IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE

CIV-2024-412-37
CIV-2024-412-38
CIV-2024-412-40
CIV-2024-412-41
CIV-2024-412-42
[2024] NZHC 3523

BETWEEN	OTAGO FISH AND GAME COUNCIL AND CENTRAL SOUTH ISLAND FISH AND GAME COUNCIL, KĀI TAHU RŪNANGA, QUEENSTOWN LAKES DISTRICT COUNCIL, OCEANA GOLD (NEW ZEALAND) LIMITED, ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Appellants
AND	OTAGO REGIONAL COUNCIL Respondent

Hearing: On the papers

Judgment: 22 November 2024

JUDGMENT OF HARLAND J
(consent orders)

Introduction

[1] This judgment addresses the proposed settlement of five appeals against decisions issued by the Otago Regional Council (Regional Council) on the freshwater planning instrument parts of the Proposed Otago Regional Policy Statement 2021

(proposed RPS)[1] under s 299 and cl 56, sch 1 of the Resource Management Act 1991 (the Act).

[2] The appellants are:

(a) Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga (collectively Kāi Tahu[2]) the southern rūnanga of Kāi Tahu iwi who hold authority (rakatirataka) within the Otago region (CIV-2024-412-38);

(b) The Otago and Central South Island councils of Fish & Game (Fish & Game) (CIV-2024-412-37);

(c) Oceana Gold (New Zealand) Ltd (Oceana Gold) a gold mining company (CIV-2024-412-41);

(d) Queenstown Lakes District Council (Queenstown Lakes) (CIV-2024-412-40); and

(e) Royal Forest and Bird Protection Society of New Zealand (Forest & Bird) (CIV-2024-412-42).

[3] There are various parties to each of the appeals referred to as interested parties. The parties, including the interested parties, appear at the end of this judgment.

[4] Fifteen provisions of the proposed RPS were appealed, with consent orders now sought for eight of them.[3] Counsel have filed a comprehensive joint memorandum dated 30 September 2024 seeking six consent orders. Two additional memoranda were received from counsel for Kāi Tahu on 7 October 2024. reached in respect of them and the proposed amendments for this Court's review.

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1 Otago Regional Council "Proposed Otago Regional Policy Statement June 2021 (Annotated Decisions Version)" at 132 [Proposed RPS] < 300824-clean-annotated-decisions-version.pdf >.

2 Mr Cameron appears as "Counsel for Kāi Tahu" in his submissions, so I adopt that term.

3 LF-WAI-P1 (prioritisation); LF-FW-O9 (wetlands); LF-FW-P10A (managing wetlands); LF-FW-P16 (discharges containing animal effluent, sewage, greywater and industrial and trade waste); LF-FW-M6 (regional plans); and LS-LF-P21 (land use and fresh water); LF-VM-O2 (vision statement for the Clutha (Mata-au)); LF-VM-O4 (vision statement for the Taiari).

[5] The parties attended mediation on 19 August 2024. The amendments to the proposed RPS arise from this process. All parties have either agreed to the proposed amendments or agree to abide the Court's decision in respect of them. The Court's judgment is made without full recourse to the evidence called at the first instance hearing and must be viewed in that light.

Procedural history

[6] The proposed RPS was notified as a single freshwater planning instrument on 26 June 2021. In *Otago Regional Council v Royal Forest and Bird Protection Society,* this Court made declarations that:[4]

(a) the Regional Council's determination that the whole of the proposed RPS was a freshwater planning instrument was in error;

(b) the Regional Council was required to decide which parts of the proposed RPS relate to freshwater and will be subject to the freshwater planning process; and

(c) the Regional Council would then need to notify those parts of the proposed RPS that are to be treated as a freshwater planning instrument and begin again the freshwater planning process in relation to those parts.

[7] By 15 September 2022, the Regional Council decided which parts of the proposed RPS related to freshwater and would therefore be subject to that planning process. The Regional Council notified which part of the proposed RPS would be subject to the freshwater planning process under s 80A(4) of the Act on 30 September 2022.

[8] On 3 May 2023, the Chief Freshwater Commissioner convened a Freshwater Hearings Panel (the Panel) to consider the freshwater parts of the proposed RPS under cl 38, sch 1 of the Act. The Panel heard submissions in August and September 2023. It issued a report dated 21 March 2024 that made its recommendations on the freshwater planning instruments of the proposed RPS. On 27 March 2024, the

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4 *Otago Regional Council v Royal Forest & Bird Protection Society of New Zealand Incorporated* [2022] NZHC 1777, (2022) 24 ELRNZ 60 at [238].

Regional Council accepted each recommendation in the Panel's report and notified its decision on 30 March 2024.

