agree that the DCC amendment is not necessary, as the list is not exhaustive, and councils can offer whatever other financial incentives they with. The submission of Kāi Tahu ki Otago is accepted for the reasons previously given.

154. We are slightly confused over the submissions from Gerald Carter and Waitaki Whitestone Geopark Trust, who request '*historic'* be removed from clause (2). Their submission had identified the provision being "*(2) rates relief and resource consent fee waivers for activities that involve the retention of* ***historic heritage places or areas****".* (Our emphasis). The notified provision does not include the word 'heritage' – it refers to 'historic places or areas' only. Deleting the word 'historic' would simply leave the phrase 'places and areas'. Deleting 'historic' would not be appropriate as a consequence. We assume here that the officer's

comments that the existing reference is consistent with the RMA and New Zealand Planning Standards is because 'historic places and areas' are part of the definition of historic heritage in those documents.

6.9.2. Recommendation

155. Amend HCV-HH-M6 as follows:

HCV-HH-M6 – Incentives and education

Local authorities are encouraged to use other mechanisms or incentives to assist in achieving Policies HCV-HH-P3 to HCV-HH-P7, including:

(1) promoting public awareness of *historic heritage* values through providing information and education, and

(2) rates differentials and *resource consent* fee waivers for activities that involve the retention of *historic heritage* places or areas.

(3) <u>enabling Kāi Tahu to interpret places and areas with historic heritage values for mana whenua.</u>

6.10. HCV-HH-E2 – Explanation

6.10.1. Discussion

156. As notified, HCV-HH-E2 reads:

HCV-HH-E2 – Explanation

The policies in this section are designed to ensure that Otago's unique historic heritage continues to contribute to the region's character, sense of identity, and social and economic well-being by requiring places and areas of significant historic heritage to be identified using regionally consistent methodology, then protecting or managing those sites or areas in particular ways to ensure that other activities do not detract from the region's special character and sense of identity. This also includes enhancing places and areas of historic heritage by encouraging the integration of historic heritage values into new activities and enabling the adaptive reuse or upgrade of historic heritage places in certain circumstances.

157. There were two submissions on this section, QLDC seeking its retention as notified and Kāi Tahu ki Otago seeks several amendments for the purpose of readability.

158. The officer considered that some of the amendments suggested by Kāi Tahu ki Otago generally improve the explanation, although she felt it appropriate to retain "in certain circumstances" on the basis that integration of historic heritage and adaptive reuse or upgrade is not applicable to all circumstances.

159. We agree with officer's position in relation to Kai Tahu's submission while we have also made consequential changes to HCV-HH-E2 in recognition of our changes to HCV-HH-P6 and HCV-HH-P7.

6.10.2. Recommendation

160. Amend HCV-HH-E2 as follows:

HCV-HH-E2 – Explanation

The policies in this section are designed to ensure that Otago's unique historic heritage continues to contribute to the region's character, sense of identity, and social and economic well-being by requiring places and areas of significant historic heritage to be identified using regionally consistent methodology, then protecting or managing those sites or areas ~~in particular ways~~ to ensure that ~~other~~ activities do not detract from the region's special character and sense of identity. This also includes ~~the enhancing places and areas of historic heritage by~~ encouraging the ongoing use and adaptive re-use of historic heritage. ~~integration of historic heritage values into new activities and enabling the adaptive reuse or upgrade of historic heritage places~~ in certain circumstances.

6.11. HCV-HH-PR2 – Principal reasons

6.11.1. Discussion

161. As notified, HCV-HH-PR2 reads:

HCV-HH-PR2 – Principal reasons

Otago is a region rich in *historic heritage*, with a diversity of significant cultural and *historic heritage* places and areas that contribute to its special character and identity. *Historic heritage* encompasses historic sites, *structures*, places, and areas; archaeological sites; sites of significance to Māori (including wāhi tapu and wāhi taoka) and the broader surroundings and landscape in which they are situated. The heritage resources in Otago are reflective of the history that helped to shape the region, and is representative of the different cultures, industries and institutions that contributed to its development. Historic landscapes in the coastal *environment* are specifically recognised in Policy 17 of the NZCPS.

The provisions in this chapter assist in implementing section 6(f) of the RMA 1991 and the NZCPS by requiring:

- the identification of places and areas with *historic heritage* values and qualities and places and areas with special or outstanding *historic heritage* values and qualities using clear criteria and methodology that is regionally consistent,
- the protection of *historic heritage* from inappropriate *subdivision*, use and development,
- the enhancement of *historic heritage* through the integration of *historic heritage* values into new activities and enabling the adaptive reuse or upgrade of *historic heritage* places and areas in certain circumstances, and
- specified actions on the part of Otago's *local authorities* in managing *historic heritage*.

- Implementation of the provisions in this chapter will occur primarily through *regional* and *district plan* provisions, however *local authorities* may also choose to adopt additional non-regulatory methods to support the achievement of the objectives.

162. There were five submissions on HCV-HH-PR2 with QLDC seeking its retention as notified. Gerald Carter, and Waitaki Whitestone Geopark Trust again sought reference geological sites while Manawa also sought consistency with their earlier submission, on the 'integration' approach. Kāi Tahu ki Otago also sought consistency in the use of wāhi tupuna.

163. The officer dealt with the submission on geological sites as she did in the preceding sections. She also did not agree with the Manawa amendments given her recommendations in relation to policy HCV-HH-P7. With respect to the Kai Tahu submission, she agreed the addition of the word 'site' provide additional certainty but noted that the identification and management of effects on wāhi tupuna is set out in the HCV-WT chapter and felt that including it within the HCV-HH chapter may create some uncertainty or confusion about which provisions prevail.

164. We agree with the officer's position in respect to the Kai Tahu, Gerald Carter, and Waitaki Whitestone Geopark Trust submissions. We have, however, made consequently amendments to HCV-HH-PR2 as the result of our previous recommendations.

6.11.2. Recommendation

165. Amend HCV-HH-PR2 as follows:

HCV-HH-PR2 – Principal reasons

Otago is a region rich in historic heritage, with a diversity of significant cultural and historic heritage places and areas that contribute to its special character and identity. Historic heritage encompasses historic sites, structures, places, and areas; archaeological sites; sites of significance to Māori (including wāhi tapu and wāhi taoka sites) and the broader surroundings and landscape in which they are situated. The heritage resources in Otago are reflective of the history that helped to shape the region, and is representative of the different cultures, industries and institutions that contributed to its development. Historic landscapes in the coastal environment are specifically recognised in Policy 17 of the NZCPS.

The provisions in this chapter assist in implementing section 6(f) of the RMA ~~1991~~ and the NZCPS by requiring:

- the identification of places and areas with historic heritage values and qualities ~~and places and areas with special or outstanding historic heritage values and qualities~~ using clear criteria ~~and methodology~~ that is regionally consistent and providing for the assessing of special or outstanding values and qualities with a regionally consistent criteria and methodology where this is required.

- the protection of historic heritage from inappropriate subdivision, use and development,

- the maintenance and enhancement of historic heritage through encouraging its ongoing use and adaptive re-use the integration of historic heritage values

into new activities and enabling the adaptive reuse or upgrade of historic heritage places and areas in certain circumstances, and

- specified actions on the part of Otago's local authorities in managing historic heritage.
- Implementation of the provisions in this chapter will occur primarily through regional plans and district plan provisions, however local authorities may also choose to adopt additional non-regulatory methods to support the achievement of the objectives.

6.12. HCV-HH-AER5

6.12.1. Discussion

166. As notified, HCV-HH-AER5 reads:

> **HCV-HH-AER5**
>
> Otago's existing built *historic heritage* is maintained, enhanced and integrated through efficient use, or adaptive reuse, where appropriate.

167. There is one submission for HCV-HH-AER5, with QLDC seeking that it is retained as notified.

6.12.2. Recommendation

168. Due to the removal of Policy HCV-HH- P7, consequential amendments are required. It is therefore recommended that HCV-HH-AER3 be amended as follows:

> **HCV-HH-AER5**
>
> Otago's existing built *historic heritage* is maintained and enhanced ~~and integrated~~ through efficient use, or adaptive reuse, where appropriate.

Section 13: Natural features and landscapes (NFL)

1. Introduction

1. This section of the decision report assesses the provisions of the pORPS which establish the planning framework for the management of natural features and landscapes within the Otago region. The Otago region contains many natural features and landscapes which are valued for a number of reasons, including their cultural and social importance and their role in supporting domestic and international tourism. These areas are also often rural working landscapes.

2. Section 6(b) of the RMA requires the protection of the outstanding examples of these natural features and landscapes from inappropriate subdivision, use and development. Some territorial authorities have also used two section 7 matters of the Act: (s7(c*) the maintenance and enhancement of amenity values*, and s7(f) *the maintenance and enhancement of the quality of the environment*, to provide a further level of landscape protection in planning documents.

3. Approximately 200 submission points have been received on the NFL provisions which address a number of themes and seek specific amendments to the provisions. In addressing these submissions, we are indebted to the efforts of the Section 42A report writer, Mr Andrew Maclennan. He identified a number of common topics across the provisions which have guided the preparation of his report. We have essentially used the format of his report as the basis for our decision report, although in some instances we have taken the grouping of the provisions a step further given the interconnectedness of many of the issues in play. As a consequence, not all of the provision related sections of Mr Maclennan's report appear in this document.

4. We would like to take this opportunity to express our gratitude to Mr Maclennan for his willingness to consult and engage with the parties throughout the process. This has led to many of the issues being resolved.

2. General themes

5. Prior to dealing with the specific provisions of the NFL provisions of the pORPS, the s42A report dealt with two general themes as follows:

   - The relationship of the NFL provisions with other chapters of the pORPS, and
   - Natural features and landscapes and Kāi Tahu cultural values

6. We consider there to be a third 'general theme' or issue that needs to be addressed up front, that being the mandatory requirement for the identification and maintenance and enhancement of *highly valued natural features and landscapes.* We address this first, before going on to address the two other general matters listed above.

7. Mr Maclennan also dealt with a number of definitions, but these are dealt with either in the context of the issue or elsewhere in the recommendation documents.

2.1 Highly Valued Natural Features and Landscapes

2.1.1 Discussion

8. The NFL provisions of the pORPS not only address the obligation of local authorities under section 6(b) of the Act to protect outstanding examples of natural features and landscapes, but they also provide a mandatory direction in relation to other features that do not meet the threshold for 'outstanding' but are considered 'highly valued' (referred to as 'HVNFL' here). The notified Objective NFL-O1 requires these areas and their values to be identified. Policy NFL-P3 then requires their maintenance or enhancement, as follows:

   NFL–P3 – Maintenance of highly valued natural features and landscapes

   Maintain or enhance highly valued natural features and landscapes by:

   (1) avoiding significant adverse effects on the values of the natural feature or landscape, and

   (2) avoiding, remedying or mitigating other adverse effects.

9. While there was some support for this approach, a number of concerns were expressed with how the pORPS dealt with such landscapes, while a number of submitters requested that these provisions be deleted altogether.

10. The submission of Meridian and Rayonier Matariki Forests highlighted the fact that there is no directive in the RMA to identify and manage highly valued natural features and landscapes and sought the deletion of the provisions. Similarly, Network Waitaki, Contact, PowerNet, and Oceana Gold requested deletion of the relevant provisions on the basis that the policy NFL-P3 goes beyond the requirements of Part 2 of the RMA and they asserted the pORPS does little to distinguish between HVNFLs and ONFs/ONLs. Port Otago raised similar concerns. Several other submitters requested removal of HVNFL's as those provisions are unlikely to be required in the replacement RMA legislation. Harbour Fish also opposed the relevant policy and sought its deletion (although no reasons were provided).

11. In response to those submitters who requested HVNFL provisions be deleted, the s42A report drew our attention to Sections 7(c) and (f) of the RMA, which require decision makers to have 'particular regard' to the maintenance and enhancement of amenity values and the quality of the environment. The report went on to say that:

    > "It has been common practice throughout New Zealand to identify "visual amenity landscapes" or in the case of the pORPS "highly valued natural features and landscapes" as these areas contribute to the overall amenity and environmental quality of an area and the adverse effects on these locations is appropriate to manage"

    And

    > "In order to ensure the pORPS achieves Sections 7(c) and (f) of the RMA, I consider it is appropriate to include provisions relating to HVNFLs".

12. In response to the Panel's questioning in relation to the requirements of s7(c) and (f), Mr Maclennan acknowledged that these sections do not make it mandatory to identify such landscapes and that there are other methods available to plan makers to address such issues. However, in his reply report Mr Maclennan continued to support retention of the HVNFLs, reiterating that it is common practice throughout New Zealand to identify such landscapes. Notably, he did soften his initial stance that HVNFLs would 'ensure' achievement of s7(c) and (f) to advising that they 'contribute' to giving effect to those sections.

2.1.2 Recommendation

13. That Policy NFL-P3 and all references to highly valued natural features and landscapes be deleted from the pORPS.

2.1.3 Reasons

14. As a number of submitters note, there is no directive in the Act that HVNFLs be identified in order to 'have particular regard to' the features referred to in s.7(c) and (f) of the Act. The Environment Court case referred to in Mr Anderson's opening submissions, *Upper Clutha Environmental Society Incorporated v Queenstown Lakes District Council* [2019] NZEnvC 205, does not address this issue directly. It deals with a district plan that has taken that approach, but it cannot be read as determining that such an approach is mandatory in relation to s.7 matters.

15. While the Panel acknowledges that HVNFLs may assist in local authorities addressing s.7 matters, we are not convinced that a mandatory regional direction is appropriate or necessary in relation to an issue that sits more comfortably with local communities to determine. Such a mandatory requirement cannot be justified merely on the basis that many local authorities may do this already. The Panel is aware of many that do not, including the Clutha District Council, in the Otago region.

16. The maintenance and enhancement of amenity values and environmental quality encompasses values wider than just landscape quality and can be achieved by a range of methods. Such measures include controls on density, building design and location, and nuisance type emissions including noise, odour and glare. In many rural districts (or rural zones), the landscape element of these values is often addressed by policy provisions that seek to maintain or enhance rural character and open space values.

17. While some Councils do use amenity landscape overlays, we are conscious of the fact that this approach tends to impact on rural communities the most. In Otago many of these communities already operate in s.6 landscapes, within the restrictions that imposes. We heard significant evidence from representatives of many of those rural communities on the large number of challenges they currently face. Section 7 landscape restrictions come at a cost, which benefits the wider community, not the landowner. While Mr Maclennan noted that "*there is generally an expectation that there is a greater ability to modify land use patterns and activities over time when compared to ONLs or ONFs"* within HVNFLs, the concerns of many of the submitters was that the proposed provisions do not reflect that.

18. It is our experience that the values that lead to the identification of s.6 outstanding landscapes and features are generally commonly held. However, the values below this threshold are generally more subjective as is the understanding of what maintenance means in this context. It is the experience of the Panel members that many of these HVNFL landscapes essentially

get treated the same as s.6 landscapes when it comes to the resource consent process. We do not consider this appropriate or warranted.

19. In our view, the costs of this planning restriction outweigh the benefits at a regional level. We believe it is more appropriate for local communities to determine how they have regard to s.7(c) and (f) in their planning documents. That may include identifying landscape overlays like those proposed here but it need not be mandatory at the regional level.

20. In coming to this conclusion, we were also swayed by the heavy body of evidence presented to us by the REG's (and others) which highlighted the enormous task this country faces if it is to seriously address the climate change issue. To decarbonise our economy in line with central government's statutory goal of net carbon zero by 2050 will require massive investment in renewable energy generation and transmission. Many of the physical attributes necessary to achieve that in Otago are, or are likely to be, located within s.6 environments, which significantly curtails the potential for such developments. This potential for conflict led to Meridian seeking the inclusion of a new policy to direct how natural features and landscapes are to be maintained and enhanced while also providing for renewable electricity generation. This is a very real issue confronting Otago (and the country) now and into the future. Further mandatory landscape restrictions do not seem sensible in this context.

21. As a consequence, we recommend the removal of all references to HVNFLs from the pORPS.

2.2 The relationship of NFL provisions with the CE chapter and Policy NFL-P6

2.2.1 Introduction

22. Mr Maclennan advised in his s42A report[1] that "the approach taken to the management of outstanding and highly valued natural features and landscapes in the pORPS is to largely separate the management of these areas between the NFL chapter and the CE chapters. The objective in the NFL chapter applies to the coastal environment, however policy NFL-P6 specifies that natural features and landscapes in the coastal environment are managed by CE-P6. The CE chapter also includes provisions which set out the management of natural features, landscapes and seascapes."

23. As notified, NFL-P6 reads:

> **NFL–P6 – Coastal features and landscapes**
>
> Natural features and landscapes located within the coastal environment are managed by CE–P6 and implementation of CE–P6 also contributes to achieving NFL–O1.

24. There were several submissions seeking clarification of the relationship between the two chapters. A number of these submitters sought amendments to integrate the management of natural features, landscapes and seascapes in the coastal environment into the NFL chapter while several submitters requested deletion of Policy NFL-P6.

25. Mr MacLennan's original position in his s42A Report was that no changes were necessary. However, in his supplementary evidence and opening statement he recommended a number

[1] S42A Report, paragraph 14

of changes to the policy suite to clarify that certain policies did not apply within the coastal environment. Further amendments were made in his closing to include an 'advice note' at the start of the chapter that confirms the provisions do not apply to the coastal environment, with the subsequent removal of the references he had recommended earlier. He did, however, consider it appropriate that NFL-P6 remain even though it is only a cross reference policy. He did not consider coastal icons were necessary given the cross referencing proposed.

2.2.2 Recommendation

26. Delete Policy NFL-P6 and insert the following advice note at the beginning of the NFL chapter:

> **Advice note:** pursuant to CE-P1 the provisions within this chapter do not apply in the coastal environment.

2.2.3 Reasons

27. We agree that the NFL provisions should not apply to the coastal environment given the application of the NZCPS to that geographic area. The PORPS provisions relating to natural features and landscapes in the coastal environment do not necessarily align with the provisions for the landward side of the coastal boundary. The advice note clarifies that. However, we do not see any purpose in retaining NFL-P6. With the introduction of the advice note, that policy becomes superfluous.

2.3 The relationship of NFL provisions with EIT chapter

2.3.1 Introduction

28. There were also several submitters seeking greater clarity regarding the relationship between the EIT and NFL provisions to ensure the functional and/or operational needs of infrastructure are recognised. Mr Maclennan agreed with these concerns and initially recommended that a new policy be inserted into the NFL chapter that essentially cross referenced the management of infrastructure in these environments to EIT-INF-P13. After the pre-hearing meeting, Mr Maclennan refined his recommendation in his supplementary evidence by incorporating the amendment into Policy NFL-P2.

2.3.2 Recommendation

29. Amend NFL-P2 as follows:

> **NFL-P2 – Protection of outstanding natural features and landscapes**
>
> Protect outstanding natural features and landscapes by:
>
> ….
> managing the adverse effects of infrastructure on the values of outstanding natural features and landscapes in accordance with EIT-INF-P13.

2.3.3 Reasons

30. We agree with and adopt the final position of the S42A Report author because it is in line with the overall approach of the PORPS that all energy and infrastructure matters are dealt with in the EIT chapter.

2.4 Natural features and landscapes and Kāi Tahu cultural values

2.4.1 Introduction

31. The pORPS requires local authorities to collaborate with Kāi Tahu to identify and map outstanding and highly valued natural features and landscapes and the identification criteria in APP9 includes, as an associative attribute, cultural and spiritual values for Kāi Tahu. However, both Ngāi Tahu ki Murihiku and Te Rūnanga o Ngāi Tahu sought amendments to the NFL chapter to better reflect the relationship between natural features and landscapes and the values of Kāi Tahu. Mr Maclennan responded to these submissions by recommending the addition of the following to NFL-M1:

    2A) collaborate with Kāi Tahu to identify the areas, values, and capacity of outstanding natural features and landscapes, and highly valued natural features and landscapes of significance for Kāi Tahu in accordance with NFL-P1,

32. In his reply report, Mr Maclennan accepted (for the most part) the evidence of Mr Bathgate to amend the new method proposed to better reflect a tikaka-based approach to landscape identification and description. However, he did not agree with Mr Bathgate that a new policy was necessary in the NFL section to ensure use of native reserves and Māori land was not restricted by these provisions as this was managed by MW-P4 and MW-P5.

2.4.2 Recommendation

33. That NFL-M1 is amended as follows:

    NFL-M1 – Identification

    Territorial authorities must:

    […]

    (2A) collaborate with Kāi Tahu to identify the areas, values, and capacity of natural features and landscapes of significance for Kāi Tahu in accordance with tikaka, and record and apply appropriate management responses as determined by *mana whenua*,

34. That MW-P4 is amended to read:

    MW-P4 – Sustainable use of ~~Māori land~~ Native Reserves and Māori land

    Kāi Tahu are able to ~~protect,~~ develop and use *land* and resources within native reserves and Māori *land* ~~held under Te Ture Whenua Māori Act 1993~~, including within *land* affected by an ONFL, in accordance with mātauraka and tikaka…

35. That MW-M5 is amended to read:

    MW-M5 – Regional plans and district plans

    Local authorities must amend their regional plans and district plans to:

    ….

(2) provide for the use of native reserves and *Māori land*, ~~held under Te Ture Whenua Māori Act 1993~~ including within land affected by an ONFL's overlay in accordance with MW-P4, and recognise Kāi Tahu rakatirataka over this *land* by enabling *mana whenua* to lead approaches to manage any adverse *effects* of such use on the *environment*,

2.4.3 Reasons

36. We agree that there is the potential for conflict when providing for customary uses of outstanding natural features and landscapes and accept Mr MacLennan's position that a new policy is not necessarily needed in the NFL section to address the issue. The approach of the MW chapter provides explicit direction to enable the use of Māori land for some described purposes in accordance with mātauraka and tikaka. However, we do think it appropriate to note in both the policy and method he refers to that this customary use is also enabled on land that may be affected by a ONFL overlay's (along with other similar overlays) to avoid any doubt.

37. We also agree with Mr Maclennan that the phrase 'of significance for Kāi Tahu' in the new method proposed, which Mr Bathgate sought to remove, be retained as we think the reference to 'outstanding' is not necessary in this context as the focus of these provisions is on landscapes "of significance to Kāi Tahu", not outstanding landscapes in the usual s6(b) context.

3. Specific Provisions

3.2 NFL-O1 – Outstanding and highly valued natural features and landscapes

3.2.1 Introduction

38. As notified, NFL-O1 reads:

NFL–O1 – Outstanding and highly valued natural features and landscapes

The areas and values of Otago's outstanding and *highly valued natural features and landscapes* are identified, and the use and development of Otago's *natural and physical resources* results in:

(1) the protection of outstanding natural features and landscapes, and

(2) the maintenance or enhancement of highly valued natural features and landscapes.

39. Only three submitters support NFL-O1 as notified. As discussed above, the Panel recommends that the reference to highly valued natural features and landscapes is removed from the pORPS and left as a matter for territorial authorities to address if they deem necessary. In relation to the remainder of the Objective, a number of submitters raised a concern with the unqualified nature of the protection proposed, given s.6(b) is qualified in that protection is only from "inappropriate subdivision, use and development".

40. Other changes requested included Kāi Tahu ki Otago seeking the addition of a 'restoration' limb to the objective to provide support for Policy NFL-P4, while Beef + Lamb and DINZ sought the term "protection" be replaced with "sustainment". Otago Rock Lobster sought to be

involved in the identification of outstanding seascapes so that the interests of the fisheries industry are recognised.

41. The initial position of the s42A report author was to recommend that Objective NFL-O1(1) remained unchanged on the basis that it clearly sets out the outcomes sought and "is appropriate for the nuanced approach to managing effects on outstanding and highly valued natural features and landscapes to be captured in the policies that implement the objective." Mr Maclennan did not consider replacing the term "protection" with "sustainment" would align with s 6(b) of the RMA.

42. However, he changed his position in his opening statement at the hearing and recommended that the objective be reframed to better align with the qualifying language of s6(b) of the Act.[2]

43. The restoration issue was addressed in his supplementary evidence, following discussions at the pre-hearing meeting with Kāi Tahu ki Otago. Mr Maclennan reconsidered his position and felt it was appropriate that the objective should prescribe the outcome that is sought to be achieved by the policies, in this case Policy NFL-P4.

44. However, that stance changed again in response to the evidence presented on behalf of Darby Planning LP & Others, Mt Cardrona Station, Oceana Gold OGL and Glenpanel Limited Partnership, who sought deletion of the reference to restoration given difficulties with interpretation and implementation. His final recommendation was to delete the restoration limb, largely on the basis that the protection concept can incorporate restoration, so it does not need to be directly mentioned in the objective. He also highlighted the interpretation issues raised by Mr Brown and Mr Ferguson.[3]

45. Mr Maclennan also addressed Mr Devlin's request to 'enable appropriate use and development' in such landscapes in his reply report, which he did not recommend on the basis that the intention of the chapter is not to 'enable' development[4].

3.2.2 Recommendation

46. That Objective NFL-O1 be amended as follows:

NFL-O1 – Outstanding ~~and highly valued~~ natural features and landscapes

The areas and values of Otago's outstanding ~~and *highly valued*~~ *natural features and landscapes* are identified, and the use and development of Otago's *natural and physical resources* results in~~:~~

~~(1)~~ the protection of them ~~outstanding natural features and landscapes,~~ from inappropriate *subdivision*, use and development. ~~and~~

(2) the maintenance or enhancement of highly valued natural features and landscapes.

47. Delete NFL-P4 as follows:

---

[2] Opening Statement, Mr MacLennan, paragraph 10.
[3] NFL Reply report, Section 4.
[4] Ibid, paragraph 31

~~NFL–P4 – Restoration~~

~~Promote restoration of the areas and values of outstanding and *highly valued natural features and landscapes* where those areas or values have been reduced or lost.~~

3.2.3 Reasons

48. With the exception of the issue relating to HVNFLs, the Panel is in agreement with Mr MacLennan's final position in relation to Objective NFL-O1(1). We agree that 'sustainment' is not the appropriate word given the use of 'protection' in s.6(b) (which we discuss in the legal issues chapter), and that protection in this instance is qualified in that section of the Act.

49. We also agree that 'restoration' should not be referred to in the objective. While we consider that 'restoration' can be a component of the 'protection', we do not think it necessary for an RPS to specifically promote 'restoration' in this context. We agree with the Ravensdown submission that the identification of a landscape or feature as outstanding in the first place should indicate that restoration is not required. As a consequence, we have deleted NFL-P4 as requested by Ravensdown. Having said that, there is nothing stopping territorial authorities from addressing this issue in their plans if they consider it warranted in certain circumstances. We imagine those circumstances to generally be in the context of decision-making in respect of resource consent applications in such areas.

50. With regard to Mr Devlin's request to enable 'appropriate use and development', while we understand his point, we do not think it necessary or appropriate for a regional policy statement to extend this far. How 'protection' of outstanding values is to be achieved is a matter best left to District Councils in the context of their particular circumstances.

3.3 Identification of outstanding and highly valued natural features and landscapes - NFL-P1, NFL and APP9

3.3.1 Introduction

51. As notified, NFL-P1 reads:

NFL–P1 – Identification

In order to manage outstanding and *highly valued natural features and landscapes*, identify:

(1) the areas and values of outstanding and *highly valued natural features and landscapes* in accordance with APP9, and

(2) the capacity of those natural features and landscapes to accommodate use or development while protecting the values that contribute to the natural feature and landscape being considered outstanding or highly valued.

52. The associated method is NFL-M1 which reads as follows:

NFL–M1 – Identification

Territorial authorities must:

(1) include in their *district plans* a map or maps and a statement of the values of the areas of outstanding and *highly valued natural features and landscapes* in accordance with NFL–P1,

(2) include in their *district plans* a statement of the capacity of outstanding and *highly valued natural features and landscapes* to accommodate change in use and development without their values being materially compromised or lost, in accordance with NFL–P1,

(3) recognise that natural features and landscapes may span jurisdictional boundaries and work together, including with the Regional Council, to identify areas under (1) to ensure that the identification of natural features and landscapes are treated uniformly across district boundaries, and

(4) prioritise identification under (1) in areas that are likely to contain outstanding natural features or landscapes and are likely to face development or growth pressure over the life of this RPS.

53. APP9 sets out the criteria for identifying the areas and values of outstanding and highly valued natural features, landscapes and seascapes. The criteria are categorised into physical attributes, sensory attributes and associative attributes.

54. CODC and QLDC support the approach in the policy, while Harbour Fish requests that it be deleted altogether. A number of submitters raised concerns with the directive to identify 'capacity' for development within such landscapes, in particular the cost, resources and time required to reliably identify such capacity. Other submitters were concerned with the potential extent of such landscapes, highlighting the need to ensure that the ONLs are restricted to only those areas that are truly outstanding (with the emphasis on 'natural landscapes'). Others requested the recognition of existing activities along with the potential for new activities within these areas.

55. Manawa Energy and the Telecommunications Companies, along with a number of other submitters, sought that the policy and APP9 be updated to reflect national best practice guidance, being the New Zealand Institute of Landscape Architects Te Tangi a te Manu – Aotearoa New Zealand Landscape Assessment guidelines. Two submitters supported the retention of APP9 as notified while a number of other submitters requested specific recognition of recreation and amenity values, including those associated with waterbodies. Concern was also raised by many that no threshold for what is significant has been provided while others noted that there is ongoing development in the understanding of natural features, landscapes and seascapes and as such, the criteria will develop over time.

56. The need for consultation with affected stakeholders (including the fishing sector) and landowners in the identification process was also a regular theme in the submissions. ECan sought an amendment to clause (3) of NFL-M1 to require consultation with neighbouring local authorities in identifying outstanding and highly valued natural features and landscapes that span across jurisdictional boundaries while Toitū Te Whenua suggested this be extended to central government agencies such as LINZ. Several submitters requested that mapping be required, with some submitters requesting that this occur at regional level, while Otago Rock Lobster noted that mapping is problematic in the coastal environment and instead supports a marine strategy and non-statutory measures.

57. In his initial s42A report, Mr Maclennan was of the view that the notified criteria encompass the NZILA guidelines and reflect current practice. He highlighted the fact that "the NZILA

Guidelines (2021) emphasise landscape assessment methods should take a reasoned approach based on transparency and explanation rather than prescriptive or standardised methods." As a consequence, he did not consider it appropriate to elaborate on how landscape assessments, and the associated capacity issue, should be undertaken as that may depend on a number of variables and should be left to expert advice. In this context, he was unclear what relief Manawa Energy sought to ensure the policy wording reflects best practice. He also drew our attention to a number of Environment Court cases that addressed the issue of "natural" versus "modified".

58. However, through his supplementary and reply evidence, he accepted that the provisions were not fully aligned with best practice and recommended that APP9 be amended to fully reflect Te Tangi a te Manu as the most recent best practice for landscape assessment. In relation to whether an amendment is required to the methods to ensure territorial authorities are not required to re-map existing areas of ONF/L or HVNFL, his view was that the new criteria will only take effect when new identification of ONF/L is required. He also supported replacing 'Tāngata whenua' with 'Mana whenua' within (l), (m), (n), and (o), as suggested by Ms Bartlett for Kai Tahu.

59. In relation to how decisions are made regarding the thresholds to determine if a landscape or feature is outstanding or highly valued, he reiterated that there is no rigid or defined set of thresholds or a checklist that can be adopted and the best practice guidance recommends that methods for determining if a landscape is to be identified or not, are best left to expert assessment and opinion.

60. Mr Maclennan also addressed the issue of capacity further in his supplementary evidence and recommended that the word 'accommodate' be changed to 'absorb' to be consistent with the change he recommended to NFL-P2(1). He considered this change would protect such areas by shifting the focus to avoiding development which cannot be absorbed while also providing for the additional use of such landscapes once their capacity is understood. However, he changed his position again in response Mr Ferguson's evidence, accepting that undertaking an identification of landscape capacity for all ONF/L is an onerous task which may not be justified in all circumstances. As a consequence, his final recommendation was to remove subsection (2) of the policy. He also promoted some refinements to the policy, while also recommending an amendment to NFL-M1 that only requires capacity assessment in areas likely to face development or growth pressure.

61. With respect to the consultation issue, he highlighted Method NFL-M1, which requires territorial authorities to include such areas on the district plan maps. As this is a public process under Schedule 1 of the RMA, he considered it unnecessary to include this requirement in the pORPS. He took a similar approach with the provision for existing or new activities. Again, he considered that such matters are best determined through the district plan change process.

62. In response to ECan's request for amendments to clause (3), he agreed that the method should recognise the potential for features and landscapes to cross regional boundaries and ensure there is consistency in identification. However, it was not clear to him how extending the method to capture central government agencies as suggested by Toitū Te Whenua would influence the identification of features and landscapes.

63. In relation to the mapping issues raised, Mr Maclennan highlighted the approach directed by APP9 and NFL-M1 which he considered made it "clear that consent applicants are not required to undertake the region-wide mapping and that local authorities will manage the identification and management of outstanding and highly valued features and landscapes

across jurisdictional boundaries." He did not consider that a marine strategy and non-statutory measures alone to be sufficient to meet the requirements of Part 2 of the RMA.

3.3.2 Recommendation

64. That APP9 be deleted and that identification of such features and landscapes be undertaken through reference to the full document from which the list in APP9 is taken, being "Te Tangi a te Manu: Aotearoa New Zealand Landscape Assessment Guidelines', Tuia Pito Ora New Zealand Institute of Landscape Architects, July 2022."

65. That Policy NFL-P1 and Method NFL-M1 be amended, in respect of the provisions considered in this chapter, as follows:

NFL–P1 – Identification

~~In order to manage~~ Identify the areas and values of outstanding ~~and *highly valued*~~ *natural features and landscapes*~~, identify:~~

~~(1) the areas and values of outstanding and *highly valued natural features and*~~ in accordance with ~~APP9, and~~ Te Tangi a te Manu: Aotearoa New Zealand Landscape Assessment Guidelines', Tuia Pito Ora New Zealand Institute of Landscape Architects, July 2022

~~(2)~~ the capacity of those natural features and landscapes to accommodate use or development while protecting the values that contribute to the natural feature and landscape being considered outstanding or highly valued.

NFL-M1 – Identification

Territorial authorities must:

…

(2) in areas likely to face development or growth pressure, include in their *district plans* a statement of the capacity of outstanding ~~and *highly valued*~~ *natural features and landscapes* to accommodate use or development while protecting the values that contribute to the natural feature and landscape being considered outstanding, ~~or maintaining the values that contribute to the natural feature and landscape being highly valued change in use and development without their values being materially compromised or lost, in accordance with NFL-P1~~,

(3) recognise that natural features and landscapes may span jurisdictional boundaries and work together, including with the Regional Council and adjoining Regional Councils, to identify areas under (1) to ensure that the identification of outstanding natural features and landscapes are treated uniformly across district boundaries and, where appropriate, regional boundaries, and…

3.3.3 Reasons

66. Turning first to APP9, the Panel accepts that if identification criteria are to be included in the pORPS, then it should be the most up to date criteria available. However, having reviewed the list of 'identification criteria' finally recommended to us, we share the concern raised by the submitters that it appears to lack a threshold where it can be determined whether a landscape is outstanding or not. The 'identification criteria' would appear to us as merely a list of all

things one might find in the landscape we see around us (for example, 'food and wine that reflect a locale') and some we may possibly not (for example, 'wayfinding and mental maps'). The Te Tangi a te Manu guideline itself seems to confirm this. The 'identification criteria' are found (with great difficulty) at section 4.29 of that guideline, with the preface that "[t]he following lists illustrate typical factors often considered under the three dimensions." The 'three dimensions' referred to are identified at section 4.10 as being:

a. physical: the physical environment—its collective natural and built components and processes,
b. associative: the meanings and values we associate with places; and
c. perceptual: how we perceive and experience places.

67. What the three dimensions mean is discussed at section 4.22 of guideline. Footnote 68 of that discussion, in reference to the terms chosen, states that "[t]he Guidelines settled on 'physical, associative, and perceptual' while recognising that those terms are not perfect or definitive. They represent an abstraction of the variety and complexity of relationships between people and place." The list at section 4.29 (reflected in the recommended APP9) provides a finer level of detail of the factors that **'are often considered'** under the three dimensions.

68. Critically, at section 4.31 Te Tangi a te Manu goes on to say:

> To reiterate, while factor lists are useful reminders, they are not a formula: factors straddle dimensions (e.g. 'naturalness' results from the interplay of physical, associative, and perceptual dimensions) not every factor is relevant everywhere factors that are not listed may be relevant the relative weight given to a factor depends on context assessing and interpreting such factors (and the conclusions and recommendations that flow from them) is a matter of professional judgement—as with all matters of professional judgement, explanation and reasons are key.

69. Given the flavour of the discussion in the guideline itself, we struggle to understand how merely listing what are referred to as 'factors' (as opposed to identification criteria) in the pORPS, without the relevant context, assists local authorities to identify ONL/Fs. We note that the guideline itself states at section 1.08 that it is "to be read as a whole' and that parts should not be taken out of context. Section 1.09 states that "[t]he intent of the Guidelines is to set out a coherent framework of concepts, principles, and approaches that can be tailored to suit each assessment's purpose and context. Promotion of such flexibility is not to be misconstrued as 'anything goes': on the contrary, the approach promoted by these Guidelines demands that practitioners understand what they are doing, and why, and that they explain it in a transparent and reasoned way."

70. Clause 1.04 highlights the fact that the guideline adopts "**a principles-based approach** to methodology that allows for assessment methods to be tailored to each situation. They emphasise transparency and reason, **rather than adherence to prescriptive methods.** Such methods are unsuitable because of the need to interpret the different types of information and values (objective and subjective) inherent in landscapes, and the different purposes for which landscape assessments are carried out. Crucially, the flexibility of a principles-based approach also provides the flexibility necessary for practice to continue to evolve." (Our emphasis).

71. In this context, we question the value of APP 9 as recommended. We are mindful that this is not a new area of resource management and that a considerable body of case law has been

developed in relation to s6(b) matters. As a consequence of that, we are of the view that the pORPS does not need to be too directive or detailed on this matter. (Indeed, one could question the need to address the matter at all in an RPS given it is a section 6 matter.) In our opinion, the most appropriate approach is to remove APP9 and for the pORPS to merely refer to the guideline as the appropriate tool to utilise when assessing landscapes and natural features in their particular context or setting.

72. The question of scope arises with this approach. We did consider the suggestion of some submitters to include a threshold to determine 'outstanding' in APP9 but were not provided with such options by the evidence. The approach adopted retains the recommended criteria in an external document but incorporates the necessary context, as is intended by the guideline itself. We consider this gives effect to the submissions requesting better alignment with the guideline.

73. That reference to Te Tangi a te Manu also needs to recognise the issue raised by the DOC submission, that guidelines are often reviewed so become outdated as time goes by.

74. Subject to the changes we recommend around APP9 and highly valued areas, we are comfortable with where the parties have finally got to in relation to Policy NFL-P1 and Method NFL-M1. We also agree that requiring capacity to be assessed in all circumstances is an onerous task and likely to be unnecessary in most instances, outside of the Queenstown Lakes District at least.

3.4 NFL-P2 – Protection of outstanding natural features and landscapes

3.4.1 Introduction

75. As notified, NFL-P2 reads:

> **NFL–P2 – Protection of outstanding natural features and landscapes**
>
> Protect outstanding natural features and landscapes by:
>
> (1) avoiding adverse *effects* on the values that contribute to the natural feature or landscape being considered outstanding, even if those values are not themselves outstanding, and
>
> (2) avoiding, remedying or mitigating other adverse *effects*.

76. Only two submitters requested that the policy be retained as notified, with a large number of submitters concerned about the unqualified 'avoidance' approach adopted in the policy (particularly in the context of Queenstown, where the majority of the district is ONF or ONL). While framed slightly differently in each case, these submitters generally sought consistency with Section 6(b), which requires protection from inappropriate subdivision, use and development, and that only significant adverse effects are to be avoided.

77. One submitter sought clarification regarding what is meant by "value" in the context of contributing to an outstanding natural landscape or outstanding natural feature while another submitter considered that avoiding adverse effects on values, rather than landscapes or features themselves, is not consistent with section 6(b). Other submitters sought recognition for existing and new activities in such areas, exemptions for particular activities and the recognition of functional needs. These submissions are considered within the earlier 'Relationship of NFL provisions to other chapters' discussion.

78. While Mr Maclennan disagreed with submitters who sought the removal of 'avoid' from the policy, he did acknowledge that the scale or significance of adverse effects to be avoided must be considered as must the 'inappropriate subdivision, use, and development' qualifier of s6(b). He recommended "shifting the focus of NFL-P2 to avoiding development which cannot be absorbed by an ONL or ONF will ensure the protection of these areas while also providing for additional use of these areas once the landscape capacity of these areas is understood." His initial approach to these issues was further refined in his reply report after consideration of Mr Brown's[5] and Mr Ferguson's[6] evidence.

79. In response to the concerns of Mr Brass for DOC[7] and Mr Bathgate for Kāi Tahu ki Otago[8] that linking the management of these areas to the capacity to absorb changes could promote a 'maximum permissible harm' approach, Mr Maclennan again reiterated his view that s.6(b) of the Act is not a 'no change' provision and some flexibility to provide for an appropriate level of development within ONF/Ls is required.

80. With respect to the meaning of "value" in this context, Mr Maclennan referred to the proposed NZILA guidelines that state the reasons a landscape is valued – the aspects that are important or special or meaningful. He did not consider the focus on values to be inconsistent with s.6(b) but considered that the recommended amendments would address the concerns of that particular submitter.

3.4.2 Recommendation

81. That Policy NFL-P2 be amended as follows:

NFL-P2 – Protection of outstanding natural features and landscapes

Protect outstanding natural features and landscapes <u>from inappropriate *subdivision*, use and development</u> by:

(1A) avoiding exceeding the landscape capacity of the natural feature or landscape,

(1) <u>maintaining</u> ~~avoiding adverse *effects* on~~ the values that contribute to the natural feature or landscape being considered outstanding, even if those values are not themselves outstanding, ~~and~~

(2) avoiding, remedying or mitigating other adverse *effects*~~.~~<u>, and</u>

(3) managing the adverse *effects* of *infrastructure* on the values of outstanding natural features and landscapes in accordance with EIT-INF-P13.

3.4.3 Reasons

82. The Panel agrees with and adopts the final position of Mr Maclennan because his reasons reflect more closely the Part 2 approach of the RMA.

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[5] Jeff Brown for Mt Cardrona Station, para [3.1] to [3.6]
[6] Chris Ferguson for Darby Planning LP & Others, para [25] to [29]
[7] Murray Brass for DOC, para [232] to [236]
[8] Michael Bathgate for Kāi Tahu ki Otago, para [137] to [139]

3.5 NFL-P5 – Wilding conifers and APP5 – Species prone to wilding conifer spread

3.5.1 Introduction

83. As notified, NFL-P5 reads:

> **NFL–P5 – Wilding conifers**
>
> Reduce the impact of wilding conifers on outstanding and highly valued natural features and landscapes by:
>
> (1) avoiding *afforestation* and *replanting* of *plantation forests* with *wilding conifer* species listed in APP5 within:
>
> (2) areas identified as outstanding natural features or landscapes, and
>
> (3) buffer zones adjacent to outstanding natural features and landscapes where it is necessary to protect the outstanding natural feature or landscape, and
>
> (4) supporting initiatives to control existing *wilding conifers* and limit their further spread.

84. Policy NFL-P5 sets out direction to reduce the impact of wilding conifers on outstanding and highly valued natural features and landscapes by avoiding afforestation and replanting of plantation forests with conifer species within identified outstanding natural features and landscapes in any buffer zones necessary to protect them. Additionally, the policy sets out support for initiatives to control existing wilding conifers. APP5 sets out the species prone to wilding conifer spread.

85. QLDC and WAI Wanaka support the policy and request that it be retained as notified.

86. City Forests Limited seeks that NFL-P5 is amended to acknowledge the existing provisions of the NESPF and the obligations already in place regarding the Wilding Calculator to manage any wilding spread from plantation forests. City Forests Limited also does not support increased buffer zones around ONFs and ONLs beyond those already required by the NESPF without clear scientific evidence of their efficacy.

87. DOC opposes NFL-P5 as its location within the NFL chapter implies that it is only an issue for outstanding natural features and landscape, but DOC observes that wilding conifers can also be problematic for agricultural land use and catchment hydrology. DOC seeks that the policy is relocated to the LF-LS chapter and the content is revisited to address other values that can be impacted.

88. Federated Farmers is concerned about the requirement to avoid planting in buffer zones around ONLs and ONFs as it is uncertain how large the buffer zones will be. Federated Farmers seeks an amendment to remove reference to buffer zones and instead that planting immediately adjacent to outstanding natural features and landscapes is to be avoided.

89. Rayonier and Toitū Te Whenua support in part NFL-P5 but seek that the policy is expanded. Rayonier seeks the inclusion of any forests, shelter belts and amenity plantings, not just plantation forests, and LINZ states that any plantation forests or invasive species, such as lupins, should be prevented from HVNFLs.

90. Waitaki DC seeks NFL-P5 is expanded from just plantation forests to also include carbon forestry. Wayfare also seeks that the policy extends to all wilding tree species and is not restricted to wilding conifers, with all planting of such species to be avoided.

91. Five submissions were received on APP5. Beef + Lamb and DINZ support APP5 and seek it is retained as notified. City Forests Limited, Federated Farmers and QLDC seek amendments to APP5. City Forests Limited seeks that heavy seed species, such as radiata pine, are removed from APP5. Federated Farmers seeks the Appendix is deleted and instead the pORPS provides for local authority plans to specify a list of wilding species prone to spread in their district. QLDC seeks that APP5 is amended to identify the wilding species contained in Rule 34.3 of the proposed Queenstown Lakes District Plan. Finally, DCC seeks that APP5 is reviewed by an ecologist to ensure the species are specific to the Otago context. They also suggest that APP5 could be expanded to include other tree species with significant invasive potential that are not conifers.

3.5.2 Recommendation

92. We recommend that Policy NFL-P5 is deleted in accordance with our recommendation on LF-LS-P16A.

3.6 NFL-M3 – District plans

3.6.1 Introduction

93. As notified, NFL-M3 reads:

> **NFL–M3 – District plans**
>
> *Territorial authorities* must prepare or amend and maintain their *district plans* to:
>
> (1) control the *subdivision*, use and development of *land* and the use of the surface of *water bodies* in order to protect outstanding natural features or landscapes in accordance with NFL–P2, and maintain and enhance highly valued natural features or landscapes in accordance with NFL–P3,
>
> (2) provide for and encourage activities undertaken for the primary purpose of restoring highly valued natural features or landscapes in accordance with NFL–P4, and
>
> (3) manage wilding conifer spread in accordance with NFL–P5.

94. Very few submissions were received on this method, with QLDC seeking that it be retained while the DCC noted that consequential relief may be required to address other submission points. Federated Farmers considered there is some confusion between Regional and District functions particularly in regard to the use of surface water bodies and amendments required accordingly.

95. Mr Maclennan was of the view that NFL-P3(1) correctly captures the roles of territorial authorities in managing activities on the surface of water bodies as set out in section 31 of the RMA.

3.6.2 Recommendation

96. That NFL-M3 be amended as follows:

NFL–M3 – District plans

Territorial authorities must prepare or amend and maintain their district plans to:

(1) control the subdivision, use and development of land and the use of the surface of *water bodies* in order to protect outstanding natural features or landscapes in accordance with NFL–P2, ~~and maintain and enhance highly valued natural features or landscapes in accordance with NFL–P3,~~

(2) provide for and encourage activities undertaken for the primary purpose of restoring highly valued natural features or landscapes in accordance with NFL–P4, and

(3) manage wilding conifer spread in accordance with NFL–P5.

3.6.3 Reasons

97. We agree with Mr Maclennan in relation to s31 of the Act. The changes recommended are merely consequential amendments from other decisions.

3.7 NFL-M4 – Other incentives and mechanisms

3.7.1 Introduction

98. As notified, NFL-M4 reads:

NFL–M4 – Other incentives and mechanisms

Local authorities are encouraged to consider the use of other mechanisms or incentives to assist in achieving the outcomes sought by the policies in this chapter, including:

(1) funding assistance for restoration projects (for example, through the Regional Council's ECO Fund),

(2) purchase of land that forms part of a natural feature or landscape,

(3) development or design guidelines (for example, colour palettes for structures in or on natural features or landscapes),

(4) rates relief for land that is protected due to its status as an outstanding natural feature or landscape,

(5) education and advice,

(6) waiver or reduction of processing fees for activities where the primary purpose is to enhance the values of highly valued natural features or landscapes, and

(7) advocating for a collaborative approach between central and local government to fund and carry out wilding conifer control.

99. Kāi Tahu ki Otago supports the method while Federated Farmers seeks that a funding mechanism specifically for landscape restoration and enhancement in order to achieve NFL-P4. Federated Farmers also consider method NFL-P4 is currently too weak and seeks amendments while QLDC opposes clauses (2), (4) and (6) as they will have disproportionate costs for them as 95% of their District is identified as a natural feature or landscape. QLDC considers that the method sets an unreasonable expectation particularly in relation to land purchase or rates relief mechanisms.

100. Mr Maclennan noted that the current drafting does not reflect any obligation for local authorities to provide funding to achieve the outcomes sought by the pORPS, and already addresses restoration projects. Hence, he did not consider amendments necessary.

3.7.2 Recommendations

101. That NFL-M4 is amended as follows:

NFL–M4 – Other incentives and mechanisms

Local authorities are encouraged to consider the use of other mechanisms or incentives to assist in achieving the outcomes sought by the policies in this chapter, including:

(1) funding assistance for restoration projects (for example, through the Regional Council's ECO Fund),

(2) purchase of land that forms part of a natural feature or landscape,

(3) development or design guidelines (for example, colour palettes for structures in or on natural features or landscapes),

(4) rates relief for land that is protected due to its status as an outstanding natural feature or landscape,

(5) education and advice,

(6) waiver or reduction of processing fees for activities where the primary purpose is to enhance the values of ~~highly valued~~ natural features or landscapes, and

(7) advocating for a collaborative approach between central and local government to fund and carry out wilding conifer control.

3.7.3 Reason

102. We accept Mr MacLennan's reasoning and the only amendment made is to remove the reference to highly valued in (6). While the restoration policy NFL-P4 has been removed, we are comfortable that the method can still refer to 'restoration projects' as that can be seen as a part of protecting landscape values. We are also comfortable that the method can be read to apply to landscapes wider than 'outstanding' examples without a policy basis for 'highly valued' landscapes. The method imposes no obligation, so this is not seen as a bar to widening the scope of the method.

103. While we understand QLDC's concern, we would comment here that the protection of landscape values is for the wider public benefit but is at a cost (generally) to individual landowners. We do not think it is unreasonable that some recompense is considered,

particularly when certain industries that rely on such values (such as tourism) benefit significantly without contributing to that cost.

3.8 NFL-E1 – Explanation

3.8.1 Introduction

104. As notified, NFL-E1 reads:

> **NFL–E1 – Explanation**
>
> The policies in this chapter are designed to require outstanding and *highly valued natural features and landscapes* to be identified using regionally consistent attributes, then managing activities to either protect outstanding natural features and landscapes in accordance with section 6(b) of the RMA 1991 or maintain *highly valued natural features or landscapes* in accordance with section 7 of the RMA 1991. This distinction recognises that these areas have values with differing degrees of significance and that, generally, those classified as 'highly valued' will have greater capacity to accommodate *land* use change and development without values being adversely affected. The policies seek to control the impact of *wilding conifers* which are a particular threat to Otago's natural features and landscapes, in a way that recognises the regulations in the NESPF.

105. QLDC sought the retention of the provision while Federated Farmers was of the view that the provisions of the NFL chapter are not consistent with the explanation and sought amendments accordingly. With the changes recommended to the provisions, Mr Maclennan did not recommend any changes.

3.8.2 Recommendation

106. Amend NFL-E1 as follows:

> **NFL–E1 – Explanation**
>
> The policies in this chapter are designed to require outstanding ~~and *highly valued*~~ *natural features and landscapes* to be identified using regionally consistent attributes, then managing activities to either protect outstanding natural features and landscapes in accordance with section 6(b) of the RMA 1991 ~~or maintain *highly valued natural features or landscapes* in accordance with section 7 of the RMA 1991~~. ~~This distinction recognises that these areas have values with differing degrees of significance and that, generally, those classified as 'highly valued' will have greater capacity to accommodate *land* use change and development without values being adversely affected~~. ~~The policies seek to control the impact of *wilding conifers* which are a particular threat to Otago's natural features and landscapes, in a way that recognises the regulations in the NESPF.~~

3.8.3 Reason

107. The amendments made are consequential to other changes recommended to the provisions.

3.9 NFL-PR1 – Principal reasons

3.9.1 Introduction

108. As notified, NFL-PR1 reads:

NFL–PR1 – Principal reasons

Natural features include resources that are the result of natural processes, particularly those reflecting a particular geology, topography, geomorphology, hydrology, ecology, or other physical attribute that creates a natural feature or combination of natural features. Landscapes include the natural and physical attributes of *land* together with air and *water*, which change over time, and which is made known by people's evolving perceptions and associations. Natural features and landscapes also have significant cultural value to Kāi Tahu. There are many sites of significance across Otago, reflecting the relationship of Kāi Tahu with the *land*, *water,* and sea.

The provisions in this chapter assist in protecting Otago's outstanding and *highly valued natural features and landscapes* by requiring:

- the identification of outstanding and *highly valued natural features and landscapes* using regionally consistent criteria,
- the protection of outstanding natural features and landscapes and maintenance of *highly valued natural features and landscapes*,
- an ongoing reduction in the impact of *wilding conifers* on natural features and landscapes, and
- specified actions on the part of Otago's *local authorities* in managing natural features and landscapes.

Implementation of the provisions in this chapter will occur primarily through *regional* and *district plan* provisions, however *local authorities* may also choose to adopt additional non-regulatory methods to support the achievement of the objectives.

109. Only one submission was received on this provision, with QLDC seeking that it be retained as notified. As a consequence, no analysis was required from Mr MacLennan.

3.9.2 Recommendation

110. Amend the provision as follows:

NFL–PR1 – Principal reasons

Natural features include resources that are the result of natural processes, particularly those reflecting a particular geology, topography, geomorphology, hydrology, ecology, or other physical attribute that creates a natural feature or combination of natural features. Landscapes include the natural and physical attributes of *land* together with air and *water*, which change over time, and which is made known by people's evolving perceptions and associations. Natural features

and landscapes also have significant cultural value to Kāi Tahu. There are many sites of significance across Otago, reflecting the relationship of Kāi Tahu with the *land*, *water,* and sea.

- The provisions in this chapter assist in protecting Otago's outstanding ~~and *highly valued*~~ natural features and landscapes by requiring:
- the identification of outstanding ~~and *highly valued*~~ *natural features and landscapes* using regionally consistent criteria,
- the protection of outstanding natural features and landscapes ~~and maintenance of *highly valued natural features and landscapes*~~,
- an ongoing reduction in the impact of *wilding conifers* on natural features and landscapes, and
- specified actions on the part of Otago's *local authorities* in managing natural features and landscapes.

Implementation of the provisions in this chapter will occur primarily through *regional* and *district plan* provisions, however *local authorities* may also choose to adopt additional non-regulatory methods to support the achievement of the objectives.

3.9.3 Reason

111. The amendments made are consequential to other changes recommended to the provisions.

3.10 Anticipated Environmental Results

3.10.1 Introduction

112. As notified, the NFL-AERs read:

NFL–AER1 The number, type, extent, and distribution of identified outstanding and highly valued natural features and landscapes are maintained over the life of this RPS.

NFL–AER2 The values of outstanding and highly valued natural features and landscapes are not reduced or lost.

NFL–AER3 Within areas identified as outstanding or highly valued natural features or landscapes, the area of land vegetated by wilding conifers is reduced over the life of this RPS.

113. Only one submission was received on these provisions, with QLDC seeking that they be retained as notified. As a consequence, no analysis was required from Mr Maclennan.

3.10.2 Recommendation

114. Amend the provisions as follows:

NFL–AER1 The number, type, extent and distribution of identified outstanding ~~and highly valued~~ natural features and landscapes are maintained over the life of this RPS.

NFL–AER2 The values of outstanding ~~and highly valued~~ natural features and landscapes are not reduced or lost.

NFL–AER3 Within areas identified as outstanding ~~or highly valued~~ natural features or landscapes, the area of land vegetated by wilding conifers is reduced over the life of this RPS.

3.10.3 Reasons

115. The amendments made are consequential to other changes recommended to the provisions.

Section 14: Urban form and development (UFD)

1. Introduction

1. This recommendation report addresses the submissions on Chapter 15 of the PORPS, which deals with Urban Form and Development (UFD). Numerous amendments were proposed, both through the s.42A report and two sets of supplementary evidence by another s.42A writer, and in evidence from submitters. Ms Emily McEwan, planner with Dunedin City Council (DCC), proposed a comprehensive redrafting of the UFD objectives and policies. Numerous other submitters through their evidence also continued to propose changes notwithstanding the s.42A report and supplementary evidence.

2. In addition, several submitters, particularly led by Ms Wharfe for Horticulture NZ, requested that Rural issues to be dealt with in a separate Rural Chapter given that the Otago region is a heavily predominant rural area. Rural matters were further complicated by the National Policy Statement – Highly Productive Land (NPS HPL) coming into force after the s.42A report was prepared. To cap it all off, the reporting officer changed during the process, further complicating matters.

3. Given the extent of the changes sought, it was floated at the hearing by the DCC counsel, Mr Michael Garbett, that a redraft of the chapter should occur. Others agreed that this was necessary while it was also suggested that this should include consideration on the desirability of a standalone rural chapter. Mr Michael Garbett discussed with ORC's advisers the possibility of any redraft process occurring before the ORC final reply, so that submitters would have an opportunity to respond before the Council's final reply. He formally made a request to that effect to the Panel on 14 February 2023.

4. The Panel shared the view that a redraft of Ch 15 was required, and that further consideration should be given to a standalone rural chapter. Minute 7 was issued accordingly, directing the process for this to occur. Ms White's redrafted chapter was circulated to submitters on 31 March 2023, and responses were provided by various parties. Ms White's reply report took into account those responses and was presented on the 23 May 2023.

5. The Panel is indebted to Ms White in this matter. Her redraft substantially improved the clarity of the chapter and helped narrow the issues in contention. Her redrafted chapter was circulated to submitters on 31 March 2023, and responses were provided by various parties. Her reply report addressed the outstanding matters, which she identified as:

    a. The drafting approach taken to the notified UFD chapter and consistency with other chapters

    b. The effect of the NPS-HPL

    c. The appropriate location for the rural-focussed provisions in the UFD chapter

    d. Direction of the urban intensification and urban expansion provisions

    e. Provisions relating to the potential transition of industrial areas

    f. Rural lifestyle development provisions

g. Management of reverse sensitivity effects

h. Regionally significant industry

6. Ms White's reply report also addresses a range of other, more minor matters where changes are recommended. These were addressed in the final section of her report.

7. In the main, we have agreed with Ms White's approach to the issues and as a consequence, our recommendation report essentially follows the issue-by-issue approach of her reply. In doing so, we have had regard to all the submissions and evidence received, along with the following reports and evidence provided in relation to this topic, being:

   a. The Section 42A Hearing Report, Chapter 15: UFD – Urban form and development, prepared by Kyle Balderston (27 April 2022).

   b. Brief of Supplementary Evidence of Elizabeth Jane White, Urban Form and Development Chapter (11 October 2022).

   c. Brief of Second Supplementary Evidence of Elizabeth Jane White, UFD - Urban Form and Development (Highly Productive Land) (21 October 2022).

   d. Third Brief of Supplementary Evidence of Elizabeth Jane White, UFD (Mineral Extraction) (24 February 2023).

2. Drafting approach and Objectives

2.0. Introduction

8. Before addressing the more specific changes sought to provisions, Ms White considered the broader drafting matters applying across the UFD chapter. These broadly related to concerns arising out of Ms McEwan's evidence for DCC. Ms McEwan was concerned that the objectives were not sufficiently clear, with many of them being "*descriptions of processes or activities* as opposed to "*end states*". As such, the content of many of them was considered more appropriate as policies. In relation to policies, Ms McEwan's concern was that they lacked sufficient direction on how activities might need to be managed to achieve the objectives. She also sought several deletions (including UFD-O3 and UFD-P1), where she considered there was unnecessary repetition or overlap with the NPSUD and other provisions in the PORPS.[1]

9. In response, Ms White agreed that the number and length of the objectives of this chapter contrasts with the more succinct approach generally taken in other chapters of the pORPS. She also agreed that a number of the clauses contained within the objectives were process-related, which resulted in several clauses being duplicated at the policy level. Ms White also accepted that there are various matters addressed in other parts of the pORPS which do not need to be referred to again in the UFD chapter. This included matters addressed in the EIT and HAZ-NH chapters, although she did consider it appropriate to retain provisions relating to the integration of infrastructure provisions with growth planning, as these are not addressed in the EIT-INF chapter and are more relevant to the UFD chapter.

[1] *Emily McEwan for Dunedin City Council, paras [22]-[33].*

10. In relation to provisions that may overlap/duplicate the NPSUD, she did not consider it appropriate to simply delete these and rely on the NPSUD alone. She rightly noted that these provisions *'will guide urban development in all urban areas, not all of which are 'urban environments' under the NPSUD.'* In her view '*there is no reason why the pORPS cannot provide additional direction for the growth and development of urban areas which compliments the NPSUD, if this is appropriate to achieve the objectives of the pORPS.'* Despite this position, she did recommend amending provisions where they either did not align with the NPSUD, or unnecessarily duplicate it.

11. As a consequence, she recommended a redraft of the objectives to:

    a. *Combine UFD-O1, UFD-O2, UFD-O3 and UFD-O5 into a single objective which is more focused on the outcome sought in relation to the development of urban areas. This, in effect, removes a number of clauses that in my view are process-related, or methods to achieve the type of urban area which is sought, and therefore sit better at a policy level.*

    b. *Amend UFD-O4 so that those clauses which are essentially methods are removed.*

12. Ms White provided a useful table in her reply report that set out the reasoning for her restructuring of the objectives. That table is set out below:

Objective	Part	Comment
UFD-O2	Chapeau	Shifted to revised UFD-O1, with UFD-O1 now focused on development and change as this more accurately reflects what the direction in the pORPS relates to. Form and functioning, as it relates to the planning for growth, is a sub-set of this.
	(1)	Outcome component covered in UFD-O1(1) – part of meeting changing needs. Method aspect shifted to UFD-P1.
	(2)	Covered in UFD-O1(1).
	(3)	Addressed in other parts of RPS in relation to identified features, and where not an identified feature is addressed in UFD-O1(2).
	(4)	Urban design covered in addition to UFD-O1(2A) and liveability covered more broadly in UFD-O1(1).
	(5)	Covered broadly in addition to UFD-O1(2A).
	(6)	Covered, at an outcome level, through addition to UFD-O1(2).
	(7)	Addressed in other parts of pORPS.
	(8)	Covered broadly in addition to UFD-O1(2A).
	(9)	Covered broadly, at an outcome level, through addition to UFD-O1(2A).
	(9A)	Covered in EIT-INF.
	(10)	Outcome component (consolidated and well-designed) shifted to UFD-O1(2A). Method aspect shifted to UFD-P4.
	(11)	Covered at the objective level by IM-O1 and MW-O1, and otherwise more process-related and therefore included at the policy level.
UFD-O3	Chapeau	Generally considered to be a method, not an outcome.

	(1)	Covered in UFD-O1(1) (accommodating needs) and UFD-O1(2A) (integrated with infrastructure).
	(2)	Covered at outcome level in IM-O1 and MW-O1, and otherwise more process-related and therefore included at the policy level.
UFD-O4	(2)	Outcome aspect covered in UFD-O4(4), more detailed aspect covered at policy level.
	(3)	Generally considered to be a method, not an outcome, which is addressed in UFD-P4, UFD-P7 and UFD-P8. Outcome is reflected in UFD-O4(4) and (4A).
	New (4A)	Deletion of "the *natural and physical resources* that support" to reflect that key aspect is productive capacity and long-term viability (e.g. reverse sensitivity does not arise from loss of resources, but is something that can affect those resources being used to their fullest extent.)
	Old (4A)	Covered by MW-P4.
UFD-O5	Chapeau	Covered in UFD-O1(2B).
	(1)	Captured at an outcome level in UFD-O1(2B)) and in addition to UFD-P3(3).
	(2)	Captured at an outcome level in UFD-O1(2B)) or otherwise reflected in UFD-P1(3). Also covered in definition of well-functioning urban environment and therefore reflected in UFD-P4(1).
	(3)	Captured at an outcome level in UFD-O1(2B)) or otherwise reflected in UFD-P1(3).
	(4)	Captured at an outcome level in UFD-O1(2B)) or otherwise covered by EIT-EN-O3.
	(5)	Covered in EIT-EN-P8.

13. The objectives as she finally recommended them are shown below (without tracking):

UFD-O1 –Development of urban areas

The development and change of Otago's *urban areas* occurs in a strategic and coordinated way, which:

(1) accommodates the diverse and changing needs and preferences of Otago's people and communities, now and in the future,

(2) integrates effectively with surrounding *urban areas* and *rural areas*,

(3) results in a consolidated, well-connected and well-designed urban form which is integrated with *infrastructure*, and

(4) supports *climate change adaptation* and *climate change mitigation.*

UFD-O4 – Development in rural areas

Development in Otago's *rural areas* occurs in a way that:

(4) provides for the ongoing use of *rural areas* for *primary production* and *rural industry*, and

(4A) does not compromise the *productive capacity* and long-term viability of *primary production* and rural communities.

14. The majority of submitters supported the approach Ms White took to redrafting the provisions, with the condensing of the objectives supported for its efficiency and better clarity. A number of submitters also advised that the changes proposed addressed a number of their concerns. However, there were several issues outstanding that the submitters raised in their response to Ms White's redraft.

15. Kāi Tahu raised two matters in their response to the changes. Kāi Tahu still seek reference in UFD-O1 to involving mana whenua and 'providing for their aspiration and values' as notified within UFD-O3. In his submission in response to the minute, Mr Cameron submitted that the absence of any such reference diminishes recognition of mana whenua interests in a way that is inconsistent with the requirement of NPSUD to take into account the principles of Te Tiriti o Waitangi. Ms White, in her reasoning for the redrafted provisions, felt the original UFD-O3 was essentially a method, not an outcome (as it related to strategic planning) and that this particular reference is provided for at an outcome level within IM-O1 and MW-O1, with the method aspect of it included in the policies.

16. In relation to the provisions relating to development of Māori land,[2] Mr Cameron argued that the amendments weaken provision for its use and development by removing the positive references of 'providing for' use of this land. In Ms White's view, the subject provisions duplicate MW-P4 so are not needed. She did, however, consider explicit reference to MW-P4 in UFD-P7(6) to be appropriate to make the relationship between the two policies clear.

17. In this part of her report, Ms White also considered Kāi Tahu's request that planning for urban development takes into account the pressures on water bodies and the potential effects of stormwater and wastewater discharges. Ms White considered these matters to be sufficiently addressed in other provisions.[3]

18. Kai Tahu also sought the deletion of policy reference to the social and economic benefits of mineral and aggregate extraction from UFD-P7(4)). This was largely based on the effects of mining and aggregate extraction activities on a range of values. While the Panel acknowledges that mining has effects, we are comfortable that the appropriate safeguards are in place to address the effects of mining. In the Panels view, it is appropriate to recognise the locational constraints of minerals and aggregate because they are critical to the social and economic wellbeing of communities, and play a significant part in the development of technology that reduces our impact on climate.

19. Silver Fern Farms also suggested some minor amendments to the two new objectives. In relation to UFD-01, they sought the addition of 'and activities' to clause (2) to provide better linkage to the land use conflict policy. With respect to UFD-04(4) they sought the deletion of 'supported by' and 'in appropriate locations', considering them superfluous and restrictive. Ms White appears to have accepted the amendments to UFD-04(4) without any commentary and did not discuss the other change sought in her reply.

20. In her response to UFD-04, Ms Collie for Matakanui Gold was uncomfortable with the use of the phrase 'rural sector' in clause (4A) because it is not a defined term. In her opinion, 'primary production', a term defined in the NPS, is the more appropriate phrase and is directly relevant

[2] UFD-O4(4A), UFD-P7(5A), UFD-P9.
[3] UFD-P4(3) and (4) and the LF chapter (LF-WAI-P3(4) and (5).

to productive capacity while also providing terminology consistency within the objective. Again, this appears to be accepted by Ms White, as it appears in her reply report UFD-04(4A) but does not appear to be commented on.

21. Fonterra's response to the redraft of the objectives sought the retention of the reference to minimising conflict between incompatible activities that was originally in UFD-O2(6) but which was removed by Ms White's redraft. Fonterra sought the addition of 'and manages conflict between incompatible land uses' to Ms White's UFD-O1(2). This provision, as now recommended in response to the DCC submission, is that development 'integrates with surrounding urban and rural area.' Ms White felt that this covered what was sought by Fonterra.

22. Ms Wharfe, for Horticulture NZ, also had concerns over this particular provision. She states that UFD-O1(2) (as recommended) "*is not clearly stating an outcome – what does 'integrates effectively' mean? Before there was an objective of minimising conflict between incompatible activities. There is no specific mention of rural urban interface*." Ms Wharfe also sought productive capacity in UFD-O4 to be replaced with 'productive efficiency' on the basis that this is limited to land based primary production and a limited range of assessment matters specific to highly productive land. She noted that Policy 5.3.1 of the partially operative ORPS uses both phrases.

23. Mr Farrell in his evidence sought the inclusion of additional clauses stating "*enables outdoor recreation (including commercial recreation)*" and "*facilitates growth or expansion of existing visitor destination places and activities*" in UFD-P7. but I do not consider that they are appropriate, as I disagree with Mr Farrell that these activities need to be specifically recognised and provided for. I note that the policy direction does not preclude these activities being established in rural areas, but UFD-P7 provides direction on how they are to be managed. I consider this is the appropriate approach to achieve the objectives.

2.1. Recommendation

24. With respect the objectives of the UFD chapter, we recommend that UFD-O1 to UFD-O5 be deleted and replaced with the following two objectives:

UFD-O1 – ~~Form and function~~ Development of *urban areas*

The development and change ~~form and functioning~~ of Otago's *urban areas* occurs in a strategic and coordinated way, which:

(1) ~~reflects~~ accommodates the diverse and changing needs and preferences of Otago's people and communities, now and in the future, ~~and~~

(2) ~~maintains or enhances the significant values and features identified in this RPS, and the character and resources of each *urban area*.~~ integrates effectively with surrounding *urban areas* and *rural areas*,

(2A) results in a consolidated, well-connected and well-designed urban form which is integrated with *infrastructure*, and

(2B) supports *climate change adaptation* and *climate change mitigation.*

UFD-O4 – Development in *rural areas*

Development in Otago's *rural areas* occurs in a way that:

~~(1) avoids impacts on significant values and features identified in this RPS,~~

~~(2) avoids as the first priority, land and soils identified as highly productive by LF-LS-P19 unless there is an *operational need* for the development to be located in *rural areas*,~~

~~(3) only provides for urban expansion, rural lifestyle and rural residential development and the establishment of *sensitive activities*, in locations identified through strategic planning or zoned within *district plans* as suitable for such development; and~~

(4) ~~outside of areas identified in (3),~~ ~~maintains and enhances~~ provides for the ongoing use of *rural areas* for *primary production* and *rural industry*, and

(4A) does not compromise the ~~*natural and physical resources* that support the productive capacity,~~ ~~rural character,~~ ~~and~~ long-term viability of *primary production* ~~the rural sector~~ and rural communities.

25. We also recommend that UFD-P7 – Rural areas be amended as follows:

UFD-P7 – The management of development in rural areas:

…

(3) prioritises land-based primary production on highly productive land in accordance with the NPS-HPL, except as provided for in (5) below,

....

(5) enables the use by Kāi Tahu of Native Reserves and Māori Land, for papakāika, kāika, nohoaka, marae and marae related activities in accordance with MW-P4,

(6) restricts the establishment of non-rural activities which could adversely affect, including by way of reverse sensitivity or fragmentation, the productive capacity of highly productive land or existing or anticipated primary production and rural industry activities, ~~unless those activities are undertaken in accordance with MW-P4~~ except as provided for in (5) or the NPS-HPL.

26. With respect to the policies of the UFD chapter, we accept the changes recommended in the final 10 October 2023 version except where changes are made below.

2.2. Reasons

27. The Panel considers the drafting approach adopted by Ms White, largely driven by the submission of the Dunedin City Council, preferable to that of the notified version of the UFD chapter. Ms White's redraft has condensed the four urban objectives of the notified PORPS into a single objective. The result is that the outcomes sought for Otago's towns and settlements are expressed in a much clearer manner, without the substance being lost.

Content more appropriate as a policy or method has been appropriately relocated, while unnecessary duplication has been removed.

28. However, we agree with Ms White that it is not appropriate to delete all those provisions which may appear to duplicate or overlap with the NPSUD. This NPS applies to *'local authorities that have all or part of an urban environment within their district or region'*, with urban environment defined as:

> ***"…** any area of land (regardless of size, and irrespective of local authority or statistical boundaries) that:*
>
> a. *is, or is intended to be, predominantly urban in character; and*
>
> b. *is, or is intended to be, part of a housing and labour market of at least 10,000 people "*

29. This clearly does not apply to all of Otago's towns and settlements. As a consequence, we agree that it is appropriate to require a level of strategic planning around the growth and development of Otago's smaller towns.

30. While the drafting approach taken by Ms White was generally supported by submitters, and recommended the relief sought in a large number of these submissions, there remain a number of outstanding issues that the Panel needs to address.

31. Kāi Tahu requested the retention of the reference to mana whenua and the need to provide for their aspirations and values in the objective. We agree with Ms White's position that the overarching Objectives IM-O1 and MW-O1 already satisfactorily provide for the 'outcome' part of this provision, being Kāi Tahu's involvement in the planning process to ensure their values are recognised and protected. It need not be restated here as the development of urban areas must be undertaken in a way that also gives effect to those objectives.

32. We also agree that as originally framed, providing for their aspirations and values in the strategic planning process is more appropriately located within the policies and methods. We note that UFD-P3 and P4 refer to addressing issues of concern to iwi and hapu, as do UFD-M1 and M2, which would encompass 'aspirations and values' as determined through the engagement process required by the overarching objectives and those already outlined in relevant iwi planning documents, which are directly referenced in the policy.

33. As a consequence, we do not recommend these changes.

34. However, when it comes to including a more specific provision for use and development of Native Reserves and Māori land, we tend to agree with Mr Cameron that the amendments weaken the current enabling approach to the use of this land by Kāi Tahu. The cultural evidence around this issue was extremely persuasive, as we have outlined in the legal section of this report. While we agree with Ms White that Kāi Tahu's request for an amendment to UFO-O1 is not necessary, we feel an explicit reference should be made in the policy to enable the use of this land by Kāi Tahu.

35. Having said that, we do not consider the second part of Mr Cameron's suggested amendment, which seems to suggest that the wider use of resources by Kāi Tahu is also enabled, to be appropriate or necessary. The provision enables the use of Māori land for its intended more culturally related purpose, which may sometimes conflict with other, more restrictive

resource management controls. We consider that appropriate, given the history of this land and the barriers to its use outlined in cultural evidence. However, Kāi Tahu's use of land that does not fall within the preserve of cultural use of Māori land should be managed through the general provisions of the PORPS.

36. In relation to Ms Wharfe's concern that UFD-O1(2) is not an outcome, we disagree. It would seem to us that the outcome is that development is effectively integrated with surrounding urban and rural areas. While there is no specific mention around 'minimising conflict', 'incompatible activities' and the 'rural urban interface', these are all matters that are integral to ensuring 'effective integration'. What 'integrates effectively' means, will be determined by the detail of the policies that follow, and the lower order planning documents.

37. For similar reasons, we do not consider the additions sought by Fonterra or Silver Ferns Farms to clause (2) are necessary. As discussed above, conflict with incompatible activities will be addressed by 'effective integration'. With respect to the addition of 'activities' to the clause, the broad reference to 'urban and rural areas' essentially encompasses the 'activities' that occur within them.

38. However, we do agree with Ms Wharfe in relation to the use of 'productive capacity' in UFD-O4. The definition of 'productive capacity' is sourced from the NPS-HPL and is defined as:

> ***productive capacity****, in relation to land, means the ability of the land to support land-based primary production over the long term, based on an assessment of:*
>
> *a) physical characteristics (such as soil type, properties, and versatility); and*
>
> *(b) legal constraints (such as consent notices, local authority covenants, and easements); and*
>
> *(c) the size and shape of existing and proposed land parcels*

39. The NPS-HPL has a narrower focus (highly productive land) than an RPS, which must consider rural resources (including soil) as a whole. As a consequence, we agree with Ms Wharfe. However, we note the 10 October 2023 reply version of the PORPS has removed reference to 'productive capacity' and clause 4(A) now simply states:

> "does not compromise the long-term viability of *primary production* and rural communities."

40. The removal of 'productive capacity' has been credited to a Horticulture NZ submission but we are unclear where this was discussed in the officer's report. However, we agree with the change as it has a broader application given the definition of 'primary production'.

41. We also note that Ms White has removed the reference to 'the rural sector' from the objective. While Ms Collie raised issue with the clarity of this phrase in her response evidence, Matakanui Gold does not appear to have standing on the issue, with the change credited to the submission of Fulton Hogan and Royal Forest and Bird. Fulton Hogan do not appear to have standing on the issue either, but we agree with the change as 'primary production' and 'rural communities' effectively covers the board. The use of the undefined term 'rural sector', while generally understood, adds no value to the objective.

42. Ms White also disagreed with Mr Farrel in relation to the additional clauses addressing outdoor recreation and visitor destination places and activities in UFD-P7. We agree with Ms White that the policy direction does not preclude these activities being established in rural areas, but that UFD-P7 provides direction on how they are to be managed. Specific identification of these activities is not needed.

43. Ms Whites s32AA analysis stated that:

> *" the revised objectives are more appropriate to achieve the purpose of the RMA, because they:*
>
> a. *Are more clearly focused on the outcomes sought for the Otago region, rather than the process for how those outcomes are achieved;*
>
> b. *Assist in giving effect to the NPSUD;*
>
> c. *Respond more clearly to the identified issue (SRMR-I4); and*
>
> d. *More clearly demonstrate how the development of urban and rural areas will provide for the well-being of the Otago region (s5 RMA) and the amenity values which are anticipated which are to be maintained and enhanced in such development (s7(c))."*

44. We adopt that analysis and consider our minor amendments further assist in this regard.

3. Location of rural provisions

45. The UFD chapter, as notified, included provisions relating to management and development in 'rural areas'. A number of submitters raised a general concern that 'rural' issues should not be in an 'urban' chapter. In her evidence, Ms Wharfe for HortNZ stated that rural matters should be contained in a separate chapter specific to the rural area which, in her view, is required by the National Planning Standards.[4] Ms Wharfe[5] also disagreed with Ms McEwan[6] for the DCC who preferred that aspects of the rural-based provisions which address non-urban activities be deleted because they do not logically sit in the UFD chapter and should be left to the district plan level to manage.

46. The initial section 42A report outlined why the rural-focused provisions were located within the UFD chapter, which seemed to us to be largely based on the management of urban expansion into rural areas. ORC's opening legal submissions[7] also advised that a separate chapter specific to the rural area is not required by the National Planning Standards. Ms White therefore considered the need for a rural chapter to be a question of merit.

47. While being concerned that separating out rural provisions misses the opportunity to consider urban expansion and the urban – rural interface in an integrated way, Ms White accepted that there may be other reasons why the management of development within rural areas may better 'fit' in another chapter. Ms Boyd addressed the matter further in in her *Reply report 1:*

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[4] *Lynette Wharfe for Horticulture New Zealand, paras [323]-[333].*
[5] *Rebuttal evidence of Lynette Wharfe for Horticulture New Zealand, paras [19]-[28].*
[6] *Emily McEwan for Dunedin City Council, paras [61]-[64].*
[7] *ORC Submission for Hearing, UFD – Urban form and development (14 February 2023), paras [49]-[54].*

Introduction and general themes. She recommended that UFD-O4, UFD-P7 and UFD-P8 (and related methods, explanations, principal reasons and anticipated environmental results) be relocated to the LF-LS chapter. Her main reasoning is that this improves integration with the management of land and soil resources, and particularly with highly productive land.

48. The Panel has some sympathy with the submitters over the lack of a specific rural chapter in the pORPS. The region is predominantly rural, and we do not understand why the management of urban expansion and the rural-urban interface should dictate that all rural development matters should be included in an urban form and development chapter. Such an approach largely ignores the bulk of the land use in the region and its significance to the social, economic, and cultural wellbeing of its communities.

49. Having said that, we think it is a little too late in the piece to be incorporating an entirely new chapter into the pORPS. This is further complicated by the fact that there has been no drafting provided by those submitters requesting such a chapter. Hence, as Ms Boyd noted, it is unclear what the scope and content of such a rural chapter would be, and how it would integrate with the other chapters of the pORPS. Hence, we agree with Ms Boyd's approach to the matter, which relocates provisions that relate to rural development to the LS- LS chapter.

4. Effect of the NPSHPL

4.0. Introduction

50. As Ms White noted in her reply report, the National Policy Statement for Highly Productive Land 2022 (NPSHPL) came into effect after the s42A reports were released. This required reconsideration of various provisions in the pORPS affected by it. Supplementary reports on the matter were produced by Ms Boyd and Ms White.[8]

51. In her reply, Ms White highlighted the various responses from submitters to the changes to the UFD chapter recommended through the supplementary evidence. She summarised them as either:

   a. *Supporting the rewording proposed.*

   b. *Seeking amendments to explicitly refer to the NPSHPL.*

   c. *Seeking additions to direct avoidance of urban rezoning of highly productive land at the objective level in UFD-O3, and in UFD-P1; and avoidance of rural lifestyle zones on highly productive land.*

   d. *Seeking deletion of provisions relating to highly productive land, relying instead directly on the NPSHPL.*

   e. *Seeking further amendments on the basis that avoidance as a 'first priority' is considered to be more stringent than the NPSHPL.*

[8] *Brief of Second Supplementary Evidence of Felicity Ann Boyd, LF – Land and Freshwater (Highly Productive Land) (21 October 2022). Brief of Second Supplementary Evidence of Elizabeth Jane White, UFD - Urban Form and Development (Highly Productive Land) (21 October 2022).*

f. *Exempting development of Māori land on highly productive land where provided for under MW-P4.*

52. In discussing the NPSHPL, Ms White highlighted the fact that it is a very prescriptive document that does not leave *"room for regional policy statements, regional plans or district plans to 'tease out' how the direction within it is to be achieved/implemented at a local level."* As such, she considered that the most appropriate approach in this instance is to directly refer to the NPSHPL. This led to several changes being recommended to UFD-P4(6), UFD-P7(6) and UFD-P8(4) so that they explicitly refer to the NPSHPL. She also noted that UFD-P7(3) refers to highly productive land by directing prioritisation of land-based primary production on it and considered it should be expanded to explicitly refer to the NPSHPL.

53. Of the submitters who responded to the redrafted provisions, only Ms Wharfe for Horticulture NZ commented on the recommended provisions. Her concern only related to the use of 'productive capacity' in UFD-P7(6).

4.1. Recommendation

54. In addition to the changes made to the policies by the Panel accepting the officer's recommendations discussed in Section 2, we also recommend the following amendments in relation to the NPS HPL:

a. Amend UFD-P4(6) as follows:

(6) avoids~~, as the first priority,~~ *highly productive land* except as provided for in the NPS-HPL, and ~~identified in accordance with LF–LS–P19~~,

b. Amend UFD-P7(3) as follows:

(3) ~~enables~~ prioritises *land-based primary production* ~~particularly on land or soils identified as~~ on *highly productive land* in accordance with the NPS-HPL~~LF–LS–P19~~,

c. Amend UFD-P7(6) as follows (noting this incorporates changes recommended for other reasons):

(6) restricts the establishment of ~~residential~~ non-rural activities~~, *sensitive activities*, and non-rural businesses~~ which could adversely affect, including by way of *reverse sensitivity* or fragmentation, the *productive capacity* of *highly productive land*, or existing or anticipated *primary production* and *rural industry* activities, ~~unless those activities are undertaken in accordance with MW-P4~~ except as provided for in (5) or the NPS-HPL.

d. Amend UFD-P8(4) as follows:

(4) it avoids~~, as the first priority,~~ *highly productive land* ~~identified in accordance with LF–LS–P16~~ except as provided for in the NPS-HPL,

4.2. Reasons

55. The provisions of the NPSHPL, and their implications for the Otago region, were the centre of much discussion at the hearing. However, we must agree with Ms White that the NPS is such a prescriptive document that despite its shortcomings in the context of the Otago region,

there is little room for a regional flavour. As a consequence, we accept that direct reference to the NPSHPL is really the only option.

56. Ms White's s32AA analysis concluded that *"the changes are more effective at achieving UFD-O4 and are required to ensure that the pORPS gives effect to the NPSHPL as required under s62(3) of the RMA".* We agree and adopt this analysis accordingly.

5. Urban intensification and expansion

5.0. Introduction

57. UFD-P3 provides direction in relation to urban intensification while UFD-P4 provides direction in relation to urban expansion. The submissions on UFD-P3 addressed a number of issues, including the 'enabling approach', infrastructure matters, reverse sensitivity, development capacity, and clarity around 'identified features and values'. The submissions on UFD-P4 addressed a number of similar themes, including infrastructure, identified features and values, and reverse sensitivity, along with highly productive land, the rural – urban interface, and alignment with the NPS-UD.

58. These matters have been addressed across the numerous officer reports on this chapter. Again, the redraft proposed by Ms White has largely been met with support from the submitters who responded. The majority of the changes have been discussed in Section 2.

59. Two matters remain outstanding. The first relates to the DCC submission seeking the deletion of UFD-P3 and UFD-P4. [9] Ms McEwan's view was that the wording of the policies was such that they could be interpreted as meaning urban intensification and expansion <u>must</u> be provided for/facilitated if the criteria in the policies are met. The original s42 writer, Mr Balderstone confirmed that the policy intent is not to limit the matters for consideration but to identify what criteria should, as a minimum, be met when intensification/expansion is contemplated. Ms White agreed in her first supplementary evidence that clause (4) of UFD-P3 (which relates to shortfall for housing or business space), could unintentionally limit when intensification occurs, while the chapeau also required amendment to clarify the intent.

60. In her reply, Ms White accepted that the recommended redraft could still be interpreted as meaning urban intensification and expansion must be provided for/facilitated if the criteria in the policies are met. This led to her providing further amendments to reframe the policies further to align with the original intent.

61. However, QLDC, who conditionally supported the original UFD-P4, did not agree with the use of the phrase 'only occurs where' in that policy. Ms Simpson for QLDC in her response evidence suggested the *"revised wording in my view results in the same concerns that the urban expansion can only occur when the listed matters are met. It does not appear to enable 'other matters' which may not have been included which does not appear to be the intent."* She suggested the wording should be reframed as "may occur where".

[9] *Emily McEwan for Dunedin City Council, paras [43]-[46].*

62. By contrast, Silver Fern Farms supported the use of 'only occurs' because they considered the previous chapeau implied urban expansion must be facilitated.

63. Ms McIntyre[10] for Kāi Tahu also sought an additional clause to UFD-P4 that required the avoidance of increasing the demand on water supply in water-short areas and of the cumulative impacts of wastewater and stormwater on water bodies and coastal waters. However, Ms White considered this issue is sufficiently addressed in UFD-P4(3) and (4) and the LF chapter (LF-WAI-P3(4) and (5).

64. For completeness, we note that Ms McEwan for the DCC also requested that UFD-P4 (7)(b) and (c) be deleted because they contain direction which is too detailed for RPS. Ms White agreed.

5.1. Recommendation

65. We recommend the following amendments to UFD-P3 and P4:

    a. Amend the chapeau of UFD-P3 as follows:

       ~~Within *urban areas*~~ Manage intensification in *urban areas*, so that as a minimum, ~~is enabled where~~ it:

    b. Amend the chapeau of UFD-P4 as follows:

       Expansion of existing *urban areas* ~~is facilitated~~ may occur where, at a minimum, the expansion:

    c. Delete UFD-P4 (7)(b) and (c)

5.2. Reasons

66. Turning first to the structure of the two policies, we essentially agree with the submitters' concern that their original construction effectively put Councils in a position where urban development must be enabled when the criteria was met. This is clearly not the intention, so we agree that Ms White's final recommendations are appropriate for UFD-P3. However, we tend to agree with Ms Simpson in relation to UFD-P4. Ms White's reasoning for the change to 'only occurs' was that the previous wording implies intensification must be enabled where only the matters listed are met. As noted previously, the policy intent is not to limit the matters for consideration but to identify what criteria should, as a minimum, be met when intensification/expansion is contemplated. Seen in that light, the two chapeaus should be similar. We agree with Ms Simpson that 'may occur' is more appropriate and prefer Ms White's previous use of 'at a minimum' in tandem with that.

67. We did give serious consideration to including Ms McIntyre's requested provision but in the end, we agreed with Ms White that those matters will require to be addressed under a number of provisions within the PORPS, in particular LF-WAI-P3(4) and (5). Iwi will also have the opportunity to raise specific issues, if and when they arise, through the application of UFD-P4 (4) and the wider processes put in place under the MW chapter.

[10] *Sandra McIntyre for Kāi Tahu ki Otago, paras [158]-[159].*

68. With respect to s32AA, Ms White considers that the changes provide greater clarity on the action required to be taken and are therefore more efficient and effective at achieving UFD-O1. We agree.

6. Industrial activities

6.0. Introduction

69. UFD-P6 provides direction in relation to the provisions for industrial activities in urban areas. Clause (4) specifically relates to the potential for the transition of industrial zoned areas for other purposes.

70. The DCC submission requested that both UFD-P5 and P6 be deleted because they were *"not convinced it is necessary to have policies on commercial activities or industrial activities as these are arguably not a regionally significant issue nor ones that easily lend themselves to policy direction that will work well /be appropriate across all the diverse towns, settlements in the region and for the city of Dunedin."* They were particularly opposed to UFD-P6 clause (4), which provides a pathway for the transition of industrial areas to other purposes. If the recommendation was not to delete of the policies, they proposed alternative wording to satisfy their concerns.

71. At the hearing, Ms McEwan advised that the biggest unresolved issue is that of UFD-P6(4). The DCC's other concerns could easily be resolved by minor amendments with the exception of UFD-P5(3) which should be deleted as it "*could be read as encouraging unlimited supply of commercial land, which would undermine the 2GP's centres hierarchy and associated strategic directions...*"

72. The concern with UFD-P6(4) was reiterated in Ms McEwan's response to the proposed redraft. She was also concerned about the drafting of UFD-P6(3), including concerns about the way the word 'avoid' is used.[11]

73. Ms White's preference was to retain UFD-P6(4) because there would otherwise be no direction at the pORPS level as to what tests any transition from industrial to commercial would need to meet. She did, however, promote some amendments to the structure of the policy and reworded the context of how 'avoid' is used in the policy.

6.1. Recommendation

74. We recommended UFD-P6 be amended as follows:

UFD-P6 – *Industrial activities*

Provide for industrial activities in urban areas by:

(1) (...)

(3) managing the establishment of non-industrial activities*,* in industrial zones, ~~by~~ to avoid~~ing~~ ~~activities likely to result in~~ the likelihood of reverse sensitivity *effects* on existing or potential *industrial activities* arising, unless the

[11] *Memorandum of Emily Kate McEwan for Dunedin City Council, 21 April 2023, paras [2.2]-[3.2].*

potential for reverse sensitivity is insignificant. ~~or the likely to result in an inefficient use of industrial zoned *land* or *infrastructure*, particularly where:~~

~~(a) the area provides for a significant *operational need* for a particular *industrial activity* or grouping of *industrial activities* that are unlikely or are less efficiently able to be met in alternative locations, or~~

~~(b) the area contains *nationally* or *regionally significant infrastructure* and the requirements of EIT–INF–P15 apply~~, and

(4) ~~in areas that are experiencing or expected to experience high demand from other urban activities, and the criteria in (3)(a) or (3)(b) do not apply, managing the establishment of non-industrial activities and the transition of industrial zoned areas to other purpose, by first applying (1) and (2).~~

6.2. Reasons

75. The Panel has some sympathy for the DCC's submission that this policy (and UFD-P5) are not addressing a regionally significant issue. Contrary to Ms White's position, we are doubtful that provision for industrial activities in District Plans requires direction from an RPS. This is particularly so with UFD-P6(4). We do not consider that to be a regional issue, let alone a regionally significant one. Accordingly, we accept Ms McEwan's evidence on the matter.

76. We also agree with Ms McEwan in relation to the use of 'avoid' in UFD-P6(3). We are comfortable with Ms White's rewording but still consider it appropriate to attach Ms McEwan's qualifier.

77. With respect to s32AA, the Panel considers that the remainder of the policy is sufficient to address any regionally significant issue with respect to the provision for industry. The changes are therefore considered more efficient and effective.

7. Rural lifestyle development

7.0. Introduction

78. As notified, UFD-O4(3), UFD-P7(6) and UFD-P8 contained direction relating to rural lifestyle and rural residential development. That direction requires rural lifestyle development to only be provided for in locations identified through strategic planning or zoned within district plans as suitable for such development.

79. Ms Wharfe for Horticulture New Zealand supports this approach to rural lifestyle development, but a number of submitters considered this too restrictive (Waterfall Park Development, Boxer Hills Trust and Darby Planning LP & Others). The concern of these submitters is centred on the fact that rural lifestyle development must be identified through strategic planning or zoned for that purpose and that such zones are to be located adjacent to existing or planned urban areas. Ms Simpson for QLDC also shared these concerns but advised caution around any redrafting to ensure it does not allow for urban development in rural areas.[12]

[12] *Rebuttal evidence of Elizabeth Simpson for Queenstown Lakes District Council, paras [4.1]-[4.6].*

80. Mr Brown (for Waterfall Park Developments/Boxer Hill Trust) and Ms McEwan (DCC) also identified a conflict between the requirement to locate close to existing or planned urban areas and the requirement to also avoid locations that are or likely to be used for urban expansion,[13] with Ms McEwan also noting the provisions could result in pressure for inappropriate rural lifestyle development adjacent to urban areas.[14]

81. Ms Tait for Fonterra also sought changes to UFD-O4(3) and (4) to direct avoidance of rural lifestyle development in areas which would compromise those matters currently set out in clause (4), rather than requiring it to be directed to strategically identified areas or specific zones.[15] Mr Tuck, for Silver Ferns Farms, sought an amendment to the redrafted provision that restricted rural lifestyle development to a zone or where not in a zone, it is designed and sited to avoid significant adverse effects on rural activities.

82. Ms White agreed that there may be instances where rural lifestyle development is appropriate within a rural zone, even if it is not the main purpose of that zone. She highlighted the definition of 'Rural Lifestyle Zone' in the National Planning Standards, noting that allowing rural lifestyle activities within rural areas is consistent with the zone description. Ms White also considered the requirement to locate adjacent to existing or planned urban areas unnecessarily limiting and agreed with Mr Brown and Ms McEwan that there is a conflict within the provisions in this regard. In her view, the remainder of the policy is sufficient to address the concerns of Ms Wharfe and Mr Tuck about effects on primary production activities, along with the recommended changes to address reverse sensitivity. Ms White also noted that primary production activities are also anticipated within rural lifestyle areas.

7.1. Recommendation

83. The Panel's recommended amendments in relation to rural lifestyle development are as follows:

    a. Delete UFD-P7(5) ("directs rural lifestyle development to areas zoned for that purpose in accordance with UFD-P8").

    b. Delete UFD-P8(1) ("*the land is adjacent to existing or planned urban areas and ready access to employment and services is available*"), and make consequential amendments to clause (2) so that it no longer refers to clause (1).

    c. Amend the title and chapeau of UFD-P8 to refer to "rural lifestyle development".

7.2. Reasons

84. We agree with Waterfall Park Development, Boxer Hills Trust, Darby Planning LP & Others, QLDC and Ms White that the 'zoning only' approach proposed for lifestyle development is overly restrictive and will foreclose appropriate rural lifestyle opportunities outside of such zones. As Ms White highlighted, rural lifestyle development is consistent with, and anticipated in, rural zones. This is reflected in the definitions contained within the National Planning

[13] Jeff Brown for Waterfall Park Developments/Boxer Hill Trust, para [2.9]; Emily McEwan for Dunedin City Council, para [79].

[14] Emily McEwan for Dunedin City Council, paras [77]-[82].

[15] Susannah Tait for Fonterra, para [12.14](e).

Standards. Not all District Councils currently have dedicated rural lifestyle zones but manage its development through standards in the rural zone.

85. While we acknowledge the concerns of Ms Wharfe and Mr Tuck (and others) as being valid, we agree with Ms White that the remainder of the policy will adequately address these concerns. Ms White, in her s32AA analysis, considers the remaining provisions to be sufficient to achieve the outcome sought in UFD-O4. Therefore, she believes that *"the deletion of these clauses will be more efficient at achieving the outcomes, as it will not restrict rural lifestyle development in locations or circumstances that may still achieve UFD-O4, while not reducing the effectiveness of the approach."* We agree and adopt that position accordingly.

8. Reverse sensitivity

8.0. Introduction

86. A number of submissions seek changes to the UFD chapter to include more directive provisions on the management of reverse sensitivity effects. Several changes were recommended in the section 42A report to address concerns in these submissions.

87. Ms Wharfe, Mr Ensor and Ms Tait supported further changes to a number of provisions,[16] which generally seek to strengthen the direction by requiring avoidance of, or protection from, reverse sensitivity impacts.[17] In her oral presentation to the Hearing Panel, Ms O'Sullivan, on behalf of the Queenstown Airport, expressed her view that the management of reverse sensitivity, when looked at across the whole of the UFD chapter, is appropriate.

88. In her reply, Ms White advised that in her view, "management *of reverse sensitivity is an action, rather than an outcome"*, and as a consequence, the changes recommended to the UFD objectives do not contain reference to reverse sensitivity. In relation to changes sought to UFD-P4(7), Ms White states that given the way the policy is framed, she considers it appropriate to require consideration of reverse sensitivity effects, rather than requiring avoidance. In her view it is only one factor to consider, and it should be balanced against other things, with no right of veto.

89. In relation to UFD-P7, which relates to the management of development in rural areas, Ms White notes that (6) requires explicit consideration of reverse sensitivity effects and the restriction of activities that could lead to such effects. She considers this appropriate without further amendment, noting 'restriction' is already a strong direction. Hence, she does not agree with Mr Ensor, for Fulton Hogan, who requested the use of 'avoidance' in this policy.

90. Ms White's recommended addition of 'avoid' in UFD-P8(3) is supported by a number of parties but is opposed by Ms McEwan. However, Ms White considers that such direction in this context is more appropriate to achieve UFD-O4 than a requirement to only minimise.

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[16] *Including UFD-O2, UFD-O3, UFD-O4, UDF-P1, UFD-P4, UFD-P7, UFD-P8 and UFD-M2.*
[17] *Lynette Wharfe for Horticulture New Zealand, paras [343]-[426] and [403]-[412]; Susannah Tait for Fonterra, paras [12.3]-[12.7], [12.16]-[12.19], [12.34] and [12.37]; Tim Ensor for Fulton Hogan, paras [25]-[35].*

8.1. Recommendation

91. The panel's recommendation in relation to this matter is to amend UFD-P8(3) as follows:

> (3) it minimises impacts on existing or anticipated *primary production, rural industry* and other rural activities ~~rural production potential, *amenity values*~~ and the potential for *reverse sensitivity effects*.

8.2. Reasons

92. The Panel generally agrees with the final position reached by Ms White on this matter. However, as we did in relation to UFD-P6, we agree with Ms McEwan in relation to the use of 'avoid' without qualification. We agree that this test is very strict as it refers to the potential for reverse sensitivity effects, which would effectively prohibit any activity that has any potential for reverse sensitivity effects, relative of the scale.

93. We note that even Ms Wharfe did not request a straight out avoid, seeking 'mitigation to the least extent possible' where avoidance is not possible. In our view, Ms Wharfe's position is essentially one of 'minimising' the effect of reverse sensitivity. In this context, we consider 'minimising' the most appropriate approach. Strict avoidance of 'potential effects' is virtually impossible to achieve.

94. Given the nature of the change, we do not consider further analysis in terms of s32AA is required. We also note here that the recommended addition of *"in adjoining rural production zones"* is not considered necessary and has not been accepted. Reverse sensitivity matters are unlikely to be confined to just rural production zones.

9. Regionally significant industry

9.0. Introduction

95. Fonterra sought the addition of a reference to 'regionally significant industry' to a number of provisions within the UFD chapter, along with a definition of this term being inserted into the pORPS. The planner for Fonterra, Ms Tait, presented comprehensive evidence on why she considers it appropriate for the pORPS to provide recognition for such industry, particularly in terms of protecting it from inappropriate urban encroachment.[18] Ms Simpson, for QLDC, did not consider it an appropriate direction for an RPS and felt it was a blunt way to manage reverse sensitivity effects.[19]

96. In her reply report, Ms White[20] noted that:

> *"there are a number of provisions in the UFD chapter (as redrafted) that apply directly or indirectly to rural industry, regardless of its level of significance. These include:*

[18] *Susannah Tait for Fonterra, para [3.1], Section 4, paras [12.6]-[12.7], [12.23]-[12.26], [12.30]-[12.32], [12.34] and [12.37](b).*
[19] *Rebuttal evidence of Elizabeth Simpson for Queenstown Lakes District Council, paras [6.1]-[6.3].*
[20] *Paragraph 82*

a. *The integration between urban and rural areas (UFD-O1(2));*

b. *Provision for ongoing use of rural areas for rural industry in appropriate locations (UFD-O4(4));*

c. *Identification of potential conflict between incompatible activities and methods for resolution of these when undertaking strategic planning (UFD-P1(8A));*

d. *Considering adverse effects on rural industry activities when determining changes to the rural/urban boundary (UFD-P4(7)); and*

e. *Managing development in rural areas to provide for rural industry and restrict non-rural activities which could adversely affect existing or anticipated rural industry activities (UFD-P7(6)).”*

97. She was of the view that this direction appropriately addresses rural industry and that there is no further need to ‘elevate’ regionally significant industry. She also agreed with Ms Simpson (and Ms Boyd in other s42A reports) that recognising regionally significant infrastructure is no justification for, and is not the same as, recognising regionally significant industry. In her view, it is *“inappropriate to require that urban intensification and urban expansion must in all cases not compromise regionally significant industry.”*[21]

98. Ms White also commented on other changes sought to the drafting, which she considered inappropriate because:

a. they result in process-related clauses being added back into the objective level (as sought through additions to UFD-O1); or

b. they add unnecessary ‘inclusions’ to clauses where this does not change the effect of the clause, but in her view, result in less clarity (UFD-O4(4A), UFD-P7(4)).

9.1. Recommendation

99. We agree with Ms White on this matter. While we consider that local authorities may consider such an approach necessary or appropriate in their local planning documents, this will depend on local context. We think industry in general is adequately recognised and provided for in the proposed provisions of the PORPS.

10. Other changes

100. In her reply, Ms White recorded changes that she recommended in response to evidence, or following further consideration of matters raised in submissions, which she considers are appropriate. Because they related to more discrete issues generally raised by one party and led to significant rearrangement of this particular chapter, she compiled them in the table, which is set out below:

[21] *As sought through changes to UFD-P3 and UFD-P4 noted in Memorandum of counsel on behalf of Fonterra Limited, 21 April 2023.*

Provision	Evidence	Change Sought	Recommendation
UFD-P2	Emily McEwan, para 42 and Annexure A	Reframe stem of policy, delete clauses (1)-(4) as these simply refer to other policies and add no value, and split clause (5) into two.	Agree that these changes are appropriate.
UFD-P4(7)	Susannah Tait, paras 12.25-12.26	Amendments to clause (7)(a) to improve understanding and clarity.	Agree with some of the changes proposed by Ms Tait. However, as a consequence of deleting (b) and (c) (refer below) this no longer needs to be a sub-clause, and re-ordering of wording is therefore also recommended for readability.
UFD-P4(7)	Emily McEwan, para 45(d) and Annexure A	Delete (7)(b) and (c) as they contain direction which is too detailed for RPS.	Agree. Do not consider the direction is necessary to achieve the outcomes sought.
UFD-P5	Emily McEwan, paras 51-52 and Annexure A	Add "where appropriate" to clause (1) as some zones will provide for some commercial activities, but appropriately limit others. Delete clause (3) because it is covered by UFD-P2. Amend clause 4 to "provide for" rather than "allow for" because the latter implies permitted activities, whereas another activity status may be more appropriate to ensure adverse effects can be managed.	Agree. Also consider clause (3) is also effectively covered already between P2, P3 and P4 and in clauses (1) and (2). This clause therefore does not appear to add anything further. "Provide for" is also more consistent with terminology used elsewhere in this chapter.
UFD-P6(3)	Liz Simpson, paras 4.3-4.5	Remove previously recommend addition of *"(particularly residential or retail activities except yard-based retail),"* in clause (3) as has the potential to unnecessarily narrow the application of the policy.	Agree. I also do not consider that this level of specificity is necessary at the pORPS level. I also consider it unclear what "particularly" is intended to mean and whether it implies a hierarchy.
UFD-P7(2) UFD-P8(3) UFD-E1	00211.050 LAC Properties	Remove all references to amenity values and rural character as they are	While I do not agree with the submitter's reasoning, I do not consider it appropriate at the RPS

Provision	Evidence	Change Sought	Recommendation
	Trustees Limited, 00210.050 Lane Hocking, 00118.066 Maryhill Limited, 00014.066 Mt Cardrona Station, 00209.05 Universal Development Limited	contrary to proposed replacement legislation and may stymie necessary growth and development opportunities.	level to direct that the amenity and character of rural areas are 'maintained'. I do not consider that this is linked back to the identified resource management issue, nor will maintenance of existing amenity and character in all instances necessarily align with the outcomes sought across the pORPS.
UFD-P7(4)	Lynette Wharfe, paras 394-400	Amend to use the word "provide" rather than "facilitate" as 'provide' gives clearer direction than 'facilitates', which is more a direction of 'assisting'	Agree. "Provide for" is also more consistent with terminology used elsewhere in this chapter.
UFD-P7(4)	Anita Collie, paras 5.9-5.10	Amend clause (4)(b) to use terminology consistent with the Crown Minerals Act and improve the clarity of the policy.	Agree
UFD-P7(6)	Susannah Tait, paras 12.31-12.32	Amend to refer to "existing or permitted" primary production rather than "existing or potential".	Do not agree with referring to "permitted" at the pORPS level. However, consider that "anticipated" provides better guidance than "potential" and recommend this change instead.
UFD-P7(6)	Tim Ensor, paras 33-35	Clause (6) should stand on its own without recourse to UFD-P4(7) and that this connection should be deleted.	Agree that reference to UFD-P4 is not required as urban expansion is governed by UFD-P4 and once established, the area will no longer be rural. Therefore this policy will not apply (but reference to UFD-P4 implies it does.) Reference to UFD-P8 is also not required as UFD-P8 is recommended to apply to all rural lifestyle development.
UFD-P8	Steve Tuck, Appendix C page 12	Amend title for consistency with other recommendations to remove reference to 'rural residential'.	Agree.

Provision	Evidence	Change Sought	Recommendation
UFD-M1(4)	Liz Simpson, paras 5.1-5.2	Split requirements into two as the additional have resulted in the clause being too long and difficult to understand.	Agree.
UFD-AER12	Liz Simpson, paras 6.1-6.5	Amend wording so that it does not focus on 'inappropriate urban expansion and urban activities' as current wording implies they are anticipated within the region's rural areas.	Agree. For completeness I note that the final recommended wording of UFD-AER12 also removes reference to "productive capacity" as a result of Ms Boyd's analysis of this.[22]

101. Ms White also advised that there will be a range of changes are required to the methods, explanation, principal reasons and anticipated environmental results as a consequence of the changes, if they are accepted. She did not set them out in the reply report, but they are shown in the "reply report" version of the pORPS.

102. Ms White also considered the responses received in relation to the redrafting provided in response to Minute 7, and where she considered additional changes to be appropriate to improve the drafting, these changes were reflected in the recommended wording contained in her reply report and in the "marked up" version of the final recommendations.