[9] The appeals arise from that decision.

Statutory framework

[10] Under s 62(3) of the Act, the proposed RPS must give effect to a national policy statement, coastal policy statement or a national planning standard. "Giving effect to" simply means "to implement".[5] A Regional Council must prepare any proposed RPS in accordance with a national policy statement[6] and it must also achieve the purpose of the Act (sustainable management as defined in s 5) by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the region's natural and physical resources.[7]

[11] In this case, both the National Policy Statement for Freshwater Management 2020 (NPSFM 2020) and the New Zealand Coastal Policy Statement 2010 (NZCPS) are relevant.

[12] The NPSFM 2020 states that regional policy statements must:

(a) contain an objective on how management of the freshwater of a region gives effect to Te Mana o te Wai;[8]

(b) contain long-term visions for freshwater management units;[9] and

(c) include provisions for the integrated management of the effects of the use and development of land on freshwater and the use and development of land and freshwater on receiving environments.[10]

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5 *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited & Ors* [2014] NZSC 38, [2014] 1 NZLR 593 at [77].
6 Resource Management Act 1991, s 61(1)(da).
7 Section 59.
8 National Policy Statement Freshwater Management 2020, cl 3.2(3) [NPSFM 2020].
9 Clause 3.3(1) and (2).
10 Clause 3.5(2).

[13] Part 1.3 of the NPSFM 2020 outlines Te Mana o te Wai as a concept of fundamental importance. Paragraph (5) details the hierarchy in Te Mana o te Wai:

> (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.

[14] Part 2.1 of the NPSFM 2020 states its single objective in the same terms, with 3.2(2) directing regional councils to apply it when developing objectives, policies, methods, and criteria for any of the purposes under subpart 3 of the NPSFM 2020 relating to natural inland wetlands, rivers, fish passage, primary contact sites, or water allocation.

Jurisdiction on appeal

[15] All counsel acknowledge:

> (a) there is no jurisdiction to make an order unless the Court finds that there has been an error of law;[11] and
>
> (b) if there has been an error of law, whether and on what terms an order should be made is for the Court to determine, notwithstanding any agreements reached between the parties.

[16] The appeals are made under cl 56, sch 1 of the Act, which stipulates:

> **56 Right of appeal in relation to accepted recommendation**
>
> (1) A person who made a submission on a freshwater planning instrument may appeal to the High Court in respect of a provision or matter relating to the freshwater planning instrument—
>
> (a) that the person addressed in the submission; and
>
> (b) in relation to which the relevant regional council accepted a recommendation of the freshwater hearings panel which resulted in—

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11 *Man O'War Farm Ltd v Auckland Council* [2017] NZHC 202 at [33].

(i) a provision or matter being included in a freshwater planning instrument; or

(ii) a provision or matter being excluded from a freshwater planning instrument.

(2) If a regional council decides to accept a recommendation of the freshwater hearings panel that is outside the scope of submissions, a person who made a submission may appeal to the High Court in respect of that decision.

(3) An appeal under this clause may be on a question of law only.

(4) Except as otherwise provided in this clause, sections 299(2), 300 to 308, and Part 11A apply with all necessary modifications.

[17] As stated, only parties that made a submission on the proposed RPS may appeal. Section 299(2) of the Act provides that appeals must be made in accordance with the High Court Rules 2016 (the Rules), except to the extent the Rules are inconsistent with ss 300–307 of the Act.[12] Rule 20.19 declares this Court's powers after hearing an appeal. It provides:

20.19 Powers of court on appeal

(1) After hearing an appeal, the court may do any 1 or more of the following:

(a) make any decision it thinks should have been made:

(b) direct the decision-maker—

(i) to rehear the proceedings concerned; or

(ii) to consider or determine (whether for the first time or again) any matters the court directs; or

(iii) to enter judgment for any party to the proceedings the court directs:

(c) make any order the court thinks just, including any order as to costs.

(2) The court must state its reasons for giving a direction under subclause (1)(b).

(3) The court may give the decision-maker any direction it thinks fit relating to—

[12] This Court has previously held there is nothing in ss 300–307 of the Act that is inconsistent with r 20.19 of the Rules: *Man O'War Farm v Auckland Council,* above n 11, at [27].

(a) rehearing any proceedings directed to be reheard; or

(b) considering or determining any matter directed to be considered or determined.

(4) The court may act under subclause (1) in respect of a whole decision, even if the appeal is against only part of it.

(5) Even if an interlocutory or similar decision in the proceedings has not been appealed against, the court—

(a) may act under subclause (1); and

(b) may set the interlocutory or similar decision aside; and

(c) if it sets the interlocutory or similar decision aside, may make in its place any interlocutory or similar decision the decision-maker could have made.