103. We agree with Ms White on these submission points and have adopted her reasoning accordingly. In terms of s32AA, we also agree with her view that the amendments will provide greater clarity and in doing so will be more efficient and effective at achieving UFD-O1 and UFD-O4.

104. Most changes also do not alter the intent of the policies, methods or anticipated environmental results, but will make their application clearer. In those cases where the recommendation includes the removal of direction,[23] the direction is not necessary to achieve the outcomes sought, making the approach more efficient while still being effective.

[22] *See Reply report 9: LF – Land and freshwater*
[23] *UFD-P4(7)(b) and (c); and parts of UFD-P6(3), UFD-P7(2), UFD-P8(3), UFD-E1.*

Appendix Two: Report by the Freshwater Hearings Panel

1. Background

1. We commence this report by formally adopting those sections of the legal issues discussion in the Prologue which have relevance both to the freshwater and non-freshwater provisions.

2. Where particularly relevant that adoption is also expressly repeated, but many of those issue discussions, such as the difference between 'protection' and 'maintaining' or 'maintenance', will have informed and guided our decision-making on this Freshwater Report.

1.1. Recommendation

3. We recommend that submissions on provisions and matters in the freshwater planning instrument are accepted or rejected wholly or in part as set out in Appendix 6: Freshwater Planning Instrument Hearing Panel Recommendations for decisions on submissions and reasons.

2. Legal Issues

2.1. Te Mana o te Wai

2.1.1. Concept of Te Mana o te Wai

4. The National Policy Statement for Freshwater Management 2020 (in its amended form as at February, 2023) ('NPSFM') describes the fundamental concept of the NPSFM as being Te Mana o te Wai. That concept is described in cl. 1.3(1) as follows:

> *Concept*
>
> *(1) 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.*

5. These hearings have demonstrated how what was obviously intended to be a readily described concept is open to being read in a range of different ways.

6. Amongst the issues we have had raised before us are varying interpretations of this concept, which stretch across a wide spectrum. Some submitters have advanced an argument that the concept involves absolute protection of freshwater from any effects; while at the other end of the spectrum, some have argued that protecting the well-being of the community requires recognition of use of freshwater, and/or effects of use of other resources on freshwater that will give rise to effects on freshwater itself. Much of the debate before us also centred on what was meant by the undefined term 'mauri'; and what was involved in the use of the word 'balance' in the last sentence of the concept.

7. In our view the final sentence in the concept description is intended to explain how the protective concept described in the first sentence is sought to be achieved. That is to occur by 'restoring and preserving' the balance 'between the water, the wider environment, and the

community.' The use of a word like 'balance' will usually involve a state of equilibrium between two differing forces, e.g. the classic example being a seesaw.

8. However, the word 'balance' can also apply to a spectrum of factors in other types of situations. Good examples are found commonly in newspaper articles, political policies, or even in judgment writing. In those contexts what is being referred to is not necessarily a state of equilibrium between two opposing forces, but rather a consideration of all factors often on a sliding scale in a manner which informs about, or considers issues across a spectrum, but in doing so does not lean unduly too far in any one direction.

9. The problem with applying the first meaning to the 'balance' referred to in the last sentence of the concept is that it refers not to two opposing forces, but expressly to three separate factors:

- the <u>water</u>
- the wider <u>environment</u> (which by the RMA definition includes):

    (a) ecosystems anmap1d their constituent parts, including <u>people and communities</u>; and

    (b) all natural and physical resources; and

    (c) amenity values; and

    (d) *the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters* and as to 'natural and physical resources' by that definition includes 'water'

- the <u>community</u>

(Panel's emphasis)

10. The unfortunate repetition of reference to 'community', both by virtue of the definition of 'environment', and the express use of just that word, does not assist. To give an intention to the drafting requires each of the three identified elements to be given some purpose for them being separately identified. What that seems to us to be intending, then, is that what is being referred to is a spectrum, which includes water as one aspect; a second being broader aspects of the natural and physical resources of the environment; and the third specifically the community. It is our view that it is this broader spectrum approach which is being used in the last sentence of the Te Mana o te Wai concept.

11. Our overall interpretation of the Te Mana o te Wai concept is that it envisages that waters may be in a degraded state, and if so they should be restored and protected in a state closer to the natural setting. However, that is not an absolute requirement, given that later provisions of the NPSFM recognise other community uses of natural and physical resources have occurred which can be beneficial to communities.

12. The clearest example of that approach involving a level of pragmatism, is found in clause 3.31 as to the recognition and acceptance of large hydro-electric generation schemes and their effects on bottom lines. Similarly, for specified vegetable growing areas for a limited period, bottom lines are relaxed in clause 3.33. So, too, in respect of aquatic off-setting and aquatic compensation provisions in Appendices 6 and 7, to mitigate the effects of particular activity proposals.

13. Both in written reports and orally in hearings before us Ms. Boyd the s.42A report writer adopted the position that her approach on freshwater issues basically reflected the NPSFM approach. She understood that to be that provided the health of freshwater was protected both in quality and quantity, then opportunities for use of residual freshwater remained for community, or other purposes, which is how she interpreted the prioritisation in clause 1.5 of the NPSFM to apply. In broad summary her approach was that if the health of freshwater was protected then all else was likely to be well. Ms Boyd properly stressed that the whole trigger for the NPSFM process, ever since its inception in 2014, was that the state of freshwater and wetland resources across the country, particularly in lower catchments, had been significantly degraded.

14. However, in our view that approach places too much weight on the first sentence of the Te Mana o te Wai concept and overlooks aspects of the spectrum balance we perceive being identified in the last sentence. That sentence acknowledges through restoration and preservation a process which balances the health needs of freshwater, the wider environment and the community benefit in a manner which is then prioritised in clause 1.5 as to Te Mana o te Wai, and again in Objective 2.1 of the NPSFM.

2.1.2. Principles of Te Mana o te Wai

15. However, before moving on to address the meaning of clauses 1.5 and Obj 2.1 as to prioritisation, (which was a particularly vexed issue which absorbed much of the freshwater hearing time), we also wish to stress that at least four of the six principles encompassed by Te Mana o te Wai in clause 1.3(4) of the NPSFM also support the proposition that protection and preservation of the health of freshwater is not expressed in absolute terms in the NPSFM.

16. The scheme of the six principles is that they appear to be in two almost reflective parts. Principles (a) to (c) address tangata whenua interactions with freshwater, while Principles (d) to (f) reflect all other New Zealanders' interactions with freshwater. None of the principles themselves are expressed as having priority one over the other, and clause 1.3(3) states they "*inform this National Policy Statement and its implementation".*

17. In the principles in subclauses 1.3(4)(a) and (d) issues of mana whakahaere or governance are addressed in terms of the making of decisions about freshwater respectively to "*maintain, protect and sustain its health and well-being*" and *"in a way that prioritises the health and well-being of freshwater now and into the future."*

18. Concepts of use of or effects on freshwater resources particularly appear, though, in Principles 1.3(4) (b), (c), (e) and (f) as follows:

> (b) *Kaitiakitanga: … and sustainably <u>use</u> freshwater*
> (c) *Manaakitanga: … respect, generosity and care for freshwater <u>and for others</u>*
> (e) *Stewardship: …to <u>manage</u> freshwater that it ensures it <u>sustains present and future generations</u>*
> (f) *Care and respect*: …*<u>in providing for the health of the nation</u>*

(Panel's emphasis)

19. The underlined wording envisages in each case concepts of use of freshwater, or management of effects of use of other resources on freshwater. In the case of (c), the reference to 'others' we consider implicitly involves a concept of use of freshwater by people who must be the 'others'.

20. That concept of use of freshwater is then expanded on in the next clause 1.5 of the NPSFM which provides a hierarchy of obligations for Te Mana o te Wai, but in a prioritised form to which we will shortly turn.

21. However, before doing so we again stress that notwithstanding the recognition in the NPSFM of the value of the use of freshwater resources we have just discussed, the basic thrust of the NPSFM remains water-centric. It is founded both in the concept and in the Principles on the health of freshwater, and as we will see that is expressly prioritised in the clause 1.5 hierarchy and the Objective 2.1. As the Environment Court has said[1] the concept of Te Mana o te Wai requires a mind-shift in relation to freshwater resources into the RMA regime.

2.1.3. Prioritisation through the hierarchy of obligations

22. So how is that reflected in the hierarchy of obligations laid down in clause 1.5 of the NPSFM and Objective 2.1 of the NPSFM? Clause 1.5 provides:

> *(5) 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.*

23. Objective 2.1 is in identical terms as to those priorities:

> ***2.1 Objective***
>
> *(1) 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.*

24. On its face that priority appears straightforward, but as is so often the case in legislative attempts to achieve clarity, the devil lies in the detail. The range of submissions made to us in these freshwater hearings illustrates how inquiring minds coming from differing points of view are able to construct arguments supporting their position in relation to this hierarchy. The concern that arose for all those submitters is the commonly experienced situation for many catchments throughout the country, which is echoed in Otago, that many catchments face demands for human uses that are at or even already beyond the capacity of the catchment to sustain. The result is that with the application of the Te Mana o te Wai concept, principles and prioritisation hierarchy having a primary focus on the health of freshwater, there is a reality to the perception

[1] *Aratiatia Livestock Limited and Ors v Southland Regional Council [2019] NZEnvC 191*

that the second and third priorities may have real bite when the National Objectives Framework (NOF) process is applied to the allocation of water availability for use.

25. That NOF process in Subpart Two of the NPSFM results in the end, through the regional water plan, in rules setting limits to protect the health of freshwater. What became very clear in the submissions, and in the presentations we heard, was that there was an anticipation of reductions as a result of those limits in the availability of water for use. That anticipation or concern led to various potential users arguing that their activity should be regarded as being of a higher priority in the hierarchy than others. That concern was particularly marked in relation to the Manuherekia and Taiari catchments, but was broadly echoed across many catchments.

26. The consequence was that we heard many submitters from a diverse range of activities arguing that we should make decisions to assist the NOF or regional water plan process through the RPS by identifying their particular activity fell within priority (b) of the clause 1.5 hierarchy as serving the 'health needs' of people. Many submitters argued that the obligation in clause 3.2(3) meant that it was not sufficient to merely regurgitate the thrust of the provisions of the NPSFM in the RPS. Clause 3.2(3) imposes in mandatory terms the following obligation:

> *(3) Every regional council must include an objective in its regional policy statement that describes how the management of freshwater in the region will give effect to Te Mana o te Wai.*

27. This type of argument then proceeded along the lines that some guidance as to how access to freshwater was to be prioritised in the regional water plan limit setting and allocation processes was necessary at RPS level.

28. However, clause 3.2(3) does not stand alone. It is but one of a number of relevant considerations that a regional council must consider as it prepares an RPS. Immediately above it for example are a series of mandatory directions in clause 3.2 including:

> *(2) Every regional council must give effect to Te Mana o te Wai, and in doing so must:*
>
> > *(a)…*
> >
> > *(b) …*
> >
> > *(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; and*
> > >
> > > *…*

29. The setting of visions is required by clause 3.4 to be conducted at RPS level. To a limited extent those visions, which must somehow reflect what communities and tangata whenua want an FMU, part FMU or catchment to be like, will involve some concepts of management at a high level. However, the detailed consideration is closely circumscribed again by mandatory provisions in the NPSFM itself.

30. Those provisions such as clause 3.4 as to tangata whenua involvement; 3.7 as to the NOF process; 3.8 as to identifying FMU's and their special sites and features; 3.9 as to values identification; 3.10 as to attribute and baseline state identification; 3.11 to 3.14 as to attribute state settings; and 3.14 – 3.17 as to setting of limits on resource use, environmental flows and levels and identifying take limits, are all expressly directed to be addressed at regional water plan level.

31. In our view clause 3.2(3) is not intended to enable or require a regional council to override those very detailed provisions in the NPSFM requiring detailed management mechanisms to be addressed in a sequential manner following on a detailed NOF process involving community and tangata whenua input.

32. Those submitters advancing those types of arguments in support of a more detailed RPS direction on priorities included sectors such as the food and fibre rural sector, the horticulture sector, (and even the viticulture sector), and the electricity generation sector. In each of those, and other cases, the arguments involved the proposition that without water they could not produce resources which were critical to the lives of people. Hence they argued that the resources they could only produce through the use of water were necessary to secure the 'health needs of people', thus meeting the criteria of priority (b). Some advanced a more nuanced approach of arguing that care was needed in applying the priorities to ensure they were not rigidly applied, and rather were applied in a more holistic manner.

33. That last more generic argument as to the proper manner of applying the hierarchy in clause 1.3(5) needs to be addressed first. It was particularly advanced in the evidence of Ms. C. Hunter for Contact Energy[2]:

> *24. 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, <u>that is why they each need to be given priority.</u> 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. <u>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'</u>.*

(Panel's emphasis)

34. The response to that statement by Counsel for ORC in closing was to emphasise and agree with the statement "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."

35. In our view the argument advanced on Contact's behalf inaccurately describes the three priorities in clause 1.3(5) as 'outcomes' which are all 'acceptable'. Instead, as the opening words of clause 1.3(5) states, they are specifically described in the NPSFM itself as 'obligations', the concept and principles of which are described in clauses 1.3(3) and 1.3(4), which particularly focus on the health of freshwater as priority (a) expressly provides. As Counsel for ORC reminded us in closing, as decision-makers making recommendations in this freshwater area, we are bound to give effect to the responsibility expressed in Principle 4 of the NPSFM under the heading of '*Governance*' being:

[2] *C. Hunter evidence for Contact Energy Limited para 24*

… 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.

36. We interpret the priorities in the hierarchy as requiring a mandatory approach to the order or priority in which access to water is to be provided in situations where limits to protect freshwater values, attributes or states or settings fixed by the consultative NOF process may be at risk. However, in our view it is a fundamental aspect of the NPSFM that the NOF process of involvement of communities and tangata whenua must occur first to inform the fixing of any priorities that are required. That whole NOF process including the fixing of any limits by means of rules which give effect to priorities, occurs as part of the regional water plan process not as part of the earlier regional policy statement process.

37. That still leaves for decision, however, the issue of how the RPS must provide the guidance required by clause 3.2(3) which it will be recalled requires that the regional council must specify in its RPS '*how the management of freshwater in the region will give effect to Te Mana o te Wai.'* The question raised by that requirement is at what level is that management required to be specified in the RPS as contrasted with the regional water plan. In particular, does clause 3.2(3) require guidance for particular activities at a prioritisation level?

38. In our view that level of detail as to particular activity types is not required, or envisaged, by the NPSFM to be provided at RPS stage. Once again, as described above, we emphasise that the detail as to FMU identification and their values; attribute baseline states; target attribute states; environmental flows and levels; and limit setting rules – are all required to be part of the NOF process which is a regional plan process involving mandatory community and tangata whenua involvement and consultation processes. In our view it would be quite wrong and in conflict with the NOF process if the regional council at RPS level was to seek to impose some priority levels which s.67(3) of the RMA would require the regional plan to 'give effect to' without the RPS having undertaken the NOF process.

39. What that realisation takes one to is the conclusion that clause 3.2(3) of the NPSFM is requiring a high-level description only at RPS stage as to how the RPS will give effect to Te Mana o te Wai. That view is consistent with the fact that the NPSFM only expressly requires an RPS to address and provide for Visions as an objective – and as we will discuss later in the topic discussions those Visions are also set at a high level only.

40. For the reasons we go on to address in the chapter or topic decisions which follow, we are satisfied that the PORPS, as recommended to be amended by those topic decisions, does address the manner in which Te Mana o te Wai is to be given effect – at an appropriate high level.

41. We also make the point that the NOF process will address the detail of prioritisation that may be seen as necessary as part of the NOF process. It is that NOF process, informed by community and tangata whenua involvement, which will identify any priorities needed in any particular catchment, part FMU or FMU. Depending on the context and settings in any particular catchment or FMU or part FMU differing activities may fall in either the second or third priorities, or if sufficient quantities at sufficient quality levels are available, then possibly access to water may be able to be shared between the second and third priorities at various times of the season, or even time of the day or night. But once again, as immediately becomes obvious when those various potential permutations are raised, it is necessary to have the NOF process conducted to inform what sort of detail is required in particular catchments, part FMUs or FMUs.

42. One area which did arise in the course of hearings which we think we should helpfully resolve in these opening legal considerations is whether or not other provisions in the PORPS, and in the

prioritisation required by clauses 1.3(5) and Obj 2.1, are limited to New Zealand, or should also take into account for example the health needs of people living overseas to whom our products are exported – including bottled freshwater.

43. Our attention was drawn in the evidence of Ms. Boyd in reply for ORC to the provisions of Principles (4)(e) and (f) respectively as to Stewardship, and Care and Respect, where in each case 'New Zealanders' are specifically referred to – and we note also that in (f) reference is also made to the 'nation'. Those type of references in the Principles need to be considered alongside the facts that this is a 'National' policy statement about freshwater, and is based on assessments in a NOF process relating to catchments located in this nation of Aotearoa. Taking all those factors into account we consider the references in the NPSFM to catchments and FMUs, and to health needs of people and communities, are plainly limited to catchments, people and communities within New Zealand.

2.2. Interpretation Issues arising from LF Chapter Usage

2.2.1. Objectives – LW-WAI-O1 & the use of 'mauri'

44. The relevant chapter in the PORPS where the NPSFM is primarily given effect for the purposes of clause 3.2(3) of the NPSFM is entitled LF-WAI – Te Mana o te Wai. Despite some criticisms that in broad terms LF-WAI-O1 – Te Mana o te Wai effectively repeats the NPSFM provisions, there are some subtle but important differences. An immediate one is that clause 1.3 of the NPSFM utilises five sub-clauses to describe Te Mana o te Wai in terms of a concept description in sub-clauses (1) and (2); six principles in a framework in sub-clauses (3) and (4); and a hierarchy of priorities in sub-clause (5). The underlying concept is described in terms that Te Mana o te Wai 'refers to the fundamental importance of water' and proceeds to emphasise that it protects 'the mauri of the wai', before concluding with references to restoration and preserving of 'the balance between the water, the wider environment, and the community' as discussed earlier. The middle of the description in clause 1.3(1) states that Te Mana o te Wai 'protects the mauri of the wai.'

45. By contrast, in the form finally recommended to us by the s.42A report writers, LF-WAI-O1 commences with a short introduction with a focus on the word 'mauri':

Objective LF-WAI-O1 – Te Mana o te Wai

The mauri of Otago's water bodies and their health and well-being is protected, and restored where it is degraded, and the management of land and water recognises and reflects that:

(1) water is the foundation and source of all life – na te wai ko te hauora o ngā mea katoa,

(2) there is an integral kinship relationship between water and Kāi Tahu whānui, and this relationship endures through time, connecting past, present and future,

(3) each water body has a unique whakapapa and characteristics,

(4) fresh water, land and coastal water have a connectedness that supports and perpetuates life,

(4A) protecting the health and well-being of water protects the wider environment

(5) Kāi Tahu exercise rakatirataka, manaakitaka and their kaitiakitaka duty of care and attention over wai and all the life it supports, and

> (6) all people and communities have a responsibility to exercise stewardship, care, and respect in the management of freshwater.

46. That commencing focus on the word 'mauri' when it is not itself expressly defined in the PORPS, the RMA or the NPSFM led to criticisms of having a principal freshwater objective of uncertain meaning.

47. On the evidence and submissions we heard, even from Kāi Tahu, the exact meaning of 'mauri' is not readily definable as it relates to a combination of physical and ecological elements, which are scientifically demonstrable, as well as amenity aspects, which are far less capable of precise description. In addition it can involve a range of te ao Māori concepts, both physical and metaphysical. They can include physical attributes such as the capability of freshwater resources to be used for mahinga kai purposes, or the gathering of resources such as harakeke for weaving or tāniko, or raupō or toetoe for thatching or tukutuku. The metaphysical aspects can include such aspects or attributes as whakapapa relationships, traditional pūrākau or historical tales, the spirit or wairua of particular water bodies in their own locational context.

48. In summary we are of the view that the subtle change in placement or use of the word 'mauri' between the NPSFM approach, where it does not need definition because the actions surrounding its use describe how it is protected, to the PORPS situation where it is the sole aim of the actions, is fraught and unhelpful. We consider a change in wording of the introductory wording to LF-WAI-O1 can achieve what we perceive its intention to be, without weakening the underlying protection approach to freshwater management which accords with the Te Mana o te Wai concept. That can be achieved by changing the opening wording in LF-WAI-O1 to state:

> ~~The mauri of~~ Otago's water bodies and their health and well-being ~~is~~ <u>are</u> protected, and restored where ~~it is~~ <u>they are</u> degraded, <u>so that the mauri of those water bodies is protected</u>, and the management of land and water recognises and reflects that:
>
> …

49. That sequencing more closely aligns with the approach utilised in clause 1.3(1) as to the concept of Te Mana o te Wai in the NPSFM, and does not require the difficult approach of attempting to define a well-nigh indefinable concept such as 'mauri'.

2.2.1.1. Recommendation

50. Amend LF-WAI-O1 to read:

> **LF-WAI-O1 – Te Mana o te Wai**
>
> ~~The mauri of~~ Otago's water bodies and their health and well-being ~~is~~ <u>are</u> protected, and restored where ~~it is~~ <u>they are</u> degraded, <u>so that the mauri of those water bodies is protected</u>, and the management of land and water recognises and reflects that:
>
> …

2.2.2. Meaning of 'health' and 'well-being' and naturalness for water and communities

51. The term 'health and well-being' is used in the NPSFM and in various places in the PORPS either as a phrase or in varying situations as individual words. In many cases, such as again in subclause 1.3(5) of the NPSFM as to the first priority, it is solely used in relation to freshwater resources. In other settings such as clause 1.3(4)(f) of the Principles the word 'health' is used alone relating to

the ‘health of the nation’, and in subclause 1.3(5)(b) is used on its own in relation to ‘the health needs of people.’ In sub-clause 1.3(5)(c) the word ‘well-being’ is used on its own to refer to the ‘social, economic and cultural well-being’ of people and communities.

52. In the PORPS the phrase again commonly appears in conjunctive form, as in recommended amended LF-WAI-O1 (4A) as to the ‘health and well being’ of water. In the Policies at LF-WAI-P1 it is used as a phrase in relation to ‘water bodies’ and ‘freshwater ecosystems’ and in relation to the environment – which by the RMA definition used in the PORPS includes ‘people and communities’. These are only some of the examples of the use of these words, but the issues arising from their use comes into the most obvious focus in considering the final recommended version of Policy LF-WAI-P1 which rewords subclause 1.3(5) of the NPSFM in the following manner:

LF-WAI-P1 – Prioritisation

In all decision-making affecting 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), together with the exercise of mana whenua to uphold these,

(2) second, health needs of people, (te hauora o te tangata); interacting with water through ingestion (such as drinking water and consuming resources harvested from the water body) and immersive activities (such as harvesting resources and 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.

53. The various usages of the words ‘health’ and ‘well-being’ have been argued to enable different interpretations. On the one hand the ORC s.42A report writer Ms Boyd has argued in relation to the priority provisions of the NPSFM that the ‘health needs of people’ are restricted to direct usages or effects of water. That is reflected in the more precise wording used in sub-clause (2) of the recommended version of Policy LF-WAI -P1.

54. Other user groups have variously argued that their particular use of water can demonstrate a very close linkage with human health and/or well-being. For example, electricity generators pointed to numerous linkages of the use of electricity generated by hydro which are potentially critical to the health of many people. They would include basic heating in homes, the ability to pump drinking water, or critical hospital usages, to name but some. Food and fibre producers argued that water was critical to their ability to supply food – an absolute basic for human health.

55. Other uses such as for major community drinking water supply purposes, such as those for Dunedin or Oamaru, then give rise to even further complications. In the former case of Dunedin much of that water supply from the Taiari catchment will be used for industrial or commercial purposes, or even for domestic lawns or decorative gardens. Those of course are only very indirectly able to be linked in some cases to ‘health needs of people’. In Ōamaru’s case the supply from lower Waitaki River provides for a mix of irrigation use, before the balance is used for urban drinking water supplies, which once again as with Dunedin’s supply will also be used as well for industrial and commercial uses, or other domestic uses not directly related to ‘health needs of people’. Other rural users with particular sensitivity to loss of or reduction in water supply include

hydroponic growers, nursery growers with highly susceptible immature root stock or vegetable plants, and viticulture users. Submitters from those varying user groups similarly advanced arguments that by taking a broad approach to interpretation their activities could be classed as essential or conducive to the 'health' or 'well-being' of people.

56. One of the immediate issues arising from those considerations, which caused much debate before us, was just what was meant by the terms 'health' or 'well-being' of waterbodies, and whether those words were used individually or jointly as a conjunctive phrase. That argument can be coupled with the related issues raised in respect of other provisions in the NPSFM and the PORPS which concerned 'natural' state; 'restoration', (i.e. restored to what state?); or a 'degraded' state.

57. These types of issues came into the most stark relief in the Objective stating the Visions at LF-FW-O1A of the recommended changes suggested in the s.42A reply version. It states that one vision objective is to be:

> *(4) the natural form, function and character of water bodies reflects their natural characteristics and natural behaviours to the greatest extent practicable,*

58. With the exception of the 'Clutha Scheme', (which is undefined in the NPSFM as to which catchments or sub-catchments are included), the concern expressed by many submitters was that long-standing infrastructure had existed for decades, or even longer than a century, for gold-mining, irrigation or drainage purposes. The concern for many submitters was that such human-made infrastructure development could mean the water bodies affected were technically regarded as being 'degraded' from a natural state. Their concern was that an interpretation might be applied that the health or well-being of the water was technically not protected while they were in that 'non-natural' state, and/or that the natural state needed to be restored by removing infrastructure. Yet they emphasised that the infrastructure changes had been accepted as part of the physical environment for very long periods – often many decades or longer.

59. Particularly in Central Otago where multitudes of smaller, but nonetheless substantial, dams and races existed for gold-mining or irrigation purposes, and had been for decades, the economic effects of any requirement to restore 'natural' conditions could be huge. The Clutha Scheme was not affected as it is included in clause 3.31 of the NPSFM, which provides an exception for it and other large hydro-electric generation schemes in certain circumstances, even from national bottom lines. Other examples, however, of either major irrigation canals or storage dams, or major drainage infrastructure or works were described. Some of those in the broader Clutha catchment were not part of the Clutha hydro electric scheme, and in the lower Waitaki and the Pomahaka respectively many other examples were described.

60. Closing submissions by counsel for ORC Mr. S. Anderson drew attention to the fact that in some resource management areas, such as landscape assessments, 'natural' landscapes have been held in the Courts to not necessarily require a landscape free of human intervention. In many cases farm scenery has been held to have natural landscape values despite the land originally being cleared by humans. Notwithstanding that type of RMA approach, Mr. Anderson also referred[3] us to a range of relevant provisions in the NPSFM some of which particularly highlight the basis for submitter concerns.

61. For example, the definition of 'naturally occurring process' in the NPS FM is one that '*means a process that occurs or would occur, in the absence of human activity'*. He continued, though, to

[3] *At pp.15-17*

point out that that definition only has application in situations where in assessing human impacts all natural changes are excluded from the assessment (NPSFM clauses 1.3(4), 3.19 and 3.32).

62. However, clause 3.25 of the NPSFM which addresses sedimentation issues in respect of rivers has a definition of 'naturally' as meaning '*its state before the arrival of humans in New Zealand*'. Mr. Anderson then made the submission that the use of such a specific definition solely in clause 3.25 for a specific assessment process relating to sedimentation meant that other uses of 'natural' or 'naturally' in the NPSFM should not be given that meaning. He supported that proposition by reference to clause 1.4 as to the interpretation of attribute states effectively being assessed as the status quo, because the definition of a 'baseline state' for attributes in Appendix 1B is identified as being 'best of the state' at the date the relevant objective was set, or 7 September, 2017 being the applicable date of the NPSFM provision itself.

63. Mr Anderson then concluded ORC's submission on this issue by advancing the proposition that *"What matters most is the context in which the word is used in this part of the vision in the RPS."* (para132) We agree with that proposition.

64. The ORC submission continued by quoting from Ms Boyd's reply report at paragraph 56 as to why she was recommending use of the phrase 'to the greatest extent practicable' in this context in her recommended amended wording for LF-FW-O1A(4):

> *In my view, 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*.

65. We will return to that issue when considering that provision in detail later in this report as to its factual subject matter.

66. What all these complications point to is the inherent danger in utilising absolute terminology in relation to the use of freshwater, when context and setting can have so many complications at so many levels. These complications also highlight why community and tangata whenua involvement in the NOF process is so necessary to ensure that informed decisions can be made in the detailed context and setting for particular catchments, FMUs or part FMUs. As discussed earlier, the outcome of that NOF process may well be a mix of limits at various times of the year, or even during a 24 hour period, enabling a broader range of sophisticated usage of freshwater for second or third priority purposes, while maintaining freshwater attribute states at the level decided to be most applicable to maintain the health and well-being of water bodies.

67. As a consequence of this conclusion, in the more detailed subject matter considerations of topics or provisions which follow we will be endeavouring to ensure that absolute positions in terminology are not expressed which may detract from the flexibility of detailed assessment of attribute setting and limit setting which can be better considered at the regional water plan stage as part of the NOF process.

68. However, we do consider in respect of these overall type of interpretation issues in the FPI that it is incumbent upon this Panel at RPS stage to provide its views on what meaning we consider needs to be applied to the second priority in clauses 1.3(5) and 2.1 of the NPSFM as reflected in LF-WAI-P1(2). That is because clause 3.2(2)(c) of the NPSFM requires that every regional council must give effect to Te Mana o te Wai and in doing so must:

(2) (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; and

69. In the PORPS process this Panel is charged with considering the long-term visions, and objectives policies and methods which will apply to water allocation, albeit only at a high level for the reasons earlier discussed.

70. It will be recalled it was recommended by the final s.42A reply report that LF-WAI-P1(2) should be worded:

(2) second, health needs of people, (te hauora o te tangata); interacting with water through ingestion (such as drinking water and consuming resources harvested from the water body) and immersive activities (such as harvesting resources and primary contact), and …

71. Almost all of the submissions we received about the second priority were from those who argued their activity or use should be regarded as being included in the second priority rather than the third. In so doing they were of course arguing for a far broader interpretation of the second priority than the ORC s.42A approach as reflected in LF-WAI -P1(2) above. The ORC approach is by contrast narrow and has a focus on direct health needs of those directly drinking, or in contact with freshwater. Those arguing for a broader interpretation asserted that if priority one was satisfied then a state of freshwater health would as a necessary consequence mean it was safe for human consumption and contact.

72. We agree with the rebuttal of that argument advanced by Mr. Anderson and Ms Boyd for ORC who argued that quantity and quality considerations for ecological and human health needs were not always identical. The examples they gave provide answers to that proposition. Their examples included that water may well be considered healthy for ecological purposes, yet contain *E.coli* which is not safe for human health; or water at a certain flow level in a river may be sufficient to provide for human health needs in terms of relatively restricted amounts required for drinking water, but too low in flow to sustain wider ecological health needs of fish and other species of flora or fauna. Those are strong arguments in support of the proposition that two priority levels are needed for those differing health needs of freshwater and related ecology, and human health needs.

73. However, the most compelling reasons for adopting the narrower approach include additional considerations.

74. The first of those is once again the overall regime in the NPSFM of the NOF process for setting attribute states and targets and the concomitant setting of limits through rules. For that to be able to function effectively the balancing required by Te Mana o te Wai requires that quantity and quality limits are able to be provided for at closely confined levels in priorities one and two, so that the broader priority conflicts can be resolved through the NOF process. That can only realistically occur if there is a high level of certainty as to what falls within priority two so that the broader aspects of priority three of 'social, economic, and cultural well-being' of people and communities can be resolved through the NOF process. Any major broadening of the interpretation of 'health needs of people' would mean that the very types of conflicting

arguments we have heard advanced, which much more closely fall within descriptions of 'social, economic and cultural well-being', could absorb all available water at priority two, leaving the other important priority three needs with no or minimal provision, or an inability to share in allocation.

75. The final consideration is that the example actually given in the NPSFM for priority two is that of drinking water. That makes it plain in our view that a very direct relationship with freshwater is what was intended. Had it been intended to include national interest considerations or less direct uses, the drafting example could have been expected to be broader, such as 'nationally significant hydro-electricity needs for the health of people', or 'irrigation for food supply'. The lack of any such broader example on its face supports the proposition that the interpretation was intended to be narrow, and related to more restricted direct human health needs.

76. However, as Ms. Burkhardt for Manawa Energy pointed out in her submission (at paras 44 et seq) the s.32 analysis of the NPSFM asserted (at pages 45-46) that Policy 4 of the NPSFM as to freshwater being managed as "part of New Zealand's integrated response to climate change":

> *…contributes to achieving the Objective (2.1 (1)(b) and (c)), by preserving hydroelectricity flexibility, which will secure renewable electricity generation, which is important for meeting the health needs of people (clause (b)) as well as enabling communities to provide for their social, cultural and economic well-being, now and into the future (clause (c));*

(Panel's emphasis)

77. Ms. Burkhardt used that statement to develop an argument that different priorities could apply to the same use and that it supported a broad interpretation of the second priority. We acknowledge the force of her argument but make two points about it.

78. The first is the obvious one, which we address in more detail in the next section, that the s.32 analysis for the NPSFM fails in this discussion to recognise that the Preamble of the NPS REG expressly makes it plain that the NPS REG "*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…*". The discussion in the s.32 analysis as a consequence is flawed as the preamble expressly makes it plain that the NPS REG does not provide any particular level of priority as to allocation and prioritisation, even for nationally significant renewable hydro generation needs.

79. The second point to make is that hydro generation needs for freshwater in a catchment can be so large that if it was to be considered as part of the second priority then third priority needs could be unable to be effectively addressed, if second priority needs absorbed all available water. We do not consider that was an intended outcome of the NPSFM priority system.

80. In summary then we agree with the approach advanced by ORC that the intent of priority two is only to capture that limited amount of water involved in contact usages which can directly affect human health needs, i.e. the taking of freshwater solely for drinking water purposes or other direct engagement activities. That should leave reasonable quantities available in most situations, short of drought conditions, for use by priority three users. The detailed methods of allocation amongst those users will then be able to be informed during the NOF process - where the national significance aspect to give effect to the NPS REG can be considered.

81. The reference to hydro-electricity generation we have just made obviously raises one final issue arising from these initial interpretation issues which we must also turn to address now.

2.3. Effect of the NPS REG on freshwater issues

82. In the Preamble to the NPS for Renewable Electricity Generation 2011 (NPS REG) the following is stated:

> *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.*

83. The provisions of the NPS REG are strongly permissive and directory that regional policy statements are to make provision for all the matters it addresses, which are best summarised by quoting the one overarching Objective of the NPS REG:

> *Objective*
>
> *To recognise the national significance of renewable electricity generation activities by providing for the development, operation, maintenance and upgrading of new and existing renewable electricity generation activities, such that the proportion of New Zealand's electricity generated from renewable energy sources increases to a level that meets or exceeds the New Zealand Government's national target for renewable electricity generation.*

84. We received submissions from Manawa Energy Limited, (the owners of the Waipori and Paerau/Pateroa hydro-electric scheme undertakings), effectively suggesting that in relation to electricity generation the obligation to give effect in the PORPS to the NPS REG required a degree of priority being accorded for REG. That was summarised at paragraphs 51 to 53 of Ms. Burkhardt's submissions as follows:

> *51. I do not necessarily consider that there a conflict that needs to be resolved here, in the same way the NZCPS port and avoid policies need to be. Manawa has not suggested that the waterbody first approach should be put to one side to allow for hydro-electricity. But the short point is that instead of approaching it as a matter of conflicting direction, the pRPS needs to ensure that it gives effect to, i.e implements, both sets of national direction as best it can.*
>
> *52. This is not by allowing HEPS regardless of its effects, but by ensuring that there is some recognition and provision for REG, <u>and a priority for these activities when looking at the suite of uses that will be enabled above bottom lines.</u>*
>
> *53. In other words, <u>providing for some degree of priority, or at least special recognition</u>, for REG over other uses that are not deemed nationally important.*

and at paragraph 83:

> *83. The pRPS must, I submit, foreshadow the choices that need to be made in the Land & Water Regional Plan and provide clear direction on provision for hydro-electricity generation rather than leaving this to be treated the same as other general uses of water. This does not need to be, and should not be, parked to be addressed via the regional plan. To do so would not comply with the statutory*

requirements for a regional policy statement. Either way, there is a strong case for prioritising access to water for HEPS over other uses, and care needs to be taken to ensure that the special recognition made for REG in the pRPS is not watered down by providing equivalent recognition to other uses which do not have the same level of importance.

(Panel's emphasis)

85. In our view, once again the propositions underlined above fail to properly recognise the statement in the Preamble that the NPS REG does not apply to allocation and priority issues "*as these are matters for regional councils to address in a catchment or regional context….*" As we have made clear in our discussion of priority issues further above, the catchment context is intended by the NPSFM to address priority and allocation issues by those issues being informed by the NOF process. We do not accept that at regional policy statement level it is appropriate to try to settle either priority or allocation issues in detail. Provided the PORPS properly recognises and provides a framework of objectives, policies and methods that recognise the national significance created by the NPS REG, that is all that is required at this higher level of provision.

86. The detailed subject consideration of the objectives, policies and methods which follows will address the issue of whether that is achieved by the PORPS. That will include a consideration of the Visions objectives, which is where the recognition Manawa seeks will need to be addressed. Reference to the Visions objectives itself raises other legal issues we now address.

3. Visions

3.1. Validity of the recommended Single Objective approach in LF-FW-O1A

87. As notified the pORPS had FMU visions for the following five FMUs:

LF-VM- 02 Clutha Mata-au FMU vision

LF-VM-03 North Otago FMU vision

LF-VM-04 Taieri FMU vision

LF-VM-05 Dunedin & Coast FMU vision

LF-VM-06 Catlins FMU vision

88. Allowing for some particular locational or contextual differences by and large the visions contained in a repetitive manner similar common provisions broadly intended doubtless to give effect to Te Mana o te Wai.

89. In reply evidence Ms Boyd for ORC instead proposed a new Objective entitled:

LF-FW-01A – Visions set for each FMU and rohe

90. That recommended new Objective was intended to draw under the one objective matters which were common to all Visions objectives, leaving the FMU Visions objectives only having to address catchment related issues in that particular FMU. That approach was challenged by some submitters as being invalid on the basis that it did not comply with the NPSFM method of setting the visions. So that raises the question of what the NPSFM actually requires a regional council to do in setting Visions?

91. The start point for that consideration is clause 3.3 of the NPSFM which in relevant aspects provides:

> ***3.3 Long-term visions for freshwater***
>
> *(1) Every regional council must develop long-term visions for freshwater in its region and include those long-term visions as objectives in its regional policy statement.*
>
> *(2) 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). ….*

92. The new recommended version LF-FW-O1A has been advanced by Ms Boyd and counsel for ORC as simply being effectively a word-smithing exercise capturing a range of common issues in one objective which is applicable to all FMUs. The advantage they point to is a simplification for the reader of the PORPS with unneccessary repetition being avoided because the common features are stated in the one objective as being applicable in each FMU.

93. This position was challenged by a number of submitters such as OWRUG, Federated Farmers & Dairy NZ and Horticulture NZ. The former asserted it was an invalid approach at law on the basis that clause 3.3(2) of the NPS FM does not provide for 'region-wide' vision objectives, and in addition, in the case of Horticulture NZ, asserted that the recommended region-wide approach also overlooks or supersedes community consultation on the Visions.

94. On the invalidity argument Counsel Ms. B Irving for the OWRUG group of submitters submitted at paragraph 66 of her submissions:

> *66. The NPSFM is clear that freshwater visions must be set at an FMU, part FMU or catchment level. Clause 3.3(2) does not provide for a region wide vision. ...*

95. The submission underlined the word 'must' presumably to emphasise the mandatory nature of the statutory direction. However, that overlooks what clause 3.3(1) actually says. It says:

> *(1) Every regional council must develop long-term visions for freshwater in its region and include those long-term visions as objectives in its regional policy statement.*

(Panel's emphasis)

96. The only mandatory use of the word 'must' in clause 3.3(1) in respect of this issue as to how broadly framed visions must be, is in fact at a region wide level. It is only the enabling, not mandatory wording, of clause 3.3(2) which enables visions to be set at a more detailed level when it says:

> *(2) Long-term visions:*
> *(a) may be set at FMU, part of an FMU, or catchment level; and*

(Panel's emphasis)

97. In our view the region-wide vision objective approach is plainly available at law, as are visions set at FMU, part FMU or catchment level.

98. We also perceive that the major thrust of the additional Horticulture NZ criticism as to impacts on consultation outcomes was directed more at the omission in recommended LF-FW-O1A of references to food production. At paragraph 47 of the Horticulture NZ submissions it was asserted that food production was a unique characteristic of particular parts of the region and where identified as such should be included in the visions for those parts, or alternatively included in LF-FW-O1A. That issue is not so much a legal issue on validity or otherwise, as one involving planning considerations, so it will be dealt with in the subject matter reasoning about the wording of LF-FW-O1A.

99. The Panel accepts, therefore, that it is in accord with common sense and brevity to combine common features in one Visions objective. Moreover, as Objective O1A is stated to be applicable in each FMU then we can see no conflict between its combined approach and any of the provisions of clause 3.3. The recommended new provision Objective O1A expressly states that it applies in each FMU, both in its title and in its opening words:

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

In each FMU and rohe in Otago and within the timeframes specified in the freshwater visions in LF-VM-02 to LF-VM-06:

(1)...

100. We are satisfied no legal error is made in adopting that recommendation aspect from the Reply report.

3.2. Are the Visions required or able to address prioritisation or allocations?

101. The requirement for Visions to be set in sub-clauses 3.3(1) and (2) of the NPSFM have been set out in the discussion above.

102. The detailed provisions as to how those Visions are to be produced are found in sub-clauses 3.3(3) and (4) which provide:

….(3) Every long-term vision must:
(a) be developed through engagement with communities and tangata whenua about their long-term wishes for the water bodies and freshwater ecosystems in the region; and

(b) be informed by an understanding of the history of, and environmental pressures on, the FMU, part of the FMU, or catchment; and

(c) express what communities and tangata whenua want the FMU, part of the FMU, or catchment to be like in the future.

(4) Every regional council must assess whether each FMU, part of an FMU, or catchment (as relevant) can provide for its long-term vision, or whether

improvement to the health and well-being of water bodies and freshwater ecosystems is required to achieve the vision.

103. The basic thrust, then, of the development of Visions requires significant community and tangata whenua engagement, with subclause 3.3(3)(c) requiring the Vision to state the outcome of the wishes of the community and tangata whenua for their FMU, part of the FMU, or catchment. In addition, every long term Vision is to be informed by historical and environmental pressures on an FMU, part of the FMU, or catchment. That in logic must include physical historical developments in or affecting water bodies, as subclause 3.3(3)(b) requires.

104. Finally, subclause 3.3(4) requires that an assessment has to be made by the regional council as to the health and well-being of the water bodies and freshwater ecosystems involved, and whether their state needs improvement to achieve the vision of communities and tangata whenua.

105. Many of the functions required by these sub-clauses are expressed in a manner which is inherently challenging – such as any attempt to identify and express what a community and tangata whenua "*want the FMU, part of the FMU, or catchment to be like in the future.*" (cl.3.3(3)(c)).

106. Those challenges are, however, made clearer by a close reading of subclause 3.3(3)(a) which requires engagement with '*communities and tangata whenua about their long-term wishes for the <u>water bodies and freshwater ecosystems</u> <u>in the region</u>'.* We have underlined the phrase '*water bodies and freshwater ecosystems in the region'* as it indicates a very broad engagement 'in the region'. That region-wide engagement as to long-term wishes for water bodies and ecosystems in the region must envisage that the engagement is to be with various communities but at a region-wide level, which will be at a high concept level.

107. However, sub-clause 3.3(3)(c) then requires the regional council to ensure that the individual Visions "*express what communities and tangata whenua want the FMU, part of the FMU, or catchment to be like in the future*." That appears to envisage that the engagement process required by 3.3(3)(a) will produce views of communities and tangata whenua as to more detailed wishes for particular FMUs, part FMUs, or catchments, which the Visions must endeavour to express.

108. A further guide as to what is intended for the visions arises from the fact that the regional water plan NOF process required by the NPSFM, which delves further into detail, does not precede but rather follows on the Visions process in the RPS.

109. It seems to us both logical and in accordance with the sequential timing involved in the NPSFM for the Visions to be settled at a high level, with the consequent NOF process delving into the detail as the values and relevant attributes are assessed and fixed, as well as all the related NOF considerations in relation to particular FMUs, part FMUs or catchments.

110. The last stage for the Visions is that sub-clause 3.3(4) requires an assessment at an FMU, part of an FMU, or catchment level as to whether improvement is needed. It might on one view appear difficult to see how that can practically be done before detailed attribute states are assessed in the NOF process.

111. As a consequence at first glance an uncertainty might be argued to arise out of the drafting of the Visions sub-clauses 3.3(3) and (4), and it is probably not too surprising that many submitters strongly advanced the proposition that prioritisation and/or allocation issues had to be

addressed at Visions stage, as that is what the communities engaged were seeking. That argument has a beguiling attraction, but it faces the problem that it flies in the face of the sequencing in the NPSFM described above and earlier in this report. That sequencing envisages high level concepts being addressed at the Visions stage in the RPS, followed by detailed attribute identification enabling prioritisation and allocation to be addressed. That is to occur later in the NOF process, as part of the regional water plan process.

112. Where the argument advanced by submitters seeking prioritisation and allocation direction in the Visions goes awry is in the failure to properly appreciate what sub-clauses 3.3(3) and (4) are really addressing. A closer reconsideration of their wording demonstrates that flaw. In our view the primary focus of sub-clauses (3) and (4) is on Te Mana o te Wai i.e. they are focussed at a high level primarily on the health and wellbeing of the water bodies in the region and their freshwater ecosystems, but also on the other priorities the communities' wish for which may impact the first priority. They are not focussed primarily on the use of water for human social, economic and cultural wellbeing.

113. As we underlined above sub-clause 3.3(3)(a) requires engagement with communities and tangata whenua '*about their long-term wishes <u>for the water bodies and freshwater ecosystems in the region</u>'.* That sub-clause does not specifically mention their wishes as to the uses of water to provide for their social, economic and cultural wellbeing.

114. Similarly, 3.3(3)(b) refers to the vision being informed by '*an understanding of the history of, and environmental pressures on, the FMU, part of the FMU, or catchment'.* In the context of 3.3(3)(a), and of 3.3(3)(c) and 3.3(4) which we discuss below, we consider that 'history' and those 'environmental pressures' relate primarily to the health and wellbeing of the water bodies and related ecosystems, not the history and environmental pressures on communities or tangata whenua.

115. So, too, in sub-clause 3.3(3)(c) the expression of what the communities and tangata whenua want the FMU, part FMU or catchment to be like must relate primarily to what the engagement in 3.3(3)(a) was about – which was '*their long-term wishes for the water bodies and freshwater ecosystems in the region.'* The expression of those wishes, therefore, in the Visions objective is to be at that high level of what communities and tangata whenua want in respect of the state of health and well-being '*for the water bodies and freshwater ecosystems in the region'* as the primary factor with the other priorities in Te Mana o te Wai having lesser priority.

116. That interpretative approach to sub-clause 3.3(3) then fits hand in glove with the statement in sub-clause 3.3(4) that the regional council must assess whether improvement is needed for each relevant FMU, part FMU or catchment to be able to provide for its vision. That assessment is expressly stated in sub-clause 3.3(4) to relate '*to the health and well-being of water bodies and freshwater ecosystems'.* That wording in respect of the issue of the potential need for improvement is related specifically to health and wellbeing from a water-centric viewpoint in relation to water bodies and freshwater ecosystems.

117. When that water-centric, or Te Mana o te Wai, focus is applied to sub-clauses 3.3(3) and (4) we are satisfied that in general terms the PORPS Vision objectives must be set at the high level discussed above. For the purposes of sub-clause (4) for example, the Visions have to express community and tangata whenua wishes, and include the ORC assessment as to whether and to what extent human-made physical changes to natural flows are best left to function as they have done, or need change to ensure the health and wellbeing of water bodies or ecosystems affected by their existence. In respect of the most significant physical works in Otago, namely the Clutha

Scheme, that task was assisted by the express recognition of the national value of that Scheme remaining in place by the provisions of sub-clauses 3.31(2) and (4) of the NPSFM itself.

118. What that allows at the Visions objective stage in terms of capturing human wishes to use water to provide for their social, economic and cultural purposes, is the expression of an objective of enabling that in circumstances where the health and well-being of water bodies and ecosystems are at a level where that can occur. However, this does not necessarily mean that such existing uses of water for social, economic and cultural purposes should cease until the health and well-being of a water body reaches a desired level. Rather, it could mean that the effects of such uses are reduced in some way, where needed, to enable the health and well-being of a water body to reach the desired level. This comes back to the concept of Te Mana o te Wai in clause 1.3(1) of the NPSFM, *"about restoring and preserving the balance between the water, the wider environment, and the community"*.

119. We have concluded, therefore, that the Visions are intended by the NPSFM to primarily operate at that high level of addressing the health and well-being of water bodies and their related freshwater ecosystems. Issues of human use as a second priority, and as a third priority, can be addressed, but again at that high level. In other words, the issues of prioritisation and allocation of freshwater for those purposes must be left until the NOF stage when detailed attributes to be identified and targets required are being set.

120. That interpretative approach also accords with sub-clause 2.2(c) of the NPSFM which requires the regional council to apply the hierarchy of obligations as set out in clause 1.3(5) when developing the long term visions under clause 3.3. The first in that hierarchy of obligations is of course '*the health and well-being of water bodies and freshwater ecosystems'.* The overall PORPS approach in the Visions objectives accords with the priority of the hierarchy, which is also obviously applied in clause 3.3 of the NPSFM itself as to the Visions.

121. The consequence of those conclusions is that, outside of the recognition of human needs alluded to in paragraph 116, we will not be addressing issues of allocation priorities for such uses in the Visions such as priority for food production; priority for taking of water for storage; priority for renewable electricity generation purposes; priorities for Dunedin's water needs; the central Government's recent Emission Reduction Plan and/or National Adaptation Plan - or any other priority of the human need related issues that were argued should be provided for in the Visions. All of those are more detailed uses of water that are not required to be addressed at the Visions stage but rather identified and addressed in appropriate detail at the NOF stage in the regional water plan process.

122. For the same reasons, timeframes issues arising out of subclause 3.3(2)(c) of the NPSFM related to human needs rather than aspirations related to the health of freshwater and related ecosystems are a second and third priority consideration we need to address at a higher level at the RPS Visions stage. In terms of clause 3.3(4) timeframe issues related to the potential for 'improvement to the health and wellbeing of waterbodies and freshwater ecosystems' are part of the considerations of the RPS Visions stage. So we turn to some legal issues in respect of those timeframes now.

3.3. Timeframes issues in Visions for the heath and wellbeing of freshwater

123. The provision requiring timeframes is found in sub-clause 3.3(2)(c) of the NPSFM. It follows on from a provision requiring goals to be set which is found at sub-clause 3.3(2)(b). Together they provide:

(2) 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)

124. The legal issues that were canvassed at the hearing in regard to timeframes were often naturally coloured by the arguments discussed above relating to prioritisation and allocation. However, in some respects, the best example of which was the Manuherekia catchment, timeframes for improvements to the health and well-being of freshwater in the river could significantly affect upper catchment water users. We received compelling bodies of evidence as to the complex mix of physical water storage and distribution structures which have been in place in that catchment for over 100 years for some infrastructure and for many decades for other infrastructure. It is plain from that evidence that the health and well-being of the river was definitely not the first priority as those structures were put in place. Rather human economic and social needs were prioritised. Consequently that catchment is at the forefront as an example of where the change in statutory emphasis under the NPSFM has the capacity to have significant detrimental social, economic and cultural effects on communities reliant on water provided through physical man-made structures as described.

125. That significant impact could, of course, be mitigated by providing for extended timeframes to achieve the goals set in the Visions for a healthy river. What the evidence also plainly demonstrated was that extended time frames may be a practical and economic necessity to allow major physical changes in the methods of operating small upper storage dam facilities to allow more flow to sustain downriver freshwater health and well-being.

126. Some of the structures described to us could only be physically altered to achieve that outcome with a mix of drawdown or drainage, each of which may affect the availability of water from storage in the year the works are carried out, and major reconstruction alteration or renewal works. The works needed have yet to be designed or commenced as final design work cannot realistically be completed until after the NOF process settles the quantities needed for freshwater health and well-being. The economic capital costs of the works needed will themselves place burdens as to financing on those supplied by such infrastructure. Funding for that capital cost will have to be negotiated either with private sources such as banks, or possibly in combination with local or national government bodies. Again all of that economic consequence cannot even commence until after the NOF process enables final design work to be done, which will then need to be quantity assessed to come up with the capital costs involved.

127. If the Manuherekia is a classic example of the type of Central Otago drylands pressures on timetables for goals for achieving healthy freshwater then the Pomahaka catchment is a good example at the other end of the scale in a higher water table area. In the lower reaches of that catchment past significant physical drainage works often involving straightening of drainage courses has been carried out in periods when freshwater health did not have the priority it now has in the NPSFM. Those works can have significant inputs to sediment-laden detrimental effects on freshwater heath. However, once more until the NOF process has been completed it will be uncertain what relevant attribute states have to be met and how that is to be achieved. Once again the financial impacts on affected farming communities may be significant, particularly if they were to be unable to regularly maintain straightened man-made drainage channels.

128. Other challenging issues in upper catchments can arise as in the upper reaches of the Matukituki where farming communities have banded together to try to achieve better health and well-being outcomes for their freshwater bodies on a voluntary basis. Submitters in that area were a good example of the voluntary catchment-led approach that was urged upon us by the various farming submitter groups such as Beef and Lamb and OWRUG.

129. A common feature of all those submitter groups and their witnesses both lay and expert was to stress the seriousness of the economic and related social burdens that 'rushed' timeframes could impose. They all sought varying degrees of timeframes to allow what they asserted were critical transition periods to enable them to adjust their use practices and the infrastructure or physical works they relied on as part of their present methods of use of freshwater resources. Their common positions were that without some such reasonable transition periods their businesses, families and lifestyles could be devastated or at the very least placed under severe strain with all the economic and social disruption that could flow from sudden harsh requirements to reduce use of water or to meet the cost of significant infrastructure upgrades.