(6) The powers given by this rule may be exercised in favour of a respondent or party to the proceedings concerned, even if the respondent or party did not appeal against the decision concerned.

[18] If satisfied there is an error of law, the Court's powers under r 20.19 are wide, enabling it to make virtually any order it thinks appropriate.[13] In *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council,* French J noted the following with regard to s 299 of the Act and errors of law:[14]

> [34] Appellate intervention is therefore only justified if the Environment Court can be shown to have:
>
> i) applied a wrong legal test; or,
>
> ii) come to a conclusion without evidence or one to which on the evidence it could not reasonably have come; or,
>
> iii) taken into account matters which it should not have taken into account; or,
>
> iv) failed to take into account matters which it should have taken into account.
>
> [35] The question of the weight to be given relevant considerations is for the Environment Court alone and is not for reconsideration by the High Court as a point of law.

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13 Jessica Gorman (ed) *McGechan on Procedure* (online ed, Thomson Reuters) at [HR20.19.01].

14 *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council* [2012] NZHC 735, [2013] NZRMA 126, citing *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).

> [36] Further, not only must there have been an error of law, the error must have been a "material" error, in the sense it materially affected the result of the Environment Court's decision.
>
> (footnotes omitted)

[19] Although referring to the Environment Court, in my view, the same principles apply to the Panel's decision.

[20] I note that whether there is evidence to support a finding is a matter for the court's determination. The sufficiency of evidence, rather than the want of it, cannot amount to a point of law.[15] A failure to consider evidence that was requested, and counsel's submissions on that evidence, has been held as unfair and a breach of natural justice.[16]

[21] Finally, I note Ronald Young J's dicta in *Re MacKenzie Irrigation Company Ltd*:[17]

> [17] Remedies in appeals such as this from specialist Tribunals where an error of law is identified, even though this Court has power to substitute a rule which it believes cures the error, is preferably left to the specialist Court [here Panel]. The reasons, given the specialist Court's expertise, are self-evident. The position may be different, however, if all the parties agree on a solution or the remedy arising from the finding of an error of law seems inevitable. Here, I consider the outcome proposed is straightforward and inevitable and while there is not consent by all parties there is no active opposition to the proposed solution. I believe that the proposed amendment can be incorporated within the plan and rules without derogating from the Board's drafting and overall scheme.

Discussion

[22] A topic-based approach has been adopted by the parties for points raised by various parties in their submissions or appeals. In this case, the topics have been allocated an identifying series of capital letters, numbers and an identifying description of the topic itself. I address each of the alleged errors of law and the proposed changes sought by reference to the topic identifiers used.

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15 *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [32]; *Raceway Motors Ltd v Canterbury Regional Planning Authority* [1976] 2 NZLR 605 (SC).

16 *Haines House Haulage Northland Ltd v Whangarei District Council* [2020] NZHC 525 at [139]–[140].

17 *Re MacKenzie Irrigation Company Ltd* [2006] ELHNZ 254, affirmed in *Man O'War,* above n 11, at [28].

LF-WAI-P1 – Prioritisation

[23] Oceana Gold and Queenstown Lakes submitted on LF-WAI-P1.

[24] The joint memorandum refers to the hierarchy of obligations in Te Mana o te Wai at cl 1.3(5) of the NPSFM 2020. Counsel submitted LF-WAI-P1 is inconsistent with the NPSFM 2020.

[25] Clause 3.2(2)(c) of the NPSFM 2020 requires regional councils to:

> … 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

[26] The health and well-being of water bodies and freshwater ecosystems must be prioritised over matters such as the social, economic and cultural well-being of people and communities.

[27] The wording in the proposed RPS is as follows:[18]

> In all management of fresh water in Otago, prioritise:
>
> (1) first, the health and well-being of water bodies and freshwater ecosystems, (te hauora o te wai) *and the contribution of this to the health and well being of the environment (te hauora o te taiao),* together with the exercise of mana whenua to uphold these.
>
> (2) second, the 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

[18] Proposed RPS, above n 1, at 132.

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

(emphasis added)

[28] Oceana Gold appealed the inclusion of the emphasised portion of cl (1). It submitted the emphasised portion imports the priorities and concerns of cl (3), if one has regard to the definition of "environment" in the Act, which includes "people and communities". I agree.

[29] The suggested amendment gives effect to Te Mana o te Wai and applies the NPSFM 2020 as required. It reads:

(1) first, the health and well-being of *water bodies* and *freshwater* ecosystems (te hauora o te wai) and the exercise of mana whenua to uphold this.