130. In the later subject considerations of planning outcomes these issues will be further addressed as to what the Hearing Panel's views were on the changes that should be made to the PORPS to recognise the force of that body of evidence, while at the same time bearing in mind the statutory imperatives in the NPSFM to give effect to Te Mana o te Wai with its first priority being the health and well-being of water bodies and freshwater ecosystems.

131. What requires to be addressed at this juncture, though is whether and to what extent it is permissible in the PORPS to take into account at the Visions timeframe stage such human effects matters. On one view, such as that propounded by Kāi Tahu and Wise Response, those human effects issues are strictly external to the health and wellbeing of freshwater, albeit intimately related to freshwater health and well-being because of the effects of the physical infrastructure or works on which they rely.

132. In our view the key to this consideration is found in a combination of sub-clause 3.3(2)(b) and sub-clause 3.3(3)(b) of the NPSFM.

133. The former sub-clause 3.3(2)(b) requires goals to be set *that are ambitious but reasonable (that is, difficult to achieve but not impossible).* In our view that requires the Regional Council to consider physical factors related to the health and well-being of freshwater, including any relevant physical infrastructure. That must necessarily include the funding of improvement works to achieve good health and well-being for freshwater, as well as the practical ability to construct any such physical works.

134. As to sub-clause 3.3(3)(b) it requires that the long term vision must be '*informed by an understanding of the history of, and environmental pressures on, the FMU, part of the FMU, or catchment'.* Earlier in the context of a discussion of sub-clauses 3.3(3)(a), and of 3.3(3)(c) and 3.3(4) above, we stated that we considered that 'history' and those 'environmental pressures' relate to the health and wellbeing of the water bodies and related ecosystems, not the history and environmental pressures on communities or tangata whenua. But the history and environmental pressures related to the health and well-being of freshwater may have been massively affected either entirely or in part by infrastructure or other physical works carried out for human activities. To that extent the two are intertwined.

135. Those conclusions are supported by the use of the word '*reasonable*' in both of sub-clauses 3.3(2)(b) and (c) as to goals, and timeframes to achieve those goals. Plainly the drafters of those parts of the NPSFM were cognisant of the fact that many aspects of what contributes to health

and well-being of water bodies may have been affected by past infrastructure or works. They would have known any past infrastructure or works would have been developed at a time when consideration of the health of water bodies was not at the high level now required by Te Mana o te Wai. Importantly, too, the drafters would have known that communities would be reliant on the existing current form of that infrastructure or other works. Any necessity to change that infrastructure to achieve a healthy water body would clearly need the economic and social effects on communities to be considered. In our view hence the use of the word 'reasonable'. And hence, too, the requirement in sub-clause 3.3(3)(b) of the NPSFM to consider the history and environmental pressures that have affected the health of water bodies in the past.

136. We have decided, therefore, that the PORPS Visions timeframes are entitled to consider at the Visions timeframe stage human effects matters, because the meeting of the goals to achieve the health and well-being of freshwater is specifically and expressly enabled to take a reasonable approach, by taking those considerations into account. That still leaves open for consideration whether the identification of some time periods in sub-clause 3.3 and other provisions of the NPSFM means that there are limits or restrictions, or not, on the timeframes that can be allowed.

3.3.1. Is the length of timeframes restricted or limited in any way?

137. There were differing positions adopted before us as to what length of timeframe could reasonably be provided by the regional council under sub-clause 3.3.(2)(c). In large part those assessments involve a measure of weight given to varying factors which will be addressed in the subject matter sections of this part of the report in due course.

138. The legal issues that arise, though, as preliminary matters to any factual assessment of the reasonableness or otherwise of timeframes in the PORPS, include:

a. does the fact that sub-clause 3.11(6) of the NPSFM requires long term attribute states to include target attribute states at intervals of not more than 10 years have any bearing on the length of timeframes for the Visions.

b. does the requirement in s.79(1) of the RMA for every RPS to be reviewed every 10 years have any impact on the term of a timeframe for the Visions.

c. should the requirements imposed in recent years in - s.6 of the RMA to 'recognise and provide for' (h) 'the management of significant risks from natural hazards'; and, s.7 of the RMA to 'have particular regard to'; (i) 'the effects of climate change'; and (j) 'the benefits to be derived from the use and development of renewable energy'; and, the NPS REG provisions elevating renewable generation capacity to a matter of national importance – either individually or collectively require shorter time frames than 30 or more years.

d. whether the reference in sub-clause 3.3.(2)(c) of the NPSFM to a thirty year period involves any limitation, and/or what weight if any should be given to it?

139. A general proposition that can be gleaned from the NPSFM is that some level of extended transitional periods are acknowledged as being likely to be required for the differing timeframes for each of the respective goals set by the Visions objectives, and under the NOF process for attribute states. The provisions expressly made in the NPSFM for extended timeframes in both 3.3.(2)(c) and in sub-clause 3.11(6) respectively make that plain.

140. However, in sub-clause 3.11(6) there is an express statement that timeframes for attribute states "*may be of any length or period*..." That wording is not used in sub-clause 3.3.(2)(c) as to timeframes for goals in the Visions. Sometimes a failure to specify something, which is specified in another part of the same instrument, can be taken to mean it is intentionally omitted, but such interpretation considerations always require the context to be taken into account. Here the context is an 'ambitious and reasonable' period of time to allow for transition to occur to achieve the goals set in the visions objectives. i.e. it is a context which expressly acknowledges an extended timeframe is able to be fixed, but without a limit upon it. We do not consider, therefore that the phrase '*may be of any length or period'* is necessary – that is implicit.

141. That the timeframe may be longer than the term of the RPS is made clear by the specific example provided being three times longer than the 10 year review period for an RPS. Similarly, the use of that length of time for the example in clause 3.3(2)(c) makes it plain that the NPSFM contemplated that the exhortatory provisions in s.6(h), 7(i) and (j) and in the NPS REG, all of which predated the 2023 version of the NPSFM, did not necessarily require a shorter timeframe to be imposed. The same rationale applies to the issue of whether the 10 year time frame for intervals for target attribute states limits the timeframe enabling provision in this sub-clause. In our view, by the use of the specific example given in the NPSFM itself in sub-clause 3.3.(2)(c), none of the first three issues identified above limit the power of fixing a longer timeframe for achievement of goals set in Visions objectives.

142. That still leaves for consideration the last issue identified above as to whether the reference in sub-clause 3.3.(2)(c) of the NPSFM to a thirty year period involves any limitation, and/or what weight if any should be given to it? In our view while the types of considerations just described do not as a matter of law impose any limitation on the length of timeframe they are all valid considerations to be taken into account in assessing what is a reasonable time frame. The thirty year example also is just one other factor to be taken into account. So, too, are the human effects scenarios that were provided to us in a powerful manner by the communities affected.

143. The countervailing powerful points also need consideration – they include concerns as to cultural effects by Kāi Tahu arising from delay in giving effect to Te Mana o te Wai. One of those factual cultural arguments requiring consideration will be the generational approach raised by Kāi Tahu and others, that timeframes should not generally be considered which will affect more than one generation. Other considerations will include the Wise Response argument that what it describes as the current climate 'emergency' requires amongst other things urgent recognition of the national importance of achieving carbon net zero emissions through enhanced supply of renewable electricity.

144. In short, the whole gamut of relevant resource management issues needs to be considered in deciding just how long or how short a transitional timeframe to achieve a Vision goal needs to be in the context of particular FMUs, part FMUs or catchments so that it can be properly considered to be '*both ambitious and reasonable'* in achieving the health and well-being of freshwater goals set in the Visions objectives. Any such long term Vision involving a transition to a state of good health and well-being of freshwater is different from the more precise interim target attribute states referred to in clause 3.11(6). We will return to address those factual considerations in the relevant subject matter section of this report.

3.4. Proposed new LF-WAI-P3A Integrated catchment management plans

145. A closely related issue to those just discussed as to the Visions arises from the presentation made by Beef and Lamb New Zealand Limited and the Deer Industry New Zealand. Their counsel Dr. R Somerville KC and Ms. C. Luisetti, and their planning witness Ms. C Perkins advanced a proposal

for a new policy setting as LF-WAI-P3A entitled 'Integrated Catchment Management' which proposed to elevate the importance of voluntary catchment groups to achieve an effective non-regulatory outcome.

146. The Panel heard evidence from farming representative witnesses, such as Ms. Scott called by Beef and Lamb, as well as from a wide range of individual farmers called by OWRUG. Those witnesses came from a wide range of catchments which had widely differing characteristics. However, the common feature of their evidence, which was highly informative for the Panel, was that they stressed both the value of the work carried out by catchment groups, and the fact that the voluntary nature of it was much more effective than regional council-driven catchment initiatives. The reason for the latter they asserted was that the voluntary aspect led to active concepts of 'ownership', control and pride in the works carried out, and led to a voluntary close 'monitoring' of ongoing input from all involved.

147. Against that background of a strong body of impressive evidence at first glance, the submitters' proposed policy LF-WAI-P3A had obvious attractions to the Panel as to its practical efficacy. However, it was criticised by counsel for ORC in reply as having some fundamental legal flaws. We have considered the arguments both ways and have reached the conclusion that the ORC objections have merit.

148. The proposed wording for LF-WAI-P3A was:

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) Progress and implement integrated management of catchments <u>through the preparation of Catchment Action Plans by the Integrated Catchment Groups</u>, <u>in accordance with clause 3.15</u> of the NPSFM that:

(a) <u>develop visions</u>, <u>identify values and environmental outcomes</u> for Otago's catchments and the <u>methods to achieve those outcomes</u>, 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<u>, including the visions and timeframes in the parent FMU</u>, 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.

(Panel's emphasis)

149. The legal problems raised by Mr. S. Anderson for ORC (at paragraphs 100 & 101 of his closing submissions) were that the ORC had no power at law to delegate functions which as a mandatory matter were devolved solely upon regional councils by the NPSFM. He submitted that action plans must be prepared by a regional council. We agree. The provisions of sub-clause 3.7(2)(f) of the NPSFM impose a mandatory obligation on the regional council only:

> *(2) By way of summary, the NOF process <u>requires regional councils</u> <u>to undertake the following steps:</u>*
>
> *(a) identify FMUs in the region (clause 3.8)*
>
> *(b) identify values for each FMU (clause 3.9)*
>
> *(c) set environmental outcomes for each value and include them as objectives in regional plans (clause 3.9)*
>
> *(d) identify attributes for each value and identify baseline states for those attributes (clause 3.10)*
>
> *(e) set target attribute states, environmental flows and levels, and other criteria to support the achievement of environmental outcomes (clauses 3.11, 3.13, 3.16) 16 National Policy Statement for Freshwater Management 2020*
>
> *(f) set limits as rules and <u>prepare action plans (as appropriate) to achieve environmental outcomes</u> (clauses 3.12, <u>3.15,</u> 3.17)*

(Panel's emphasis)

150. That structure for the NOF process does not envisage catchment group involvement as proposed, even though we observe that the submitters' proposal also included the regional council in the integrated catchment group concept. The reason for that is not that the NPSFM does not encourage such a co-operative non-regulatory approach to integrated management. To the contrary, the NPS FM does envisage catchment groups working in with regional councils, but it specifically uses different terminology for that type of non-regulatory approach.

151. Provision for that type of process is found at sub-clause 3.15(2) where non-regulatory measures are specifically referred to as being distinct from regulatory measures. The difference is explained in that sub-clause in the following manner, but the obligation on the regional councils to adopt action plans is not changed. Sub-clause 3.15(2) just makes it plain that the action plans a regional council prepares may involve both regulatory and non-regulatory methods:

> *(2) An action plan may describe both regulatory measures (such as proposals to amend regional policy statements and plans, and actions taken under the Biosecurity Act 1993 or other legislation) and <u>non-regulatory measures (such as work plans and partnership arrangements with tangata whenua and community groups</u>).*

(Panel's emphasis)

152. Nothing in the NPSFM sub-clauses 3.2(2) as to the giving effect to Te Mana o te Wai, or 3.5(2) as to integrated management of the effects on freshwater and receiving environments, which are referred to in the proposed policy, provides any statutory jurisdiction beyond that specified in sub-clause 3.7(2)(f).

153. Moreover, as Mr. Anderson also stressed sub-clause 3.15(5) of the NPSFM already requires as a mandatory matter that before a regional council prepares an action plan it "*must consult with communities and tangata whenua*." The proposed policy clause to that effect is, therefore, is serving no practical purpose. So, too are most if not all of the other functions contained in sub-clause (3) of the submitters' proposed policy already provided for in the NPSFM.

154. However, a major difference between the NPSFM provisions and the submitters' proposed policy is that the former has a set sequence for its mandatory processes. That commences with Visions being set through the RPS process, again solely by the regional council. Then that process is followed by the NOF process as part of the regional water plan process. The NOF process addresses the other more detailed aspects of setting FMUs or catchments, values, environmental outcomes, attributes for values & their baselines, target attribute states, limits and action plans. The submitters' proposed policy conflates those differing sequenced stages into one attempted policy approach which does not conform with the NPSFM approach.

155. Finally we observe that the PORPS provisions in various Methods do set out to enable the type of integrated approach at a catchment level in conjunction with communities and tangata whenua which the submitters' proposed policy advances. Those are found in LF-VM-M3 (1), (2) and (3) under the sub-heading 'Community involvement', and even more specifically in recommended LF-FW-M8AA under a sub-heading of 'Integrated Catchment Management'. We accept this optional approach is appropriate for the reasons set out in Ms Boyd's reply report at paragraphs 105 to 107 which identified the exploratory co-operative optional process that is being undertaken at a catchment level.

156. For all of those reasons we do not consider we have the scope at law to adopt the submitters' proposed policy approach, and we are satisfied that the PORPS as amended has appropriate provisions which echo what was proposed. In the subject matter consideration the Panel will discuss a Vision recognising the advantages of catchment group involvement.

4. Wetlands Issues

4.1. Definition issues

157. Much argument arose before the Hearing Panel as a consequence of the implications which caused concern for the s.42A report writers arising from:

- the introduction of a new definition of 'natural inland wetland' in the NPS FM in December, 2022;
- the related wider pathways for consents to use such wetlands;
- the promulgating of the NPS IB in 2023;

- the apparent extra stringency of the environmental effects hierarchy in the NPS IB based on a principle of 'net gain' as compared to the NPS FM effects management hierarchy principle of 'no net loss and preferably a net gain'; and
- what were perceived as a consequence as 'gaps' by the s.42A report writer Ms. Boyd in the drafting of the notified PORPS.

158. The start point to any consideration of these issues must commence with the s.2 RMA definition of a wetland which is all-encompassing of areas subject to some inundation at some time:

> ***wetland*** *includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions*

159. The new definition of 'natural inland wetland' in the 2022 amendments to the NPS FM amalgamated the previous definitions of 'natural wetland' and 'natural inland wetland' into one lengthy definition which reads:

> ***natural inland wetland*** *means a wetland (as defined in the Act) that is not:*
>
> *(a) in the coastal marine area; or*
>
> *(b) a deliberately constructed wetland, other than a wetland constructed to offset impacts on, or to restore, an existing or former natural inland wetland; or*
>
> *(c) a wetland that has developed in or around a deliberately constructed water body, since the construction of the water body; or*
>
> *(d) a geothermal wetland; or*
>
> *(e) a wetland that:*
>
> > *(i) is within an area of pasture used for grazing; and*
> >
> > *(ii) has vegetation cover comprising more than 50% exotic pasture species (as identified in the National List of Exotic Pasture Species using the Pasture Exclusion Assessment Methodology (see clause 1.8)); unless*
> >
> > *(iii) the wetland is a location of a habitat of a threatened species identified under clause 3.8 of this National Policy Statement, in which case the exclusion in (e) does not apply*

160. That new combined definition is intended to exclude some RMA defined wetlands from the detailed level of protection and restoration otherwise required by the NPSFM, and to provide a base for a closely controlled consent pathway in clause 3.22(1) of the NPSFM for some types of activities which are described in that sub-clause.

161. The provisions of clause 3.22 commence by providing that every regional council must include the following opening words of a policy, or words to similar effect, in its regional plan:

> *The loss of extent of natural inland wetlands is avoided, their values are protected, and their restoration is promoted, except where:…*

162. Sub-clause 3.22(1)(a) of the NPSFM then continues to require regional plans to include a policy enabling a 'loss of extent or values' where that arises from a wide range of activities in natural inland wetlands including:

- customary harvesting of resources,
- wetland maintenance and restoration,
- scientific research,
- harvest of sphagnum moss, and
- construction of wetland utility structures.

163. Significantly also included in that sub-clause is an exclusion inter alia for:

- maintenance or operation of '*specified infrastructure'*, the definition of which includes '*regionally significant infrastructure*' identified in a regional policy statement or regional plan, (but we observe this exception does not enable construction or upgrade of such specified infrastructure which is captured under cl. 3.22(1)(b)(i)),
- water storage infrastructure, and
- public flood control, protection and drainage works.

164. Moreover, those exclusions are then further augmented by other wetland consent pathway provisions for other activities in sub-clause 3.22(1). It provides for a mandatory policy to be included in a regional plan which provides pathways (b) to (f).

165. Those sub-clauses (b) to (f) of that mandatory policy in regional plans includes the enabling of consent pathways for:

- construction or upgrade of specified infrastructure
- urban development;
- quarrying activities;
- extraction of minerals;
- landfills and cleanfills.

166. All of those enabling provisions for consent pathways for those described activities, however, have a safeguard in sub-clause 3.22(3). That is that in each of these consent pathways the council must apply the effects management hierarchy which has its own definition now in clause 3.21. It applies to all natural inland wetlands.

167. That definition in clause 3.21 reads:

> ***effects management hierarchy****, in relation to natural inland wetlands and rivers, means an approach to managing the adverse effects of an activity on the extent or values of a wetland or river (including cumulative effects and loss of potential value) that requires that:*
>
> *(a) adverse effects are avoided where practicable; then*
>
> *(b) where adverse effects cannot be avoided, they are minimised where practicable; then*

(c) where adverse effects cannot be minimised, they are remedied where practicable; then

(d) where more than minor residual adverse effects cannot be avoided, minimised, or remedied, aquatic offsetting is provided where possible; then

(e) if aquatic offsetting of more than minor residual adverse effects is not possible, aquatic compensation is provided; then

(f) if aquatic compensation is not appropriate, the activity itself is avoided

168. The phrases 'aquatic off-setting' and 'aquatic compensation' similarly have their own NPS FM definitions in clause 3.21(2).

169. That sub-clause 3.21(2) provides the following respective definitions for those phrases:

(2) For the purpose of the definition of effects management hierarchy:

***aquatic compensation** means a conservation outcome resulting from actions that are intended to compensate for any more than minor residual adverse effects on a wetland or river after all appropriate avoidance, minimisation, remediation, and aquatic offset measures have been sequentially applied*

***aquatic offset** means a measurable conservation outcome resulting from actions that are intended to:*

(a) redress any more than minor residual adverse effects on a wetland or river after all appropriate avoidance, minimisation, and remediation, measures have been sequentially applied; and

(b) achieve no net loss, and preferably a net gain, in the extent and values of the wetland or river, where:

(i) no net loss means that the measurable positive effects of actions match any loss of extent or values over space and time, taking into account the type and location of the wetland or river; and

(ii) net gain means that the measurable positive effects of actions exceed the point of no net loss.

170. Finally, in outlining the provisions that caused concern it also necessary to refer to Appendix 6 of the NPSFM which contains 11 Principles which must be applied to the use of aquatic offsets.

171. Amongst the reactive recommendations to the combination of all these new provisions that were made in various reports and bodies of evidence, (and related track change versions), by the s.42A report writer Ms. Boyd was an initial position that the NPSIB effects management hierarchy should be applied to natural inland wetlands under this approach. The rationale for that was based on the '**Net gain'** principle expressed in the NPSIB which was perceived as being more stringent than the approach in the NPSFM effects management hierarchy, which was based on a '**No net loss and preferably a net gain'** approach. That was accompanied by complex arguments about how the new wetland definitions were to be applied.

172. Many of the submissions by counsel for submitters concerned about that approach, and by their planning witnesses, focused on the inappropriateness of attempting to use NPSIB provisions in

the freshwater context when there was a specific National Policy Statement as to freshwater issues. Those submissions were particularly based on clause 1.4(3) of the NPSIB which expressly states:

> *(3) If there is a conflict between the provisions of this National Policy Statement and the National Policy Statement for Freshwater Management 2020 or the Resource Management (National Environmental Standards for Freshwater) Regulations 2020, the latter prevail.*

173. The submitters opposed to the original s.42A recommendations were asserting that those recommendations potentially created a conflict between the two NPS documents, but even if there was to be considered to be no direct conflict, the s.42A approach was itself said to be in conflict with the purpose underlying clause 1.4(3) of the NPSIB. They asserted that purpose was palpably to ensure that the NPS FM had priority in relation to any issues relating to freshwater resources.

174. As it turned out this strongly disputed issue fell away at the final hearing. On that occasion the Panel raised with Ms. Boyd and counsel for ORC that a close reading of the principles underpinning the effects management hierarchy in each of the two NPSs appeared to show no practical difference in stringency between the manner in which the two effects management hierarchies were applied.

175. In the case of the NPSFM Appendix 6 lays down Principles for aquatic offsetting. Principle 3 commences with a sub-heading '**No net loss and preferably net gain**'. Principle 3 explains that 'no net loss and preferably net gain':

> *…is achieved when the extent or values gained at the offset site (measured by type, amount and condition) are equivalent to or exceed those being lost at the impact site.*

(Panel's emphasis)

176. In the case of the NPSIB Appendix 3 lays down Principles for biodiversity offsetting. Principle 3 commences with a sub-heading '**Net gain'.** However, as with the NPSFM principle 3, Principle 3 similarly explains that 'Net gain':

> *…is achieved when the indigenous biodiversity values at the offset site are equivalent to or exceed those being lost at the impact site…*

(Panel's emphasis)

177. After further consideration Counsel for ORC formally advised that it was accepted there was no difference in stringency between the application of those two principles. That was followed formally by an acceptance in final track change and 'clean' version recommendations by the s.42A report writer in a final supplementary statement of evidence by Ms. Boyd (dated 26 September 2023) that the NPSFM effects management hierarchy should apply to the natural inland wetland consent pathway processes. Whilst Ms. Boyd still insisted (at paragraph 13-15) that there was a difference in the definition of 'aquatic offset' in the NPSFM between 'no net loss' and 'net gain', that difference in definition does not affect the reality that the application of the principles for the two environmental effects management hierarchies as set out above has no difference in stringency between the two NPSs. That remains the critical factor.

4.2. Wetland definition

178. The specific recognition in the RMA area of a need to protect wetlands commenced with s.6(a) of the RMA itself, which significantly has not been amended since 1991. It recognises that one matter of national importance, which is required to be recognised and provided for, is the preservation of wetlands, and their protection from inappropriate development. It provides:

> ***6 Matters of national importance***
>
> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, and development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:*
>
> *(a) the preservation of the natural character of the coastal environment (including the coastal marine area), <u>wetlands,</u> and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use and development:…*
>
> (Panel's emphasis)

179. That position remained extant in RMA law as applying to all wetlands without any further specific provisions until the release of various relevant National Policy Statements. The first relevant one of those national policy statements was the NZCPS in 2010. It made mention of 'coastal wetlands', 'saline wetlands' and 'wetlands' in various provisions. In particular, Policy 11 (b) required the avoidance of significant adverse effects, and avoidance, remediation or mitigation of other adverse effects, on indigenous ecosystems and habitats that are only found in the coastal environment and which "*are vulnerable to modification, including estuaries, lagoons, <u>coastal wetlands</u>, dunelands*…".

180. Earlier versions of the NPSFM in 2011, 2014 and 2017 included some specific, but nonetheless rather general, protective wetland provisions which related to the term 'wetlands', (as for example in Objectives A2 (b) and B4 requiring the protection of 'significant values' of 'wetlands'.) That general approach changed in the 2020 version of the NPSFM. The 2020 s.32 analysis for the NPSFM records, amongst other national concerns about freshwater degradation, that an increased loss of wetland areas had become of major concern. The report noted (at pp. 5 & 62) that 90% of the country's original historical inland wetlands had been lost. The 2020 NPSFM, therefore, included a strongly directive Policy 6 stating:

> *Policy 6: There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.*

181. That protection was achieved by providing for much greater protection of 'natural inland wetlands', and only providing a consent pathway for some 'specified infrastructure'.

182. The wetland definitions provided in the 2020 version of the NPSFM were:

> ***natural wetland*** *means a wetland (as defined in the Act) that is not:*
>
> *(a) a wetland constructed by artificial means (unless it was constructed to offset impacts on, or restore, an existing or former natural wetland); or*
>
> *(b) a geothermal wetland; or*

(c) any area of improved pasture that, at the commencement date, is dominated by (that is more than 50% of) exotic pasture species and is subject to temporary rain derived water pooling

natural inland wetland *means a natural wetland that is not in the coastal marine area*

183. The consent pathway that was allowed for 'specified infrastructure' in the 2020 NPSFM was limited, with the overall purpose being described in the s.32 report (at pp.62-63) in the following manner:

The impact of Policy 6 is immediate. It uses strongly directive language and is reinforced by the requirement for councils to replicate Policy 6 in regional plans without using the Schedule 1 process in the RMA. The policy also affords a high degree of protection, one of the strongest in the NPS-FM 2020.

The requirements allow for a specific exception for "specified infrastructure" (which is defined). Broadly, this exception only applies to necessary infrastructure operated by a lifeline utility and public flood or drainage related works, or regionally significant infrastructure identified as such in a regional policy statement or regional plan. Applicants seeking a resource consent under the exception must be able to demonstrate significant national or regional benefits, a functional need, and manage effects by applying the effects management hierarchy. The overall theme is a presumption that further loss of inland natural wetland extent is unlikely to be approved, other than in limited circumstances.

…

184. The severity of that outcome led to a reconsideration in 2022, (now published as the 2023 version), which amended the NPSFM in a manner intended to mitigate this extremely strict level of protection and the limitations of the consent pathways. In 2022 '*natural inland wetlands*' were redefined with the '*natural wetland*' definition being dropped and the 'natural inland wetland' definition being amended to exclude coastal wetlands – meaning only one term and definition was required i.e. '*natural inland wetland'*. A significant change in definition, though, related to those wetland areas which were effectively farmed and predominantly in exotic, i.e. non-native, pasture species. While the 2020 version had exempted such areas, its exemption related to 'improved' pasture, whereas the new 2022 version just requires that the area is being used for grazing and has more than a 50 per cent coverage in non-native grasses. The relevant part of the 2023 exemption from the definition of a 'natural inland wetland' is now:

(e) a wetland that:

(i) is within an area of pasture used for grazing; and

(ii) has vegetation cover comprising more than 50% exotic pasture species (as identified in the National List of Exotic Pasture Species using the Pasture Exclusion Assessment Methodology (see clause 1.8)); …

185. Possibly most significantly, the 2023 amendments also provided extended consent pathways for various major activities affecting natural inland wetlands. In addition to specified infrastructure activities, consent pathways were now provided also for urban development, mining, quarrying and landfills and clean-fills. All those activities were to be assessed under an amended effects management hierarchy which was introduced into the 2023 NPSFM.

186. Right at the end of our hearings the NPSIB was promulgated which now contains restoration provisions as to 'natural inland wetlands' at clauses 1.3(2)(c) and 3.21(2)(d). The definition of 'natural inland wetland' in the NPSIB itself is:

> ***natural inland wetland*** *has the meaning in the National Policy Statement for Freshwater Management 2020*

187. The NPSIB does not have a separate definition of 'natural wetland'.

188. The preparation and notification of the original PORPS occurred when the original 2020 version of the NPSFM was in place. As a consequence it originally utilised the same definition of 'natural wetland' as was in the 2020 NPSFM, but the PORPS did not initially include a definition of 'natural inland wetland'.

189. The later change in the 2023 NPSFM definition of 'natural inland wetland', and extended consent pathways within them, then gave rise in turn to a reaction by the s.42A report writers in the PORPS process in response to evidence from submitters such as DOC, Iwi and Fish and Game. They have now recommended that a further definition was needed of '*natural wetland'* to provide protection for wetlands which were exempted by the NPSFM 2023 definition of '*natural inland wetland*' – which they described as a 'gap' in the protection provided for some wetlands. One major example they often quoted during the hearings were the upper Taiari scroll-plain wetlands, much of which were grazed, but which the ecological evidence suggested in many localities or physical settings potentially held particular indigenous biodiversity, hydrology and landscape values. There were other examples also referred to including the unusual inland saline wetlands and other ephemeral wetlands.

190. The definition recommended now for the PORPS for '*natural wetland'* is broad, encompassing <u>all</u> wetlands as defined in the RMA with only two exclusions. That recommended definition in the 10 October 2023 version of the PORPS is:

> ***Natural wetland*** *means a wetland (as defined in the Act) that is not:*
>
> *(a) a deliberately constructed wetland, other than a wetland constructed to offset impacts on, or to restore, an existing or former natural wetland; or*
>
> *(b) a wetland that has developed in or around a deliberately constructed water body, since the construction of the water body.*

191. By contrast the recommended definition of '*natural inland wetland'* in the 10 October 2023 version of the PORPS is:

> ***Natural inland wetland*** *has the same meaning as in clause 3.21 of the National Policy Statement for Freshwater Management 2020 (as set out in the box below)*

192. The result of that additional broad recommended definition of '*natural wetland'* in the PORPS is that in the final 10 October 2023 recommended version of the PORPS we find that Objective LF-FW-09, which is the only objective in the PORPS as to wetlands protection, refers solely to 'natural wetlands' and not to 'natural inland wetlands' – presumably on the basis that the former

includes the latter. However, the terminology in other provisions then becomes confusing. The recommended LF-FW-P8 now requires identifying and mapping of 'natural inland wetlands', (which is required by clause 3.23(1) of the NPSFM). However, the protective and restoration policies LF-PW- P9 and P10, which previously flowed from that identification and mapping process, still refer to 'natural wetlands', despite there being no mapping and monitoring process recommended for 'natural wetlands'.

193. This is one area where the issue of FPI blue shading, or lack of it in this case, adds procedural difficulty to the dual PORPS hearing processes. The definition of 'natural inland wetland' is shaded blue as part of the FPI process, but strangely the definition of 'natural wetland' is not. Yet the Objective related to the protection of 'natural wetlands' is LF-FW-09 which is shaded blue, as are the related Policies LF-FW-P9 and P10. To add to the confusion, we observe that Policy LF-FW-P8, originally as to identification and mapping of 'natural wetlands', is not shaded blue, but has been recommended to be changed to 'natural inland wetlands' as a minor change on the basis that it removes duplication caused by the new 'natural inland wetland' definition in the NPSFM (para 84 Ms Boyd evidence 11 August 2023). Most surprisingly LF-FW-P13 as to 'Preserving natural character' was also not shaded blue, despite it referring to the natural character of lakes and rivers. It, too, has been recommended to be amended in a manner which introduces consideration of values of wetlands (in Ms Boyd's supplementary evidence addressing both non FPI and FPI aspects of the implications of the NPSIB). We find this inconsistency in FPI shading perplexing, as we consider any wetland provision should plainly have been an FPI issue and shaded blue. However, in fairness to Ms. Boyd we should emphasise, as we did in overall introductory remarks, that all of ORC's advisers have faced the complication of trying to achieve one integrated planning document through two separate processes. The fact that the NPSIB had implications for both processes has now just complicated matters even more.

194. In one other brief by Ms. Boyd, the significant observation is made that:

> *… like the NPSFM, the pORPS is silent on the management of wetlands that are not natural inland wetlands by virtue of being excluded on the basis of their vegetation cover, which may not fully implement the direction in the objective and policies 5 and 9 of the NPSFM."*
>
> (paragraph 77 evidence of Ms Boyd dated 11 Aug 2023)

195. We have struggled to accept that description of the outcome of the recommended provisions in the PORPS as being 'silent' as to the management of wetlands that are not natural inland wetlands, because Objective LF-FW-O9 is headed '**Natural wetlands'** and requires that Otago's 'natural wetlands' are protected or restored. That seems clearly to apply to all 'natural wetlands' falling within that recommended definition which is very broad.

196. Similarly, LF-PW- P9 is specifically headed '**Protecting natural wetlands'** and LF-PW- P10 is headed '**Restoring natural wetlands'**. In each case the policy wording under those sub-headings consistently also refers to 'natural wetlands'. It seems clear those two recommended policies are intended to require protection and restoration of all defined 'natural wetlands', which will include both 'natural inland wetlands' and those excluded by its definition because of their vegetative cover.

197. Moreover, even putting that complicating aspect to one side, in our view that statement by Ms Boyd fails to recognise that the purpose of the definition of 'natural inland wetland' in the NPSFM is not to remove all protection from other wetlands not falling within the definition. Rather it is to ensure any 'natural inland wetland' as defined will have specific provisions as to identification

and mapping, as well as monitoring, but also to enable some described activities in natural inland wetlands to have a particular consent pathway through sub-clause 3.21 of the NPSFM, backed by the safeguard of the effects management hierarchy.

198. The RMA definition of 'wetland' is extremely broad and still applies to all other wetlands including those that fall within the exemptions in the 'natural inland wetland' definition. Moreover, Policy 5 of the NPSFM similarly relates to the management of the health and well-being of '*water bodies'* and their potential for improvement. The RMA definition of a 'water body' means *'fresh water or geothermal water in a river, lake, stream, pond, wetland, or aquifer, or any part thereof, that is not located within the coastal marine area'*. Policy 9 of the NPSFM as to the protection of the habitats of indigenous freshwater species, must also include those in a wetland. Therefore, Policies 5 and 9 of the NPSFM still apply to all those wetlands exempted by the definition of 'natural inland wetland'. So, too, of course does s.6(a) of the RMA itself still apply to those wetlands requiring their preservation and protection from inappropriate use and development.

199. If the concern that has led to the recommendation of this expanded definition of 'natural wetland' relates to the fact that 'coastal wetlands' are excluded from the definition relating to 'natural inland wetlands' and related protection provisions, then we also make the observation that coastal wetlands will still be directly protected by the specific provisions of the NZCPS, such as policies 11 (b)(iii), 13(2)(c), 14(c)(iv). They could be also protected in the PORPS Coastal Environments chapter. To the extent there is concern that the current recommended provisions in the PORPS coastal chapter may not specifically address coastal wetland protection and restoration, in our view that is best addressed by considering amendments to, or inserting specific provisions in, that coastal chapter if necessary, rather than attempting to create a new class of defined 'natural wetland' through further definition applying throughout the PORPS.

200. As we understand the concerns of the DOC witnesses and Ms Boyd, it is that areas like the Taiari scroll plain and other locations with ephemeral wetlands which are grazed will likely have significant aspects of ecological and hydrological importance which are exposed to potential degradation unless the RPS recognises those risks. In our view, the s.6 protection and the protection intended by policies 5 and 9 of the NPSFM is still able to be provided by the requirement for protection from inappropriate activities. The RPS can assist by the LF and/or the ECO chapter identifying particular values where development activities may be inappropriate. We consider that a better mechanism than attempting to insert a new definition of 'natural wetlands'.

201. We have concluded the 'natural wetland' definition is superfluous, and worse that it is potentially raising the level of protection of all wetlands as defined to a level of absolute preservation and restoration through recommended Objective LF-FW-O9(3) and recommended policies LF-FW-P9 and LF-FW-P10 which are beyond the outcomes intended by s.6(a) of the RMA. The recommended objective and the two recommended policies do not provide the qualifier of protection from inappropriate use and development that s.6(a) provides. Nor do they provide the consent pathways and the application of the effects management hierarchy that the provisions relating to natural inland wetlands apply. We are concerned that that strict absolute outcome provides a higher level of protection for wetlands exempted from the 'natural inland wetland' definition in the NPSFM than the protection level accorded to those falling within that definition. That means that the recommended PORPS provisions have the potential to be considered as being contrary to the overall scheme in the 2023 NPSFM as to the manner of treatment of non-coastal wetlands through the 'natural inland wetland' terminology and effects management hierarchy provisions.

202. Moreover, in terms of the s.32AA analysis we consider that the lack of requirement of identification, or any method of identification, of what areas would fall within the definition of 'natural wetlands' means we cannot even begin to make any reasonable estimate of the costs involved in imposing such an absolute protection and restoration regime in respect of all wetlands. For example, Appendix 14 to the s.32 report for the PORPS referred to the fact that some 3000 ephemeral wetlands had been identified in Otago. Evidence from Oceana Gold Limited emphasised the impact that absolute protection and restoration provisions could have on their proposed activities because of the proliferation of ephemeral wetlands on their landholdings, to mention but one example of the effects of including all of those. Infrastructure providers such as Waka Kotahi, and the transmission, distribution and generation providers, also stressed impacts they may have to cope with in the face of absolute protection objectives and policies.

4.2.1.1. Recommendation

203. We recommend the definition 'natural wetland' is deleted. Deletion of the 'natural wetland' definition and related amendments to apply the 'natural inland wetland' approach will have consequences for those LF-FW Objectives and Policies we have referred to, and some other provisions, which will need consequential amendment.

204. We will return to those policies in the subject matter consideration of LF-FW objectives and policies as to wetlands which follows in this Appendix Two report.

4.3. Protection and restoration – a 'region-wide', district or local approach?

205. A difficult issue which arose in the freshwater hearings was whether the NPSFM was requiring assessments of effects on values to be protected or restored to be assessed on a region wide basis, or on a more local impact site or district wide basis. The Te Mana o te Wai fundamental concept provision in clause 1.3 of the NPSFM states that 'protecting the health of freshwater protects the health and well-being of the wider environment.' That may well be suggested by some to contemplate a broader assessment approach. The 6 principles in clause 1.3(4) do not throw any greater light on the issue, and nor does clause 1.3(5) as to the hierarchy of obligations.

206. Some submitters supporting a narrow approach pointed to the provisions of Appendix 6 Principle 3 as being worded in a manner that required a closer approach relevant to the impact site, while others seeking a broader approach emphasised the regional indications in other provisions.

207. Principle 3 in Appendix 6 in its full form states:

> *3. **No net loss and preferably a net gain**: This is demonstrated by a like-for-like quantitative loss/gain calculation, and is achieved when the extent or values gained at the offset site (measured by type, amount and condition) are equivalent to or exceed those being lost at the impact site.*

208. The emphasis by those seeking a narrower interpretation was understandably placed on the reference in that principle to the comparison of effects at particular 'sites'.

209. By Principle 7 of Appendix 6, however, as to landscape context, the best ecological outcome to be sought is "preferably close to the impact site or within the same ecological district.' The underlined words there make it plain that in the landscape context the comparison can be at a wider ecological district level.

210. The definition of 'effects management hierarchy' in clause 3.21 speaks of it being an approach "to managing the adverse effects of an activity on the extent of values of a wetland or river (including cumulative effects and loss of potential value)…". The phrase 'loss of value' is defined as follows:

> ***loss of value**, in relation to a natural inland wetland or river, means the wetland or river is less able to provide for the following existing or potential values:*
>
> *(a) any value identified for it under the NOF process*
>
> *(b) any of the following values, whether or not they are identified under the NOF process:*
>
> *(i) ecosystem health*
>
> *(ii) indigenous biodiversity*
>
> *(iii) hydrological functioning*
>
> *(iv) Māori freshwater values*
>
> *(v) amenity values*

211. There are also numerous other usages of the term 'effects' in the NPSFM none of which appear definitive as to whether the assessment of effects needs to be at an impact site, ecological district or region-wide level.

212. In our view the context is what will dictate which is most relevant. In differing cases fauna or flora affected, or the wetland body itself, may be nationally or regionally significant in some respect, or significant in terms of the ecological district or at a more localised level. In other cases the effects requiring assessment may be at an impact site level.

213. At the RPS stage, therefore, we are reluctant to constrict the level at which policies should be drawn in respect of wetland protection and restoration. Once more in our view the NOF process is what will drive the identification of values requiring protection or restoration in particular FMUs or catchments. A perusal of the Appendices 1A as to compulsory values, and 1B as to other values to be identified, make it plain that effects on those values could potentially be assessed at differing levels depending on context. In our view at RPS stage the objectives and policies should enable that process, and any subsequent effects assessment, to be context-driven at whatever level is appropriate.

5. SRMR – Significant Resource Management issues for the region

5.1. Introduction

214. Three of the eleven regionally significant issues identified in the SRMR chapter are part of the freshwater planning instrument. These are:

a. SRMR-I5 – Freshwater demand exceeds capacity in places;
b. SRMR-I6 – Declining water quality has adverse effects on the environment, our communities, and the economy; and
c. SRMR-I9 – Otago lakes are subject to pressures from tourism, and population growth.

215. While these issues received a number of submissions, the underlying facts of water shortages and declining water quality were not generally a focus of evidence at the hearing. Objectives, policies and methods addressing those issues tended to somewhat understandably take the limelight, although we do acknowledge that the amendments recommended by the s.42A officer, Ms Todd, addressed much of the relief sought by submitters.

216. As a general comment, we consider that issue statements should be general statements of region wide issues that inform and direct the drafting of objectives and policies. They should not be overly detailed as to specific locations or industries and, while there is some overlap between issues statements due to the integrated nature of the issues that they are addressing, they are discrete statements. Examples may be appropriate where they serve to aid in understanding or illustrating an issue, but there is little value in using multiple examples to highlight what are region wide issues.

217. We make these general comments here as many of the submissions sought amendments to highlight specific issues at certain locations or associated with certain industries. We have considered all such requests and, while many highlight valid localised issues, we have not found any additional amendments of this type that would strengthen any of the above issue statements. We make this observation here rather than repeating ourselves for each issue statement.

218. We also note here that a number of submitters, for example, OWRUG and DairyNZ, highlighted what was considered to be a theme of negativity around resource use in the issues statements. The relief sought seeks that the issues better recognise the benefits of resource use, for example water use for primary production. Ms Todd recommended a number of amendments to this effect.

219. The three issues listed above are addressed below, along with requests for new significant resource management issues for the region.

5.2. New significant resource management issues for the region

220. The following new issues statements were sought:

a. NZSki and Realnz sought to identify the benefits to people and the environment from subdivision, use and development of natural and physical resources, along with the well-being benefits of people accessing the natural environment.
b. Similarly, Fish and Game sought to recognise that the social, cultural and economic well-being of Otago's communities depends on use and development of natural and physical resources.
c. Fonterra sought a new issue statement focusing on the impact that restricted resource use may have on the social and economic well-being of Otago. As an alternative, they sought amendments to SRMR-I6 .
d. DCC sought to identify the damming of Te Mata-au Clutha River as a regionally significant issue and legacy effect, and requested associated objectives and policies.

221. The new resource management issues sought in (a), (b) and (c) above were also sought through the non-freshwater process. As part of that process, parties participated in caucusing on new significant resource management issues for the region, and other submitters were provided with the opportunity to comment. Two new issues statements arose from this process and are considered through the non-freshwater process. We agree with Ms Todd, the s.42A officer for

this section, that the new issues sought in (a). (b) and (c) above are best considered through the non-freshwater process alongside the two additional issues.

222. Turning to (d) above, DCC consider that the damming of the Clutha River/Mata-au significantly impacts on downstream sediment delivery, including to the coast, increasing coastal erosion. DCC's submission references several reports on this issue, however they did not suggest wording in their submission or evidence.

223. We agree with Ms Todd that damming of the Clutha River/Mata-au in itself is not a regionally significant issue, and that the issues associated with damming are appropriately addressed through other issues statements.

224. We do not consider that any new issues statements should be introduced through the freshwater process.

5.3. SRMR-I5-Freshwater demand exceeds capacity in places

225. There were thirty submissions in relation to SRMR-I5, including four submissions seeking it be retained as notified and others seeking a collective broad range of amendments. These requested amendments are well summarised in Ms Todd's s42A report. We received some evidence in support of these submissions but the focus of evidence was mostly on objectives, policies and methods.[4]

226. Ms Todd recommended a range of amendments to SRMR-I5 in her s.42A and an additional amendment in her reply report in response to amendments sought by Mr Hodgson for Horticulture NZ. With one exception, we consider that these amendments are appropriate. That exception relates to paragraph 2 of the Context section, where the following sentence is recommended:

> However, there continues to be debate in the community about how historical *freshwater* allocations can be adjusted to ~~achieve a balance of~~ prioritise protection of the mauri of *water* bodies, meet the health needs of people, and provide for economic, environmental, social and cultural needs.

227. We have previously stated that *"'mauri' is not readily definable as it relates to a combination of physical and ecological elements which are scientifically demonstrable, as well as amenity aspects which are far less capable of precise description. In addition it can involve a range of te ao Māori concepts, both physical and metaphysical".* In this instance we consider that 'health and wellbeing' should be used in place of 'mauri'. This is consistent with our approach elsewhere in the PORPS, and also with the concept of Te Mana o te Wai in the NPSFM.

5.3.1.1. Recommendation

228. We recommend that the wording in the PORPS Reply Report version dated 10 October 2023 be adopted for SRMR-I5 – Freshwater demand exceeds capacity in some places, with the exception of paragraph 2 of the Context where we recommend the following amendment:

> However, there continues to be debate in the community about how historical *freshwater* allocations can be adjusted to ~~achieve a balance of~~ prioritise protection

[4] *Freshwater s.42A report of Ms Jacqui Todd, paragraphs 505-540.*

of the health and well-being of *water* bodies, meet the health needs of people, and provide for economic, environmental, social and cultural needs.

5.4. SRMR-I6– Declining water quality has adverse effects on the environment, our communities and the economy

229. There were thirty submissions in relation to SRMR-I6, including five submissions seeking it be retained as notified, and others seeking a variety of amendments. Ms Todd summarised these requested amendments in her s42A report.[5]

230. Ms Todd recommended a number of amendments throughout SRMR-I6 in her s.42A report and Reply Report and we consider that these act to clarify and strengthen this issue statement. We do not consider that any additional amendments are required.

5.5. SRMR-I9 – Otago lakes are subject to pressures from tourism and population growth

231. Fifteen submissions were received in relation to SRMR-I9, including four submissions seeking it be retained as notified, and others seeking a variety of amendments. Ms Todd summarised these requested amendments in her s42A report.[6]

232. As for SRMR-I5 and SRMR-I6, Ms Todd recommended a number of amendments throughout SRMR-I9 in her s.42A report and Reply Report and we do not consider that any additional amendments are required.

6. RMIA – Resource Management Issues of significance to Iwi Authorities in the region

233. The RMA provides as follows in s.62(1)(b):

> ***62. Contents of regional policy statements***
> *(1) A regional policy statement must state –*
> (a) *the significant resource management issues for the region; and*
> (b) *the resource management issues of significance to iwi authorities in the region; and…*

234. At paragraph 554 of the original s.42A report the following was stated:

> *554. Iwi consultancies Aukaha and Te Ao Marama Incorporated (as agents of, and in consultation with, Otago's mana whenua) have led preparation of the corresponding sections of the PORPS 2021. The issues presented represent Kāi Tahu's key concerns with resource management in Otago.*

235. Only two of the RMIA issues were shaded blue as being part of the FPI being RMIA-WAI-I1 and RMIA- AI-I3. (Again we observe that appeared strange as RMIA-WAI-I2, RMIA-WAI-I4, and RMIA-WAI-I5 all by their title using WAI we would have thought related obviously to freshwater issues,

[5] *Freshwater s.42A report of Ms Jacqui Todd, paragraphs 560-596.*
[6] *Freshwater s.42A report of Ms Jacqui Todd, paragraphs 624-637.*

as did their content. Nonetheless, for reasons which are applicable both to the freshwater and non-freshwater RMIA issues the Panel had no matters it needed to discuss in relation to either process. The comments which follow echo observations already made in the non-freshwater Appendix One.

236. As a consequence of the fact that Kāi Tahu led the development of this chapter, submissions by Kāi Tahu agencies were not major and in general constituted almost a process of 'polishing' the provisions Kāi Tahu had already shaped in the preparation stage. That is unsurprising, because as Mr Adams the s.42A report writer pointed out:

> *553. A regional policy statement must state the resource management issues of significance to iwi authorities in the region. Only mana whenua can make such statements with authenticity in Otago.*

237. That reality, and the limited room for major submission points to be raised by those other than iwi authorities in relation to issues of significance to iwi authorities, is reflected by Mr Adams' repetitive observation in recommending the rejection of various limited submission points seeking amendment to particular provisions, that the notified provision is "*a direct expression of iwi concerns.*"

238. In the closing submissions by ORC's counsel in reply, no major outstanding legal issues were identified as needing to be addressed in relation to this chapter. In the s.42A reply report some very limited further planning wording aspects were addressed which Kāi Tahu had requested.

7. LF – Land and Freshwater

7.1. Introduction

239. The provisions in the LF chapter are comprised of Freshwater Planning Instrument (FPI) provisions and non-FPI provisions. As discussed in the 'Legal Issues' section, we found the split to be unhelpful and, in some instances, nonsensical. We could relate to Mr Cameron's legal submissions for Kāi Tahu, where he commented that the parties have had to 'moonlight as contortionists' to determine how to deal with the FPI and non-FPI split.[7] Closely related provisions are, in some instances, split between the FPI and non-FPI, making it difficult to prepare this recommendation report in a coherent and structured way.

240. To address this complex situation we have decided to replicate our complete report for this chapter, containing both FPI and non-FPI provisions, in both Appendix One and Appendix Two. The alternative would have been to separate the FPI and non-FPI provisions which we consider would have continued to complicate matters.

241. This chapter of the PORPS was further complicated by amendments to the NPSFM which came into effect on 5 January 2023. This was after the release of the non-FPI s42A report and evidence, and we thank Ms Boyd for her helpful supplementary evidence and submitters for addressing these amendments in their presentations to the hearing. Amendments to the NPSFM wetland management provisions and the addition of aquatic offsetting (NPSFM Appendix 6) and aquatic compensation (NPSFM Appendix 7) were of particular relevance to this chapter of the PORPS.

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[7] *Comment made by Mr Cameron during his legal submissions on behalf on Kāi Tahu during the non-FPI hearings on 8 May 2023.*

242. The LF chapter, as notified, was split into four sections, as follows:

LF-WAI – Te Mana o te Wai
LF-VM – Visions and management
LF-FW – Fresh water
LF-LS – Land and soil.

243. The long-term visions were prepared to give effect to clause 3.3 of the NPSFM, which prescribes a process for developing long-term visions which are to be included as objectives in a regional policy statement. These were discussed in the 'Legal issues' section of Appendix Two and are discussed further below, but we note here that the vision objectives essentially set the policy direction in the LF-FW chapter. As a result, Ms Boyd sensibly recommended merging the LF-VM section into the LF-LF section. We accept this recommendation and the discussion in this chapter is based on the three-section structure recommended in the PORPS version dated 10 October 2023.

7.2. LF-WAI – Te Mana o te Wai

244. We discussed the LF-WAI chapter extensively in the Legal Issues section of Appendix Two to our report. We do not intend to repeat those discussions here and direct the reader to that section. Our recommendations are provided in that section and are replicated below. Where we do not make recommendations, we have considered that the recommendations made by the s.42A report author, Ms Boyd, and documented in the 10 October 2023 reply version of the PORPS are appropriate.

7.2.1. LF-WAI-O1 – Te Mana o te Wai

245. In the Legal Issues section of Appendix Two, we recommended a change in placement of the word 'mauri' in the introductory sentence of LF-WAI-O1 to clarify what we consider the intent of the objective to be and to better reflect the concept of Te Mana o te Wai.

7.2.2. LF-WAI-P1 - Prioritisation

246. We discussed the term 'health and wellbeing' in the Legal Issues section of Appendix Two. This phrase is used in the NPSFM and in various place in the PORPS. In LF-WAI-P1(1), it is used as in relation to 'water bodies' and 'freshwater ecosystems' and in relation to the environment. By the RMA definition used in the PORPS this includes 'people and communities'. We considered the use of this phrase in LF-WAI-P1(1) was appropriate.

247. Our Legal Issues section also discussed the vexed issue of prioritisation under tier 2 and tier 3 of Te Mana o te Wai in the NPSFM. This was a common theme in submissions for a number of provisions in the LF chapter and is the essence of LF-WAI-P1. As we discussed, a number of submitters sought amendments to reference particular activities or industries as priority 2. We concluded that the approach taken by the ORC for the PORPS is correct, *"that the intent of priority two is only to capture that limited amount of water involved in contact usages which can directly affect human health needs, i.e. the taking of freshwater solely for drinking water purposes or other direct engagement activities."* We considered *"that should leave reasonable quantities available in most situations, short of drought conditions, for use by priority three users."*

248. We consider that the detailed methods of how to allocate water amongst uses will be informed and determined during the NOF process.

7.3. LF-VM – Visions and management

7.3.1. Introduction

249. The LF-VM – Visions and management section contains five long-term freshwater visions as follows:

LF-VM-O2 – Clutha Mata-au FMU vision

LF-VM-O3 – North Otago FMU vision

LF-VM-O4 – Taieri FMU vision

LF-VM-O5 – Dunedin & Coast FMU vision

LF-VM-O6 – Catlins FMU vision

250. The visions are set at the FMU level, with the Clutha Mata-au vision containing a combination of clauses that apply across the whole FMU and clauses that apply in one or more specific rohe. This reflects the decision of Council to retain the Clutha Mata-au as one FMU to ensure an integrated approach to managing the catchment, while providing for delineation of various sub-catchments (rohe), recognising the considerably different environments and pressures in these areas.

7.3.2. Structure and consistency of freshwater visions

251. A number of submitters sought amendments to the structure of the visions to address the lack of consistency between them. This included some submitters requesting an overarching or regional wide Vision that applies to all waterbodies in Otago. (FPI037.014 Fish and Game, FPI030.019 Kāi Tahu ki Otago, FPI045.008 Forest and Bird, FPI030.045 Kāi Tahu ki). Fish and Game and Forest and Bird proposed an 'all of Otago catchment vision' while Kai Tahu promoted a number of outcomes for inclusion in an overarching vision.

252. Ms Boyd recommended the inclusion of a new region-wide objective that combined all the common elements of the five Visions, along with all the matters contained within LF-FW-O8, which she recommended for deletion as a consequential amendment. Most parties considered that approach to be lawful although OWRUG, Federated Farmers, DairyNZ and Horticulture NZ continued to challenge that approach at the hearing.

253. We addressed the lawfulness of this approach in section 3.1 of Appendix 2 from paragraph 86 and concluded that it is plainly available at law, as visions are set at FMU, part FMU or catchment level. As Ms Boyd noted, it is not surprising that there is commonality of outcomes sought across the region and we have accepted that it makes sense for efficiency purposes to combine common features in one region-wide Vision objective. The concern of Ms Perkins for OWRUG, Federated Farmers, and Dairy NZ appeared to relate more to a process issue than a substantive issue. In her opinion, *"the separation of the visions back out to at least FMU level, even with repetition, will more effectively allow for future changes to the visions as needed at FMU level or below."* Ms Boyd did not agree with this position, stating that she did not think *"there is any difference between making changes to an objective that applies across the region and an objective (vision) that applies to an FMU. Both are provisions in the pORPS and both require a formal planning process to be amended."*

254. While we understand Ms Perkins' point, we tend to agree with Ms Boyd on this. While a number of the parties, particularly the farming witnesses for OWRUG, Federated Farmers, and Dairy NZ,

complained that their 'visions' have not been represented in the notified pORPS, we were presented with very little in the way of 'vision statements' that were specific to the various FMUs, or to waterbodies within them. The geographic breadth of the FMUs makes this difficult anyway and as a consequence, the Visions can really only be set at a high level, with the consequent NOF process delving into the detail as the values and relevant attributes are assessed and fixed in relation to specific catchments and waterbodies.

255. That only leaves us to consider the content of Visions, which we do by following Ms Boyd's order at paragraphs 895 to 990 of her s.42A report, and then the specific provisions that follow in section 8.4.5 to 8.4.9. But before we do that, we must briefly address her concern that there is a lack of clarity with the relationship between the LF-VM and LF-FW sections. She drew our attention to the fact that the LF-VM section (which contains the Visions) is 'heavy' on objectives and contains only two policies that are procedural in nature, while the LF-FW section only contains relatively brief objectives but is very 'heavy' on policies, which are intended to achieve the objectives of both sections.

256. Ms Boyd considered this structure to be unhelpful as the sections are intended to be read together as one policy framework. In her view, it is preferable to have the provisions sitting together and she recommended the following changes accordingly:

a. *Moving all of the LF-VM content into the LF-FW section so that there is a cohesive suite of objectives, policies, and methods relating to freshwater (and therefore condensing the LF chapter to three sections: LF-WAI, LF-FW, and LF-LS),*

b. *Incorporating a region-wide objective for freshwater as the first objective in the merged LF-FW section, followed by the FMU and rohe visions and then LF-FW-O9, and making consequential amendments to the FMU and rohe visions, and LF-FW objectives, to remove duplication with and include cross-references to, the region- wide objective.*

257. We agree with Ms. Boyd that her proposed amalgamation of the two sections makes sense and will assist with the efficiency and clarity of the pORPS. While no submitters requested this change, we consider these changes to be of minor effect and they do not alter the substance of the provisions so are permissible under clause 16 of Schedule 1 of the RMA.

7.3.3. Content of a region-wide objective for freshwater

258. After considering the submissions and the various freshwater and Vision objectives, Ms Boyd recommended the following new region-wide objective in her s.42A report:

LF-FW-O1A – Region-wide objective for freshwater

In all FMUs and rohe in Otago and within the timeframes specified in the *freshwater* visions in LF-VM-O2 to LF-VM-O6:

(1) *freshwater* ecosystems support healthy populations of indigenous species and
mahika kai that are safe for consumption,

(2) the interconnection of *land*, *fresh water* (including *groundwater*) and *coastal water* is recognised,

(3) indigenous species can migrate easily and as naturally as possible,

(4) the natural character, including form and function, of *water bodies* reflects their natural behaviours to the greatest extent practicable,

(5) the ongoing relationship of Kāi Tahu with *wāhi tūpuna*, including access to and use of *water bodies*, is sustained,

(6) the health of the *water* supports the health of people and their connections with *water bodies*,

(7) innovative and sustainable *land* and *water* management practices provide for the health and well-being of *water bodies* and *freshwater* ecosystems and improve resilience to the *effects* of *climate change*, and

(8) direct *discharges* of *wastewater* to *water bodies* are phased out to the greatest extent practicable.

259. Consequential deletions of clauses to LF-VM-O2 to LF-VM-O6 that are now proposed for inclusion in LF-FW-O1A were also recommended and are discussed in relation to those provisions.

260. As notified, each of the freshwater Vision objectives included an identical clause that *"fresh water is managed in accordance with the LF-WAI objectives and policies".* Fulton Hogan sought this clause be deleted unless a comprehensive set of policies addressing "how Te Mana o te Wai applies to water bodies and freshwater ecosystems in the region" is included amongst the LF-WAI objectives and policies. Prioritisation does not, in their opinion, provide the direction necessary to provide a regional context to the priorities set out in the NPSFM Objective. We have dealt with the prioritisation issue within Appendix 2 in section 2.1.3, but agree with Ms Boyd that such a 'belt and braces' approach is not necessary given the LF-WAI provisions must be given effect to when making decisions affecting freshwater.

7.3.4. LF-FW-O1A

261. Turning to the recommended LF-FW-O1A(1), being 'freshwater ecosystems support healthy populations of indigenous species and mahika kai that are safe for consumption', Ms Boyd noted that it is similar to the following notified provisions:

a. LF-FW-O8(1): the health of the wai supports the health of the people and thriving mahika kai,

b. LF-VM-O2(4): water bodies support thriving mahika kai

c. LF-VM-O3(3): healthy riparian margins, wetlands, estuaries and lagoons support thriving mahika kai, indigenous habitats and downstream coastal ecosystems,

d. LF-VM-O4(6): water bodies support healthy populations of *galaxiid* species,

e. LF-VM-O6(3): water bodies support thriving mahika kai [and access of Kāi Tahu whānui to mahika kai].

262. The only freshwater vision that does not contain a similar type of outcome is the Taiari FMU, but Kāi Tahu ki Otago (FPI030.022 Kāi Tahu ki Otago) sought its inclusion within that vision. A number

of submitters (Kāi Tahu ki Otago, Contact, and Ravensdown) also sought to clarify that mahika kai is safe for consumption, which Ms Boyd considered appropriate and consistent with the second priority in decision-making set out in LF-WAI- P1(2).

263. In her opening statement at the hearing, Ms Boyd responded to the evidence of Mr Brass for the Director-General of Conservation by recommending direct reference to non-diadromous galaxiids and Canterbury mudfish in LF-FW-O1A. Mr Brass did not support the proposed wording because he considered it changes the focus of the clause such that the purpose of supporting healthy populations of indigenous species is only valued in relation to mahika kai rather than in its own right. Ms Boyd agreed with Mr Brass but was concerned his suggested amendment removes the reference to 'plentiful' mahika kai.

264. While the Panel acknowledges that this issue was highlighted in the cultural evidence for Kāi Tahu, we note that this objective applies across the board to all freshwater ecosystems and while Mahika kai is part of a freshwater ecosystem, we consider that it has elements of both priority 2 and 3 as it places human use value on some parts of the ecosystem over others. As we have already determined, the Vision objectives are not the place to prioritise these matters. How 'plentiful' mahika kai should be in any given waterbody will be determined through the NOF process. Hence, we do not agree with the use of the word 'plentiful' in this context.

265. The recommended LF-FW-O1A(2) largely adopts the wording currently contained in LF-FW-O8(3) and is similarly described in LF-VM-O2(7)(c)(ii). Ms Boyd considered it appropriate to add reference to 'land' in the new clause to address the submissions on LF-FW-O8(3), which we agree with.

266. The recommended LF-FW-O1A(3) is that "indigenous species can migrate easily and as naturally as possible" and Ms Boyd notes it is similar to the following notified provisions:

a. LF-FW-O8(4): native fish can migrate easily and as naturally as possible and taoka species and their habitats are protected,

b. LF-VM-O2(5): indigenous species migrate easily and as naturally as possible along and within the river system,

c. LF-VM-O3(4): indigenous species can migrate easily and as naturally as possible to and from the coastal environment,

d. LF-VM-O5(3): healthy estuaries, lagoons and coastal waters support thriving mahika kai and downstream coastal ecosystems, and indigenous species can migrate easily and as naturally as possible to and from these areas.

267. A number of submitters addressed this direction in the various notified provisions above, including:

a. Moutere Station sought that it only applies to migration of indigenous species where required to complete their life cycle.

b. DOC sought a new clause that that would ensure passage of undesirable fish species is prevented where necessary.

c. Contact considers the clause fails to reflect that the dams have altered the natural form and function of the Clutha River, and that the restoration of natural processes may not be feasible in all cases. Contact seeks to replace

'where possible' with 'practicable'.

d. Meridian proposes that the migration of these species is maintained, and enhanced where practicable, while removing reference to the migration being easy and as natural as possible.

e. Oceana Gold seeks the removal of the phrase 'as naturally as possible' and amendments so that provision is made for indigenous species to migrate.

f. Fish and Game and John Highton seek amendments to provide for the migration of valued introduced species such as salmon, as well as native species.

268. In Ms Boyd's recommended objective, she has used the reference "indigenous species" as opposed to "native fish". She also addressed the differentiation about where migration occurs in her s42A report, noting that *"migration at a high level is generally between fresh and coastal waters. However, the barriers to that migration are often in the freshwater bodies. In my view, the ability to migrate is the key outcome sought and therefore it is not necessary to specify the different types of migration that might occur (and unintentionally limit the application of the clause to, for example, migration occurring at the fresh/coastal water interface)."* However, the final recommended version of this clause is that such species 'migrate easily within and between catchments'.

269. Ms Boyd agreed with submitters that there are practical constraints on the ability for indigenous species to travel up and down rivers but considered the clause "as natural as possible" recognises "that there will be situations were natural solutions are not possible." (However, we note that this phrase has been removed from the provisions as recommended.) Ms Boyd considers her recommended provision to be consistent with the specific requirements for the management of fish passage under the NPSFM.

270. However, it is not clear to us how the provision is consistent with the NPSFM Clause 3.26(1) which requires an objective to be inserted in a regional plan that reads as follows (or to similar effect):

> *"The passage of fish is maintained, or is improved, by instream structures, except where it is desirable to prevent the passage of some fish species in order to protect desired fish species, their life stages, or their habitats."*

271. Of course, this objective is to be included in a regional plan and what we are dealing with here is the wishes of the community and tangata whenua for the Vision objectives of the pORPS. However, the final recommended wording for this provision includes the word 'easily' and does not use the phrase as 'naturally as possible'. In the panel's view, this is not particularly well aligned with the NPS approach as that direction recognises, by referencing instream structures, that there will be circumstances where fish passage will not be easy and will not be natural. The NPS approach also relates to all fish, not just indigenous species.

272. We heard evidence from both Contact Energy (Mr Brinsdon) and Ocean Gold (Ms Hunter) on the difficulty encountered with existing impediments to migration in waterbodies affected by their operations. As a consequence, the use of 'trap and transfer' methods have been adopted to address the issue. We also heard extensive evidence from other submitters, including the OWRUG witnesses, that highlighted how many waterbodies throughout Otago are modified by various structures, many of which are decades old, and how difficult and costly it is to modify

them. The DCC also raised concern with the provision in relation to urban water bodies that are often part of a stormwater network and are highly modified.

273. This evidence was compelling, and we consider any broad, region wide visions must reflect the reality of these circumstances. Otherwise, how is the Council to implement 'improvements' to achieve the vision it may identify under cl.3.3(4) of the NPS to return waterbodies back to natural state when it obviously cannot be done? We would suggest these types of visions are simply unachievable in many of Otago's waterbodies.

274. Accordingly, we agree with the evidence of Ms Styles for Manawa on this particular issue. She stated that the pORPS provision *"sets a very clear expectation that fish passage will be required in all circumstances"* but that the NPS *"clearly does not require the provision of fish passage in all cases and having inflexible language in the RPS with a blanket expectation of fish passage does not enable the Water Plan to take the expected nuanced approach."* As a consequence, we have recommend adopting wording similar to that proposed by Ms Styles, which more accurately reflects the NPS:

> *(3) fish passage within and between catchments is provided for except where it is desirable to prevent the passage of some fish species in order to protect desired fish species, their life stages, or their habitats.*

275. This provision does not impose the standard of 'easily' on the outcome and does not require it to be as 'naturally as possible'. It will enable the current approaches undertaken on waterbodies like the Clutha to continue and will also allow their use in other situations where a historical impediment precludes any other method. It also enables the interaction between exotic and indigenous species to be managed as foreshadowed by policies 9 and 10 of the NPS.

276. LF-FW-O1A(4) raises a similar issue as it reads "the natural form and function, of water bodies reflects their natural behaviours to the greatest extent practicable." It is similar to the following notified provisions:

a. LF-FW-O8(2): water flow is continuous throughout the whole system,

b. LF-VM-O2(7)(b)(i): flows in water bodies sustain and, wherever possible, restore the natural form and function of main stems and tributaries to support Kāi Tahu values and practices (noting this applies only to the Dunstan, Manuherekia, and Roxburgh rohe),

c. LF-VM-O2(7)(c)(i): there is no further modification of the shape and behaviour of the water bodies and opportunities to restore the natural form and function of waterbodies are promoted wherever possible (noting this applies only to the Lower Clutha rohe),

d. LF-VM-O5(4): there is no further modification of the shape and behaviour of the water bodies and opportunities to restore the natural form and function of water bodies are promoted wherever possible.

277. As Ms Boyd highlighted in her s.42A report, there are many submissions in opposition to these provisions, with most seeking either deletion or significant amendment to improve clarity or recognise the reality that many waterbodies have been modified. Ms Boyd recognised in her report that a number of the outcomes sought were not practical given the high level of modification of some water bodies, which we have discussed above. In her view, "any outcome

regarding natural form and function needed to be aspirational but also practical". Her solution is the introduction of the phrase "to the greatest extent practicable", which she considers to be a 'mid ground' somewhere between "anything within the realm of possibility" and "the minimum financially viable". In her view, "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."

278. We agree that the Vision objectives outcomes should be aspirational and the use of *"to the greatest extent practicable"* does not readily align with that. However, they also need to be realistic and achievable and quite plainly, an objective that does not contain such a qualifier is neither. In the vast majority of situations, it simply could not be achieved. Furthermore, many of the community's responses to the effects of climate change may, by necessity, involve how we manage the form and function of our water bodies. Existing renewable energy schemes such as those on the Clutha may need to be expanded or otherwise modified as a part of this response. The Onslow project that was recently assessed by the previous government is another example of where an already modified catchment may need to undergo significant further modification as a part of the response. There is also the situation raised by the Dunedin City Council in relation to highly modified urban waterways, some of which form part of the city stormwater network. This will also likely be the case in other urban areas throughout the region.

279. Ms Hunter, for both Contact and Oceana Gold, raised concern with the phrase to the greatest extent practicable". At paragraph 37 of her Oceana Gold evidence, she said:

> *"I am also unclear as to how the term "to the greatest extent practicable," as it applies throughout this objective, would be tested. As drafted, it could imply that the demonstration of practicability could be interpreted on a sliding scale. And that the application of the "greatest extent practicable" therefore means something more than "to the extent practicable or reasonably practicable", or even the best practicable option. If this is the intent, it is not clear to me how an applicant would be able to demonstrate that they have gone to this level of effort and therefore extent versus something lesser in terms of a practicability test. In other words, where is the line between achieving what is practicable versus achieving something to the "greatest extent" that is practicable. "*

280. We tend to agree with Ms Hunter and consider the phrase should be 'reasonably practicable'. Practicable generally means it is able to be done or put into practice successfully while the term 'reasonably practicable' limits the precautions to be taken to those that are not only possible but that are also suitable or rational, given the particular situation. Hence, what is 'reasonably practicable 'in the particular situation' will be determined by a range of things, generally dealt with in the lower order plans, and will also involve consideration of other objectives, such as those dealing with our response to climate change as discussed above. As a consequence, we recommend that the clause be amended as follows:

> "the form, function and character of water bodies reflects their natural characteristics and natural behaviours to the extent reasonably practicable,

281. The first ‘natural’ in the provision has also been removed as it is redundant given the aim is for the character to reflect its ‘natural characteristics and behaviours’.

282. With respect to the consequential amendments recommended by Ms Boyd, we accept those as appropriate with the exception of the use of ‘where possible’ in relation to restoration opportunities in LF-VM-O2(7)(c)(i) and LF-VM-O5(4) should be replaced with ‘where reasonably practicable’. We are in agreement with Ms Styles’ position (for Manawa Energy) that ‘possible’ sets an extremely high bar for a policy given the recent High Court interpretation of “possible”, where they concluded that if it is “technically feasible it is possible, whatever the cost” (Tauranga Environmental Protection Society Inc v Tauranga City Council [2021] NZHC 1201 [27 May 2021] at [149]).

283. The evidence of Mr. Wallace for OWRUG highlighted the difficulties in managing the effects of historic modification in the Lower Pomahaka catchment (which is located within the Lower Clutha rohe). Almost all of the streams in this catchment are mechanically straightened waterways with an impervious clay bottom, which creates significant sedimentation issues. Many properties also contain tile drains, the actual locations of which are not always known. While it may be ‘technically feasible’ to return these waterbodies to their natural alignment and remove all the tile drains, the cost would be astronomical and would not likely return the water to its natural state anyway. In cases such as this, it seems more likely that water quality improvements will be achieved through other forms of intervention that may not see the waterbody returned to its natural form but may see it achieving more of its natural function.

284. LF-FW-O1A(5) is that “the ongoing relationship of Kāi Tahu with wāhi tūpuna, including access to and use of water bodies, is sustained”. This is a priority 2 and 3 matter that picks up on a theme that is common across the freshwater visions but for some unknown reason, is inconsistently expressed. It has not been included in LF-FW-08 but is found in the following Vision objectives:

   a. LF-VM-O2(3), LF-VM-O4(2), LF-VM-O5(2), and LF-VM-O6(2): the ongoing relationship of Kāi Tahu with wāhi tūpuna is sustained,

   b. LF-VM-O3(2): the ongoing relationship of Kāi Tahu with wāhi tūpuna is sustained and Kāi Tahu maintain their connection with and use of the water bodies

   c. LF-VM-O6(3): water bodies support thriving mahika kai and access of Kāi Tahu whānui to mahika kai.

285. The only concern from submitters, raised by Beef + Lamb and DINZ in relation to LF-VM- O6(3), was that public access needs to be considerate of and consistent with landowner needs, health and safety, and animal welfare matters. Ms Boyd agrees that these matters are relevant but did not consider that the wording establishes an expectation that access will be guaranteed, or that access could not be negotiated in a way that is considerate of and respects landowner needs. We agree and note that access to waterbodies is a s.6(d) RMA matter relevant to the entire community, not just Kai Tahu.

286. LF-FW-O1A(6) is that “the health of the water supports the health of people and their connections with water bodies.” Ms Boyd advised that this was included to pick up on an aspect of LF-FW-O8(1) that is not covered by LF-FW-O1A(1), being ‘the health of the water supporting the health of people’. Contact and Ballance sought amendments to LF-FW-O8(1) to recognise the connections of people with water bodies while Fish and Game has also sought recognition of recreation in and around water and harvesting food from water bodies. Ms Boyd considered that the wording proposed by Contact and Ballance captured this philosophy and adopted it

accordingly. We consider Fish and Game's request is essentially provided for by this wording and we note that a specific amendment has been made to LF-VM-02 to address outdoor recreation opportunities.

287. LF-FW-O1A(7) has been introduced to address human use values that will fall within priority 2 and 3. It picks up on similar notified provisions as follows:

a. LF-VM-O2(7)(b)(ii): innovative and sustainable land and water management practices support food production in the area and reduce discharges of nutrients and other contaminants to water bodies so that they are safe for human contact (noting this applies only to the Dunstan, Manuherekia and Roxburgh rohe),

b. LF-VM-O2(7)(c)(iii) and LF-VM-O3(5): land management practices reduce discharges of nutrients and other contaminants to water bodies so that they are safe for human contact,

c. LF-VM-O4(8): innovative and sustainable land and water management practices support food production in the area and improve resilience to the effects of climate change.

d. LF-VM-O6(6): sustainable food production for future generations.

288. Ms Boyd noted that there many submissions made on these provisions. In relation to LF-VM-O2(7)(b)(ii) these included:

a. Manuherekia Group seeks to delete the term 'innovative'.

b. Several submitters seek alternative terms to 'food production', including: 'agricultural, pastoral, horticultural and viticultural production'; 'food and fibre sector'; 'innovative land use'; 'food and fibre production'; and 'primary production'. COWA seeks that viticulture is referenced alongside food production.

c. COWA seeks that 'land and water management practices are enabled'.

d. Waterfall Park seeks that the management practices described in clause (7)(b)(ii) 'improve water quality where degraded', in addition to supporting food production and reducing discharges.

e. Beef + Lamb and DINZ seeks amendments to only require the reduction of discharges of nutrient and other contaminants to water bodies 'where necessary to ensure they are safe for human contact.

f. Horticulture NZ seeks that clause (7)(b)(ii) include reference to management practices that 'reduce emissions and improve resilience to the effects of climate change'.

289. In response to the Manuherekia Group's request to delete 'innovative', Ms Boyd considered this term consistent with the desire expressed by the community to see new approaches developed to manage activities in the future. In her view, *"the purpose of employing innovative and sustainable practices is to ensure that activities, regardless of what they are, reduce their impacts on the health and well-being of freshwater."*

290. Innovation is generally considered to be a new way of doing things, often ground-breaking or pioneering. The proposed wording requires the practice to be both innovative and sustainable. While we acknowledge that there will be a place for innovation in achieving freshwater outcomes, not all approaches will necessarily be innovative. The more important approach to achieving the outcomes sought will be 'sustainable' land and water management practices. That may sometimes include new approaches but that may not always be necessary in some areas (for example, the Dunstan rohe where Ms Boyd notes water quality is generally very good). Hence, we have removed the word 'innovative'.

291. In the original iteration of this provision, Ms Boyd removed the reference to specific activities (such as food production) and instead focused on the outcome sought in the water bodies. This raised significant concern from many segments of the community and was also of concern to the Panel. While we have acknowledged that it is not appropriate for the Visions to step into the allocation regime, they must address all three priorities (to give effect to Te Mana o te Wai) and the outcomes sought for the waterbodies will be impacted by the needs of the community and tangata whenua in this regard, subject to achieving the bottom-lines required by the NPS.

292. Ms Boyd took this on board and after discussion with Ms Perkins (OWRUG) she included reference to food production into the provision. However, Ms Perkins requested the use of term "food and fibre production" on the basis that this covers "the full range of primary sector land uses, not just those responsible for food production. This better recognises the resource use issue."

293. Ms Boyd's concern was *"that there was clear feedback from some communities about forestry in their FMUs"*, which included North Otago, Taiari and the Catlins. While the community concerns listed by Ms Boyd included water quality issues, there was also a preference for maintaining an agriculture base. In our view, this steps into the realm of allocating resources and prioritising one land use over another. It also ignores the effect of the National Environmental Standard – Commercial Forestry (which recently superseded the NES-PF). Forestry occurs in most, if not all, of the FMUs identified in Otago. We heard compelling evidence from Mr. Oliver for City Forests on the impact of forestry activities on water quantity and quality and how that is managed to appropriate levels in the Otago context. We agree with him that it is poorly managed forestry (and other land use activities) that impact on freshwater values, not forestry per se. As a consequence, we do not agree with the lack of provision for forestry as an important land use within the region. As with all other activities, the effects of it will be managed by the lower order plans.

294. Hence, we have recommended that the reference in this provision be to 'food and fibre production' as defined by Ms Scott for OWRUG. This ensures the associated processing industries are also recognised as the definition reads:

> ***Food and Fibre Production*** *means the primary sector production industries (other than mining) including Arable, Dairy, Forestry and Wood Processing, Horticulture (including vegetables, viticulture and winemaking), Pork, Poultry, Bees, Red Meat and Wool (Sheep, Beef and Deer), Seafood and Cross-Sector and the related processing industries. Note: This definition is intended to describe the suite of activities that occur throughout Otago from a rural land use perspective and is not intended to prioritise one primary sector production industry over another.*

295. Ms Boyd also incorporated reference to improving resilience to the effects of climate change to this provision which was a part of the notified LF-VM-O4. She noted that a number of submitters sought a similar amendment to the other freshwater visions as follows:

a. HortNZ: LF-VM-O2, LF-VM-O5 and LF-VM-O6,[584]

b. DOC: LF-VM-O2 and LF-VM-O4,[585]

c. Federated Farmers: LF-VM-O5 and LF-VM-O6.[586]

d. Ravensdown: LF-VM-O5 and LF-VM-O6.[587]

296. Ms Boyd stated that "the effects of climate change will have significant implications for some land and water users and, given the timeframes the visions contain, it will be important for practices to improve resilience as those effects are felt." We agree and are comfortable with the clause as finally expressed by Ms Boyd. In this context, water storage was raised as an important issue by many groups, including the OWRUG witnesses, who sought its inclusion in the visions. However, we note that this issue was addressed and enabled in LF-FW-P7A so direct refence is not required in the visions.

297. We do note, however, that the focus of this provision is on the practices of resource users needing to adapt to climate change. It does not address the wider issue of the management of freshwater for renewable energy generation as part of New Zealand's integrated response to climate change. We heard compelling evidence from not just the REGs but from a wide range of submitters, in particular Wise Response, on what will be required to meet central Government's targets to decarbonise our society's activities. Recognition of the part renewable energy generation will play in this was specifically sought by Contact and Meridian. Wise Response sought something similar requesting the addition of "freshwater use is for activities compliant with national and international emissions reduction and biodiversity policy agreements."

298. We agree that if New Zealand is to get anywhere near its statutory targets in this respect, renewable energy generation development will be critical, and that will at least include the upgrade and development of existing hydro schemes, if not consideration of other hydro projects in the future. As a consequence, we agree with the REGs, and to a point, Wise Response, that there will be implications for the management of freshwater and specific recognition of this should occur. We therefore recommend that the following clause is added to LF-FW-O1A:

> *"freshwater is managed as part of New Zealand's integrated response to climate change and renewable electricity generation activities are provided for."*

299. A further issue that requires consideration is community water supplies, and three waters infrastructure. The bulk of the evidence we heard on this issue was from the Dunedin City Council. The evidence of Ms Moffat highlighted the significant challenges faced in managing the drinking water, stormwater and wastewater networks of Otago's largest urban area. These challenges arise in three of the five Freshwater Management Units (FMU) included in the pORPS: Taiari, Dunedin & Coast, and North Otago. Essentially, DCC were concerned that the pORPS does not adequately recognise the importance of community water supplies and associated three waters infrastructure in supporting the health needs of the people. Mr Taylor proposed a raft of changes to the vision and various policies to address this concern. That included the following addition to the relevant vision objectives:

> *"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."*

300. The Queenstown Lakes District Council supported the DCC on this issue. Their Infrastructure Operations Manager, Mr Simon Mason, provided evidence that highlighted the key services that QLDC provides that are dependent on the freshwater planning framework. In his view, *"the policy environment needs to allow for local councils to provide services to meet the needs to the community in an affordable manner whilst managing effects on the environment sustainably."*

301. Mr. Anderson, for the Regional Council, in his opening statement (paras 117 – 131), addressed the legality of including reference to the DCC's 'coordinated strategy 'approach as proposed by Mr Taylor. While accepting that such a strategy might be desirable, Mr Anderson submitted that 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."* We agree with Mr Anderson on that, but we are concerned that three water services and infrastructure has not been recognised in the visions as, for example, food and fibre production and the social, economic, and cultural well-being of Otago's people and communities, has been. While it could be argued that three waters fall within the ambit of 'wellbeing', we consider it to be a more basic human need than that, which should be specifically recognised in the vision objectives. We would find it very unusual if communities did not want their FMUs to provide for their most basic health needs in the form of three waters services, which will fall across both priority 2 and 3 under Te Mana o te Wai.

302. Because of the foregoing, the Panel considers that this recognition must be provided within the region-wide objective because all FMUs contribute to these basic human needs. However, we do not think the detail proposed by Mr. Tayor is necessary. Ensuring the needs of Otago's communities are provided for is all that is considered necessary at the visions level.

303. LF-FW-O1A(8) deals with discharges, and seeks the direct discharges of wastewater to water bodies to be phased out to the greatest extent practicable. This clause is similar to LF-VM-O2(7)(c)(iv) and LF-VM-O4(7) although these clauses impose a stricter standard, that there are no direct discharges of wastewater to water bodies. Kāi Tahu ki Otago sought the extension of this approach to all visions while Fonterra and Silver Fern Farms sought to distinguish between sewage and wastewater. Both submitters were concerned that this approach could inadvertently prohibit discharges of appropriately treated and authorised discharges that do not contain sewage. The DCC highlighted the fact that in some situations (such as extreme weather events or when a system fault has occurred), discharges of treated and/or untreated wastewater to water bodies can occur and that in some cases, a wastewater overflow may be the best practicable option with minimal environmental effect as total elimination of overflows is unlikely to be possible in most wastewater systems. They sought general amendments to address this.

304. After considering the concerns of the submitters on both sides of this issue, Ms Boyd concluded that while it is appropriate for a long-term objective to aim to phase out direct discharges as much as possible, she acknowledged that there will be cases where this is not practicable. To recognise this, she recommended the phasing out direct discharges "to the greatest extent practicable". She considers that this approach is consistent with the direction in the LF-FW policies given the amendments she recommends, noting that the policy on wastewater does not require ceasing all discharges. She considered the issue further in her opening and closing statements, highlighting the significant cost involved in phasing out all direct discharges.

305. We agree with Ms. Boyd that the evidence indicates that it will not always be practical to phase out some direct discharges to water. Hence, we are comfortable with the approach she recommends with the exception of using the phrase 'greatest extent practicable', for the reasons we have previously discussed. We deal with Ms Boyd's changes to the policy on this matter (LF-FW-P15) later in this decision.

7.3.4.1. Recommendation

306. Our final recommendation for the region-wide objective is therefore as follows:

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

In each FMU and rohe in Otago and within the timeframes specified in the freshwater visions in LF-VM-O2 to LF-VM-O6:

(1) healthy freshwater and estuarine ecosystems support healthy populations of indigenous species (including non-diadromous galaxiids and Canterbury mudfish) and mahika kai that are safe for consumption,

(2) the interconnection of land, freshwater (including springs, groundwater, ephemeral water bodies, wetlands, rivers, and lakes) and coastal water is recognised,

(3) fish passage within and between catchments is provided for except where it is desirable to prevent the passage of some fish species in order to protect desired fish species, their life stages, or their habitats,

(4) the form, function and character of water bodies reflects their natural characteristics and natural behaviours to the extent reasonably practicable,

(5) the ongoing relationship of Kāi Tahu with wāhi tūpuna, including access to and use of water bodies, is sustained,

(6) the health of the water supports the health of people and their connections with water bodies,

(7) sustainable land and water management practices:

  (a) support food and fibre production and the continued social, economic, and cultural well-being of Otago's people and communities, and

  (b) improve the resilience of communities to the effects of climate change, and

  (c) ensure communities are appropriately serviced by community water supplies, and other three waters infrastructure,

(8) direct discharges of wastewater to water bodies are phased out to the extent reasonably practicable, and

(9) freshwater is managed as part of New Zealand's integrated response to climate change and renewable electricity generation activities are provided for.

7.3.5. Implications for LF-FW objectives

307. As Ms Boyd notes, the approach finally recommended by Council has implications for the three objectives in the LF-FW section, which are:

a. LF-FW-O8 applies to all fresh water,

b. LF-FW-O9 applies to natural wetlands, and

c. LF-FW-O10 applies to natural character.

308. The introduction of a region- wide objective for freshwater has made clauses (1), (2), (3), and (4) of LF-FW-O8 redundant. Clause LF-FW-O8(5) deals with identifying and protecting the significant and outstanding values of Otago's outstanding water bodies. This issue has been addressed in the non-FPI process, in relation to LF-FW-P12 which essentially repeats the content of LF-FW-O8(5). Ms Boyd notes that "as outstanding water bodies are a subset of freshwater bodies, new LF-FW-O1A would apply to outstanding water bodies as well" and does not consider a specific objective necessary, particularly given it mostly repeats the content of the subsequent policy. On that basis, she is of the opinion that LF-FW-O8(5) can also be deleted.

309. However, the new region wide objective does not appear to address outstanding water bodies. As a consequence, we consider this part of the objective, LF-FW-O8(5), must be retained.

310. The provisions of LF-FW-O1A do not cover the full range of matters that would fall under natural character matters.

7.3.5.1. Recommendation

311. Adopting a region-wide objective has led to the following consequential changes:

a. Deleting the following clauses from the freshwater visions as a consequential amendment to introducing LF-FW-O1A:

i. LF-VM-O2(3), (4), (5), (7)(b)(i) and (ii), (7)(c)(i), (iii) and (iv),

ii. LF-VM-O3(2), (4), and (5),

iii. LF-VM-O4(2), (6), (7), and (8),

iv. LF-VM-O5(2) and (4), and

v. LF-VM-O6(2) and (3).

b. Deleting the part of LF-VM-O3(3) that relates to mahika kai and indigenous species,

c. Deleting the part of LF-VM-O5(3) that relates to migration of indigenous species,

d. Amending LF-FW-O8 to only retain clause (5) as follows:

> The significant and outstanding values of Otago's *outstanding water bodies* are identified and protected.

e. Retaining LF-FW-O9 but locating it after the suite of freshwater visions, and

f. Merging the LF-VM and LF-FW sections into one LF-FW section.

7.4. Timeframes

312. There are a number of submissions that seek amendments to the timeframes contained within the freshwater visions. Some of these were made generally across the suite of visions while others were made specifically in relation to one or more of the visions. Ms Boyd's s42A report summarised what the submissions sought, and we have not repeated that here. In brief, some

submitters request that the specific timetables be deleted or amended until further consultation/assessment is done to determine the cost of achieving them, and whether they are in fact achievable. Others are seeking timeframes from anywhere between 10 and 50 years. Some submitters requested that interim steps be included, with reporting requirements.

313. We have also addressed the legal issues around the timeframe issue in section 3.3 of Appendix Two. In response to the concerns of the various water user groups, we concluded that human effects matters should be considered, along with all other resource management matters, when determining what is a 'reasonable and ambitious' timeframe to achieve the vision.

314. Possibly the biggest concern of these submitters was the uncertainty they face and the need for a period of transition so that resource use change can occur in a way and over a time period that is sustainable for rural communities. As Ms Scott noted for OWRUG, agriculture and horticulture are biological processes, and there is generally a time lag between practice change and the desired environmental outcomes. Farm system changes can also take many years to implement and refine, and this is limited by funding.

315. In recognition of this, Ms Boyd and Ms Perkins discussed and agreed on a new policy (LF-VM-P6A) which, in Ms Boyd's view, addresses this concern in a way that does not inappropriately constrain, or override, the NPSFM implementation to occur in the LWRP. We have discussed the other policy approaches sought by OWRUG (relating to the use of non-regulatory measures and integrated catchment management) in our legal commentary and do not consider them to be legally available to the council in the way proposed by the submitters.

316. However, we do agree that the proposed new LF-VM-P6A is appropriate and have recommended its inclusion accordingly. In terms of the s32 evaluation, we agree with Ms Boyd that there are no costs associated with the policy while it has the benefit of recognising the need for changes in practices to occur over time to manage the impacts of those changes on communities. This is consistent with section 5(2) of the RMA – *"managing … natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being …".* Overall, the policy improves the effectiveness of the suite of policies designed to achieve the objectives.

317. We also agree with Ms Boyd's view in relation to the submissions seeking interim timeframes for achieving freshwater visions. In her view, the NOF process will provide a more robust foundation for determining interim timeframes. She did, however, recommend an amendment to LF-FW-M6 to require the identification of interim milestones, which we agree is appropriate.

318. With respect to the timeframes themselves, Ms Boyd concluded in her s42A report that:

a. *North Otago FMU (2050) and Catlins FMU (2030) looked unlikely to be achievable given nutrient lag times.*

b. *Lower Clutha rohe (2045) may be unachievable given there are higher/ contributing catchments with longer timeframes.*

c. *Manuherekia rohe (2050) is challenging, and I was open to hearing more evidence on the timeframe.*

319. She noted in her reply report that few submitters sought to extend Vision timeframes, but some still considered they should be shortened. While she agreed that action should be taken immediately to halt the decline in freshwater health, she was not convinced that these

submitters demonstrated that the timeframes they seek are "reasonable" in accordance with clause 3.3 of the NPSFM. She highlighted the significant challenges that will affect some communities and suggested that achieving the visions needs to balance the need for action with the 'large and difficult actions' that need time to be planned, funded, and carried out. To illustrate this, she cited the evidence of Ms Heckler for OWRUG, who indicated that the cost in achieving the vision for the Manuherekia rohe alone would be in the hundreds of millions.

320. Having considered the submissions and evidence from the various parties, Ms Boyd recommended retaining the timeframes as notified with the following exceptions:

a. **Catlins FMU:** Based on the Otago Regional Council submission that the vision for the Catlins FMU is unlikely to be met by the 2030 timeframe (due to current modelling for periphyton), Ms Boyd recommended revising this timeframe to 2035 as there will be no opportunity to review it before 2025 is reached through normal plan review processes.

b. **Lower Clutha rohe:** Ms Boyd considered it would be difficult for this rohe to achieve the notified timeframe given it is located at the bottom of the Clutha Mata-au catchment and has an earlier timeframe than the rohe higher in the catchment. She therefore recommended extending the Lower Clutha rohe timeframe to 2050 for consistency with the Manuherekia rohe timeframe.

321. In relation to the North Otago FMU, she considered that there is still a risk that the North Otago FMU vision will not be achieved by 2050 due to lag times but noted that there will be at least one review of the pORPS content prior to that deadline being reached. In relation to the Manuherekia rohe, she noted Ms Heckler's view at the hearing that the issues in that catchment should be resolved by this generation and consequently, did not recommend amending the 2050 timeframe for this rohe.

322. We were not presented with any evidence at the hearing that presented a strong case for deviation from Ms Boyd's recommendations. We acknowledge the significant difficulties that rural communities are likely to face in adapting to the approach dictated by the NPSFM, however we would expect the timeframes for most of the rohe are likely to be revisited through the next plan review cycle, which will occur after the NOF process has been carried out and monitoring has provided greater certainty around how realistic or not the timeframes are.

7.4.1. LF-VM-O2 – Clutha Mata-au FMU vision

323. With the consolidation of common provisions into a region-wide objective for freshwater and amendment to the timeframes, there were few specific provisions remaining in LF-VM-O2. Ms Boyd recommended a number of further changes throughout the process as follows:

- In response to the NZSki and Realnz request to recognise outdoor recreation opportunities, Ms Boyd noted in her s42A report that the feedback gathered for this rohe indicated that recreational pursuits and opportunities were a common theme. She considered recognition of the fact that these waterbodies support a range of outdoor recreation opportunities an appropriate amendment, in line the second priority in NPS-FM.

- In relation to clause 7(a), Contact sought a requirement to improve water quality where it is degraded while Wise Response sought a reference to water quality being restored. Ms Boyd considered this appropriate, adopting the wording of Contact.
- Subsequent to her s42A Report, Ms Boyd also accepted Contact's submission to recognise and provide for the 'operation, maintenance and upgrading' of the Clutha Hydro-electricity scheme in clause 6.
- The reference to "*sustainable abstraction occurs from lakes, river main stems or groundwater in preference to tributaries"* that was removed in her s42A report version was also reinstated, we assume in response to Kai Tahu's submission.

324. The Panel is in general agreement with Ms Boyd's proposed amendments, with just two adjustments. In relation to the tributary issue, while we recognise and acknowledge Kai Tahu's position on this matter, we also heard evidence from the OWRUG's witnesses (in particular, Ms McKeague) on the practicality of restricting takes to main stems. Again, we feel this clause should be qualified with 'to the extent reasonably practicable'.

325. With respect to the amendment proposed in relation to the Contact submission, we note that Ms. Hunter went further in her submission as follows:

> *"…the national significance of the ongoing operation, maintenance and upgrading of the Clutha hydro-electricity generation scheme, including its generation capacity, storage and operational flexibility and its contribution to climate change mitigation is recognised, provided for and protected"*

326. Mr Brinsdon provided compelling evidence on how the current operating regime imposed on the scheme limits its efficiency and therefore its ability to fully contribute to the country's renewable energy needs. We also heard from Mr Brinsdon about the potential for other developments within the system and the wider catchment that may not be provided for under the 'upgrading reference'.

327. It is the Panel's firm opinion that these options cannot be foreclosed if the country wishes to achieve the various emissions targets and renewable energy goals it has committed to. While there will obviously be effects associated with this, Mr Boyd provided several examples of how these could be mitigated or compensated for. The Clutha is already a highly modified catchment and as we have already discussed, many of the original vision objectives are not achievable.

328. As a consequence, we accept Contact's submission in full and recommend that the current clause is expanded to include future development options are also provided for in what is an already significantly modified catchment. The provision as now recommended reads as follows:

> *"The national significance of the ongoing operation, maintenance and upgrading of the Clutha hydro-electricity generation scheme, including its generation capacity, storage and operational flexibility and its contribution to climate change mitigation is recognised and protected, and potential further development is provided for within this modified catchment"*

7.4.1.1. Recommendation

329. The Panel's final recommendation for LF-VM-O2 is as follows:

LF-VM-O2 – Clutha Mata-au *FMU* vision

In the Clutha Mata-au *FMU*, and in addition to the matters in LF-FW-O1A:

(1) management of the *FMU* recognises that:

(a) the Clutha Mata-au is a single connected system ki uta ki tai, and

(b) the source of the wai is pure, coming directly from ~~Tawhirimatea~~ Tāwhirimātea to the top of the mauka and into the awa,

(1A) sustainable abstraction occurs from *lakes*, *river* main stems or *groundwater* in preference to tributaries, to the extent reasonably practicable,

~~(2) *fresh water* is managed in accordance with the LF-WAI objectives and policies,~~

~~(3) the ongoing relationship of Kāi Tahu with *wāhi tūpuna* is sustained,~~

~~(4) *water bodies* support thriving *mahika kai* and Kāi Tahu whānui have access to *mahika kai*,~~

~~(5) indigenous species migrate easily and as naturally as possible along and within the *river* system~~

(6) the national significance of the ongoing operation, maintenance and upgrading of the Clutha hydro-electricity generation scheme, including its generation capacity, storage and operational flexibility and its contribution to climate change mitigation, is recognised and protected, and potential further development is provided for within this modified catchment.

(6A) *water bodies* support a range of outdoor recreation opportunities,

(7) ~~in addition to (1) to (6) above:~~

~~(a)~~ in the Upper Lakes rohe, the high quality *waters* of the *lakes* and their tributaries are protected, and if degraded are improved, recognising the significance of the purity of these *waters* to Kāi Tahu and to the wider community,

~~(b) in the Dunstan, Manuherekia and Roxburgh rohe:~~

~~(i) flows in *water bodies* sustain and, wherever possible, restore the natural form and function of main stems and tributaries to support Kāi Tahu values and practices, and~~

~~(ii) innovative and sustainable *land* and *water* management practices support food production in the area and reduce~~

~~discharges of nutrients and other *contaminants* to *water bodies* so that they are safe for human contact, and~~

~~(iii) sustainable abstraction occurs from main stems or *groundwater* in preference to tributaries,~~

(~~c~~7A) in the Lower Clutha rohe,~~:~~

~~(i) there is no further modification of the shape and behaviour of the *water bodies* and~~ opportunities to restore the natural form and function of *water bodies* are promoted wherever reasonably practicable ~~possible,~~ and

~~(ii) the ecosystem connections between *freshwater*, *wetlands* and the coastal environment are preserved and, wherever possible, restored,~~

~~(iii) *land* management practices reduce discharges of nutrients and other *contaminants* to *water bodies* so that they are safe for human contact, and~~

~~(iv) there are no direct *discharges* of *wastewater* to *water bodies*, and~~

8) the outcomes sought in (7) are to be achieved within the following timeframes:

(a) by 2030 in the Upper Lakes rohe,

(b) by 2045 in the Dunstan, and Roxburgh ~~and Lower Clutha~~ rohe, and

(c) by 2050 in the Manuherekia and Lower Clutha rohe.

7.4.2. LF-VM-O3 – North Otago FMU vision

330. With the consolidation of common provisions into a region-wide objective for freshwater, there were again few specific provisions remaining in LF-VM-O3. Ms Boyd also recommended some changes to the vision objective in her s42A report that accepted the Meridian request to recognise the national significance of the Waitaki hydro-electricity generation scheme, and a rewording of the first clause as a consequential amendment.

331. The Panel agrees with Ms Boyd's recommended changes.

7.4.3. LF-VM-O4 – Taiari FMU vision

332. LF-VM-O4 has also been significantly narrowed with the development of a region wide objective. Ms. Boyd made further changes in her s42A report to the wetland clause in response to Beef and Lamb, and DINZ. Subsequent to her s42A report, she also accepted Manawa Energy's request to recognise the various hydro-electricity schemes in the catchment.

333. We generally agree with Ms Boyd's recommended amendments to the vision objective, subject to provision for future development of the existing hydro-electricity schemes within this catchment. We also note that the DCC raised the issue of their primary water supply being

sourced from this FMU but we are of the opinion that the recognition of community water supplies and three water infrastructure in the region wide objective should address this.

7.4.3.1. Recommendation

334. The Panel recommends LF-VM-O4 be amended as follows:

LF-VM-O4 – ~~Taieri~~ Taiari *FMU* vision

By 2050 in the ~~Taieri~~ Taiari *FMU*, and in addition to the matters in LF-FW-O1A:

~~(1) *fresh water* is managed in accordance with the LF-WAI objectives and policies,~~

~~(2) the ongoing relationship of Kāi Tahu with *wāhi tūpuna* is sustained,~~

~~(3)~~ ~~healthy *wetlands* are restored in~~ the upper and lower catchment *wetland* complexes, including the ~~Waipori/Waihola Wetlands~~ Waipōuri/Waihola wetland complex, ~~Tunaheketaka/Lake Taiari, scroll plain,~~ Upper Taiari wetland complex, and connected tussock areas are protected, restored or enhanced where they have been degraded or lost,

~~(4)~~ the gravel *bed* of the lower ~~Taieri~~ Taiari is restored and sedimentation of the ~~Waipori~~ Waipōuri/Waihola wetland complex is reduced,

(4A) the national significance of the Waipoūri hydro-electricity generation scheme, and the regional significance of the Deep Stream and Paerau/Patearoa hydro-electricity generation schemes, is recognised and their operation, maintenance, and upgrading is provided for, while potential further development of these schemes is provided for.

(5) creative ecological approaches contribute to reduced occurrence of didymo, ~~and~~

~~(6) *water bodies* support healthy populations of *galaxiid* species.,~~

(7) ~~there are no direct *discharges* of *wastewater* to *water bodies*, and~~

(8) ~~innovative and sustainable *land* and *water* management practices support food production in the area and improve resilience to the *effects* of *climate change*.~~

7.4.4. LF-VM-O5 – Dunedin & Coast FMU vision

335. As with the other visions, most of the issues raised in relation to this vision have been dealt with by the introduction of a region-wide objective for freshwater. Hence there are few specific provisions left. Some minor changes have been made to the original provision relating to downstream coastal ecosystems, to bring it in line with other similar provisions, which we agree with.

336. Given Otago's largest metropolitan area lies within the Dunedin FMU, the DCC emphasised that there needs to be a clear vision for Dunedin's urban waterways in terms of water quality, access, the community values. However, no specific wording was provided to recognise this, with Mr Taylor merely recommending the inclusion of the 'coordinated strategy' clause previously discussed.

337. While we see merit in the DCC submission, the Panel is of the view that the recognition of community water supply and other three waters infrastructure in the region wide objective should address the DCC's concerns in this regard.

7.4.4.1. Recommendation

338. The Panel recommends LF-VM-O5 be amended as follows:

LF-VM-O5 - Dunedin & Coast *FMU* vision

By 2040 in the Dunedin & Coast *FMU* and in addition to the matters in LF-FW-O1A:

~~(1) *fresh water* is managed in accordance with the LF-WAI objectives and policies,~~

~~(2) the ongoing relationship of Kāi Tahu with *wāhi tūpuna* is sustained,~~

~~(3)~~ healthy riparian margins, *wetlands*, estuaries, and lagoons ~~and *coastal waters*~~ support the health of ~~thriving *mahika kai* and~~ downstream coastal ecosystems, ~~and indigenous species can migrate easily and as naturally as possible to and from these areas,~~

~~(4) there is no further modification of the shape and behaviour of the *water bodies* and~~ opportunities to restore the natural form and function of *water bodies* are promoted wherever practicable ~~possible~~. ~~, and~~

~~*discharges of contaminants* from urban environments are reduced so that *water bodies* are safe for human contact.~~

7.4.5. LF-VM-O6 – Catlins FMU vision

339. The submission points in relation to this vision have generally been addressed through the region-wide objective and as a consequence, only two specific clauses remain. We note the second clause refers to both 'recreation' and 'sustainable food production'. A number of submitters requested 'food production' be replaced with 'primary production'. However, given the 'food and fibre production' clause added to the region wide objective, the Panel is of the view that this part of the vision can be deleted.

7.4.5.1. Recommendation

340. The Panel recommends LF-VM-O6 be amended as follows:

LF-VM-O6 – Catlins *FMU* vision

By 2035 in the Catlins *FMU* and in addition to the matters in LF-FW-O1A:

~~(1) *fresh water* is managed in accordance with the LF-WAI objectives and policies,~~

~~(2) the ongoing relationship of Kāi Tahu with *wāhi tūpuna* is sustained,~~

~~(3) *water bodies* support thriving mahika kai and access of Kāi Tahu whānui to mahika kai,~~

~~(4)~~ the high degree of naturalness of the water bodies and ecosystem connections between the forests, *freshwater* and coastal environment are preserved, and

~~(5)~~ ~~*water bodies* and their catchment areas support the health and well-being of *coastal water*, ecosystems and indigenous species, including downstream kaimoana, and~~

~~(6)~~ healthy, clear and clean *water* supports opportunities for recreation ~~and sustainable food production for future generations~~.

7.5. Associated Policies and Provisions

7.5.1. Timeframes and Catchment Group Approach

LF-VM-P5, LF-VM-P6 and the recommended LF-VM-P6A relate to the Visions. We have already stated in our discussion on timeframes above that we consider the new transitional policy, LF-VM-P6A, to be appropriate and recommend that it be included in the PORPS. In a related discussion, we also accepted Ms. Boyd's recommended method M8AA that addresses the integrated catchment management issue raised by various submitters.

We would also comment here that, although not part of the Freshwater part of the PORPS, we agree with and accept the changes proposed to LF-VM-M3 in response to the OWRUG submission, which explicitly recognise encouraging catchment groups to address freshwater issues at a local catchment level.

7.5.2. LF-VM-P5 – Extent and boundaries of FMUs and rohe

341. LF-VM-P5 sets out the FMUs and rohe in Otago and refers to MAP1 which shows the boundaries of each area. The s42A report evaluated the submissions on these provisions together. The submissions were generally supportive although there were some requests for map changes and clarification in the text.

342. In relation to the Fish and Game request to include text defining the spatial extent of these areas, we agree with Ms Boyd that it is more appropriate for this information to sit outside the pORPS. It may, however, be helpful for the online version of the pORPS to contain a link to the relevant webpages for each FMU and rohe.

343. Te Rūnanga o Ngāi Tahu, Kāi Tahu ki Otago and DOC requested that the coastal boundaries of the FMUs be amended to include all estuarine areas and enclosed shallow inlets. Ms Boyd accepted this as appropriate given that they are important receiving environments for fresh water, noting that Clause 1.5 of the NPSFM states:

> [The NPSFM] applies to all freshwater (including groundwater) and, to the extent they are affected by freshwater, to receiving environments (which may include estuaries and the wider coastal marine area).

344. The Panel agrees that this change should be made given the need to recognise the interconnectedness of the whole environment and the emphasis on integrated management. While the maps were not redrawn to illustrate this, we agree with the alternative approach proposed by Mr Brass for DOC, who suggested inserting wording into the policy itself that reflects this approach.

7.5.3. Boundary of North Otago and Dunedin & Coast FMUs

345. Kāi Tahu ki Otago, along with the DCC, also sought an amendment to the boundaries of the North Otago and Dunedin & Coast FMUs so that the Waikōuaiti River catchment is included in the Dunedin & Coast FMU. In their opinion, this would better align management across all catchments that flow into the coastal receiving environment that is included in the East Otago Taiāpure (which encompasses marine and estuarine waters enclosed by Cornish Head, Brinns Point, Warrington Spit and Potato Point).

346. Ms Boyd sought the opinion of Mr De Pelsemaeker from ORC's Policy team on the process adopted to develop the FMUs and rohe boundaries and the implications of amending the boundary as proposed. Based on Mr De Pelsemaeker's opinion that the risk of amending the boundaries is negligible and that there are potential benefits if both estuaries that discharge into the East Otago Taiāpure are guided by the same vision in the pORPS, Ms Boyd recommended the change. However, neither submitter had provided a redrawn boundary and as she did not commission one from ORC, this was a live issue at the hearing.

347. Mr Taylor, for the DCC, produced a map at the hearing that showed the proposed location of the new boundary. Ms McIntyre, for Kāi Tahu ki Otago, advised us at the hearing that she had reviewed that map and that Kai Tahu supported the new boundary.

7.5.3.1. Recommendation

348. On the basis of this agreement, and the reasons for it, the Panel accepts that the new boundary is appropriate and will better support the integrated management of the East Otago Taiāpure area catchment. To avoid any issue about whether there is sufficient scope in the DCC submission as to the map, we rely on clause 49(2)(b) of the first schedule to adopt the map attached to Mr Taylor's evidence.

349. A revised copy of MAP1 was included in the Reply Report version, which we accept.

7.5.4. Boundary between Catlins and Clutha Mata-au FMUs

350. In a similar vein, Ms Boyd raised an additional issue relating to the Pūerua River catchment and the rohe boundaries. The Pūerua River catchment is currently identified in the Catlins FMU, despite its hydrological connection with the Clutha Mata-au River. She advised that ORC staff, working on the development of the FMU framework for the LWRP, raised concern with the appropriateness of including this catchment in the Catlins FMU when it is connected with the Clutha Mata-au River.