[30] Queenstown Lakes appealed the italicised portion of cl (2) above at [26], noting its exclusion of basic sanitation needs and arguing it is inconsistent with clauses 1.3, 2.1 and 3.2(2)(c) of the NPSFM 2020. Queenstown Lakes submitted that, while the Panel discussed priority 2 in Te Mana o te Wai and its focus on water used for contact usages "which can directly affect human health needs",[19] there is no indication the Panel turned its mind to water used for sanitation.

[31] The joint memorandum notes that terms defined in National Planning Standards 2019 issued under s 58E of the Act and used in the NPSFM 2020 have the meanings in those standards unless otherwise specified, under cl 1.4(3) of the NPSFM 2020. The proposed RPS gives "drinking water" the same definition as seen in the National Planning Standards, namely:[20]

Water intended to be used for human consumption; and includes water intended to be used for food preparation, utensil washing, and oral or other personal hygiene.

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19 Report and recommendations of the Non-Freshwater and Freshwater Hearings Panels to the Otago Regional Council, March 2024, [247]–[248] [March 2024 Report].

20 National Planning Standard 2019, at 53.

[32] The proposed RPS excludes elements of "drinking water" as defined by the NPSFM 2020. The term "ingestion" excludes food preparation, utensil washing and oral or personal hygiene, thereby not giving effect to the NPSFM 2020. I agree that this amounts to an error of law and approve the following suggested amendment:

> In all decision-making affecting fresh water in Otago, prioritise:
>
> […]
>
> (2) second, the health needs of people (te hauora o te tangata) interacting with water through:
>
> (a) ingestion (such as drinking of water and consuming resources harvested from the water body),
>
> (b) immersive activities (such as harvesting resources and primary contact) and
>
> (c) personal hygiene activities (such as food preparation, utensil washing, oral hygiene, showering and flushing the toilet) and

LF-FW-O9 – Wetlands

[33] Forest & Bird submitted on LF-FW-O9 and appeal on the basis that cl 2, outlined below and italicised, requires "no net decrease" in wetland extent contrary to the NPSFM 2020 and the NZCPS. LF-FW-O9 in relation to wetlands states as follows:[21]

> **LF–FW–O9 –Wetlands**
>
> Otago's wetlands are protected from inappropriate subdivision, use and development and, where degraded, 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 extent and diversity of wetland indigenous ecosystem types and habitats*, and
>
> (3) there is no reduction and, where degraded, there is an improvement in wetland ecosystem health, hydrological functioning, amenity values, extent or water quality, and

[21] Proposed RPS, above n 1, at [138].

(4) their flood attenuation and water storage capacity is maintained or improved.

(emphasis added)

[34] Policy 6 of the NPSFM 2020 stipulates that there is to be "no further loss of extent of natural inland wetlands"—there is no qualifier, such as the "*net* decrease" seen in LF-FW-O9(2). Forest & Bird has critiqued the drafted approach contending it allows the loss of wetland in some places on the basis there is a matching increase elsewhere, namely, an "unders and overs" approach.[22] Accordingly, Forest & Bird submits that as drafted, the policy does not give effect to policy 6 of the NPSFM 2020.

[35] It should also be noted that cl 3.22 of the NPSFM 2020 provides that, for some listed activities, effects on natural inland wetlands can be managed by applying the effects management hierarchy. On my reading, while that does allow for some loss, it is not the same as the broad "unders and overs" approach disputed.

[36] The joint memorandum notes that wetlands can occur in the coastal marine area (and therefore be subject to the NZCPS), the coastal environment (subject to the NZCPS and NPSFM 2020) and outside the coastal environment (only subject to the NPSFM 2020). As things stand, LF-FW-O9 does not distinguish between the different policy directions wetlands are subject to, failing to give effect to the NPSFM 2020 and the NZCPS. The joint memorandum submits the "no net decrease" stipulation is contrary to policy 6 of the NPSFM 2020 (to the extent that cl 3.22 of the NPSFM 2020 does not apply) and is also contrary to policy 11(a) of the NZCPS. I agree that a greater degree of clarity is required.

[37] The goal of the proposed amendment is to clarify where the NPSFM will apply (without creating conflict with the NZCPS), to outline what policy will apply to natural inland wetlands (with their unique effects permission structure under cl 3.22) and to clarify what will apply to wetlands outside the coastal marine environment (that are not natural inland wetlands).

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[22] *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* (2015) 18 ELRNZ 565 (EnvC) at [56] and [64].