351. The Panel too was surprised that the Pūerua River was not included in Lower Clutha rohe of Clutha River/Mata-au FMU given its obvious connection to that river and the nature of the development adjoining it. In our view, it is quite clear that this river should be part of the Lower Clutha rohe rather than the Catlins FMU. We note that Mr De Pelsemaeker agreed with this. While no submission was made on this matter, Ms Boyd agreed in principle but considered it appropriate for the hearings panel to hear from submitters who may have an interest in the matter.

352. No objection to this was forthcoming from any submitter, with Ms McIntyre confirming at the hearing that this approach would be "*consistent with the submission and evidence of Kāi Tahu ki Otago to manage the Mata-au as a single system*".

7.5.4.1. Recommendation

353. Because there was no submission on the matter, Ms Boyd recommended that we utilise clause 49(2)(b) of Schedule 1 of the RMA to make the change. We agree and recommend the change accordingly.

7.5.5. Use of rohe in Taiari FMU

354. That brings us to Federated Farmers request that the Taieri FMU be split into rohe, given their opinion that the Taieri river covers a range of landscapes, land use, climate and ecosystems, and targeted management would be beneficial. This amendment is opposed in the further submission of Kāi Tahu ki Otago which states that Kāi Tahu "*support[s] consideration of the Taiari as a whole catchment, recognising its interconnectedness ki uta ki tai.*"

355. Ms Boyd advised that Mr De Pelsemaeker recommended "against further division because there are not enough, or significant enough, differences between the upper and lower parts of the catchment to warrant different spatial units being identified." This was "in contrast to the Clutha Mata-au FMU where there are significant differences between, for example, the Upper Lakes rohe and the Lower Clutha rohe, as well as different 'sections' of the river demarcated by hydroelectricity generation infrastructure."

356. Based on our knowledge and experience of this catchment, we are surprised at this conclusion. The upper and lower parts of the catchment are quite different, with the upper part (the Maniototo) forming part of the Central Otago area while the lower part is similar to the wetter plains of lower Clutha catchment. The climate, soil and farm management systems are quite different. Hence, we do not agree with Mr De Pelsemaeker in his memorandum where he says:

> *While there are some differences between the upper and lower parts of the Taiari catchment, these differences are not as significant in the Taiari FMU, compared to the Clutha Mata-au FMU. Furthermore, there are also strong commonalities in terms of the land uses, types of water bodies and environmental issues that exist in different parts of the Taiari catchment.*

357. Mr De Pelsemaeker also makes the comment that "the Taiari FMU encompasses generally small, rural communities without the significant elements of urban development present in the Clutha Mata-au FMU". While the communities in the upper part of the catchments are generally small, Mosgiel is located in the lower catchment and is larger than all Clutha communities with the exception of Queenstown.

358. The fact that both the upper and lower parts of the Taiari catchment have extensive wetland areas is also identified as a similarity. However, it would seem to us that there are significant differences in the characteristics of the upper and lower catchment wetlands.

359. In the Panel's mind, there is some justification for splitting this FMU into rohe. Ms Boyd advised, "as the FMU boundaries are established at the pORPS level they will not be able to be revisited during the development of the LWRP without a formal change to the RPS. Therefore, ensuring the FMU boundaries are correct in the pORPS will alleviate the risk of errors being embedded in future processes, such as the implementation of the NOF in the LWRP." However, the difficulty we have is that Federated Farmers did not provide any information on how the FMU could be further divided. We do not have the details to do that ourselves and consequently, we have not accepted this submission point. Furthermore, we accept Mr De Pelsemaeker's comment "that

managing the Taiari catchment as one FMU does not preclude the inclusion of plan provisions (objectives, rules or policies) that only apply to certain part(s) of the FMU ....”

360. We would also make the observation that some of the other rohe boundaries could possibly warrant some further consideration, particularly the boundary between the Upper Lakes rohe and the Dunstan rohe. For example, while the Shotover discharges into the Kawarau just below Lake Wakatipu, the characteristics of its catchment would appear more aligned with the Upper Lakes rohe. Furthermore, the majority of the area covered by the ‘Dunstan’ rohe has not historically been known by that name. The Dunstan area is more associated with the Alexandra/Clyde basin and the lower part of the Manuherekia rohe. The majority of ‘Dunstan’ rohe was part of the former Vincent County and was known by either that name or Upper Clutha. And of course, the North Otago rohe only covers part of North Otago as the result of central government, in one Panel member’s view, rather strangely incorporating the northern part of that province into the Canterbury Region in 1989.

7.5.6. LF-VM-P6 – Relationship between FMUs and rohe

361. Turning now to LF-VM-P6, which addresses the relationship between FMUs and rohe. Ms Boyd made a number of changes to this policy in response to submissions and these were generally favourably received, with little comment from the submitters at the hearing.

362. However, Wise Response did address their suggested amendments to this policy in their presentation to the Panel. They refined their requested addition to clause (1) of the policy to read “*informed by environmental and resource risks, limits and trends*” referring to the requirement in clause 3.3(3) (b) of the NPSFM for long-term visions to be informed by “environmental pressures” as justification for the amendment.

363. Ms Boyd considered the amendment would introduce uncertainty into the policy. She highlighted the fact that the phrase ‘environmental outcomes’ is defined in the NPSFM and that their development must follow a defined process. This includes clause 3.9 which sets the process for identifying values and setting environmental outcomes as objectives, and clause 3.10 which deals with the identification of attributes and their baseline states, or other criteria for assessing achievement of environmental outcomes.

364. While the Panel appreciates the point the submitter was making, the subject clause is not addressing how the environmental outcomes are developed. As Ms Boyd notes, there is a defined process for that, and it is not appropriate to cloud that through this policy framework.

365. With respect to Contact’s request to recognise clause 3.31 of the NPSFM (relating to large hydro-electric generation schemes) in the policy, Ms Boyd did not consider such a specific reference to be necessary. As with the issue above, she set out how target attribute states are developed, noting that the exceptions under the NPSFM must be recognised in this process.

366. While Ms Hunter, for Contact, did not directly address this issue in her evidence, her table of amendments still contained the request to recognise the Clutha hydro scheme. However, no specific amendments were proposed, and we accept Ms. Boyd’s evidence that the scheme will need to be recognised as an exception when the target attribute states are developed.

8. LF-FW – Fresh water

8.1. Integrated catchment management

8.1.1. Introduction

367. Beef + Lamb and DINZ, through the legal submissions of Dr Somerville and the opening statement of Ms Perkins, proposed a new policy on integrated catchment management be inserted in the LF-WAI section of the PORPS. Their proposed wording is as follows:

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) 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.

368. This proposed policy reflected the evidence from these submitters, along with those of OWRUG, that there is a substantial amount of freshwater improvement work being done across the region by established catchment groups. As we have previously discussed, we were impressed by the

commitment and achievements of these groups. We heard that ORC staff already support and work with many of these groups and the submitters wanted these catchment-based approaches to be recognised through the PORPS.

369. Ms Boyd provided additional information in her reply report that discussed ORC's commitment to integrated catchment management through its Long term Plan 2021-31.[8] A pilot Catlins Integrated Catchment Group is underway and more groups are proposed to follow. From the information we received, this ORC-led approach is different to the more 'grass-roots', community-led approach that we heard about from the submitters. We consider that there is a place for both types of approaches.

370. Ms Boyd supports including a provision that addresses integrated management and considered whether the proposed provision should be a policy or a method. The Panel support her view that a method is more appropriate. The method proposed by Ms Boyd in her reply report is as follows:

LF-FW-M8AA – Integrated catchment management

Otago Regional Council may:

(1) develop and implement an integrated catchment management programme for the region, and

(2) work in partnership with *mana whenua* and in collaboration with communities to develop catchment action plans that:

(a) collate and build on existing work in the catchment,

(b) incorporate science and mātauraka Māori, and

(c) identify and target effective environmental management actions.

371. The method recommended by Ms Boyd captures the catchment action plan approach included in the Long-term Plan but would not capture the established community-led groups that may not fit with the Council-led catchment action plan approach. We consider that the PORPS should acknowledge the role of both approaches and note that community initiatives at a local catchment level are recognised in the submitters' proposed clause (d). This is in part done through Ms Boyd's proposed clause (2)(a) but this is in relation to development of catchment action plans rather than on-the-ground delivery of these plans.

372. We propose adding the following clause to Ms Boyd's recommended wording to ensure that both approaches are captured:

(3) Encourage and support community initiatives, at varying catchment levels, that help to deliver catchment action plans.

373. This work will be dependent on funding and interest by mana whenua and local communities. The chapeau of this method includes the word 'may' which we consider is appropriate given these potential limitations.

8.1.2. Recommendation

374. We recommend the following new method be added to the LF-FW section:

[8] *FPI ZReply Report of Ms Felicity Boyd, 15 September 2023, from para 78*

LF-FW-M8AA – Integrated catchment management

Otago Regional Council may:

(1) develop and implement an integrated catchment management programme for the region,

(2) work in partnership with mana whenua and in collaboration with communities to develop catchment action plans that:

(a) collate and build on existing work in the catchments,

(b) incorporate science and mātauraka Māori, and

(c) identify and target effective environmental management actions, and

(3) encourage and support community initiatives, at varying catchment levels, that help to deliver catchment action plans.

8.2. Wetland management

8.2.1. Introduction

375. We addressed the legal issues around wetland definitions in the Legal Issues section of Appendix Two. While we are not going to revisit that discussion in detail, a summary is needed here to put the discussion that follows into context. The issues primarily arise due to a requirement to address the RMA's broad approach to wetland protection and the NPSFM's more narrow approach through its focus on 'natural inland wetlands'.

376. The RMA has broadly defined 'wetland' in s.2 as:

> ***wetland*** *includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions*

377. Section 6(a) recognises and provides for 'the preservation of the natural character of … wetlands … from inappropriate subdivision, use and development' as a matter of national importance.

378. In addition to s.6 recognition in the RMA, the NZCPS includes provisions that apply to wetlands in the coastal environment, most specifically Policy 11(b). While earlier versions of the NPSFM included general, protective provisions which related to 'wetlands', the NPSFM 2020 contained more specific provisions with definitions of 'natural wetlands' and 'natural inland wetlands'.

379. The PORPS was notified under the original 2020 version of the NPSFM and later amended in response to the 2023 amendments to the NPSFM. As discussed in the Legal Issues section, the NPSFM amendments amalgamated the previous definitions of 'natural wetland' and 'natural inland wetland' into one definition of 'natural inland wetland'. The definition of 'natural inland wetland' introduced to the NPSFM in the 2023 amendments reads as follows:

> ***natural inland wetland*** *means a wetland (as defined in the Act) that is not:*
>
> *(a) in the coastal marine area; or*
>
> *(b) a deliberately constructed wetland, other than a wetland constructed to offset impacts on, or to restore, an existing or former natural inland wetland; or*

(c) a wetland that has developed in or around a deliberately constructed water body, since the construction of the water body; or

(d) a geothermal wetland; or

(e) a wetland that:

(i) is within an area of pasture used for grazing; and

(ii) has vegetation cover comprising more than 50% exotic pasture species (as identified in the National List of Exotic Pasture Species using the Pasture Exclusion Assessment Methodology (see clause 1.8)); unless

(iii) the wetland is a location of a habitat of a threatened species identified under clause 3.8 of this National Policy Statement, in which case the exclusion in (e) does not apply

380. Policy 6 of the NPSFM places a strong emphasis on the protection of 'natural inland wetlands', as follows:

Policy 6: There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.

381. Policy 6 is in part implemented by clause 3.22 of the NPSFM, which directs that a policy is included in regional plans with wording the same or similar to that provided in the clause. The opening wording of this policy states:

The loss of extent of natural inland wetlands is avoided, their values are protected, and their restoration is promoted, except where:…

382. The policy enables a 'loss of extent or values' in a natural inland wetland where that arises from a wide-ranging list of activities. The activities are, with one exception, subject to there being a functional need to locate the activity in the specified area and the effects of the activity being managed through applying the NPSFM effects management hierarchy (defined in clause 3.21).

383. Following some debate through the hearing process, we concluded in the 'Legal Issues' section of Appendix Two that there is no difference in stringency between the principles for the effects management hierarchies in the NPSFM and the NPSIB.

384. Turning back to the definition of 'natural inland wetland', as we stated in the 'Legal Issues' section of Appendix Two,

That new combined definition is intended to exclude some RMA defined wetlands from the detailed level of protection and restoration otherwise required by the NPSFM, and to provide a base for a closely controlled consent pathway in clause 3.22(1) of the NPSFM for some types of activities which are described in that sub-clause.

385. In response to what the report writers perceived as a gap between the NPSFM 'natural inland wetlands' and the RMA definition, the ORC officers proposed a definition for 'natural wetland' that is broader than the NPSFM 'natural inland wetland' definition, as follows:

Natural wetland *means a wetland (as defined in the Act) that is not:*

(a) a deliberately constructed wetland, other than a wetland constructed to offset impacts on, or to restore, an existing or former natural wetland; or

(b) a wetland that has developed in or around a deliberately constructed water body, since the construction of the water body.

386. The officers considered that the RMA definition arguably includes constructed wetlands, which can be built for purposes including stormwater or wastewater detention and treatment, and that such wetlands should be excluded from the pORPS provisions.

387. Ms Hunter for Oceana Gold expressed concern that the definitions, coupled with amendments to LF-FW-P9, "would likely result in a more onerous policy environment for activities where there may be 'natural wetlands' present, and likely result in significant costs to resource users which have not been properly quantified."[9] She considers that, as recommended, a broader level of protection would apply to 'natural wetlands' than to 'natural inland wetlands', which are proposed to be managed under clause 3.22 of the NPSFM and have the accompanying exemptions for activities. Ms Hunter considers that a "more appropriate approach would see the policy framework responding more specifically to the distinction between higher value "natural inland wetlands" and "natural wetlands"."[10]

388. The extent of wetland loss in Otago was not a matter of contention, with both historical losses and more recent losses being highlighted by Ms Boyd, Mr Couper for Fish and Game, Mr McKinlay for the Director General of Conservation, and numerous witnesses for Kāi Tahu. We heard evidence about the extent of loss of both wetland extent and condition. This has resulted from drainage predominantly for farmland as well as the introduction and spread of invasive species.

389. Submitters, including the Director General of Conservation and Fish and Game, highlighted the different types of high value wetlands that fall outside of the NPSFM definition of 'natural inland wetland'. The evidence in chief of Mr McKinlay for the Director General of Conservation addressed the importance of Otago's ephemeral wetlands and the values that they can hold.

390. Mr McKinlay drew our attention to the Upper Taiari and Paerau Wetland Scroll Plain complex, which he stated is unique in New Zealand and is 'the largest intact scroll plain complex in the Southern Hemisphere'[11]. The complex provides habitat for a wide range of indigenous flora and fauna. He goes on to state that there are three distinct categories of wetland within the complex: permanent river and lagoon, semi-permanent shallow, marshy areas, and temporary/ephemeral wetlands which exist for two months or less on average a year. Some categories would be considered as 'natural inland wetland' while others would not, potentially leading to inconsistent and inadequate management.

391. Mr McKinlay also highlighted Otago's nationally significant inland saline ecosystems and referred us to a Wildlands Consultants report prepared for ORC.[12] He discussed the geology of these areas and the threatened plant, lichen and lepidoptera species that these areas support.[13]

392. We stated in the Legal Issues section that:

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[9] Supplementary evidence of Ms Claire Hunter for Oceana Gold, 18 August 2023, para 15.
[10] Ibid., para 22.
[11] Evidence in Chief of Mr Bruce McKinlay for the Director General of Conservation, 23 November 2022, para 63.
[12] Evidence in Chief of Mr Bruce McKinlay for the Director General of Conservation, 23 November 2022, para 79.
[13] Ibid, para 80-85.

> *As we understand the concerns of the DOC witnesses and Ms Boyd, it is that areas like the Taiari scroll plain and other locations with ephemeral wetlands which are grazed will likely have significant aspects of ecological and hydrological importance which are exposed to potential degradation unless the RPS recognises those risks. In our view, the s.6 protection and the protection intended by policies 5 and 9 of the NPSFM is still able to be provided by the requirement for protection from inappropriate activities. The RPS can assist by the LF and/or the ECO chapter identifying particular values where development activities may be inappropriate. We consider that a better mechanism than attempting to insert a new definition of 'natural wetlands'.*[14]

393. We went on to conclude that:

> *"… the 'natural wetland' definition is superfluous, and worse that it is potentially raising the level of protection of all wetlands as defined to a level of absolute preservation and restoration through recommended Objective LF-FW-O9(3) and recommended policies LF-FW-P9 and LF-FW-P10 which are beyond the outcomes intended by s.6(a) of the RMA. The recommended objective and the two recommended policies do not provide the qualifier of protection from inappropriate use and development that s.6(a) provides. Nor do they provide the consent pathways and the application of the effects management hierarchy that the provisions relating to natural inland wetlands apply. We are concerned that that strict absolute outcome provides a higher level of protection for wetlands exempted from the 'natural inland wetland' definition in the NPSFM than the protection level accorded to those falling within that definition. That means that the recommended PORPS provisions have the potential to be considered as being contrary to the overall scheme in the 2023 NPSFM as to the manner of treatment of non-coastal wetlands through the 'natural inland wetland' terminology and effects management hierarchy provisions.*

394. We accept that constructed wetlands should not be subject to the same level of protections as 'natural' wetlands, however constructed wetlands would arguably not support *"a natural ecosystem of plants and animals that are adapted to wet conditions"* (Panel's emphasis) as per the RMA definition of 'wetland'. We also consider it unlikely that constructed wetlands would have a level of natural character that would justify being preserved as per s.6(a) of the RMA. We therefore do not consider that an exclusion for constructed wetlands is necessary.

395. With these conclusions in mind, we turn to addressing the specific wetland management provisions of the LF-FW section. As notified, these provisions fall in both the non-FPI and FPI processes, as follows.

> LF-FW-O9 – Natural wetlands
>
> LF-FW-P8 – Identifying natural wetlands

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[14]

LF-FW-P9 – Protecting natural wetlands

LF-FW-P10 – Restoring natural wetlands

LF-FW-AER – AER11

8.2.2. LF-FW-O9

396. As notified, LF-FW-O9 reads as follows:

LF-FW-O9 – Natural wetlands

Otago's natural wetlands are protected or restored so that:

(1) mahika kai and other mana whenua values are sustained and enhanced now and for future generations,

(2) there is no decrease in the range and diversity of indigenous ecosystem types and habitats in natural wetlands,

(3) there is no reduction in their ecosystem health, hydrological functioning, amenity values, extent or water quality, and if degraded they are improved, and

(4) their flood attenuation capacity is maintained.

397. Four submitters supported LF-FW-O9 as notified, one sought its deletion and several submitters sought amendments. The amendments sought to include the following:

(a) Oceana Gold considered that the objective is unclear on what is to be achieved – what the reference to the range of values means, what needs to be enhanced, and what the endpoint of enhancement is.

(b) The Director General of Conservation sought that ephemeral wetlands are specifically referenced, for the reasons discussed above.

(c) The Director General also sought the that 'protect or restore' is replaced with 'protect and restore', although the planning evidence of Mr Brass accepted that this does not need to be pursued.

(d) DairyNZ sought that wetlands only be restored only where they are degraded, and Oceana Gold sought that wetlands are 'protected, improved or restored'.

(e) Beef + Lamb and DINZ, Kāi Tahu ki Otago, and Ballance seek that 'range' be replaced with 'extent' in clause (2).

(f) Ballance, NZSki, Realnz, Silver Fern Farms, and Fulton Hogan sought varying amendments to clauses (2) and (3) to reduce their stringency.

(g) Beef + Lamb and DINZ sought that 'amenity values' be deleted from clause (3), considering that wetlands do not need to be aesthetically pleasing.

(h) Wise Response sought that wetland flood attenuation capacity in clause (4) should be steadily improved rather than just maintained, while Kāi Tahu ki Otago sought reference to water storage capacity alongside flood attenuation capacity in clause (4).

(i) DOC sought the addition of a new clause to recognise the importance of wetlands in providing habitat to mobile species such as waterfowl and rails.

398. Federated Farmers sought that the objective be deleted, as it is inconsistent with the NPSFM and a duplication of provisions located in *ECO – Ecosystems and indigenous biodiversity* chapter. We have dealt with these matters above and in the Legal Issues section.

399. Consistent with our determinations above, we are recommending that the PORPS does not use the term 'natural wetlands'. We agree with Oceana Gold that the objective is unclear, particularly as there are no benchmarks to guide whether it is being achieved.

400. We also find that LF-FW-O9, as notified, is not consistent with s.6(a) of the RMA through seeking protection or restoration of all 'natural wetlands', therefore not necessarily providing for appropriate subdivision, use and development. Our recommended amendments seek to clarify this.

401. We carefully considered whether to remove 'amenity values' from clause (3), as requested by Beef + Lamb and DINZ. Ms Boyd's s.42A report directs us to the RMA definition of 'amenity value' and, more importantly, to the definition of 'loss of values' in clause 3.21(1) of the NPSFM which the PORPS adopts. The latter definition includes 'amenity values' in the list of values in clause (b). While this definition applies to natural inland wetlands and rivers, we consider it appropriate to apply to the broader consideration of wetlands in LF-FW-O9.

8.2.2.1. Recommendation

402. The Panel recommends the following amendments to LF-FW-O9:

LF-FW-O9 – ~~Natural w~~Wetlands

Otago's ~~natural~~ wetlands are protected from inappropriate subdivision, use and development and, where degraded, ~~or restored~~ restoration is promoted so that:

(1) mahika kai and other mana whenua values are sustained and enhanced now and for future generations,

(2) there is no net decrease, and preferably an increase, in the ~~range~~ extent and diversity of wetland indigenous ecosystem types and habitats ~~in natural wetlands~~, and

(3) there is no reduction and, where degraded, there is an improvement in ~~their~~ wetland ecosystem health, hydrological functioning, amenity values, extent or water quality, ~~and if degraded they are improved, and~~

(4) their flood attenuation and water storage capacity is maintained or improved.

403. As a consequential amendment, we recommend deleting the definition of 'natural wetland' from the PORPS. We note that the RMA definition of 'wetland' was included in the notified PORPS and it is appropriate that this remains.

404. As a further consequential amendment, we recommend deleting 'natural' from 'natural wetland' or wetlands' in other provisions in the PORPS, specifically LF-FW-M6(7), LF-VM-E2 paragraph 3 and LF-FW-AER11.

8.2.3. LF-FW-P8

405. As notified, LF-FW-P8 reads as follows:

> **LF–FW–P8 – Identifying *natural wetlands***
>
> Identify and map *natural wetlands* that are:
>
> (1) 0.05 hectares or greater in extent, or
>
> (2) of a type that is naturally less than 0.05 hectares in extent (such as an ephemeral *wetland*) and known to contain threatened species.

406. QLDC, DCC, Kāi Tahu ki Otago, and CODC support LF-FW-P8 and seek to retain it as notified. Forest and Bird also support LF-FW-P8 but submitted that the policy should specify that mapping is to be completed by 2030.

407. Submissions by PWCG and Lloyd McCall sought that the wetland area in (2) is increased from 0.05 hectares to 1 hectare, while City Forests sought that it be increased to 0.25 hectares to be consistent with the NESPF. The 0.05 hectare area included in LF-FW-P8(1) is consistent with clause 3.23(1) of the NPSFM and we consider that increasing this area would result in the policy being inconsistent with the NPSFM.

408. As outlined above, the NPSFM approach to managing wetlands was amended after the s42A report and evidence in chief were prepared. The 2023 amendments to the NPSFM deleted the definition of 'natural wetland' and introduced a new definition of 'natural inland wetland' that is provided in paragraph 384 above. The amended definition of 'natural inland wetland' is narrower than that included in the NPSFM 2020 (and RMA) and is accompanied by an additional suite of clauses which provide consent pathways for urban development, mining, quarrying and landfills and clean-fills, in addition to specified infrastructure activities (which were provided for in the NPSFM 2020).

409. LF-FW-P8(1) and (2) replicate Clause 3.23(1)(a) and (b) of the NPSFM which did not change through the 2023 amendments. What did change in the PORPS is the recommended amendment in clause (1) from 'natural wetland' to 'natural inland wetland'. As discussed above, we consider that there are differences between the two.

410. Ms Boyd's supplementary evidence on the NPSFM 2023 amendments addressed the difference in the definitions but did not specifically consider the implications for LW-FW-P8. This policy was also not addressed in Ms Boyd's reply report, however was amended under Clause 16(2) of Schedule 1 of the RMA to apply to 'natural inland wetlands' rather than 'natural wetlands'.

411. The relevant portion of the 2023 NPSFM definition of 'natural inland wetland' for LF-FW-P8 is:

> *Means a wetland (as defined in the Act) that is not:*
>
> *…*
>
> *(e) a wetland that:*
>
> *(i) is within an area of pasture used for grazing; and*

(ii) has vegetation cover comprising more than 50% exotic pasture species (as identified in the National List of Exotic Pasture Species using the Pasture Exclusion Assessment Methodology (see clause 1.8)); unless
(iii) the wetland is a location of a habitat of a threatened species identified under clause 3.8 of this National Policy Statement, in which case the exclusion in (e) does not apply

412. The Director General of Conservation and Otago Fish and Game raised concerns about the large number of wetlands that would fall outside of the 'natural inland wetland' definition, many of which may provide habitat for threatened species. However, we point out that the presence of threatened species is one of the double negatives that is in the provision to ensure these are natural inland wetlands.

413. Ms Boyd, in her supplementary evidence for the FPI process on the implications of the NPSIB, recognised that some wetlands will "fall through the cracks" due to not being mapped or due to the prevalence of exotic pasture species. We agree with the Director General and Fish and Game that mapping is an important precursor to managing wetlands and will help to reduce the likelihood of some wetlands falling through the cracks. Broader mapping would also mean that the Council would be better able to give effect to s.6(a) of the RMA and Policies 5, 13 and 14 of the NPSFM.

414. A Wildland Consultants report on ecosystem mapping was provided as Appendix 13 to the s.32 report[15]. This Wildland report details the mapping of potential and actual natural terrestrial and wetland ecosystems using a methodology agreed to by regional councils across New Zealand. In relation to mapping of ephemeral wetlands, the report states at section 2.6:

415. Ephemeral wetlands were poorly mapped in existing layers such as LCDB and FENZ, as they generally occur at much smaller areas than the minimum mapping units of these classifications. However, ephemeral wetlands are in most cases easily distinguished in aerial imagery, and were mapped by hand digitisation across all parts of Otago where ephemeral wetlands occur. Almost 3,000 ephemeral wetlands were ultimately mapped. Very shallow ephemeral wetlands would be less easy to distinguish and are not likely to have been mapped, and other ephemeral wetlands where the wetland boundary is not sharp.

416. This section of the Wildland report goes onto conclude that:

The end result of these wetland ecosystem mapping approaches is wetland mapping of significantly better spatial and thematic resolution than any other existing regional scale mapping of wetlands.

417. It therefore appears that a comprehensive mapping exercise has been completed to a high level for all wetlands and not just 'natural inland wetlands'.

418. While we understand Ms Boyd's reason for recommending that LF-FW-P8 apply solely to 'natural inland wetlands', given the 2023 amendments to the NPSFM, we do not accept that the proposed change can be justified under Clause 16(2) of Schedule 1 of the RMA. Such an amendment changes the intent of the policy through the use of a narrower definition, which we do not consider is of 'minor effect' or corrects a 'minor error' as per s.16(2).

[15] *Lloyd, K. (2020) Mapping of potential natural ecosystems and current ecosystems in Otago Region. Wildlands Consultants Contract Report No. 5015a prepared for Otago Regional Council.*

419. As we explained in the Legal section to the Introduction to this Appendix Two report the legal situation is that a 'wetland' not falling within the definition of 'natural inland wetland' does not magically lose all RMA protection. It will still remain a defined 'wetland' under the RMA and the protective policies in the NPSFM still apply to it. What that means in practice is that for such wetlands falling outside the 'natural inland wetland' definition any proposed activity will still at law have to be assessed as to whether it is an inappropriate use or development under s.6(a) RMA. Moreover, it will have the protective policies applying to it under the NPSFM such as policies 5 and 9. The manner in which we have recommended the adoption of the RMA 'wetland' definition above, and the use of only that term in the heading and chapeau to the objective LF-FW-09 ensures that level of protection is addressed in both plan and consenting processes.

420. Care is needed in considering what is required by the NPSFM for both identification and mapping of wetlands and how that is reflected in the PORPS. Identification in the NPSFM is required by regional councils of both 'natural inland wetlands', (see cl.3.8(3)(e)), and importantly of 'the location of habitats of threatened species', (see cl.3.8(3)(c).

421. However, sub-clause 3.23(1) of the NPSFM refers to both identifying and mapping and commences by requiring:

> (1) Every regional council must identify and map every natural inland wetland in its region that is:
>
> *(a) 0.05 hectares or greater in extent; or*
>
> *(b) of a type that is naturally less than 0.05 hectares in extent (such as an ephemeral wetland) and known to contain threatened species.*

422. In other words as the chapeau of cl. 3.23 in sub-clause(1) commences with reference only to identifying and mapping of every 'natural inland wetland' then sub-clauses (a) and (b) only appear to apply to 'natural inland wetlands'. That at first sight also appears to mean that in terms of cl.23(1) of the NPSFM those wetlands falling outside the definition of 'natural inland wetland' are not required to be identified or mapped.

423. But that becomes confused even further in that sub-clause 3.23(4) then states that all mapping must be completed within 10 years of commencement date and specifies the regional council must:

> *...prioritise its mapping, for example by:*
>
> *(a) first, mapping any wetland at risk of loss of extent or values; then*
> *(b) mapping any wetland identified in a farm environment plan, or that may be affected by an application for , or a review of, a resource consent; then*
> *(c) mapping all other natural inland wetlands of the kind described in subclause (1).*

424. Whilst we acknowledge that the priority provided is stated in cl.23 (4) as being 'by way of example' it is still a mandatory requirement to carry out the mapping. The word used is 'must.' In the absence of any other priority being suggested in our view it must be followed.

425. The result is an unhappy state of confusion as to whether wetlands not falling within the definition of 'natural inland wetlands' are required to be mapped, but sub-clause 3.23(4) appears to expressly require that to be done.

426. Given that confusing statutory background we do recognise that in respect of policies like LF-FW-P8 as to both identification and mapping of wetlands, if that policy is restricted only to identification pursuant to cl.3.23(1) of the NPSFM as to 'natural inland wetlands', then some significant wetlands that fall within the exclusion of 'natural inland wetlands' may be overlooked in plan formulation and consenting processes. That is because an assumption may be made by some planners that the *R J Davidson Family Trust v Marlborough District Council* [*2018*] *NZCA 316* decision means that higher level protection issues have been addressed in the RPS with no identification or mapping process needed for those sensitive areas. That would not be legally correct because as we have explained any 'wetland' still has the higher level protection as described above. Moreover, sub-clause 3.23(4) (a) also expressly requires them to be mapped. Therefore, out of an excess of caution to safeguard against that possibility we consider this identification and mapping policy in LF-FW-P8 needs another limb in addition to requiring identification and mapping solely of 'natural inland wetlands' as apparently required by cl.3.23(1) of the NPSFM.

8.2.3.1. Recommendation

427. In the amended wording we have recommended below we have addressed two other areas of significance – one as to threatened species and another as to extent. That recommended wording reflects the priority and wording specified in clause 3.23(4) of the NPSFM, which the regional council is bound at law to comply with, (but subject to the area limitations for 'natural inland wetlands' in sub-clause 3.23(1)). LF-FW-P8 should read:

LF–FW–P8 – Identifying ~~*natural*~~ *wetlands*

By 3 September 2030, ~~Identify~~ identify and map ~~*natural wetlands* that are~~:

1. any wetland at risk of loss of extent or values,

2 any wetland identified in a farm environment plan, or that may be affected by an application for, or a review of, a resource consent, and

3. all other natural inland wetlands that are:

   (i) 0.05 hectares or greater in extent, or

   (ii) of a type that is naturally less than 0.05 hectares in extent (such as an ephemeral *wetland*) and known to contain threatened species.

428. We make the closing observation that in terms of the s.32AA analysis we had earlier expressed concerns in the Legal section about not having enough information to decide cost issues as to identification and mapping if a 'natural wetlands' definition was adopted and applied in the PORPS. That issue does not arise with this recommended change above. The regional council is bound at law to comply with the NPSFM. What we have finally recommended for LF-FW-P8 is taken expressly from a combination of clauses 3.23(1) and (4) of that statutory instrument the NPSFM. We do not consider there is any discretion to depart from that legal obligation.

8.2.4. LF-FW-P9 and LF-FW-P10

429. As notified, LF-FW-P9 reads as follows:

LF-FW-P9 – Protecting *natural wetlands*

Protect natural wetlands by:

(1) avoiding a reduction in their values or extent unless:

(a) the *loss of values* or extent arises from:

(i) the customary harvest of food or resources undertaken in accordance with tikaka Māori,

(ii) restoration activities,

(iii) scientific research,

(iv) the sustainable harvest of sphagnum moss,

(v) the construction or maintenance of *wetland utility structures*,

(vi) the maintenance of operation of *specific infrastructure*, or *other infrastructure*,

(vii) natural hazard works, or

(b) the Regional Council is satisfied that:

(i) the activity is necessary for the construction or upgrade of *specified infrastructure*,

(ii) the *specified infrastructure* will provide significant national or regional benefits,

(iii) there is a *functional need* for the *specified infrastructure* in that location,

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

(v) the other *effects* of the activity (excluding those managed under (1)(b)(iv)) are managed by applying the *effects management hierarchy,* and

(2) not granting resource consents for activities under (1)(b) unless the Regional Council is satisfied that:

(a) the application demonstrates how each step of the *effects management hierarchies* in (1)(b)(iv) and (1)(b)(v) will be applied to the *loss of values* or extent of the *natural wetland*, and

(b) any consent is granted subject to conditions that apply the *effects management hierarchies* in (1)(b)(iv) and (1)(b)(v).

430. LF-FW-P10 was notified as follows:

LF-FW-P10 – Restoring *natural wetlands*

Improve the ecosystem health, hydrological functioning, *water* quality and extent of *natural wetlands* that have been degraded or lost by requiring, where possible:

(1) an increase in the extent and quality of habitat for indigenous species,

(2) the restoration of hydrological processes,

(3) control of pest species and vegetation clearance, and

(4) the exclusion of stock.

431. As notified, LF-FW-P9 largely reflected clause 3.22 of the 2020 version of the NPSFM. The key differences are: the split between protection in LF-FW-P9 and restoration in LF-FW-P10, whereas clause 3.22 addresses both; and the reference in LF-FW-P9 to the biodiversity effects management hierarchy in the ECO chapter rather than the NPSFM effects management hierarchy. The 2023 amendments to the NPSFM resulted in LF-FW-P9 becoming more stringent than the updated requirements, with the addition of Clause 3.22(1)(c)-(f) in the NPSFM. Following consideration of submissions and evidence, including in the context of the 2023 NPSFM amendments, Ms Boyd recommended substantial amendments to LF-FW-P9 as follows:

LF-FW-P9 – Protecting *natural wetlands*

Protect natural wetlands by:

(1) in the coastal environment, managing them in accordance with the NZCPS in addition to (2) or (3) below,

(2) except as provided for by (3), managing activities to ensure they maintain or enhance the ecosystem health, indigenous biodiversity values, and hydrological functioning of *natural wetlands*,

(3) for *natural inland wetlands*, implementing clause 3.22(1) to (3) of the NPSFM.

432. Clause (2) of the revised recommended LF-FW-P9 was developed through discussions between Mr Farrell for Fish and Game, Mr Brass for the Director-General of Conservation, Ms McIntyre for Kāi Tahu ki Otago, Ms Bartlett for Ngāi Tahu ki Murihiku, and Ms Boyd for ORC. The intent of the clause is to provide flexibility for the LWRP to manage different activities in different ways, provided activities are collectively achieving a common outcome. We acknowledge the collaborative efforts of the parties.

433. Parties including Oceana Gold raised concerns that LF-FW-P9 was stricter for wetlands that are not considered to be natural inland wetlands. We acknowledge that this could be the case and consider that the wording proposed in clause (2) is problematic. This clause could be interpreted to directly link an activity to its effects on a specific wetland and require the listed values of that wetland to be managed. This would close the door to approaches such as compensation and offsetting. In addition, clause (2) would apply to all activities without having the exceptions provided by clause 3.22 of the NPSFM, or the s.6(a) of the RMA qualifier of protection *"from inappropriate subdivision, use, and development"*.

434. The Panel considers that, for the reasons discussed above, the exceptions in clause 3.22 should also apply to those wetlands that aren't 'natural inland wetlands'. This would provide for the effects management hierarchy to apply to proposed activities that could affect such wetlands, for such activities to need to demonstrate a functional need to be in the proposed location, and for there to be significant national or regional benefits from these activities.

435. It is also important here to refer to Policy 5 and Policy 9 of the NPSFM, which we discussed in the Legal Issues section. These refer to water bodies and freshwater ecosystems, and habitats of freshwater indigenous species, respectively. The RMA definition of 'water body' includes

'freshwater' in a 'wetland', with 'freshwater' including 'all water except coastal water and geothermal water'.

436. Given that a water body includes a wetland, we also have to give effect to Policy 5 and Policy 9 of the NPSFM. In short, wetland health needs to be improved where it is degraded and otherwise maintained, and the habitats of freshwater indigenous species are to be protected. Policies 5 and 9 of the NPSFM are implemented through LF-FW-P7 clauses (1) and (2) respectively, which we discuss later in this section of our report, but we must ensure that the wetland provisions are consistent with these national directions.

437. Whereas LF-FW-P9 deals with protecting natural wetlands, LF-FW-P10 addresses restoring natural wetlands. Both protecting and restoring are part of Policy 6 and clause 3.22(1) of the NPSFM, in relation to 'natural inland wetlands'. Policy 6 reads:

> **Policy 6:** There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.

438. The 'no further loss of extent' component of Policy 6, which is largely mirrored by clause 3.22(1), is implemented through clause (3) of LF-FW-P9 which refers to clause 3.22(1) to (3) and only applies to 'natural inland wetlands'. Clause (2) of LF-FW-P9 also indirectly addresses the 'no further loss of extent' through its expression to 'maintain or enhance'. We are therefore satisfied that policies LF-FW-P9 and LF-FW-P10 give effect to the NPSFM.

439. We do question whether there needs to be separate protect and restore policies, or whether the same could be achieved through one policy relating to managing natural wetlands. LF-FW-P9 is not strictly about natural wetland protection given the reasonably long list of exceptions that are provided through clause 3.22(1) of the NPSFM. Similarly, LF-FW-P10 is not restricted to restoration but is also about managing wetlands to retain their existing values (for example, through controlling pest species and vegetation clearance in clause (3)).

440. Ms Boyd notes in her s.42A report that some aspects of clause 3.22(4) of the NPSFM are not addressed through LF-FW-P9 and LF-FW-P10, namely Māori freshwater values, and amenity values. Clause 3.22(4) of the NPSFM states:

> *Every regional council must make or change its regional plan to include objectives, policies, and methods that provide for and promote the restoration of natural inland wetlands in its region, with a particular focus on restoring the values of ecosystem health, indigenous biodiversity, hydrological functioning, Māori freshwater values, and amenity values.*

441. While this clause applies to a regional plan and not a regional policy statement, we note that all the matters of focus that are listed are addressed in LF-FW-O9. These matters will also need to be considered where the NPSFM effects management hierarchy applies to a proposed activity. Ms Boyd advises[16] that no submitter sought amendments to add Māori freshwater values and amenity values to LF-FW-P9 and LF-LW-P10. However, as these provisions are part of the freshwater process, we can recommend amendments that are outside the scope of submissions. We consider that addition of Māori freshwater values and amenity values would aid to implement LF-FW-O9 and ensure that the PORPS is consistent with the NPSFM.

[16] *S.42A report of Ms Felicity Boyd, para 1475.*

442. Some submitters sought changes to the chapeau of LF-FW-P10 to either reduce or increase its stringency. Policy 6 and clause 3.22(1) of the NPSFM require that restoration of natural inland wetlands is 'promoted', while clause 3.22(4) requires regional plans to include provisions that "provide for and promote" restoration. The notified version of LF-FW-P10 uses the term 'requiring, where possible' and, following consideration of submissions and evidence, Mr Boyd recommended that this be amended to 'requiring, to the greatest extent practicable'. It is important to note that LF-FW-P10 applies to improving the values and extent of wetlands that have been degraded or lost and is likely to be applied through non-regulatory methods. It will not apply to more intact, high value wetlands.

443. Policy 6 of the NPSFM requires a halt to the loss of extent and the protection of values (of natural inland wetlands) but there is no <u>requirement</u> to increase wetland extent. We are concerned about a potentially strict interpretation of 'requiring' in a regulatory sense and, while we acknowledge the importance of wetland restoration, we consider that 'promoted' is an appropriate term to use in the PORPS. It's relevant here to note that Policy 5 of the NPSFM is to improve the health and well-being of water bodies "if communities choose".

444. Turning to clause (4)(d) of LF-FW-P10, Beef + Lamb and DINZ, Federated Farmers and John Highton consider that some sheep grazing can be beneficial to wetland health and referenced the Stock Exclusion Regulations as already managing this issue (sheep were deliberately excluded from the regulations). We accept these submissions and refer particularly to the evidence of Emma Crutchley for OWRUG and Federated Farmers, who considers that stock access *"can cause water quality issues but they also control aggressive pasture species and weeds – enhancing natural character and hydrology"*. From the evidence, we accept that sheep grazing in certain circumstances can be a useful tool for managing pasture and weed species, and we do not consider that the door should be shut to this. No wording has been proposed so we have recommended an amendment in line with the evidence.

8.2.4.1. Recommendation

445. We recommend deleting LF-FW-P9 and LF-FW-P10 as notified and replacing it with the following:

<u>LF-FW-P10A – Managing wetlands</u>

<u>Otago's *wetlands* are managed:</u>

<u>(1) in the coastal environment, in accordance with the NZCPS in addition to (2) and (3) below,</u>

<u>(2) by applying clause 3.22(1) to (3) of the NPSFM to all wetlands, and</u>

<u>(3) to improve the ecosystem health, hydrological functioning and extent of wetlands that have been degraded or lost by promoting:</u>

<u>(a) an increase in the extent and condition of habitat for indigenous species</u>,

<u>(b) the restoration of hydrological processes</u>,

<u>(c) control of pest species and vegetation clearance</u>, <u>and</u>

<u>(d) the exclusion of stock, except where stock grazing is used to enhance wetland values.</u>

8.2.5. LF-FW-O8 – Fresh water and LF-FW-P7 – Fresh water

446. As notified, LF-FW-O8 reads:

LF-FW-O8 – *Fresh water*

In Otago's *water bodies* and their catchments:

(1) the health of the wai supports the health of the people and thriving mahika kai,

(2) water flow is continuous throughout the whole system,

(3) the interconnection of *fresh water* (including *groundwater*) and *coastal waters* is recognised,

(4) native fish can migrate easily and as naturally as possible and taoka species and their habitats are protected, and

(5) the significant and outstanding values of Otago's *outstanding water bodies* are identified and protected.

447. Ms Boyd recommended deleting LF-FW-O8 and moving most of its content to LF-FW-O1A. We accepted the addition of LF-FW-O1A, albeit with some amendments, and agree that retaining LF-FW-O8, with the exception of clause (5), would result in unnecessary duplication. We therefore accept Ms Boyd's recommendation to delete LF-FW-O8.

448. As notified, LF-FW-P7 reads:

LF-FW-P7 – *Fresh water*

Environmental outcomes, attribute states (including target *attribute* states) and limits ensure that:

(1) the health and well-being of *water bodies* is maintained or, if *degraded,* improved,

(2) the habitats of indigenous species associated with *water bodies* are protected, including by providing for fish passage,

(3) *specified rivers and lakes* are suitable for primary contact within the following timeframes:

(a) by 2030, 90% of rivers and 98% of lakes, and

(b) by 2040, 95% of rivers and 100% of lakes, and

(4) mahika kai and *drinking water* are safe for human consumption,

(5) existing *over-allocation* is phased out and future *over-allocation* is avoided, and

(6) *fresh water* is allocated within environmental limits and used efficiently.

449. After considering the submissions and evidence, Ms Boyd recommended the following amendments in her s.42A report:

LF-FW-P7 – *Fresh water*

Environmental outcomes, attribute states (including target *attribute* states), environmental flows and levels, and limits ensure that:

(1) the health and well-being of *water bodies* is maintained or, if *degraded,* improved,

(2) the habitats of indigenous freshwater species ~~associated with *water bodies*~~ are protected and sustained, including by providing for fish passage,

(2A) the habitats of trout and salmon are protected insofar as this is consistent with (2),

(3) *specified rivers and lakes* are suitable for primary contact within the following timeframes:

(a) by 2030, 90% of *rivers* and 98% of *lakes*, and

(b) by 2040, 95% of *rivers* and 100% of *lakes*, and

(4) resources harvested from water bodies including *mahika kai* and *drinking water* are safe for human consumption, and

(5) existing *over-allocation* is phased out and future *over-allocation* is avoided.~~, and~~

(6) ~~*fresh water* is allocated within environmental *limits* and used efficiently.~~

450. A number of submitters raised concerns about the phrase 'protected and sustained' in clause (2). Meridian and Oceana Gold considered that this clause should only apply to 'significant indigenous species, with Oceana Gold also requesting that the protection requirement be replaced with 'maintain and enhance. Similarly, Horticulture NZ suggests 'maintain and improve'. Conversely, Fish and Game consider that restoration should be required as well as protection, and Contact and Kāi Tahu favour habitats to be sustained as well as protected.

451. We agree with Ms Boyd's assertion that use of the word 'protection' is consistent with the NPSFM, specifically Policy 9 which reads:

> ***Policy 9:*** *The habitats of indigenous freshwater species are protected.*

452. We do not accept the submitters' requests to remove reference to 'protected', as softening this policy would result in the PORPS being less stringent than Policy 9.

453. Continuing with clause (2), Ballance seeks an amendment to refer to 'indigenous freshwater species', rather than the broader reference to 'indigenous species associated with water bodies'. Ballance consider this terminology to be more consistent with Policy 9 and Clause 3.26 of the NPSFM, which we acknowledge that it is.

454. This proposed amendment was challenged in the evidence of Ms McIntyre from Kāi Tahu. Ms McIntyre considers that such a rewording "*could exclude species such as water and wading birds that do not spend all their time in the water but are still reliant on the health of the water body for some part of their life stages*".[17] We consider this is an important point and, similar to the view of Ms Boyd, irrespective of the wording in Policy 9 we favour Ms McIntyre's evidence. We support the amendment that Ms Boyd has recommended to clause (2) in this regard.

455. Considering other submissions, we adopt the recommendations and reasoning of Ms Boyd. There were a number of submissions on clauses (5) and 6) requesting additional direction on the allocation and use of water. Ms Boyd has recommended deleting these clauses and that an

[17] *Evidence in chief of Ms McIntyre for Kāi Tahu, para 78(a).*

additional policy, LF-FW-P7A, be inserted to address water allocation and use. We support this recommendation and discuss LF-FW-P7A below.

8.2.6. LF-FW-P7A –Water allocation and use

456. LF-FW-7A was recommended by Ms Boyd in the Freshwater Hearing s.42A report as follows:[18]

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

(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.

457. As highlighted above, LF-FW-P7A was recommended in response to submissions on LF-FW-P7(5) and (6). Given its late introduction through the s42A report, there was substantial discussion on this policy at the hearing. Some of these submitters sought amendments that would prioritise allocation to specific uses or uses based on efficiency of water use. These submitters were essentially asking that LF-FW-P7A specify what uses would be considered as priority (2) of Te Mana o Te Wai. We have addressed this previously in the Legal Issues section where we determined that it is not appropriate for the PORPS to determine what activities are to be considered as priority (2) or (3). We therefore do not accept submissions for such determinations in LF-FW-P7A.

458. Ms Styles for Manawa Energy has requested additional recognition of the use of water for REG in LF-FW-P7A to give effect to the NPS-REG.[19] In response to questions from the Panel, Ms Styles amended her proposed wording in clause (1) as follows (amendments in addition to those in her EIC are in red):

(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 ***prioritising allocation of available fresh water*** *for:*

(a) community drinking water supplies, ***and***

(b) ***maintaining existing generation output and capacity and future generation***

[18] *S.42A report prepared for the Freshwater Hearings, para 1417.*

[19] *Evidence in Chief of Ms Styles for Manawa Energy, para 8.21-8.27.*

from existing *renewable electricity generation* ***schemes****, and* ***then***
(c) land-based primary production, ***and then (d) other commercial and industrial uses, …***

459. We do not support including the phrase *"prioritising allocation of available fresh water"* in clause (1), as we consider that this is akin to the prioritisation that was discussed in the previous paragraph. In addition, such a phrase as proposed would apply to all uses listed in clause (1) and not just to REG. We note that LF-FW-P7A would need to considered alongside the provisions in the EIT chapter which give effect to the enabling stance of the NPS-REG for REG activities. We do support Ms Styles' amendments to clause (1)(b), as we consider that limiting this provision to existing REG is consistent with the visions.

460. The policy as proposed in the s.42A report did not address water harvesting and storage. In response to submissions by Horticulture NZ, the Chair invited them to file a memorandum that suggests policy wording to address this gap.[20] Mr Hodgson for Horticulture NZ proposed amendments to LF-FM-P7A, LF- VM-M3, and LF-FW-M6. However, LF-VM-M3 is not an FPI provision and Ms Boyd did not recommend a consequential amendment through the non-FPI process, as it occurred prior. Ms Boyd accepted Mr Hodgson's proposed amendments to LF-FM-P7A and LF-FW-M6, with some amendments to ensure consistency with other provisions. We accept these changes and the reasoning of Horticulture NZ and Ms Boyd. We consider that LF-VM-M3 should also be amended to ensure consistency and address this in relation to this method.

461. The Panel is unclear how water would be allocated for 'aspirations' in clause (2)(c). We consider that 'aspirations' does not provide sufficient certainty and recommend that this clause read as "mana whenua customary or cultural needs and activities". We consider that this amendment is consistent with the relief sought by Kāi Tahu ki Otago.

462. Ms Hunter for Oceana Gold requested that 'land based primary production' in clause (2)(d) be amended to 'primary production' so that it also includes mining and quarrying and associated processing and production.[21] Ms Boyd considers that in community feedback on the freshwater visions, such activities *"were not highlighted as being important region-wide in the way that pastoral, arable and horticultural activities were"*.[22] While we accept this, we acknowledge the importance of mining and quarrying at a regional level and the requirement of these activities for water. For these reasons, we accept Ms Hunter's proposed amendment.

8.2.6.1. Recommendation

463. We recommend the following wording for LF-FW-P7A:

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) managing over-allocation as set out in LF-FW-M6,

(2) allocating *fresh water* efficiently to support the social, economic, and cultural well-being of people and communities, including for:

[20] *Memorandum of counsel for Horticulture NZ dated 13 September 2023.*
[21] *Evidence in Chief of Ms Hunter for Oceana Gold, paras 48-49.*
[22] *FPI Reply Report of Ms Boyd, para 144.*

(a) community drinking water supplies,
(b) maintaining generation output and capacity from existing *renewable electricity generation schemes*,
(c) *mana whenua* customary or cultural needs and activities, and
(d) primary production,

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

(4) ensuring that the efficiency of *freshwater* abstraction, storage, and conveyancing *infrastructure* is improved,

(5) providing for the harvesting and storage of *fresh water* to meet increasing demand for *water*, to manage *water* scarcity conditions and to provide resilience to the *effects* of *climate change*, and

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

464. We recommend the follow consequential change to LF-FW-M6:

LF–FW–M6 – *Regional plans*

Otago Regional Council must publicly notify a Land and Water *Regional Plan* ~~no later than 31 December 2023~~ and, after it is made operative, maintain that *regional plan* to:

…

(5A) provide for the allocation and use of *fresh water* in accordance with LF-FW-P7A, including for *water* harvesting and storage,

…

8.3. Outstanding water bodies

8.3.1. LF–FW–P11 – Identifying outstanding water bodies

465. Outstanding water bodies are addressed through LF-FW-P11 and LF-FW-P12 and LF-FW-M5. LF-FW-P11 and LF-FW-M5 refer to the criteria for identifying outstanding water bodies that are provided in APP1. We discuss each of these provisions in turn below.

466. LF-FW-P11 was notified as follows:[23]

LF–FW–P11 – Identifying *outstanding water bodies*

Otago's *outstanding water bodies* are:

(1) the Kawarau River and tributaries described in the Water Conservation (Kawarau) Order 1997,

(2) Lake Wanaka and the outflow and tributaries described in the Lake Wanaka Preservation Act 1973,

[23] *S.42A report prepared for the Freshwater Hearings, para 1417.*

(3) any *water bodies* identified as being wholly or partly within an outstanding natural feature or landscape in accordance with NFL–P1, and

(4) any other *water bodies* identified in accordance with APP1.

467. Once again confusion arises in this LF-FW area between the two processes in respect of these related water body provisions now under consideration here. LF-FW-P11 as to outstanding water bodies, LF-FW-P12 as to identifying and managing those water bodies, LF-FW-P13 as to protecting instream values, LF-FW-P14 as to instream values, and LF-FW-M5 as to outstanding water bodies are not shaded blue as FPI provisions. (Nor was the definition of 'effects management hierarchy' in the notified version shaded blue as part of the FPI, despite it specifically adopting the NPSFM definition in that respect.) These are so integrally freshwater issues located in the LF-FW chapter, (even the very title used is 'FW' i.e. freshwater), that we have dealt with the subject matter in this Appendix Two report. This is a classic illustration of the reason why, out of caution, because of the lack of shading, we have also formally included this consideration of those provisions in the non-freshwater report in Appendix One as well.

468. There were several submissions on LF-FW-P11, including three in support and several seeking amendments. Ms Boyd recommended deleting clause (3) in response to submissions by Beef + Lamb and DINZ and Federated Farmers. We consider this to be appropriate and agree with the submitters that being wholly or partly in an outstanding natural feature or landscape does not necessarily mean that a waterbody is outstanding. We agree with Ms Boyd's amendments and reasoning provided in her s.42A report and Reply Report and do not discuss LF-FW-P11 further.

8.3.1.1. Recommendation

469. We recommend the following amendments to LF-FW-P11:

LF-FW-P11 – ~~Identifying~~ Otago's *outstanding water bodies*

Otago's *outstanding water bodies* are:

(1) the Kawarau River and tributaries described in the Water Conservation (Kawarau) Order 1997,

(2) Lake Wanaka and the outflow and tributaries described in the Lake Wanaka Preservation Act 1973, and

~~(3) any *water bodies* identified as being wholly or partly within an outstanding natural feature or landscape in accordance with NFL-P1, and~~

(4) any other *water bodies* identified in accordance with APP1.

8.3.2. LF-FW-P12 – Protecting outstanding water bodies

470. Turning to LF-FW-P12, as notified this provision reads:

LF–FW–P12 – Protecting outstanding water bodies

The significant and outstanding values of outstanding water bodies are:

(1) identified in the relevant regional and district plans, and

(2) protected by avoiding adverse effects on those values.

471. Forest and Bird and Federated Farmers expressed concern that LF-FW-P12 was not well aligned with Policy 8 of the NPSFM, which reads:

Policy 8: *The significant values of outstanding water bodies are protected.*

472. As notified, LF-FW-P12 requires the significant and outstanding values of outstanding water bodies to be identified, rather than identifying outstanding water bodies and protecting their significant values. We agree with the submitters that there are differences between the two provisions. We also agree with Ms Boyd that *"if significant values must be protected then to my mind it is consistent to apply the same requirement to outstanding values"*.

473. We do not agree with Meridian Energy who considers there is no difference between outstanding values and significant values. They sought to delete references to "outstanding values" in LF-FW-P12 and LF-FW-M5. The Panel's view is that outstanding is a 'higher' classification than significant and therefore, by default, any value that is outstanding would also be significant and therefore requiring protection under Policy 8 of the NPSFM.

474. Several submitters sought a way through the 'protected' restriction in Policy 8 of the NPSFM, requesting varying relief to qualify the protection or manage effects to a certain level. Similarly, OWRUG, Aurora Energy, Waka Kotahi, and Transpower sought a pathway for infrastructure that may have an operational and functional need to operate in a way that would affect an outstanding waterbody. We consider that the 'protective' direction of Policy 8 of the NPSFM is clear and do not consider that we can 'water down' the requirements in the ways proposed by submitters.

475. Relevant to this, the NPSFM defined 'outstanding waterbody' as follows:

> ***outstanding water body*** *means a water body, or part of a water body, identified in a regional policy statement, a regional plan, or a water conservation order as having one or more outstanding values.*

476. It therefore follows that outstanding values have to be identified in order to determine whether a waterbody is outstanding. To achieve Policy 8 of the NPSFM, significant values would also have to be identified for such waterbodies to enable the protection of those significant values.

8.3.2.1. Recommendation

477. We accept Ms Boyd's final recommended wording for LF-FW-P12 in her Reply Report and recommend the following amendments:

LF-FW-P12 – ~~Protecting~~ <u>Identifying and managing</u> *outstanding water bodies*

~~The significant and outstanding values of *outstanding water bodies* are:~~

~~(1) identified in the relevant *regional* and *district plans*, and~~

~~(2) protected by avoiding adverse *effects* on those values.~~

<u>Identify *outstanding water bodies* and their significant and outstanding values in the relevant *regional plans* and *district plans* and protect those values.</u>

8.3.3. LF-FW-M5 – Outstanding water bodies

478. LF-FW-M5 sets out the process for identifying outstanding waterbodies and was notified as follows:

LF–FW–M5 – *Outstanding water bodies*

No later than 31 December 2023, Otago Regional Council must:

(1) undertake a review based on existing information and develop a list of *water bodies* likely to contain outstanding values, including those *water bodies* listed in LF-VM-P6,

(2) identify the outstanding values of those *water bodies* (if any) in accordance with APP1,

(3) consult with the public during the identification process,

(4) map *outstanding water bodies* and identify their outstanding and significant values in the relevant *regional plan(s*), and

(5) include provisions in *regional plans* to avoid the adverse effects of activities on the significant and outstanding values of *outstanding water bodies*.

479. We generally agree with the analyses of submissions and Ms Boyd's recommended amendments as per her Reply report and the 10 October 2023 version of the PORPS. We note that the date in the chapeau has not been recommended to change, and our understanding is that the work to identify outstanding waterbodies has largely been completed by ORC. That said, clauses (4) and (5) of LF-FW-M5 are to map outstanding waterbodies in the relevant regional plan and include provisions to protect the significant and outstanding waterbodies, respectively. Our understanding is that the date that the regional plan will be publicly notified is uncertain and we consider it appropriate to delete the date requirement in the chapeau to reflect this. This would be consistent with other references in the PORPS that refer to regional plan requirements, including LF-FW-M6.

8.3.3.1. Recommendation

480. We recommend the following amendments to LF-FW-M5:

LF-FW-M5 – *Outstanding water bodies*

~~No later than 31 December 2023,~~ Otago Regional Council must:

(1) ~~in partnership with Kāi Tahu,~~ undertake a review based on existing information and develop a list of *water bodies* likely to contain outstanding values, including those *water bodies* listed in ~~LF-VM-P6~~ LF-FW-P11,

(2) identify the outstanding values of those *water bodies* (if any) in accordance with APP1,

(3) consult with the public and relevant local authorities during the identification process,

(4) map *outstanding water bodies* and identify their outstanding and significant values in the relevant *regional plan(s),* and

(5) include provisions in *regional plans* <u>that protect</u> ~~to avoid the adverse effects of activities on~~ the significant and outstanding values of *outstanding water bodies*.

8.3.4. APP1 – Criteria for identifying outstanding waterbodies

481. Turning to APP1, several submissions were received on APP1 which sought to improve the clarity of the criteria. In her s.42A report Ms Boyd recommended accepting Manawa Energy's submission to replace the notified APP1 criteria with those adopted in Hawke's Bay Regional Council's Plan Change 7. Following responses by parties in evidence and at the hearing, Ms Boyd changed her recommendation to that of amending the notified APP1 criteria rather than adopting the Hawkes Bay criteria.

482. Concerns were raised by submitters in evidence about use of the Hawkes Bay criteria, particularly by the Director General for Conservation and Fish and Game. The evidence of Dr Richarson for the Director General considered that the notified APP1 provided for more expert evaluation and interpretation.[24] She expressed concern about the ecological considerations in the Hawke's Bay criteria and considered that aspects weren't relevant to the Otago region. Her recommendations were supported by Mr Brass for the Director General, who helpfully provided suggested amendments to APP1.

483. The evidence of Mr Couper and Mr Paragreen for Fish and Game discussed their concerns with the Hawke's Bay criteria for recreation[25] and, in his statement to the LF hearing, Mr Paragreen also helpfully provided tracked amendments to APP1 to address their concerns.[26]

484. As mentioned previously, Ms Boyd also explained to us, both at the hearing and in her Reply Report, that ORC staff have done a considerable amount of work to determine outstanding waterbodies against the notified criteria and that changing to the Hawkes Bay criteria would mean that at least some of this work would need to be redone. We support her recommendation to retain and modify the notified APP1, rather than adopting the Hawkes Bay criteria.

485. Of importance, Kāi Tahu ki Otago and Ngāi Tahu ki Murihiku sought that the reference to cultural and spiritual values be deleted, as ranking waterbodies does not reflect the relationship of Kāi Tahu with water. The two submitters sought different relief: Kāi Tahu ki Otago sought an addition to Table 4 to ensure that the cultural and spiritual values are recognised and protected for the waterbodies that are identified using APP1; while Ngāi Tahu ki Murihiku sought to separate the outstanding waterbody process from the process for developing wāhi tupuna relevant to waterbodies, noting that wāhi tūpuna should be identified through APP7 – identifying wāhi tūpuna.

486. The Hawkes Bay criteria do not include consideration of cultural and spiritual values and Ms McIntyre stated at the hearing that:

> *The s. 42A report recommendation to change the criteria for identification of outstanding waterbodies resolved this problem by adopting a set of criteria that does not include cultural and spiritual values … If the recommendation is reversed, then the Kai Tahu submissions on this matter will also need to be considered.*

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[24] *Dr Marine Richarson for DOC, para 123-127*
[25] *Jayde Couper for Fish and Game, paras [146]-[157]; Nigel Paragreen for Fish and Game, para [125]*
[26] *Opening statement of Nigel Paragreen for LF hearing, Appendix 2*

487. We note that in the absence of a values criterion for cultural and spiritual values, LF-FW-P12 (and NPSFM Policy 8) would still require that significant cultural and spiritual values are protected for each waterbody that is identified as outstanding – the criteria in APP1 are only for identifying outstanding waterbodies and are not to be used to identify the significant values of those outstanding waterbodies. It is Policy 8 of the NPSFM that requires that significant values of outstanding waterbodies are protected, i.e. there will be more significant values for a waterbody that is identified as outstanding through APP1. Therefore, while the absence of a criterion would mean that waterbodies would not be ranked according to their cultural and spiritual values, it would not mean that such values would go unprotected. We recognise the importance of APP7 in assisting to identify these significant values, as part of the process of identifying wāhi tūpuna.

488. Ms Boyd has recommended amendments to APP1 following consideration of submissions and evidence. We accept these recommendations, with the following amendments:

(a) For landscape values, deletion of 'high' in clause (2), as criteria should relate to outstanding rather than high values;

(b) Similarly, for natural character values, delete 'high' from the introductory sentence in the description.

8.3.4.1. Recommendation

489. We recommend the following amendments to APP1 – Criteria for outstanding waterbodies, which are consistent with those recommended in the 10 October 2023 version of the PORPS.

APP1 – Criteria for identifying *outstanding water bodies*

Outstanding water bodies include any *water body* with one or more of the following outstanding values, noting that sub-values are not all-inclusive:

Table 1 - Values of outstanding water bodies

Values	Description	Example sub-values
~~Cultural and spiritual~~	~~A *water body* which has outstanding cultural and spiritual values.~~	~~Wāhi tapu, wāhi taoka, wai tapu, rohe boundary, battle sites, pa, kāika, tauraka waka, mahika kai, pa tuna; and acknowledged in korero tuku iho, pepeha, whakatauki or waiata~~
Ecology	A *water body* which has outstanding ecological value as a habitat for: • Native birds • Native fish ~~• Salmonid fish~~ • Other aquatic species	Native birds, native fish, native plants, aquatic macroinvertebrates
Landscape	A *water body* that: (1) is an essential ~~which forms a key~~ component of a landscape or natural feature that is "conspicuous, eminent, remarkable or iconic" within the region, and ~~or is critical to an outstanding natural feature~~.	Scenic, association, natural characteristics (includes hydrological, ecological and geological features)

	(2) has landscape, wild and/or scenic values that contain distinctive qualities which are outstanding in the context of the region.	
Natural character	A *water body* with ~~high~~ naturalness that: (1) exhibits a~~n exceptional~~ combination of natural processes, natural patterns and natural elements ~~with low levels of modification to its form, ecosystems and the surrounding landscape~~ that is exceptional in the context of the region, and (2) has little to no human modification to its form, ecosystems, and the surrounding landscape.	Natural characteristics (includes hydrological, ecological and geological features)
Recreation	A *water body* which is recognised as providing an outstanding recreational experience for an activity which is directly related to the *water*.	Angling, fishing, kayaking, rafting, jetboating
Physical	A *water body* which has an outstanding geomorphological, geological or hydrological feature which is dependent on the *water body's* condition and functioning.	Science

8.4. Natural character and instream values

490. Natural character and instream values are addressed through LF-FW-P13 and LF-FW-P14. We discuss each of these provisions in turn below.

8.4.1. LF-FW-P13 – Preserving natural character and in stream values

491. LF-FW-P13 was notified as follows:

LF–FW–P13 – Preserving natural character

Preserve the natural character of *lakes* and *rivers* and their *beds* and margins by:

(1) avoiding the *loss of values* or extent of a *river*, unless:

(a) there is a *functional need* for the activity in that location, and

(b) the *effects* of the activity are managed by applying:

(i) for *effects* on indigenous *biodiversity*, either ECO-P3 or ECO-P6 (whichever is applicable), and

(ii) for other effects, the effects management hierarchy,

(2) not granting resource consent for activities in (1) unless Otago Regional Council is satisfied that:

(a) the application demonstrates how each step of the *effects management hierarchies* in (1)(b) will be applied to the *loss of values* or extent of the *river*, and

(b) any consent is granted subject to conditions that apply the *effects management hierarchies* in (1)(b),

(3) establishing environmental flow and level regimes and *water* quality standards that support the health and well-being of the *water body,*

(4) wherever possible, sustaining the form and function of a *water body* that reflects its natural behaviours,

(5) recognising and implementing the restrictions in Water Conservation Orders,

(6) preventing the impounding or control of the level of Lake Wanaka,

(7) preventing modification that would reduce the braided character of a *river*, and

(8) controlling the use of *water* and *land* that would adversely affect the natural character of the *water body.*

492. This provision attracted over 40 submission points which have some common themes. These include:

(a) That the policy should recognise instream values alongside natural character;

(b) Concerns about clause (1)(b) which refers to 'functional need';

(c) How the effects management hierarchy is referred to in clause (2);

(d) Exclusions for regionally significant infrastructure;

(e) Requests to have a separate policy for environmental flows and levels (clause (3));

(f) Providing for some modification of natural character, particularly if it is associated with mitigating risks to health and safety; and

(g) An additional clause that addresses the values of riparian margins.

493. Ms Boyd recommended a number of amendments to LF-FW-P13, which are presented in the PORPS version dated 10 October 2023 and with reasoning in her s42A report, supplementary evidence and reply report.[27] Barring one exception which we address below, we agree with her recommendations and reasons and recognise that some of the amendments are discussed elsewhere in our report. These include amendments to the reference to the effects management hierarchy in clause (2), which we address in Legal Issues section, and the provision for regional infrastructure which we address in the EIT section of our report.

494. Kāi Tahu ki Otago's requested addition of a new clause that specifically related to riparian margins was discussed in Ms Boyd's Reply Report.[28] Ms Boyd recommended:

[27] *S42A Report 1: Introduction and general themes, para 1095-1124; Fourth brief of supplementary evidence of Felicity Ann Boyd, LF – Land and freshwater (NPSFM amendments), dated 24 February 2023; Reply Report from para170.*
[28] *Paras 174-175 and 178-179*

> *… I am not convinced that listing the specific outcomes to be achieved from maintaining or enhancing the values of riparian margins is necessary. In my view, there are many reasons to implement this action and they are not necessary to specify in this policy. I recommend ending this clause after 'riparian margins.'*[29]

495. This recommendation is not incorporated into the recommended amendment to clause (9) in Ms Boyd's Reply Report or in the PORPS version dated 10 October 2023. In any event, we prefer the additional phrase 'supporting natural flow behaviour' that Ms McIntyre for Kāi Tahu proposed at the hearing.[30] We consider that the addition of this phrase, and retaining the proposed wording after 'riparian margins', will assist to clarify the intent of the clause.

496. We have considered the appropriateness of LF-FW-P13(2)(c) referring to 'Appendix 6 and 7 of the NPSFM' rather than these appendices being included as appendices in the PORPS. Our view is that these should be included as PORPS appendices, both to provide additional certainty to the policy and to be consistent with the ECO chapter, where Appendix 3 and 4 of the NPSIB are included as APP3 and APP4 of the PORPS. Therefore we have recommended that Appendix 6 and 7 of the NPSFM are included in the PORPS as APP4A and APP4B, with the wording of LF-FW-P13(2)(c) amended accordingly.

8.4.1.1. Recommendation

497. We recommend the following amendments to LF-FW-P13:

LF-FW-P13 – Preserving natural character and instream values

Preserve the natural character and instream values of *lakes* and *rivers* and the natural character of their *beds* and margins by:

(1) avoiding the *loss of values* or extent of a *river*, unless:

(a) there is a *functional need* for the activity in that location, and

(b) the *effects* of the activity are managed by applying~~:~~

~~(i) for *effects* on indigenous *biodiversity*, either ECO-P3 or ECO-P6 (whichever is applicable), and~~

~~(ii) for other *effects*~~ the *effects management hierarchy* *(in relation to natural inland wetlands and rivers)*,

(2) not granting *resource consent* for activities in (1) unless ~~Otago Regional Council~~ the consent authority is satisfied that:

(a) the application demonstrates how each step of the ~~*effects management hierarchies* in (1)(b)~~ *effects management hierarchy (in relation to natural inland wetlands and rivers)* will be applied to the *loss of values* or extent of the *river*, and

(b) any consent is granted subject to conditions that apply the ~~*effects management hierarchies* in (1)(b)~~ *effects management hierarchy (in*

[29] *Para 178*
[30] *Sandra McIntyre for Kāi Tahu ki Otago, Appendix 2*

relation to natural inland wetlands and rivers) in respect of any *loss of values* or extent of the *river*,

(c) if *aquatic offsetting* or *aquatic compensation* is applied, the applicant has complied with principles 1 to 6 in APP4A and APP4B, and has had regard to the remaining principles in APP4A and APP4B, as appropriate, and

(d) if *aquatic offsetting* or *aquatic compensation* is applied, any consent granted is subject to conditions that will ensure that the offsetting or compensation will be maintained and managed over time to achieve the conservation outcomes,

(3) establishing environmental flow and level regimes and *water* quality standards that support the health and well-being of the *water body,*

(4) ~~wherever possible~~ to the extent practicable, sustaining the form and function of a *water body* that reflects its natural behaviours,

(5) recognising and implementing the restrictions in Water Conservation Orders,

(6) preventing the impounding or control of the level of Lake Wanaka,

(7) preventing modification that would permanently reduce the braided character of a *river*, ~~and~~

(8) controlling the use of *water* and *land* that would adversely affect the natural character of the *water body*~~.~~, and

(9) maintaining or enhancing the values of riparian margins to support habitat and biodiversity, reduce *contaminant* loss to *water bodies* and support natural flow behaviour.

498. We also recommend that Appendix 6 of the NPSFM is included in the PORPS as APP4A and Appendix 7 of the NPSFM is included in the PORPS as APP4B.

8.4.2. LF-FW-P14 – Restoring natural character and instream values

499. LF-FW-P14 was notified as follows:

LF–FW–P14 – Restoring natural character

Where the natural character of *lakes* and *rivers* and their margins has been reduced or lost, promote actions that:

(1) restore a form and function that reflect the natural behaviours of the *water body*,

(2) improve *water* quality or quantity where it is *degraded*,

(3) increase the presence, *resilience* and abundance of indigenous flora and fauna, including by providing for fish passage within *river* systems,

(4) improve *water body* margins by naturalising bank contours and establishing indigenous vegetation and habitat, and

(5) restore *water* pathways and natural connectivity between *water* systems.

500. Submissions on LF-FW-P14 varied from support for the notified provision, to requests to make the provision more directive by replacing 'promote' with 'require', to relaxing the provision by replacing 'promote' with 'support' or 'encourage' or adding 'where practicable'.

501. We consider that 'promoting' is appropriate for a restoration policy such as LF-FW-P14. Instances where restoration is required should be determined through the regional plan, for example where restoration is needed to meet desired environmental outcomes. We do not have the information before us to determine such requirements and do not consider that a blanket requirement is appropriate. Conversely, we do not see a material difference between 'promoting' and 'supporting' or 'encouraging', and consider that 'where practicable' is more appropriate for directive provisions.

502. Many of the submission points have been accepted by Ms Boyd, either in full or in part, and we consider that these amendments strengthen the intent and clarity of the policy. The submission points that have not been accepted seek, in many instances, to soften the policy. For example, Contact and OWRUG consider that restoring some waterbodies would result in significant adverse effects. We acknowledge that restoring a highly modified waterway such as the Clutha-Mata-au would not be a feasible proposition, however the policy is not determinative and there would likely be actions that could improve the natural character and instream values of the Clutha-Mata-au. We discussed this earlier in relation to LF-VM-O2 – Clutha Mata-au vision.

8.4.2.1. Recommendation

503. We recommend the following amendments to LF-FW-P14:

LF-FW-P14 – Restoring natural character and instream values

Where the natural character or instream values of *lakes* and *rivers* ~~and~~ or the natural character of their margins has been reduced or lost, promote actions that, where practicable:

(1) restore a form and function that reflect the natural behaviours of the *water body*,

(2) improve *water* quality or quantity where it is *degraded*,

(3) increase the presence, *resilience* and abundance of indigenous flora and fauna, including by providing for fish passage within *river* systems and, where necessary and appropriate, creating fish barriers to prevent incursions from undesirable species,

(4) improve *water body* margins by naturalising bank contours and establishing *indigenous vegetation* and habitat, and

(5) restore ~~*water* pathways and~~ natural connectivity between and within *water* systems.

8.5. Stormwater, animal effluent and wastewater

504. LF-FW-P15 was notified as follows:

LF–FW–P15 – *Stormwater* and *wastewater* discharges

Minimise the adverse *effects* of direct and indirect *discharges* of *stormwater* and *wastewater* to *fresh water* by:

(1) except as required by LF–VM–O2 and LF–VM–O4, preferring *discharges* of *wastewater* to *land* over *discharges* to *water,* unless adverse *effects* associated with a *discharge* to *land* are greater than a *discharge* to *water*, and

(2) requiring:

(a) all sewage, industrial or trade waste to be *discharged* into a reticulated *wastewater* system, where one is available,

(b) all *stormwater* to be *discharged* into a reticulated system, where one is available,

(c) implementation of methods to progressively reduce the frequency and volume of wet weather overflows and minimise the likelihood of dry weather overflows occurring for reticulated *stormwater* and *wastewater* systems,

(d) on-site *wastewater* systems to be designed and operated in accordance with best practice standards,

(e) *stormwater* and *wastewater discharges* to meet any applicable water quality standards set for *FMUs* and/or rohe, and

(f) the use of water sensitive urban design techniques to avoid or mitigate the potential adverse *effects* of *contaminants* on receiving *water bodies* from the *subdivision,* use or development of *land,* wherever practicable, and

(3) promoting the reticulation of stormwater and wastewater in urban areas.

505. DOC, Fonterra, DCC, Ravensdown, and Kāi Tahu ki Otago sought that LF-FW-P15 be split into two policies. The submitters' requests varied, with Fonterra considering that industrial and trade waste should be included in the direction on stormwater, while DCC, Ravensdown, and Kāi Tahu ki Otago considering that it should be included with wastewater. Ms Boyd's s.42A report recommended that LF-FW-P15 address stormwater, while a new policy LF-FW-P16 be included to address animal effluent, sewage and industrial and trade waste.[31] Ms Tait for Fonterra considered that this split was appropriate but sought that the title and wording of LF-FW-P16 should also include greywater.

506. We agree with the general proposition that stormwater and wastewater should be the subject of separate policies. Ms Boyd's s.42A report directed us to the National Planning Standards definition of industrial and trade waste, which reads:

> *liquid waste, with or without matter in suspension, from the receipt, manufacture or processing of materials as part of a commercial, industrial or trade process, but excludes sewage and greywater.*

507. We agree with Ms Boyd that the contaminants and treatment associated with industrial and trade waste are more closely aligned with wastewater than stormwater and support their inclusion in LF-FW-P16.

[31] *At para 1552.*

508. Turning to greywater, we note that ‘wastewater’ is defined by the National Planning Standards and in the PORPS as follows:

> *Means any combination of two or more the [sic] following wastes: sewage, greywater or industrial and trade waste.*

509. The proposed policy split sees LF-FW-P16 addressing animal effluent, sewage, and industrial and trade waste, in place of wastewater that was included alongside stormwater in the notified LF-FW-P15.

510. Industrial and trade waste is defined in the National Planning Standards, and in the pORPS, as:

> *liquid waste, with or without matter in suspension, from the receipt, manufacture or processing of materials as part of a commercial, industrial or trade process, <u>but excludes sewage and greywater.</u>*
>
> [Panel’s emphasis]

511. Sewage is defined in the National Planning Standards, and in the pORPS, as:

> *Means human excrement and urine.*

512. The definition of sewage therefore also excludes greywater.

513. We consider that Ms Tait for Fonterra has a justified concern that greywater is excluded. We support her recommended amendments to include greywater in the heading and in the chapeau of LF-FW-P16.[32] We note that greywater would be addressed by the policy wording by its inclusion in the definition of ‘wastewater’, a term which is used in clauses (2)(d) to (e) and clause (3). We agree with Ms Tait that a consequential change is required to include greywater in LF-FW-M6(8). A further consequential change is needed to insert the National Planning Standard definition of greywater into the Interpretation section of the PORPS.

514. Unsurprisingly, there was considerable discussion in evidence and at the hearing about whether there should be some provision for direct wastewater overflows to surface water. We heard from Kāi Tahu ki Otago witnesses that direct discharges of human or animal effluent to surface water are unacceptable, with Mr Ellison stating that:

> *The discharge of human waste to water is contrary to tikaka and kawa and renders affected waterways inaccessible for customary practices such as harvesting and eating mahika kai or using water for cultural purposes and rituals.*[33]

515. Mr Ellison provided the example of wastewater discharging from the Waihola wastewater treatment plant into the Waihora (Lake Waihola) outflow channel. Ms McIntyre for Kāi Tahu told us that change in practice away from direct discharge has been slow in Otago and she considers that the qualifier “to the greatest extent possible” in clause (1) of LF-FW-P16 “does not recognise the strength of the concern about the impact of these discharges on mauri”.[34] She sought that this phrase be deleted from clause (1).

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[32] *Evidence in chief of Ms Susannah Tait for Fonterra, para 7.15.*
[33] *Evidence in chief of Mr Edward Ellison for Kāi Tahu ki Otago, para. 71.*
[34] *Evidence in chief of Ms Sandra McIntyre for Kāi Tahu ki Otago, para. 73.*

516. We heard from DCC about the degraded state of their three waters infrastructure, with Ms Moffat (DCC 3 Waters Planning Manager) providing a useful overview. [35] She stated that over 50 per cent of DCC's infrastructure is expected to require renewal by 2060. She discussed the Council's 3 Waters Strategic Direction Statement 2010-2060 and told us that $3.6 billion would need to be invested in the next 30 years to maintain the existing levels of service.

517. The DCC operates seven wastewater treatment plants and hold four resource consents to discharge wastewater overflow to waterways or the coast. These overflows operate during heavy rain when stormwater and/or groundwater enters wastewater pipes. The overflows are part of the system design, with the alternative being the back-up of wastewater onto private property. While Ms Moffat outlined the Council's commitment to reducing direct discharges to freshwater, we acknowledge that this is a long-term project.

518. Mr Simon Mason from QLDC informed us that the four wastewater plants in the Queenstown district discharge to land, although he acknowledged that the Shotover treatment plant discharges into gravels in close proximity to the river. Waitaki District Council, Clutha District Council and Central Otago District Council did not submit on the FPI however Ms Boyd's Table 1 of her Opening Statement provided a useful summary of municipal wastewater discharges in the Otago Region.[36] It shows that these smaller councils all have consented wastewater discharges to freshwater, with Clutha and Central Otago District Councils each having several.

519. We also heard from Fonterra about the importance of their Stirling processing plant and the difficulties they have disposing of wastewater. Mr Watt's evidence stated that Fonterra are consented to discharge up to 3,700 m3/day of treated wastewater from the plant into the Clutha Mata-Au, with the consent expiring in 2043.[37] Mr Watt told us that, while discharge volumes and contaminant concentrations have reduced with upgrades to the plant and Fonterra continue to investigate improvement options, the steep topography and wet soils surrounding the site make land disposal challenging.[38]

520. We support phasing out direct discharges of wastewater to surface water and acknowledge the impact that these discharges have on Kāi Tahu values. Ms McIntyre pragmatically acknowledged at the hearing that only a certain amount of progress can be made in 10 years and, from the evidence that we have received from DCC and Fonterra, we have concluded that full removal of such discharges is not feasible within the lifetime of this RPS.

521. That said, we consider that the PORPS should send a clear signal that such discharges are to be phased out. We consider that this is achieved by clause (1). Some submitters suggested that 'to the greatest extent possible' be replaced with 'to the greatest extent practicable'. We consider that the use of 'to the extent practicable' is appropriate, primarily to ensure consistency with LF-FW-O1A(8) which we have discussed earlier.

522. Turning to the LF-FW-M6, our understanding is that the date that the regional plan is to be publicly notified is uncertain and we consider it appropriate to delete the date requirement in the chapeau to reflect this. This is consistent with our approach to LF-FW-M5 and LF-LS-M11.

[35] Evidence in chief of Ms Zoe Moffat for DCC, paras. 47-52.
[36] Opening Statement of Ms Felicity Boyd, 28 August 2023.
[37] Evidence in chief of Mr Morgan Watt for Fonterra, para. 18.
[38] Evidence in chief of Mr Morgan Watt for Fonterra, para. 29

8.5.1. Recommendation

523. Other than the points discussed above, we adopt the recommendations and reasoning of Ms Boyd. We recommend the following amendments to LF-FW-P15:

LF-FW-P15 – *Stormwater* ~~and wastewater~~ *discharges*

Minimise the adverse *effects* of direct and indirect *discharges* of *stormwater* ~~and wastewater~~ to *fresh water* by:

~~(1) except as required by LF-VM-O2 and LF-VM-O4, preferring discharges of wastewater to land over discharges to water, unless adverse effects associated with a discharge to land are greater than a discharge to water, and~~

(2) requiring:

~~(a) all sewage, industrial or trade waste to be discharged into a reticulated wastewater system, where one is available,~~

(ab) integrated catchment management plans for management of *stormwater* in *urban areas*,

(b) all *stormwater* to be discharged into a reticulated system, where one is made available by the operator of the reticulated system, unless alternative treatment and disposal methods will result in the same or improved outcomes for *fresh water*,

(c) implementation of methods to progressively reduce unintentional stormwater inflows to ~~the frequency and volume of wet weather overflows and minimise the likelihood of dry weather overflows occurring for reticulated stormwater and~~ wastewater systems,

~~(d) on-site wastewater systems to be designed and operated in accordance with best practice standards,~~

(e) that any *stormwater* ~~and wastewater~~ *discharges* do not prevent *water bodies* from ~~to~~ meeting any applicable water quality standards set for *FMUs* and/or rohe, and

(f) the use of water sensitive ~~urban~~ design techniques ~~to avoid or mitigate the potential adverse effects of contaminants on receiving water bodies from the subdivision, use or development of land~~, wherever practicable, and

(3) promoting the reticulation of *stormwater* ~~and wastewater~~ in *urban areas* where appropriate~~.~~, and

(4) promoting source control as a method for reducing *contaminants* in *discharges* and the use of good practice guidelines for managing *stormwater*.

8.5.2. Recommendation

524. We recommend the following amendments to new LF-FW-P16 recommended in the Reply Report:

LF-FW-P16 – *Discharges* containing animal effluent, *sewage*, *greywater* and *industrial and trade waste*

Minimise the adverse *effects* of direct and indirect *discharges* containing animal effluent, *sewage*, *greywater* and *industrial and trade waste* to *fresh water* by:

(1) phasing out existing *discharges* containing *sewage* or *industrial and trade waste* directly to water to the extent practicable,

(2) requiring:

(a) new *discharges* containing *sewage* or *industrial and trade waste* to be to *land*,

(b) *discharges* of animal effluent from *land-based primary production* to be to *land*,

(c) that all *discharges* containing *sewage* or *industrial and trade waste* are discharged into a reticulated *wastewater* system, where one is made available by its owner, unless alternative treatment and disposal methods will result in improved outcomes for *fresh water*,

(d) implementation of methods to progressively reduce the frequency and volume of wet weather overflows and minimise the likelihood of dry weather overflows occurring from reticulated *wastewater* systems,

(e) on-site *wastewater* systems and animal effluent systems to be designed and operated in accordance with best practice standards,

(f) that any *discharges* do not prevent *water bodies* from meeting any applicable water quality standards set for FMUs and/or rohe,

(3) to the greatest extent practicable, requiring the reticulation of *wastewater* in *urban areas*, and

(4) promoting source control as a method for reducing *contaminants* in *discharges*.

8.5.3. Recommendation

525. We recommend a consequential change to include the definition of greywater in the Interpretation section as follows:

Greywater	has the same meaning as in Standard 14 of the National Planning Standards 2019 (as set out in the box below) means liquid waste from domestic sources including sinks, basins, baths, showers and similar fixtures, but does not include *sewage*, or *industrial and trade waste*.

8.5.4. Recommendation

526. We recommend a further consequential change is required to include 'greywater' in LF-FW-M6(8) as follows:

LF-FW-M6 – *Regional plans*

Otago Regional Council must publicly notify a Land and Water *Regional Plan* ~~no later than 31 December 2023~~ and, after it is made operative, maintain that *regional plan* to:

…

(8) manage the adverse *effects* of *stormwater* and ~~*wastewater*~~ *discharges* containing animal effluent, *sewage*, *greywater* or *industrial and trade waste* in accordance with LF-FW-P15 and LF-FW-P16, and~~.~~

…

8.6. LF-VM-M3 – Community involvement

527. LF-VM-M3 was notified as follows:

LF–VM–M3 – Community involvement

Otago Regional Council must work with communities to achieve the objectives and policies in this chapter, including by:

(1) engaging with communities to identify *environmental outcomes* for Otago's *FMUs* and rohe and the methods to achieve those outcomes,

(2) encouraging community stewardship of *water* resources and programmes to address *freshwater* issues at a local catchment level,

(3) supporting community initiatives that contribute to maintaining or improving the health and well-being of *water bodies*, and

(4) supporting industry-led guidelines, codes of practice and environmental accords where these would contribute to achieving the objectives of this RPS.

528. This method is intended to implement provisions that are part of the freshwater process, including the vision objectives, LF-FW P7, LF-FW-P7A and some wetland provisions, and non-freshwater process, for example natural character and outstanding water body provisions.

529. Some submitters sought amendments to clause (1) to more directly reference the requirements of the NPSFM National Objectives Framework, including in identifying attributes, target attribute states, timeframes for achieving target attribute states, limits, and action plans. The notified clause (1) refers to environmental outcomes, which are defined in the NPSFM and the PORPS as follows:

means, in relation to a value that applies to an FMU or part of an FMU, a desired outcome that a regional council identifies and then includes as an objective in its regional plan.

530. Environmental outcomes are expressed in Clause 3.9 of the NPSFM, whereby regional councils must identify values that apply to an FMU or part of an FMU (clauses (1) and (2)) and identify an environmental outcome for each of these values (clause 3). These are to be expressed as an objective(s) in the regional plan (clause (4). Once the values and environmental outcomes are determined, the NPSFM requires attributes and their baseline states to be identified (clause

3.10), target attribute states set (clause 3.11), limits set (clause 3.12) and action plans prepared (clause 3.15).

531. We agree with Ms Boyd that there is no need to specify these requirements, but that reference to 'values' in clause (1) alongside 'environment outcomes' is appropriate. This better reflects clause 3.9 of the NPSFM which then applies to the next steps in the NOF process.

532. The Panel is in agreement with Ms Boyd's recommended amendments and reasons for LF-VM-M3.

533. We also addressed LF-VM-M3 in the FPI report in our discussion on LF-FW-P7A. We considered that a consequential amendment to LF-VM-M3 to add clause (4A) is appropriate for consistency with recommended amendments to freshwater provisions LF-FW-P7A and LF-FW-M6. These amendments were in response to a request by Mr Hodgson for Horticulture NZ as part of the freshwater process.

8.6.1. Recommendation

534. We therefore recommend the following consequential change to LF-VM-M3.

LF-VM-M3 – Community involvement

Otago Regional Council must work with Kāi Tahu and communities to achieve the objectives and policies in this chapter, including by:

(1) engaging with Kāi Tahu, communities and stakeholders to identify values and *environmental outcomes* for Otago's *FMUs* and rohe and the methods to achieve those outcomes,

(2) encouraging community stewardship of *water* resources and programmes to address *freshwater* issues at a local catchment level, including through catchment groups,

(3) supporting community initiatives, industry-led guidelines, codes of practice and environmental accordsthat contribute to maintaining or improving the health and well-being of *water bodies*, and

~~(4) supporting industry-led guidelines, codes of practice and environmental accords where these would contribute to achieving the objectives of this RPS.~~

(4A) education, advocacy and co-ordination to encourage efficient use of freshwater, including water harvesting, use of storage and consideration of alternative water supply.

8.7. LF-FW-M6 – Regional plans

535. LF-FW-M6 was notified as follows:

LF–FW–M6 – Regional plans

Otago Regional Council must publicly notify a Land and Water *Regional Plan* no later than 31 December 2023 and, after it is made operative, maintain that *regional plan* to:

(1) identify the compulsory and, if relevant, other values for each *Freshwater*

Management Unit,

(2) state *environmental outcomes* as objectives in accordance with clause 3.9 of the NPSFM,

(3) identify *water bodies* that are *over-allocated* in terms of either their *water* quality or quantity,

(4) include environmental flow and level regimes for *water bodies* (including *groundwater*) that give effect to *Te Mana o te Wai* and provide for:

(a) the behaviours of the *water body* including a base flow or level that provides for variability,

(b) healthy and resilient mahika kai,

(c) the needs of indigenous fauna, including taoka species, and aquatic species associated with the *water body*,

(d) the hydrological connection with other *water bodies*, estuaries and coastal margins,

(e) the traditional and contemporary relationship of Kāi Tahu to the *water body*, and

(f) community *drinking water* supplies, and

(5) include limits on resource use that:

(a) differentiate between types of uses, including *drinking water*, and social, cultural and economic uses, in order to provide long-term certainty in relation to those uses of available *water*,

(b) for *water bodies* that have been identified as *over-allocated*, provide methods and timeframes for phasing out that *over-allocation*,

(c) control the *effects* of existing and potential future development on the ability of the *water body* to meet, or continue to meet, *environmental outcomes*,

(d) manage the adverse *effects* on *water bodies* that can arise from the use and development of *land*, and

(6) provide for the off-stream storage of surface *water* where storage will:

(a) support Te Mana o te Wai,

(b) give effect to the objectives and policies of the LF chapter of this RPS, and

(c) not prevent a surface *water body* from achieving identified *environmental outcomes* and remaining within any limits on resource use, and

(7) identify and manage *natural wetlands* in accordance with LF–FW–P7, LF– FW–P8 and LF–FW–P9 while recognising that some activities in and around *natural wetlands* are managed under the NESF, and

(8) manage the adverse *effects* of *stormwater* and *wastewater* in accordance with LF–FW–P15.

536. This method pertains to the regional plan which is the main regulatory document that will implement the land and water provisions in the PORPS. A number of amendments were requested through submissions and evidence, many of which are consequential to requested changes to objective and/or policy wording, to plug gaps in references to policies, or to improve consistency with the NPSFM. We have discussed many of these matters already in this section. The s.42A recommended changes in response include:

(a) Deleting notified clauses (1), (2), (4) and (5) and replacing them with a new clause (1A) to *"implement the required steps in the NOF process in accordance with the NPSFM"*;[39]

(b) Amending clause (3) to better reflect the methods to address over-allocation;[40]

(c) Adding a new clause (5A) to implement the new recommended policy LF-FW-P7A regarding allocation and use of water;[41]

(d) Amending the policy references in clause (7) to delete LF-FW-P8 and include LF-FW-P10, and include reference to the NPSPF in this clause;[42] and

(e) Consequential amendments to clause (8) to add reference to LF-FW-P16 to reflect the splitting of LF-FW-P15.

537. Some submitters, for example McArthur Ridge and COWA, sought amendments that would result in allocation priority for certain water use activities based on water use efficiency or industry type. We consider that such considerations are better addressed through the NOF process with resulting provisions included in a regional plan. Such submissions are also dangerously close to seeking what uses would be considered as priority (2) of Te Mana o Te Wai. We have addressed this previously in this section in relation to LF-FW-P7A and in the Legal Issues section, where we determined that it is not appropriate for the PORPS to determine what activities are to be considered as priority (2) or (3). We therefore do not accept submissions for such determinations in LF-FW-M6.

8.7.1. Recommendation

538. We recommend the following amendments to LF-FW-M6:

LF-FW-M6 – *Regional plans*

Otago Regional Council must publicly notify a Land and Water *Regional Plan* ~~no later than 31 December 2023~~[43] and, after it is made operative, maintain that *regional plan* to:

(1A) implement the required steps in the NOF process in accordance with the NPSFM,[44]

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[39] FPI025.030 Beef + Lamb and DINZ
[40] FPI012.007 Minister for the Environment
[41] [41] Clause 10(2)(b)(i), Schedule 1, RMA – consequential amendment arising from including LF-FW-P7A
[42] FPI035.017 Wise Response, FPI014.003 Rayonier Matariki
[43] Clause 16(2), Schedule 1, RMA
[44] FPI025.030 Beef + Lamb and DINZ

~~(1) identify the compulsory and, if relevant, other values for each *Freshwater Management Unit*,~~

~~(2) state *environmental outcomes* as objectives in accordance with clause 3.9 of the NPSFM,~~

(3) identify *water bodies* that are *over-allocated* ~~in terms of either their *water* quality or quantity~~ and the methods and timeframes for phasing out that *over-allocation* (including through environmental flows and levels and *limits*) within the timeframes required to achieve the relevant *freshwater* vision,

~~(4) include environmental flow and level regimes for *water bodies* (including *groundwater*) that give effect to *Te Mana o te Wai* and provide for:~~

~~(a) the behaviours of the *water body* including a base flow or level that provides for variability,~~

~~(b) healthy and resilient mahika kai,~~

~~(c) the needs of indigenous fauna, including taoka species, and aquatic species associated with the *water body*,~~

~~(d) the hydrological connection with other *water bodies*, estuaries and coastal margins,~~

~~(e) the traditional and contemporary relationship of Kāi Tahu to the *water body*, and~~

~~(f) community *drinking water* supplies, and~~

(5A) provide for the allocation and use of *fresh water* in accordance with LF-FW-P7A, including by providing for off-stream water storage,

~~(5) include *limits on resource use* that:~~

~~(a) differentiate between types of uses, including *drinking water*, and social, cultural and economic uses, in order to provide long-term certainty in relation to those uses of available *water*,~~

~~(b) for *water bodies* that have been identified as *over-allocated*, provide methods and timeframes for phasing out that *over-allocation*,~~

~~(c) control the *effects* of existing and potential future development on the ability of the *water body* to meet, or continue to meet, *environmental outcomes*,~~

~~(d) manage the adverse *effects* on *water bodies* that can arise from the use and development of *land*, and~~

~~(6) provide for the off-stream storage of surface *water* where storage will:~~

~~(a) support *Te Mana o te Wai*,~~

~~(b) give effect to the objectives and policies of the LF chapter of this RPS, and~~

~~(c) not prevent a surface *water body* from achieving identified *environmental outcomes* and remaining within any *limits on resource use*, and~~

(7) identify and manage *natural wetlands* in accordance with LF-FW-P7, ~~LF-FW-P8 and~~ LF-FW-P9 and LF-FW-P10 while recognising that some activities in and around *natural wetlands* are managed under the NESF and the NESPF, ~~and~~

(8) manage the adverse *effects* of *stormwater* and ~~*wastewater*~~ *discharges* containing animal effluent, *sewage*, or *industrial and trade waste* in accordance with LF-FW-P15 and LF-FW-P16, and~~.~~

(9) recognise and respond to Kāi Tahu cultural and spiritual concerns about mixing of water between different catchments.

8.8. LF-FW-M7 –District plans

539. LF-FW-M7 was notified as follows:

LF-FW-M7 – District plans

Territorial authorities must prepare or amend and maintain their *district plans* no later than 31 December 2026 to:

(1) map *outstanding water bodies* and identify their outstanding and significant values using the information gathered by Otago Regional Council in LF-FW-M5, and

(2) include provisions to avoid the adverse *effects* of activities on the significant and outstanding values of *outstanding water bodies*,

(3) require, wherever practicable, the adoption of water sensitive urban design techniques when managing the *subdivision,* use or development of *land*, and

(4) reduce the adverse *effects* of *stormwater discharges* by managing the *subdivision,* use and development of *land* to:

(a) minimise the peak volume of *stormwater* needing off-site disposal and the load of *contaminants* carried by it,

(b) minimise adverse *effects* on *fresh water* and *coastal water* as the ultimate receiving environments, and the capacity of the *stormwater* network,

(c) encourage on-site storage of rainfall to detain peak *stormwater* flows, and

(d) promote the use of permeable surfaces.

540. Similar to LF-FW-M6 for regional plans, LF-FW-M7 is the method for district councils to implement the policies in the LF-FW section through their district plans. Similar to LF-FW-M6, some of the issues raised by submitters are consequential to submissions on other provisions in this section and have been addressed previously. For example, submissions requesting

amendments to clauses (1) and (2) have been addressed above in our discussion of the outstanding waterbody provisions.

541. The Panel agrees with Ms Boyd's proposed amendments and her reasons. While some of the requested amendments have merit, we agree that they are too detailed for an RPS and should be left for the district plan to address. The key recommended amendment to LF-FW-M7 is the addition of a new clause (2A) that addresses the natural character of the margins and surface of lakes and rivers. We consider that this addresses a gap in this method and reflects the functions of territorial authorities. It also implements LF-FW-P13 which is part of the non-freshwater process.

8.9. LF-FW-M8 –Action plans

542. LF-FW-M8 was notified as follows:

LF-FW-M8 – Action plans

Otago Regional Council:

(1) must prepare an action plan for achieving any target *attribute* states for *attributes* described in Appendix 2B of the NPSFM,

(2) may prepare an action plan for achieving any target *attribute* states for *attributes* described in Appendix 2A of the NPSFM, and

(3) must prepare any action plan in accordance with clause 3.15 of the NPSFM.

543. This method reflects the NPSFM requirement to prepare action plans as part of the NOF process, specifically clause 3.15. Action plans can be appended to a regional plan or published separately, and so are not necessarily covered by LF-FW-M6 – Regional plans.

544. LF-FW-M8 largely reflects the requirements of the NPSFM and, for that reason, DairyNZ sought that it be deleted. We can understand the reasons for this request, however action plans are a key requirement under the NPSFM in some circumstances and sit alongside regional plans as the ORC's means to achieve target attribute states. The requirements of the NPSFM are reflected through other provisions in this section and we consider it appropriate to include a method to reflect the requirement for action plans.

545. This method sits alongside LF-VM-M3 which provides for community involvement and reflects the requirements of clause 3.7(1) to engage with communities and tangata whenua.

546. The Panel considers that this method should be retained, with the addition of clause (2A) sought by The Fuel Companies to better reflect clause 3.15 of the NPSFM, as recommended by the Reply Report.

8.10. New method –Identifying and managing species interactions between trout and salmon and indigenous species

547. Fish and Game sought the addition of a new method to manage the interactions between trout and salmon and indigenous species through both the freshwater and non-freshwater processes. Such a method would give effect to LF-FW-P7 as well as Policies 9 and 10 of the NPSFM.

548. The legal submissions of Ms Baker-Galloway, Fish and Game's counsel, addressed this method through both processes however expressed a preference for the provision to be included as a freshwater provision. Ms Baker-Galloway submitted that the new method would implement LF-FW-O8 and LF-FW-P7 which are freshwater provisions, and that the full suite of trout and salmon habitat provisions should be considered together.

549. Ms Boyd considered the proposed method in her non-freshwater s.42A report and reply report. She recommended that such a method be included in the PORPS and recommended wording based on that proposed by Mr Paragreen from Fish and Game. Ms Boyd considered the requested method again in her freshwater s.42A report, where she stated:[45]

> *Fish and Game made a similar request in its submission on the non-FPI part of the pORPS. Legal advice confirmed that was the appropriate process for including the new method, therefore I have recommended the method sought be included in the non-FPI part of the pORPS.*

550. We respectfully disagree with the ORC's advice and consider that the appropriate place for such a method to be considered is through the freshwater process. We have found the split between freshwater and non-freshwater provisions particularly difficult to decipher where related provisions are split between the two processes. In our view, the proposed method would qualify for inclusion as a freshwater provision and we consider that there are distinct advantages of it being in the same process as its associated objectives and policy, in particular if these provisions should be appealed.

551. We support the wording proposed and acknowledge the collaborative way in which it was developed with input from Fish and Game, ORC, DoC and Kāi Tahu.

8.10.1. Recommendation

552. We recommend that a new LF-FW-M8A be included as a freshwater provision:

LF-FW-M8A – Identifying and managing species interactions between trout and salmon and indigenous species

(1) When making decisions that might affect the interactions between trout and salmon and indigenous species, *local authorities* will have particular regard to the recommendations of the Department of Conservation, the Fish and Game Council for the relevant area, Kāi Tahu, and the matters set out in LF-FW-M8A(2)(a) to (c), and

(2) Otago Regional Council will work with the Department of Conservation, the relevant Fish and Game Council and Kāi Tahu to:

  (a) describe the habitats required to provide for the protection of indigenous species for the purposes of (2)(a), (b), and (c),

  (b) identify areas where the protection of the habitat of trout and salmon, including fish passage, will be consistent with the protection of the habitat of indigenous species and areas where it will not be consistent,

[45] *Freshwater s.42A report, para 1654.*

(c) for areas identified in (b), develop provisions for any relevant action plans(s) prepared under the NPSFM, including for fish passage, that will at minimum:

(i) determine information needs to manage the species,

(ii) set short, medium and long-term objectives for the species involved,

(iii) identify appropriate management actions that will achieve the objectives determined in (ii), including measures to manage the adverse effects of trout and salmon on indigenous species where appropriate, and

(iv) consider the use of a range of tools, including those in the Conservation Act 1987 and the Freshwater Fisheries Regulations 1983, as appropriate.

8.11. LF-FW-M9 – Monitoring

553. LF-FW-M9 attracted three submissions, with QLDC in support and DCC and Kāi Tahu seeking amendments. Ms Boyd discussed these requests at paragraphs 1315 to 1316 of her s.42A report and recommended amendments to address the submitters' concerns. We agree with Ms Boyd's recommendations and consider that they address the submitters' concerns.

8.12. LF-FW-M10 – Other methods

554. QLDC and Kāi Tahu ki Otago submitted in support of LF-FW-M10, while the Director General of Conservation sought amendments to recognise that the methods in the ECO chapter also apply. As notified, the LF chapter comprised four sections. This has been reduced to three, LF-WAI, LF-FW and LF-LS, and LF-FW-M10 aims to ensure that the three sections are treated as a coherent whole. We agree with Ms Boyd that referring to the ECO chapter methods is not consistent with the intent of this method. There are a number of methods in other chapters that would assist with achieving the policies in the LF chapter and which would need to be considered if we were to refer to the ECO chapter.

555. We support Ms Boyd's recommendation in the 10 October 2023 reply version of the PORPS to delete the reference to LF-VM, the provisions of which we are recommending be incorporated into the LF-FW section.

8.13. LF-VM-E2 - Explanation and LF-FW-E3 - Explanation

556. We recommended that the LF-VM and LF-FW sections be combined, as recommended by Ms Boyd. As a consequence, LF-VM-E2 and LF-FW-E3 were recommended to be combined in the 10 October 2023 reply version of the PORPS with the combined version being numbered LF-VM-E2. We agree with this recommendation.

557. OWRUG sought consequential amendments to LF-VM-E2 to reflect relief sought elsewhere that we have not accepted.[46] Similarly, Ngāi Tahu ki Murihiku sought consequential amendments to LF-FW-E3 to reflect relief sought to LF-FW-M5. We did not accept the relief sought elsewhere by either of these submitters, therefore we do not accept the relief they seek for this explanation.

[46] *For example, Uncoded submission point – p.54 of submission by OWRUG*

558. Ms Boyd recommended accepting what we consider to be reasonably minor amendments requested by Kāi Tahu ki Otago. We agree that these better reflect the policy direction and aid in consistency with the remainder of the PORPS.

559. Some of the paragraphs in this explanation are shaded blue as freshwater provisions and some are non-freshwater. We consider this to be a good example of the nonsensical way that the freshwater and non-freshwater provisions are split. The amendments that we are recommending are all in the third paragraph of the 10 October 2023 version of the PORPS, which is a freshwater paragraph. However for ease of digestion, we are duplicating the discussion and recommendation for LF-VM-E2 (that is, the combined LF-VM-E2 and LF-FW-E3) in both the freshwater and non-freshwater sections of our recommendation report. Those paragraphs that are part of the freshwater planning instrument are shaded blue.

8.13.1. Recommendation

560. We recommend that LF-FW-E3 is incorporated into LF-VM-E2 and that the combined LF-VM-E2 is amended as follows:

LF-VM-E2 – Explanation

This section of the LF chapter outlines how the Council will manage *fresh water* within the region. To give effect to *Te Mana o te Wai*, the *freshwater* visions, and the policies set out the actions required in the development of *regional plan* provisions to implement the NPSFM. *[Note to reader: originally LF-FW-E3 para 1]*

Implementing the NPSFM requires Council to identify *Freshwater Management Units* (*FMUs*) that include all *freshwater bodies* within the region. Policy LF-VM-P5 identifies Otago's five *FMUs*: Clutha Mata-au *FMU*, ~~Taieri~~ Taiari *FMU*, North Otago *FMU*, Dunedin & Coast *FMU* and Catlins *FMU*. The Clutha Mata-au *FMU* is divided into five sub-*FMUs* known as 'rohe'. Policy LF-VM-P6 sets out the relationship between *FMUs* and rohe which, broadly, requires rohe provisions to be no less stringent than the parent *FMU* provisions. This is to avoid any potential for rohe to set lower standards than others which would affect the ability of the *FMU* to achieve its stated outcomes.

The outcomes sought for *natural wetlands* are implemented by requiring identification, protection and restoration. The first two policies reflect the requirements of the NPSFM for identification and protection but apply that direction to all *natural wetlands*, rather than only inland natural wetlands (those outside the *coastal marine area*) as the NPSFM directs. This reflects the views of ~~*takata*~~ *mana whenua* and the community that *fresh* and *coastal water*, including *wetlands*, should be managed holistically and in a consistent way. While the NPSFM requires promotion of the restoration of natural inland wetlands, the policies in this section take a stronger stance, requiring improvement where *natural wetlands* have been *degraded* or lost. This is because of the importance of restoration to Kāi Tahu and in recognition of the historic loss of *wetlands* in Otago and the indigenous biodiversity and hydrological values of wetland systems. *[Note to reader: originally LF-FW-E3 para 2]*

The policies respond to the NPSFM by identifying a number of *outstanding water bodies* in Otago that have previously been identified for their significance through other processes. Additional *water bodies* can be identified if they are wholly or partly

within an outstanding natural feature or landscape or if they meet the criteria in APP1 which lists the types of values which may be considered outstanding: cultural and spiritual, ecology, landscape, natural character, recreation and physical. The significant values of *outstanding water bodies* are to be identified and protected from adverse *effects*. *[Note to reader: originally LF-FW-E3 para 3]*

Preserving the natural character of *lakes* and *rivers*, and their *beds* and margins, is a matter of national importance under section 6 of the RMA 1991. The policies in this section set out how this is to occur in Otago, reflecting the relevant direction from the NPSFM but also a range of additional matters that are important in Otago, such as recognising existing Water Conservation Orders, the Lake Wanaka Act 1973 and the particular character of braided *rivers*. Natural character has been reduced or lost in some *lakes* or *rivers*, so the policies require promoting actions that will restore or otherwise improve natural character. *[Note to reader: originally LF-FW-E3 para 4]*

The impact of *discharges* of *stormwater* and *wastewater* on *freshwater bodies* is a significant issue for *mana whenua* and has contributed to *water* quality issues in some *water bodies*. The policies set out a range of actions to be implemented in order to improve the quality of these *discharges* and reduce their adverse *effects* on receiving environments.

8.14. LF-VM-PR2 – Principal reasons and LF-FW-PR3 – Principal reasons

561. For the same reasons as LF-VM-E2 and LF-FW-E3, Ms Boyd recommended that LF-FW-PR3 be incorporated into LF-VM-PR2. We agree with amalgamation of these principal reasons and also with the amendments and reasons recommended by Ms Boyd. Some of these amendments are in response to direct submissions while others are consequential to amendments to other provisions in the LF chapter.

562. Similar to the explanation discussed previously, two of the paragraphs in LF-VM-PR2 are shaded blue as freshwater provisions and one is non-freshwater, LF-FW-PR3 is solely freshwater and the resulting combined principal reason comprises both freshwater and non-freshwater provisions. Again, for ease of digestion, we are duplicating the discussion and recommendation for LF-VM-PR2 (that is, the combined LF-VM-PR2 and LF-FW-PR3) in both the freshwater and non-freshwater sections of our recommendation report. Those paragraphs that are part of the freshwater planning instrument are shaded blue.

8.14.1. Recommendation

563. We recommend that LF-FW-PR3 is incorporated into LF-VM-PR2 and that the combined LF-VM-PR2 is amended as follows:

LF-VM-PR2 – Principal reasons

To support the implementation of the NPSFM, the Council is required to develop long-term visions for *fresh water* across the Otago region. *Fresh water* visions for each *FMU* and rohe have been developed through engagement with Kāi Tahu and communities. They set out the long-term goals for the *water bodies* (including *groundwater*) and *freshwater* ecosystems in the region that reflect the history of, and environmental pressures on, the *FMU* or rohe. They also establish ambitious but reasonable

timeframes for achieving these goals. The Council must assess whether each *FMU* or rohe can provide for its long-term vision, or whether improvement to the health and well-being of *water bodies* (including *groundwater*) and *freshwater* ecosystems is required to achieve the visions. The result of that assessment will then inform the development of *regional plan* provisions in the *FMU*, including *environmental outcomes, attribute* states, target *attribute* states and *limits* <u>*(in relation to freshwater).*</u>

Otago's *water bodies* are significant features of the region and play an important role in Kāi Tahu beliefs and traditions. <u>They support people and communities to provide for their social, economic, and cultural well-being.</u> A growing population combined with increased *land* use intensification has heightened demand for *water,* and increasing nutrient and sediment contamination impacts *water* quality. The legacy of Otago's historical mining privileges, coupled with contemporary <u>urban and rural</u> *land* uses, contribute to ongoing *water* quality and quantity issues in some *water bodies*, with significant cultural effects. *[Note to reader: originally LF-FW-PR3 para 1]*

This section of the LF chapter ~~contains more specific direction on managing *fresh water* to give effect to *Te Mana o te Wai* and contributes to achieving the long-term *freshwater* visions for each *FMU* and rohe. It also~~ reflects key direction in the NPSFM for managing the health and well-being of *fresh water*, including *wetlands* and *rivers* in particular, and matters of national importance under section 6 of the RMA 1991. The provisions in this section will underpin the development of the Council's *regional plans* and provide a foundation for implementing the requirements of the NPSFM, including the development of *environmental outcomes*, *attribute* states, target *attribute* states and limits. *[Note to reader: originally LF-FW-PR3 para 2]*

8.15. Anticipated environmental results: LF-VM-AER3

564. LF-VM-AER3 is the only anticipated environmental result that is not part of the freshwater planning instrument. This seems highly unusual and counter-intuitive to us given that the freshwater visions to which it refers are all part of the freshwater planning instrument. Thankfully we do not wish to make any consequential amendments to LF-VM-AER3 resulting from changes to the freshwater vision objectives – concerningly, we would have been unable to do so had this been the case.

565. We support the recommendation and reasoning provided by Ms Boyd at paragraph 696 of her s.42A report to amend LF-VM-AER3 in response to a submission by Ngāi Tahu ki Murihiku.

566. The remaining anticipated environmental result provisions, LF-FW-AER4 to LF-FW-AER11, are part of the freshwater planning instrument and are discussed in the freshwater planning instrument section of our report.

8.16. Anticipated environmental results: LF-FW-AER4 to LF-FW-AER11

567. LF-FW-AER4 to LF-FW-AER11 are all part of the freshwater planning instrument, with LF-VM-AER3 being the sole non-freshwater anticipated environmental result. LF-FW-AER4 to LF-FW-AER11 were notified as follows:

LF-FW-AER4	*Fresh water* is allocated within limits that contribute to achieving specified *environmental outcomes* for *water bodies* within timeframes set out in *regional plans* that are no less stringent than the timeframes in the LF–VM section of this chapter.
LF-FW-AER5	*Specified rivers* and *lakes* are suitable for primary contact within the timeframes set out in LF-FW-P7.
LF-FW-AER6	*Degraded water* quality is improved so that it meets specified *environmental outcomes* within timeframes set out in *regional plans* that are no less stringent than the timeframes in the LF–VM section of this chapter.
LF-FW-AER7	*Water* in Otago's aquifers is suitable for human consumption, unlessthat *water* is naturally unsuitable for consumption.
LF-FW-AER8	Where *water* is not *degraded*, there is no reduction in *water* quality.
LF-FW-AER9	The frequency of *wastewater* overflows is reduced.
LF-FW-AER10	The quality of *stormwater discharges* from existing *urban areas* is improved.
LF-FW-AER11	There is no reduction in the extent or quality of Otago's *natural wetlands*.

568. There were few submissions on these AERs and many of these were to ensure consistency with other requested relief. We agree with the amendments recommended by Ms Boyd and her reasoning in paragraphs 1688 to 1696 of her freshwater s.42A report, including the addition of a new AER, labelled LF-FW-AER11A in the 10 October 2023 version of the PORPS.

569. The one exception to this is in relation to LF-FW-AER11 where, in response to Silver Fern Farms' submission, Ms Boyd has recommended the following amendment:

LF-FW-AER11	There is ~~no reduction~~ an improvement[47] in the extent or ~~quality~~ condition[48] of Otago's *natural wetlands*.

570. With the replacement of 'no reduction' with 'an improvement', the 'or' should change to 'and'. It was appropriate for there to be no reduction 'in the extent or condition', but to be consistent with the objectives and policies in the LF chapter, improvement should be sought in both.

8.16.1. Recommendation

571. We recommend the following amendments and the addition of a new AER, as follows:

LF-FW-AER4	*Fresh water* is allocated within limits that contribute to achieving specified *environmental outcomes* for *water bodies* within timeframes set out in *regional plans* that are no less stringent than the timeframes in the LF-VM section of this chapter.
LF-FW-AER5	*Specified rivers* and *lakes* are suitable for primary contact within the timeframes set out in LF-FW-P7.
LF-FW-AER6	*Degraded water* quality is improved so that it meets specified *environmental outcomes* within timeframes set out in *regional plans* that are no less

[47] *FPI020.027 Silver Fern Farms*
[48] *FPI046.023 QLDC*

stringent than the timeframes in the ~~LF-VM~~ objectives in the LF-FW[49] section of this chapter.

LF-FW-AER7	*Water* in Otago's aquifers is suitable for human consumption, unless that *water* is naturally unsuitable for consumption.
LF-FW-AER8	Where *water* is not *degraded*, there is no reduction in *water* quality.
LF-FW-AER9	Direct *discharges* of *wastewater* to *water* are phased out to the greatest extent practicable and the ~~The~~[50] frequency of *wastewater* overflows is reduced.
LF-FW-AER10	The quality of *stormwater discharges* from existing *urban areas* is improved.
LF-FW-AER11	There is ~~no reduction~~[51] an improvement[52] in the extent and ~~or quality~~[53] condition[54] of Otago's ~~*natural*~~ *wetlands*.
LF-FW-AER11A	The economic, social, and cultural well-being of communities is sustained.[55]

[49] *Clause 16(2), Schedule 1, RMA*
[50] *FPI032.026 Te Rūnanga o Ngāi Tahu, FPI030.040 Kāi Tahu ki Otago*
[51] *FPI035.021 Wise Response*
[52] *FPI020.027 Silver Fern Farms*
[53] *FPI024.034 DairyNZ, FPI046.023 QLDC*
[54] *FPI046.023 QLDC*
[55] *FPI043.054 OWRUG*

9. LF-LS – Land and soils

9.1. Introduction

572. This section of the LF – Land and freshwater chapter is focused on the management of land and soils, including for soil quality and conservation purposes as well as in relation to the management of fresh water. The Otago region contains a land area of 31,186 square kilometres (Stats NZ, 2022). The region has a diverse and varied range of land types and landscapes, from mountains and drylands in the western and central parts of the region to coastline and rainforests in the east.

573. This section of the report addresses the following provisions:

LF-LS-O11 – Land and soil

LF-LS-O12 – Use of land

LF-LS-P16 – Integrated management

LF-LS-P17 – Soil values

LF-LS-P18 – Soil erosion

LF-LS-P19 – Highly productive land

LF-LS-P20 – Land use change

LF-LS-P21– Land use and freshwater

LF-LS-P22 – Public access

LF-LS-M11– Regional plans

LF-LS-M12 – District plans

LF-LS-M13 – Management of beds and riparian margins

LF-LS-AER14 – Other methods

LF-LS-E4 – Explanation

LF-LS-PR4 – Principal reasons

LF-LS-AER12

LF-LS-AER13

LF-LS-AER14

9.2. Objectives: LF-LS-O11 – Land and soil and LF-LS-O12 – Use of land

9.2.1. Discussion

574. As notified, the Land and Soil chapter had two objectives as follows:

LF–LS–O11 – *Land* and soil

The life-supporting capacity of Otago's soil resources is safeguarded and the availability and productive capacity of highly productive land for *primary production* is maintained now and for future generations.

LF–LS–O12 – Use of *land*

The use of *land* in Otago maintains soil quality and contributes to achieving *environmental outcomes* for *fresh water*.

575. The submissions on these provisions addressed a range of issues including how productivity is provided for, including highly productive land; provision for supporting activities; the links to achieving freshwater outcomes; the balance with urban development; and the biophysical capacity of soils. New objectives in relation to biodiversity were also sought.

576. A number of these issues were addressed by the restructuring of the UFD chapter. This led to amendments to UFD-O4 and the recommendation that it is included in the LS chapter, which we accepted in our decision on the UFD chapter. The focus of UFD-O4 is on development (including urban) that occurs in the rural area, and it reads as follows:

UFD-O4 – Development in rural areas

Development in Otago's *rural areas* occurs in a way that:

(4) provides for the ongoing use of *rural areas* for *primary production* and *rural industry*, and

(4A) does not compromise the *productive capacity* and long-term viability of *primary production* and rural communities.

577. The 'highly productive land' issue was complicated by the fact the pORPS was notified in 2021, well before the NPSHPL was gazetted in September 2022. Several of the reporting officers, in particular Ms White and Ms Boyd, prepared supplementary evidence on the content of the NPSHPL and its implications for the pORPS. A number of amendments were recommended as a result. This matter is dealt with later in this decision.

578. The objectives above went through a number of iterations through the hearings process, including a standalone objective dealing specifically with highly productive land. A final consideration of these provisions was undertaken in Ms Boyd's 'Introduction and General Themes' reply report, dated 23 May 2023.

579. In that report, Ms Boyd advised that some submitters still sought additions to the objectives. She identified these as follows:

a. The availability of rural land for primary production (Fulton Hogan),

b. Recognition of the role of resource use and development in the region and its contribution to enabling people and communities to provide for their social, economic, and cultural well-being (Oceana Gold),

c. Land environments support healthy habitats for indigenous species and ecosystems (DOC), and

d. Manage land use activities to recognise and protect terrestrial, freshwater, and coastal values which may be affected by these activities (DOC).

580. In addressing these matters, Ms Boyd took the approach of re-drafting the "objectives to address these matters in a more integrated way …preferable to simply inserting a range of additional objectives". In her opinion, "*listing a series of separate objectives does not assist with attempting to address … tension and runs the risk of 'trading off' objectives against one another.*" In addition to recommending the inclusion of the amended UFD-O4 (which we have previously accepted), she recommended the two existing objectives be redrafted as follows:

> **LF-LS-O11 – *Land* and soil**
>
> ~~The life-supporting capacity of Otago's soil resources is safeguarded and the availability and productive capacity of highly productive land for *primary production* is maintained now and for future generations.~~
>
> Otago's *land* and soil resources support healthy habitats for indigenous species and ecosystems.
>
> **LF-LS-O12 – Use, development, and protection ~~of land~~**
>
> ~~The use of *land* in Otago maintains soil quality and contributes to achieving *environmental outcomes* for *fresh water*.~~
>
> The use, development, and protection of *land* and soil:
>
> (1) safeguards the life-supporting capacity of soil,
>
> (2) contributes to achieving *environmental outcomes* for *fresh water*, and
>
> (3) recognises the role of these resources in providing for the social, economic, and cultural well-being of Otago's people and communities.

581. Ms Boyd considered that Fulton Hogan's request was provided for by UFD-O4(1) while the concerns of Oceana Gold and other submitters with an interest in mineral and aggregate extraction are addressed in the amended LF-LS-O12 and its reference to the importance of resource use to well-being. While she initially considered DOC's requested objectives to be inappropriate in this chapter, given these matters are specifically addressed in the ECO chapter, Ms Boyd specifically provided for them within the amended LF-LS-O11. She also recommended deleting reference to 'highly productive land' in LF-LS-O11 as she considers it to be adequately addressed in her recommended LF-LS-P19.

582. While we do not necessarily agree with Ms Boyd that 'separate' objectives will run the risk of creating scenarios where objectives are traded off against one another, the drafting style of this RPS is particularly broad and it is difficult to now adopt a different approach of including objectives relating to specific activities. In the Panel's view, the changes proposed to the issues by the inclusion of SRMR-I10A and now these provisions, corrects the balance of the pORPS by providing recognition that resource use is essential to the wellbeing of people and communities, where previously the provisions tended to have a more protectionism focus.

583. Hence, we are comfortable with amended LF-LS-O12. However, as with Ms Boyd in her s42A report, we do not agree that the new LF-LS-O11 is appropriate in this chapter. In managing the use of land and soil, regard will need to be given to the provisions of the ECO chapter. Hence, the new LF-LS-O11 provision is not required in this chapter.

584. As we will discuss in section 9.4 below, nor we are comfortable with the deletion of that part of LF-LS-O11 which deals with highly productive land.

9.2.2. Recommendation

585. Our recommendation is therefore to delete the notified LF-LS-O12 and the reference to life supporting capacity of soil in LF-LS-O11, and replace both of those provisions with the following objective:

> **LF-LS-O12 – Use, development, and protection ~~of land~~**
>
> ~~The use of *land* in Otago maintains soil quality and contributes to achieving *environmental outcomes* for *fresh water*.~~
>
> The use, development, and protection of *land* and soil:
>
> (1) safeguards the life-supporting capacity of soil,
>
> (2) contributes to achieving *environmental outcomes* for *fresh water*, and
>
> (3) recognises the role of these resources in providing for the social, economic, and cultural well-being of Otago's people and communities.

9.3. LF-LS-P18 – Soil erosion

9.3.1. Introduction

586. As notified LF-LS-P18 reads:

> **LF–LS–P18 – Soil erosion**
>
> Minimise soil erosion, and the associated risk of sedimentation in water bodies, resulting from *land* use activities by:
>
> (1) implementing effective management practices to retain topsoil in situ and minimise the potential for soil to be *discharged* to *water bodies*, including by controlling the timing, duration, scale and location of soil exposure,
>
> (2) maintaining vegetative cover on erosion-prone *land*, and
>
> (3) promoting activities that enhance soil retention.

587. While no submitters opposed LF-LS-P18 in its entirety, there were a range of amendments requested as follows:

- changes to chapeau of the policy to include an element of 'practicability' (Oceana Gold, Contact, Ravensdown).
- clause (1): removal of the term "effective" (DairyNZ); addition of reference to "appropriate and effective management practices" (Ravensdown); and clarity around "scale" (Fed Farmers).
- clause (2): include reference to re-establishing, as well as maintaining, vegetative cover (Silver Fern Farms), and add reference to enhancing (QLDC) to
- clause (3): reference to soil structure alongside soil retention (Wise Response).

588. Ms Boyd did not support the introduction of a practicability test on the basis that the notified wording provides flexibility for resource users to adopt practices based on the activity being

undertaken. She was also of the opinion that the use of "appropriate" as well as "effective" would introduce uncertainty into the policy. Ms Boyd did agree that maintaining vegetative cover as required by (2) will not always be possible or practicable. Her solution was to reverse the order of clauses (1) and (2) so that maintaining vegetative cover is the first step (current clause (2)), and where that is not possible, effective management practices (current clause (1)) are required to be implemented.

589. That initial amendment still required topsoil to be retained in-situ, which Ms. Hunter for both Contact and Oceana Gold took issue with at the hearing, highlighting the fact that it this is not always possible. She also considers the changes made did not make grammatical sense and suggested an amendment to remove the reference to 'retain topsoil in situ'.

590. We note that in the final recommended version of this policy, 'in situ' has been removed by Ms Boyd as a 'minor' change in response to Ms Hunter's evidence. However, we agree with Ms. Hunter that the rest of that phrase should also be removed. This provision is about minimising soil erosion and loss of soil to water, not retaining topsoil per se. Not all activities will retain topsoil and it is not always possible to completely reinstate topsoil once an activity is finished (for example, Oceana Gold's mining operation). With this phrase removed, there is no need to include Ms Boyd's proposed change.

591. We also agree with DairyNZ that the word 'effective' is unnecessary in this provision. The management practice is required to minimise the potential soil for loss to water. It is Implicit that this be 'effective'.

592. We do agree with Ms Boyd that the amendment sought by QLDC to include reference to enhancement is not needed as clause (2) does not prevent this from occurring. We would also note that 'enhancement' may be promoted under clause (3). We also agree with Ms Boyd's response to the Wise Response's submission. Improving soil structure is also an activity that can be promoted under clause (3) to enhance soil retention.

9.3.2. Recommendation

593. We recommend that LF-LS-P18 be amended as follows:

LF–LS–P18 – Soil erosion

Minimise soil erosion, and the associated risk of sedimentation in water bodies, resulting from *land* use activities by:

(2) maintaining vegetative cover on erosion-prone *land*, to the extent practicable, ~~and~~

(1) implementing ~~effective~~ management practices to ~~retain topsoil in situ and~~ minimise the potential for soil to be *discharged* to *water bodies,* including by controlling the timing, duration, scale and location of soil exposure, and

(3) promoting activities that enhance soil retention.

9.4. Highly Productive Land

9.4.1. Discussion

594. As notified, highly productive land was referenced in LF-LS-O11 (as discussed above) and LF-LS-P19 which, as notified, reads as follows:

LF–LS–P19 – Highly productive *land*

Maintain the availability and productive capacity of highly productive *land* by:

(1) identifying highly productive *land* based on the following criteria:

(a) the capability and versatility of the *land* to support primary production based on the Land Use Capability classification system,

(b) the suitability of the climate for primary production, particularly crop production, and

(c) the size and cohesiveness of the area of *land* for use for primary production, and

(2) prioritising the use of highly productive *land* for primary production ahead of other *land* uses, and

(3) managing urban development in rural areas, including rural lifestyle and rural residential areas, in accordance with UFD–P4, UFD–P7 and UFD–P8.

595. As noted in the previous discussion, the NPSHPL came into force after the pORPS was notified. Section 62(3) of the RMA requires that a regional policy statement must give effect to a national policy statement. However, as Mr Logan for the ORC advised, the ability to make changes to the RPS is constrained by the submissions received as the NPSHPL has been introduced 'mid-process'.

596. Ms Boyd carefully reviewed the submissions received and identified where the NPSHPL can be given effect to, within the scope of those submissions. She advised that:

> *"several submitters acknowledged the proposed NPSHPL in their submissions and sought that the provisions of the pORPS better align with the (then draft) NPSHPL. The New Zealand Cherry Corp sought any further relief necessary to give effect to the NPSHPL when it is gazetted while Beef and Lamb + DINZ sought that the LF Chapter be better aligned with the NPSHPL when it is made operative."*

597. While the Panel considers this particular NPS to be a very blunt instrument, which creates a number of issues with the inclusion of LUC 3 land (particularly in the Clutha District context, where most of their flat land is LUC 3), along with its lack of flexibility and recognition of reality, we consider we are obligated to give effect to it as far as possible. The new government has signalled that there will be changes to the national planning framework, and we anticipate any review that precedes those change may include this NPS. Hence, the issues that concern us may well be addressed in due course but not in time for this process.

598. To align these provisions as closely as possible with the NPS, Ms Boyd has proposed a range of amendments, where submissions allow. Some of those amendments were supported by

submitters and some were not. Ms Boyd advised that the key matters still in contention are as follows:

a. *whether the 'interim' identification of highly productive land in the NPSHPL will protect land in Otago valued for horticulture and viticulture and, if not, whether (and how) the pORPS should 'fill the gap'.*

b. *Whether highly productive land is to be maintained or protected,*

c. *Use of the term 'productive capacity'.*

599. We first discuss the matter of 'maintain' or 'protect', which is also relevant to LF-LS-O11. Horticulture NZ sought that "the outcome related to the protection of [highly productive land] is focused on protecting the productive capacity of highly productive land from inappropriate subdivision, use and development" and Ms Wharfe provided some amendments to achieve that. In her initial s42A report, Ms Boyd agreed that it would be preferable to adopt the same wording as the NPSHPL but did not consider there is scope to make this amendment. However, in her final reply she accepted there was scope and recommended the following change to the title and chapeau of the policy:

LF-LS-P19 – Rural land and h~~H~~*ighly productive land*

~~Maintain~~ Protect the availability of rural land and the *productive capacity* of *highly productive land* by:

600. In her supplementary evidence on the NPSHPL, she recommended the standalone objective "the availability and productive capacity of highly productive land for land-based primary production is maintained now and for future generations", which is the second part of the original LF-LS-O11. Her final reply amendments recommended deleting this phrase altogether.

601. The changes recommended, however, do not reflect what HortNZ requested. Ms Wharfe's use of 'protection' was in relation to highly productive land (not rural land in general) in the previously recommended LF-LS-O11A and she did not request a change to the chapeau of LS-LS-P19. Furthermore, the change to that chapeau proposed by Ms Boyd significantly widens the application of the policy because it captures all rural land for protection.

602. We believe Ms Boyd's recommended LF-LS-O11A, with the changes proposed by Ms Wharfe, more appropriately reflects the NPS and we have adopted them accordingly. We note this approach to splitting the original LF-LS-O11 was also requested by Fulton Hogan. In terms of Fulton Hogan's other concerns, the request to maintain the availability of rural land for primary production is addressed by UFD-O4 while the reference to the NPS-HPL in LF-LS-P19 (2) (and UFD-P7(3)) acknowledges the consent pathway for mining activities.

603. With this change to LF-LS-O11, no change is required to the chapeau of LF-LS-P19.

604. In relation to the interim identification criteria, the issue related to the view of several submitters that some land in Otago valued for horticulture and viticulture will not be considered 'highly productive land' in the interim period because it is not located on LUC 1, 2, or 3. Ms Boyd agreed that this is problematic and was of the opinion that productive land outside LUC classes 1, 2, and 3 should be protected until such time as the mapping process is undertaken. Ms Boyd stated "that many of these areas are under pressure from urban development, which makes their protection even more important" although no evidence was produced to back up this statement.

605. However, Horticulture NZ raised concern with the amendments recommended in Ms Boyd's supplementary evidence. They felt that land valued for horticulture and viticulture that would have been identified as highly productive land using notified LF-LS-P19, would not be identified as such under the recommended amendments.

606. Ms Boyd took this onboard in her reply but was reluctant to support either of Ms Wharfe's proposed amendments. Being mindful of Mr Logan's legal submissions, she did not attempt to redefine criteria or definitions from the NPSHPL, but rather recommended a simpler amendment to LF-LS-P19 to protect additional areas of land that are valuable for horticulture and viticulture as follows:

> (2A) until clause 3.5(1) of the NPSHPL has been implemented, protecting land that is suitable for horticulture or viticulture from uses that are not *land-based primary production* or *rural industry*.[35]

607. We were presented with a significant volume of evidence throughout the hearings from Otago's agriculture, horticulture, and viticulture industry about the importance of the region as a primary producer. We have accepted that and have made changes to the pORPS to provide more recognition of what a significant contributor this sector is to not only the local economy, but also the national economy as the country's most significant export.

608. However, as with our concern over the inclusion of LUC 3 land in the NPS, we are now being asked to widen a protectionist/prioritisation approach further, through the proposed amendment. Mr Ford for HortNZ went so far as suggesting LUC 4 and 5 land should be included in the definition of HPL, while Mr Dicey for OWRUG stated that grapevines flourish on LUC 1 to LUC 6 land. Ms Wharfe's first suggested amendments would have had a region wide effect although her supplementary evidence restricted its application to central Otago (a restriction that would be difficult to define).

609. Our concern is that while submitters spoke broadly about urban and lifestyle encroachment on this land, very limited evidence was provided as to any reality about such a threat, where it was occurring, and what form it was taking. Nor was any cost benefit analysis provided on the effect of widening this restriction as requested, in terms of the impact it may have on other land uses (for example, the activities of Matakanui Gold) that look to operate, or can only operate, in rural areas. Furthermore, the issue does not appear to be a regional issue, being confined to certain parts of central Otago (in the geographic sense as opposed to local authority boundaries) so it does not seem to meet the threshold test of being a significant resource management issue for the region.

610. We do not necessarily agree with Ms Wharfe and Ms Boyd that it can be said, with any certainty, that the notified provision would provide protection for LUC 4 and 5 land, as that has not historically been seen as highly productive land (and we observe in passing the same can be said about LUC 3 land). Hence, the Panel does not think it appropriate to extend interim RPS protection this far, when the implications of it are unclear to us. However, there is nothing stopping the relevant District Council from initiating its own process to address the issue raised by HortNZ and the viticulture industry, if they think it is significant in the context of their district.

611. We do, however, accept Ms Boyd's recommendations in relation Ms Wharfe's concerns about the use of the term 'productive capacity' in the pORPS and where it should be deleted.

612. We also agree with the consequential amendments to the methods proposed by Ms Boyd in her supplementary evidence on the NPSHPL which require the identification and mapping of highly productive land.

9.4.2. Recommendation

613. As a consequence of the foregoing, the Panel recommend the following amendments:

1. In SRMR-I10 – Economic, replacing 'productive capacity of agricultural land' with 'the ability of land to support primary production'.
2. Amend LF-LS-O11 to read as follows:

LF–LS–O11 – *Land* and soil

~~The life-supporting capacity of Otago's soil resources is safeguarded and~~ The availability and productive capacity of highly productive land for land based *primary production* is ~~maintained~~ protected-now and for future generations.

3. Amend LF-LS-P19 as follows:

LF-LS-P19 –~~H~~ighly productive land

Maintain the availability and the *productive capacity* of *highly productive land* by:

(1) identifying *highly productive land* based on the following criteria:

~~(a) the capability and versatility of the *land* to support primary production based on the Land Use Capability classification system,~~

~~(b) the suitability of the climate for primary production, particularly crop production, and~~

~~(c) the size and cohesiveness of the area of *land* for use for primary production, and~~

(d) land must be identified as *highly productive land* if:

(i) it is in a general rural zone or rural production zone, and

(ii) it is predominantly *LUC 1, 2, or 3 land*, and

(iii) it forms a large and geographically cohesive area,

(e) land may be identified as *highly productive land* if:

(i) it is in a general rural zone or rural production zone, and
(ii) it is not *LUC 1, 2, or 3 land*, and
(iii) it is or has the potential to be highly productive for *land-based primary production* in Otago, having regard to the soil type, the physical characteristics of the land and soil, and the climate.

(f) land must not be identified as *highly productive land* if it was *identified for future urban development* on or before 17 October 2022, and

(2) prioritising the use of *highly productive land* for land-based *primary production* in accordance with the NPSHPL ~~ahead of other *land* uses~~, ~~and~~

(3) ~~managing urban development in rural areas, including rural lifestyle and rural residential areas, in accordance with UFD-P4, UFD-P7 and UFD-P8.~~

4. Add a new method as follows:

LF-LS-M11A – Identification of *highly productive land*

(1) In collaboration with *territorial authorities* and in consultation with *mana whenua*, Otago Regional Council must identify *highly productive land* in Otago in accordance with LF-LS-P19(1), and

(2) Otago Regional Council must include maps of the *highly productive land* identified in accordance with (1) in the Regional Policy Statement by the date specified in the National Policy Statement for Highly Productive Land.

5. Add the following new clause to LF-LS-M12:

(4) maintain the availability and *productive capacity* of *highly productive land* identified and mapped under LF-LS-M11A in accordance with LF-LS-P19, and

9.5. LF-LS-P16 – Integrated management

9.5.1. Discussion

614. As notified, LF-LS-P16 reads:

LF–LS–P16 – Integrated management

Recognise that maintaining soil quality requires the integrated management of *land* and *freshwater* resources including the interconnections between soil health, vegetative cover and *water* quality and quantity.

615. While most submitters supported this policy, Ravensdown opposes the provision in its entirety, because of duplication. Kāi Tahu ki Otago submitted that the policy direction should be stronger. Ms Boyd originally rejected the submissions of both Ravensdown and Kāi Tahu, but after further discussion with them, she recommended changes to ensure there is no duplication, and that maintaining soil quality requires managing land and freshwater was specifically highlighted as suggested by Kāi Tahu.

616. We agree with her changes and recommend them accordingly.

9.5.2. Recommendation

617. That LF-LS-P16 be amended as follows:

LF-LS-P16 – ~~Integrated management~~ Maintaining soil quality

~~Recognise that maintaining~~ Maintain soil quality ~~requires the integrated management of~~ by managing both *land* and *freshwater* resources, including the interconnections between soil health, vegetative cover and *water* quality and quantity.

9.6. LF-LS-P17 – Soil values

9.6.1. Introduction

618. As notified, LF-LS-P17 reads:

LF–LS–P17 – Soil values

Maintain the mauri, health and productive potential of soils by managing the use and development of *land* in a way that is suited to the natural soil characteristics and that sustains healthy:

(1) soil biological activity and *biodiversity*,

(2) soil structure, and

(3) soil fertility.

619. No submitters oppose the provision in its entirety with several supporting it. The DCC submitted that urban development cannot avoid effects on soil and also requested clarity on how forestry fits within this. They suggested replacing the term 'maintain' with "minimise to the degree practical, considering other objectives in the RPS". OWRUG sought the reference to 'mauri' be replaced with well-being, and that the word "natural" is deleted. Tōitu Te Whenua seeks that the soil characteristics and values listed in the policy are replaced with the national soil quality indicators, and soil biology. J Griffin requested that the policy promote management systems that build soil carbon, which will in turn improve soil biodiversity, structure and fertility, and provide some degree of climate remediation.

620. In relation to the DCC submission, Ms Boyd considered the policy provides flexibility for a range of actions to occur, so no changes were required. She recommended rejecting the OWRUG submission because clauses (1)-(3) of LF-LS-P17 are considered to provide clear guidance on this. With respect to the Toitū Te Whenua and Griffin submissions, she felt the factors they discuss are already provided for under the three clauses of the policy as notified. In addition, she was of the view that specific details relating to target ranges, if any, are best placed in a regional plan.

621. While the DCC did not address their submission at the hearing, the Panel has some sympathy for their position. Quite clearly, many activities that people and communities carry out will not maintain the productive potential of soils. Urban development is one such example, but mining is another. Hence, we consider the phrase to 'the extent reasonably practical' is also appropriate in this policy.

622. While we agree with Ms Boyd in relation to the Toitū Te Whenua and Griffin submissions, we do not agree with her position in relation to 'mauri'. We have discussed this elsewhere in our decision, and the same reasoning applies here. As we said there, "'mauri' is not readily definable as it relates to a combination of physical and ecological elements which are scientifically demonstrable, as well as amenity aspects which are far less capable of precise description. In addition, it can involve a range of te ao Māori concepts, both physical and metaphysical." We agree with OWRUG that the focus should be on the health and productive potential of soil which, if taken care of, will maintain mauri.

623. We also agree with OWRUG that the reference to 'natural' should be removed as this suggests soils that might have improved fertility compared to their natural state, would need to revert back. It also suggests any improvement in fertility may not be possible.

9.6.2. Recommendation

624. The Panel recommends that LF-LS-P17 be amended as follows:

LF-LS-P17 – Soil values

Maintain the ~~mauri,~~ health and productive potential of soils, to the extent reasonably practicable by managing the use and development of *land* in a way that is suited to the ~~natural~~ soil characteristics and that sustains mauri through healthy:

(1) soil biological activity and *biodiversity*,

(2) soil structure, and

(3) soil fertility.

9.7. LF-LS-P20 – Land use change

9.7.1. Discussion

625. As notified, LF-LS-P20 reads:

LF–LS–P20 – *Land* use change

Promote changes in *land* use or *land* management practices that improve:

(1) the sustainability and efficiency of *water* use,

(2) resilience to the impacts of *climate change,* or

(3) the health and quality of soil.

626. There were several submissions on this policy, including two in support and one seeking its deletion. Several submitters sought amendments ranging from minor adjustments to the addition of new clauses addressing a range of matters.

627. Ms Boyd made two small changes to the policy in her s42A report. We agree with her response to the submissions and have accepted her recommendations accordingly.

9.7.2. Recommendation

628. The Panel recommends LF-LS-P20 be amended as follows:

LF-LS-P20 – *Land* use change

Promote changes in *land* use or *land* management practices that support and improve:

(1) the sustainability and efficiency of *water* use,

(2) resilience to the impacts of *climate change,* ~~or~~

(3) the health and quality of soil,~~.~~ or

(4) *water* quality.

9.8. LF-LS-P21 – Land use and fresh water

9.8.1. Introduction

629. As notified LF-LS-P21 reads:

LF–LS–P21 – *Land* use and *fresh water*

Achieve the improvement or maintenance of fresh water quantity or quality to meet environmental outcomes set for Freshwater Management Units and/or rohe by:

(1) reducing direct and indirect discharges of contaminants to water from the use and development of land, and

(2) managing land uses that may have adverse effects on the flow of water in surface water bodies or the recharge on groundwater.

630. A wide range of submissions were received on this provision, with Beef + Lamb and DINZ seeking that the policy be deleted, or moved to the LF-FW chapter, on the basis that it is in the wrong subchapter. Ms. Boyd disagreed with this, and we accept her position as the policy is addressing land use activities.

631. Several submitters sought changes to the chapeau of the policy and Ms Boyd agreed that the chapeau wording of the could be simplified. She adopted the amendment sought by Contact and others, as she considered this consistent with the wording of LF-FW-P7 and that gives effect to policy 5 of the NPSFM. This amendment also included changing 'fresh water' to 'water bodies'. This was in response to the DairyNZ submission to ensure 'coastal water' is not addressed within this policy, as that would be inconsistent with the NPSFM.

632. The amendment promoted did not include the request from Kāi Tahu ki Otago and DOC which seeks to include reference to ecosystem values. While she agreed with their reasoning for the change, she was unsure what is meant by the term 'ecosystem values'. In response to this, Ms McIntyre for Kai Tahu noted that *"other amendments recommended to the chapeau align wording more closely to that in the sole NPSFM objective, but without the reference to freshwater ecosystems included in that sole objective."* In her view including reference to freshwater ecosystems in this policy would give better effect to the NPSFM objective.

633. We agree with Ms McIntyre and have included reference to 'freshwater ecosystems' in the chapeau. This change will also better reflect Policy 5 of the NPSFM.

634. Several submitters also sought amendments to clause (1) to recognise that it is not necessary to reduce discharges of contaminants to water, and that there are often circumstances where management of discharges may be more appropriate than their reduction or avoidance. Ms Boyd agreed with these submitters and promoted a change to the wording to include "or otherwise managing" after "reducing". This wording was generally accepted by submitters who presented evidence at the hearing, with the exception of Kai Tahu who felt this change does not provide clear guidance. We disagree with Ms McIntyre as the reason for the management of adverse effects is clear – it is to maintain the health and well-being of water bodies and freshwater ecosystems. Hence, we agree with Ms Boyd's approach to this matter and recommend her changes accordingly.

635. Ms Boyd did not recommend any changes to clause (2). In relation to DairyNZ's request to delete "may" from clause (2), she considered a more cautious approach to managing those activities is

required on the basis that it may not be certain if some land uses will have adverse effects on freshwater. Given such land uses could be for long time periods (e.g. production forestry), the Panel agrees that caution is warranted in catchments that may be susceptible to this.

636. Three submitters sought the addition of a new clause regarding the maintenance and enhancement of riparian margins. Ms Boyd agreed that healthy riparian margins contribute to the wider health and well-being of freshwater bodies and that this should be recognised in the policy. However, she did not consider it necessary to identify specific reasons for this in the policy (such as reducing sedimentation, improving the functioning of catchment processes etc. as requested) because there may be many reasons for this action. We agree and have accepted her recommended amendment as appropriate.

637. In the Reply Report, a recommended subclause (2A) was advanced which we believe may have emanated from DOC's submission on the FMU Vision objectives. We are comfortable with the recommended wording in that subclause say for the wording being amended to refer to some catchments. o avoid any issues about scope for its inclusion, we rely upon clause 49(2)(b) of the First Schedule.

9.8.2. Recommendation

638. We recommend that LF-LS-P21 is amended as follows:

LF-LS-P21 – *Land* use and *fresh water*

~~Achieve the improvement or maintenance of *fresh water* quantity, or quality~~ <u>The health and well-being of *water bodies* and freshwater ecosystems is maintained</u> to meet *environmental outcomes* set for *Freshwater Management Units* and/or rohe by:

(1) reducing <u>or otherwise managing the adverse effects of</u> direct and indirect *discharges* of *contaminants* to *water* from the use and development of *land*, ~~and~~

(2) managing *land* uses that may have adverse *effects* on the flow of *water* in surface *water bodies* or the recharge of *groundwater*~~.~~<u>, and</u>

<u>(2A) recognising the drylands nature of some of Otago's catchments and the resulting low *water* availability, and</u>

<u>(3) maintaining or, where degraded, enhancing the values of riparian margins.</u>

9.9. LF-LS-P22 – Public access

9.9.1. Discussion

639. As notified, LF-LS-P22 reads:

LF–LS–P22 – Public access

Provide for public access to and along *lakes* and *rivers* by:

(1) maintaining existing public access,

(2) seeking opportunities to enhance public access, including by *mana whenua* in their role as kaitiaki and for gathering of mahika kai, and

(3) encouraging landowners to only restrict access where it is necessary to protect:

(a) public health and safety,

(b) significant natural areas,

(c) areas of outstanding natural character,

(d) outstanding natural features and landscapes,

(e) places or areas with special or outstanding *historic heritage* values, or

(f) places or areas of significance to *takata whenua*, including wāhi tapu and wāhi tūpuna.

640. This policy was supported by four submitters while several others sought amendments to, and clarification of, the notified wording. A number of submitters sought the addition of sub-clauses in (3) to include other values or circumstances where access should be restricted. These included:

- Areas of establishing vegetation/restoration projects, on the basis that access should be restricted to avoid or minimise damage to young and establishing vegetation,
- Against negative impacts of public access on farming business, to ensure negative impacts from public access on farming businesses can be mitigated.
- Protect against interruption of business operations, for health and safety matters, and for animal welfare issues, in order to provide for landowner's interests.
- Critical farming activities including lambing, fawning, mustering and the movement of stock.
- Biosecurity.
- To ensure a level of security with the operational requirements of a lawfully established activity.

641. Ms Boyd recommended several changes to the policy including an addition to clause (3) to restrict access to reflect the operational requirements of an activity. Overall, we are comfortable with the recommendations made by Ms Boyd and have adopted them accordingly.

9.9.2. Recommendation

642. The Panel recommends that LF-LS-P22 be amended as follows:

LF-LS-P22 – Public access

Provide for public access to and along *lakes* and *rivers* by:

(1) maintaining existing public access,

(2) seeking opportunities to enhance public access, including access by *mana whenua* in their role as kaitiaki and for gathering of ~~mahika kai~~ *mahika kai*, and

(3) encouraging landowners to ~~only~~ avoid restricting access ~~where~~ unless it is necessary to protect:

(a) ~~public~~ health and safety,

(b) significant natural areas,

(c) areas of outstanding natural character,

(d) outstanding natural features and landscapes,

(e) places or areas with special or outstanding *historic heritage* values, ~~or~~

(f) places or areas of significance to ~~*takata whenua*~~ Kāi Tahu, including wāhi taoka, wāhi tapu and wāhi tūpuna,~~.~~

(g) establishing vegetation, or

(h) a level of security consistent with the operational requirements of a lawfully established activity.

9.10. Pest species (including wilding conifers)

9.10.1. Discussion

643. As notified, the pORPS contains two policies focused on managing the impacts of wilding conifers on outstanding natural features and landscapes and significant natural areas through NFL-P5 and ECO-P9. These were as follows:

ECO-P9 – *Wilding conifers*

Reduce the impact of *wilding conifers* on indigenous *biodiversity* by:

(1) avoiding *afforestation* and *replanting* of *plantation forests* with *wilding conifer* species listed in APP5 within:

(a) areas identified as *significant natural areas,* and

(b) buffer zones adjacent to *significant natural areas* where it is necessary to protect the *significant natural area*, and

(2) supporting initiatives to control existing *wilding conifers* and limit their further spread.

NFL-P5 – *Wilding conifers*

Reduce the impact of *wilding conifers* on outstanding and *highly valued natural features and landscapes* by:

(1) avoiding *afforestation* and *replanting* of *plantation forests* with *wilding conifer* species listed in APP5 within:

(a) areas identified as outstanding natural features or landscapes, and

(b) buffer zones adjacent to outstanding natural features and landscapes where it is necessary to protect the outstanding natural feature or landscape, and

(2) supporting initiatives to control existing *wilding conifers* and limit their further spread.

644. A number of submitters sought inclusion of new provisions, or amendments to existing provisions, to provide clear policy direction on pest control. DOC sought a new policy in the ECO chapter addressing pests to complement ECO-P9. However, their planning witness, Mr Brass,

suggested this would be better placed in LF-LS section. Ms Lynette Baish for Ernslaw One also sought a new policy, focused specifically on wilding conifers. At the hearing, many of the witnesses who appeared for OWRUG, Federated Farmers, and DairyNZ noted the impacts of pests on productive land while Mr Brass for DOC also highlighted the need to enable pest control activities such as the use of pesticides. Associated with this issue was the request from some submitters to include in the pORPS, the definition of 'pest' from the Biosecurity Act 1993.

645. In her opening statement for the LF hearing, Ms Boyd addressed this issue, stating that she "was not opposed to incorporating this type of direction in the pORPS and that the LF-LS section was the appropriate place for this given its focus on land resources." After hearing the evidence presented at the various hearings, Ms Boyd's final assessment of the matter was carried out in her reply report on 'Introduction and General Theme' matters. She noted that the evidence confirmed that "biodiversity has been lost or degraded due to human activities and the presence of pests and predators" and that "the direction on managing pest species in the pORPS is unnecessarily narrowed to only managing the effects of specific wilding conifer species on outstanding natural features and landscapes and significant natural areas." As a consequence, she recommended a new policy for inclusion in the LS chapter that addressed both pests and wilding conifers, which incorporate the direction from ECO-P9 and NFL-P5, as generally supported by submitters.

646. A number of submitters sought to expand the scope of ECO-P9 and APP5, which currently just lists conifers prone to spread, to apply to all invasive/wilding tree species, not only wilding conifers. Others sought the restriction of such plantings in not just plantation forests but in shelterbelts and amenity plantings also.

647. While Ms Boyd accepted that there are other tree species that may result in wilding spread, she did not make any changes to the policy or APP5. Nor did she recommend widening the framework to include smaller plantings. While she considered it appropriate for the pORPS to contain broader direction on the management of pests, she was concerned that this should not duplicate the requirements of the Biosecurity Act 1993 or the Otago Regional Pest Management Plan 2019-2029 (Otago PMP). Furthermore, she was unsure if this was a region wide concern. Despite this, she felt that her recommendation to incorporate additional direction on pest species will assist with addressing the concerns of the submitters. As a part of that, she accepted the need for the definition of pest as requested.

648. Having reviewed Ms Boyd's recommended policy, and other evidence the Panel is of the view that pest species, particularly wilding conifers, are a region-wide issue. The Panel are comfortable that Ms Boyd's recommended wording addresses the issue appropriately. While the policy framework does not identify other wilding tree species, there is nothing stopping local authorities from addressing these concerns in lower order planning documents. That is in fact what currently occurs in District Plans.

9.10.2. Recommendation

649. The Panel recommends as follows:

(1) the deletion of ECO-P9 and NFL-P5 and their replacement with the following new policy in the LF-LS chapter:

LF-LS-P16A – Managing pests

Reduce the impact of *pests*, including *wilding conifers*, by:

(1) avoiding *afforestation* and *replanting* of *plantation forests* with *wilding conifer* species listed in APP5 within:
   (a) areas identified as outstanding natural features, outstanding natural landscapes, or *significant natural areas*, and
   (b) buffer zones adjacent to the areas listed in (a) where it is necessary to protect those areas,

(2) outside *plantation forests*, avoiding the planting of *wilding conifer* species listed in APP5 and any other *pests* in a way that is consistent with the Otago Regional Pest Management Plan 2019-2029,

(3) enabling the control of *pests* on *land,* and

(4) supporting initiatives to control *pests* and limit their further spread.

(2) Include the following new clause in LF-LS-M12 (District plans):

LF–LS–M12 – *District plans*

(1) manage *land* use change by:

(aa) avoiding the planting of *pest* plants in accordance with LF-LS-P16A,

(3) Include reference to the policies of the LF chapter seeking to 'reduce the impacts of pests' in the first line of LF-LS-E4 (Explanation).

(4) Including the following new paragraph at the beginning of LF-LS-PR4 (Principal Reasons):

Pests, including *wilding conifers*, pose a range of threats to Otago's environment. While the regional pest management plan is the primary tool for controlling *pests* under the Biosecurity Act 1993, it is important that the management of land works alongside that tool to reduce the impacts of *pests*.

9.11. LF-LS-M12, LF-LS-M13, Explanation and Principal Reasons

650. In addition to the consequential amendments already discussed, Ms Boyd has recommended several other relatively minor amendments to these provisions, generally to reflect amendments in the policy approach. We have reviewed the submissions and Ms Boyd's final response to those, and are generally comfortable with the position she reached, with one exception in relation to LF-LS-M12.

651. City Forests Limited opposes clause 1(a), which requires "controlling the establishment of new or any spatial extension of existing plantation forestry activities or permanent forestry activities where necessary to give effect to an objective developed under the NPSFM" and requested that it be deleted. Rayonier and Ernslaw One also raised concern with this provision while the Waitaki DC sought two new sub-clauses that would provide guidance for managing water short catchments.

652. Mr Peter Oliver for City Forests and Ms Lynette Baish for Ernslaw One addressed this issue at the hearing. Mr Oliver and Ms Baish did not consider the evidence was as clear as Ms Boyd suggested in her s42A report when she said that afforestation can affect water yield and *"given the dry*

nature of some of Otago's catchments and recent increases in forestry expansion, it may be necessary to control forestry activities in order to give effect to environmental outcomes established under the NPSFM."

653. In this context, Ms Boyd highlighted regulation 4(1)(a) of the NESPF that specifically allows plan rules to be more stringent than the NES if those rules give effect to an objective developed to give effect to the NPSFM. However, we note that LF-LS-P21 (2) requires the management of land uses that may have adverse effects on the flow of water in surface water bodies or the recharge of groundwater. This provision does not identify specific activities and in our view, nor should the method.

654. Hence, we agree with Ms Baish that the method "is overly directive and narrowly targeted" and as a consequence, we prefer her recommended amendment, as follows:

> *"controlling the establishment of new or any spatial extension of existing <u>land use activities</u> where necessary to give effect to an objective developed under the NPSFM;"*

9.12. LF-LS-M11 – Regional plans

9.12.1. Discussion

655. As notified LF-LS-M11 reads:

LF–LS–M11 – *Regional plans*

Otago Regional Council must publicly notify a Land and Water *Regional Plan* no later than 31 December 2023 and then, when it is made operative, maintain that *regional plan* to:

(1) manage *land* uses that may affect the ability of *environmental outcomes* for *water* quality to be achieved by requiring:

  (a) the development and implementation of *certified freshwater farm plans* as required by the RMA and any regulations,

  (b) the adoption of practices that reduce the *risk* of sediment and nutrient loss to *water*, including by minimising the area and duration of exposed soil, using buffers, and actively managing critical source areas,

  (c) effective management of effluent storage and applications systems, and

  (d) *earthworks* activities to implement effective sediment and erosion control practices and setbacks from *water bodies* to reduce the *risk* of sediment loss to *water*, and

(2) provide for changes in *land* use that improve the sustainable and efficient allocation and use of *fresh water*, and

(3) implement policies LF–LS–P16 to LF–LF–P22.

656. There were several submissions received on this provision, with Beef + Lamb and DINZ again seeking that it be deleted, or moved to the LF-FW chapter, on the basis that it is in the wrong subchapter. Ms. Boyd disagreed with this, and we again accept her position given the policy is addressing land use activities.

657. Ms Boyd agreed with Fish & Game and Kāi Tahu ki Otago that the clause (1)(a) reference to the 'RMA and any regulations' is not necessary and recommended its removal. She did not recommend any further amendments to the method in her s42A report except in relation to a consequential amendment to enable implementation of a new policy (LF-LS-P16A) that was recommended during the non-freshwater process.

658. The proposed sub-clause 2A addition by way of an amendment to LF-LS-M11 is required because this method specifies how the full suite of LF-LS policies will be implemented in regional plans, and therefore needs to reflect any amendments to non-FPI provisions as well as FPI provisions. The proposed wording is "enable the discharge of contaminants to land for pest control". Ms Boyd notes that "although arising from the non-FPI part, I consider this also responds to DOC's FPI submission." We agree the amendment is appropriate and have recommended the change accordingly.

659. Ms. Boyd did, however, make some further amendments in response to submissions in her opening statement. However, these were not discussed but were merely referred to as 'minor' changes. We do not consider them to be minor as they broaden the impact of the provisions. One such change was to clause (1)(b), where 'reduce' was deleted and replaced with 'avoid or minimise' in response to a submission from Fish & Game, who sought reference to avoiding land uses which result in any pugging in critical source areas and limiting high risk activities on steep slopes. Given the direction in LF-LSP18 and 21 (which refer to 'minimising' and 'reducing'), we consider 'reduce' to be the appropriate word in this instance so have not recommended that change.

660. Ms Boyd initially rejected Kāi Tahu ki Otago's request to amend clause (2) to delete 'efficient allocation' and instead reference reducing demand on freshwater resources to give effect to objectives developed under the NPSFM. She subsequently made this amendment as a 'minor' change. While we do not agree that it is a minor change, we do agree that the change is appropriate based on Ms McIntyre's' reasoning in her evidence for Kai Tahu. She advised that Kai Tahu sought that:

> *this method refer to the ability for regional plans to provide for changes in land use that reduce demand for water by methods other than simply improving efficiency of use. This has not been accepted in the section 42A report, but no clear reason is given for this. I consider that in areas where there is a need to reverse over-allocation, a broad range of tools must be available to ORC to achieve this. In some areas I consider that improvements in water use efficiency alone are unlikely to achieve this. In such circumstances, controls on water demanding land uses should be a tool that ORC can consider in development of the LWRP.*

661. We agree with Ms McIntyre so have recommended the change accordingly.

662. As discussed above in relation to LF-FW-M5 and LF-FW-M6, our understanding is that the date that the regional plan is to be publicly notified is uncertain and we consider it appropriate to delete the date requirement in the chapeau to reflect this.

663. The Panel has carefully considered Ms Boyd's response to the other submissions made on this provision. We are comfortable with her conclusions so adopt them accordingly.

9.12.2. Recommendation

664. We recommend that LF-LS-M11 is amended as follows:

LF-LS-M11 – Regional Plans

Otago Regional Council must publicly notify a Land and Water Regional Plan ~~no later than 31 December 2023~~ and then, when it is made operative, maintain that *regional plan* to:

(1) manage *land* uses that may affect the ability of *environmental outcomes* for *water* quality to be achieved by requiring:

(a) the development and implementation of *certified freshwater farm plans,* ~~as required by the RMA and any regulations,~~

(b) the adoption of practices that reduce the *risk* of sediment and nutrient loss to *water,* including by minimising the area and duration of exposed soil, using buffers, and actively managing critical source areas,

(c) effective management of effluent storage and application systems, and

(d) *earthworks* activities to implement effective sediment and erosion control practices and setbacks from *water bodies* to reduce the *risk* of sediment loss to *water,* and

(2) provide for changes in *land* use that improve the sustainable and efficient ~~allocation and~~ use of *fresh water* <u>and that reduce water demand where there is existing over-allocation,</u> and

<u>(2A) enable the *discharge* of *contaminants* to *land* for *pest* control, and</u>