[38] The suggested amendment to (2) of the LF-FW-O9 is:

> (2) … in relation to the extent and diversity of indigenous ecosystem types and habitats:
>
> (a) for wetlands outside the coastal marine area, there is no net decrease, and preferably an increase, and
>
> (b) for natural inland wetlands, there is no decrease and preferably an increase, other than as provided by the NPSFM, and
>
> …

[39] This proposed amendment does not apply the "no net decrease" to natural inland wetlands (which excludes the coastal marine area), bringing the provision into line with the NPSFM 2020 and makes any conflict with policy 11(a) of the NZCPS unlikely. The inclusion of "other than as provided by the NPSFM" in (2)(b) recognises that for activities listed in cl 3.22 of the NPSFM 2020, that provision will apply.

[40] For freshwater wetlands in the coastal environment, while (2)(a) will apply, I refer to and endorse the submission in the joint memorandum that any conflict with (2)(a) will be resolved by reference to the CE–Coastal Environment chapter of the proposed RPS and, if required, policy 11 of the NZCPS.

[41] For wetlands outside the coastal marine area, which are not natural inland wetlands, the "no net decrease" wording is retained, which is consistent with the NPSFM 2020 (noting that policy 6 only applies to natural inland wetlands) and the ability of consenting authorities to consider the offsetting or compensation of any adverse effects under s 104(1)(ab) of the Act.

LF-FW-P10A – Managing wetlands

[42] LF-FW-P10A in the decisions version of the proposed RPS states as follows:[23]

> **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,*

[23] Proposed RPS, above n 1, at 141.

(2) by applying clause 3.22(1) to (3) of the NPSFM 2020 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.

(the portion at issue is italicised).

[43] Forest & Bird and Oceana Gold appeal on the basis that LF-FW-P10A(1) and (2) wrongly apply cl 3.22 of the NPSFM 2020 to all wetlands, including wetlands in the coastal marine area. As noted, that creates the potential for conflict with the NZCPS. Clause 3.22 allows certain activities to occur in natural inland wetlands if certain criteria are met, including through the effects management hierarchy (defined in cl 3.21(1) of the NPSFM 2020). It is submitted, and I agree, that the Panel has not given effect to the NPSFM 2020 and has failed to consider the NZCPS.

[44] Additionally, Kāi Tahu note the Panel's recommendation in relation to cl 3.22(4) where it said:[24]

> 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 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 [proposed RPS] is consistent with the NPSFM.*
>
> (references omitted, emphasis added)

[45] Despite that conclusion, Kāi Tahu submits that LF-FW-P10A does not include any reference to Māori freshwater values. Kāi Tahu refers to cl 3.22(3) of the NPSFM 2020 which provides that every regional council must make or change is regional plan

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[24] March 2024 Report, above n 19.

to ensure that any application for an activity referred to in cl 3.22(2) is not granted unless, among other things, the Council is satisfied that the applicant has demonstrated how each step of the effects management hierarchy will be applied to any loss of extent or values of an affected natural inland wetland, particularly (without limitation) in relation to Māori freshwater values.

[46] Kāi Tahu refers to cl 3.22(4) of the NPSFM 2020 that requires every regional council to make or change its regional plan to include objectives, policies and methods that provide for and promote, among other things, Māori freshwater values. It is submitted that the Panel erred in not giving effect to the NPSFM 2020.

[47] The parties have jointly proposed the following wording that I adopt:

> Otago's wetlands are managed:
>
> (1) in the coastal environment, in accordance with CE – Coastal environment, and
>
> (2) by applying clause 3.22(1) to (3) of the NPSFM to natural inland 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 and
>
> (4) to sustain and enhance Māori freshwater values.

LF-FW-P16 – Discharges

[48] Queenstown Lakes and Oceana Gold submitted and appealed on LF-FW-P16. The decisions version of the LF-FW-P16 provides:[25]

> **LF-FW-P16 – Discharges containing animal effluent, sewage, and industrial and trade waste**

[25] Proposed RPS, above n 1, at 143.

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 into 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.

(emphasis added)

[49] "Wastewater", "sewage", "greywater" and "industrial trade waste" are all defined terms in the proposed RPS. The definitions are as follows:[26]

Wastewater: means any combination of two or more the following wastes: sewage, greywater or industrial and trade waste

Sewage: means human excrement and urine

Greywater: means liquid waste from domestic sources including sinks, basins, baths, showers and similar fixtures, but does not include sewage, or industrial and trade waste.

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[26] Proposed RPS, above n 1, see pages 48, 42, 27 and 30 for each respective definition in the order listed. Note the definitions are all congruent with those used in the National Planning Standards 2019.

> Industrial and trade waste: means 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

[50] The intention of cl (2)(a) of LF-FW-P16 is to assist in achieving objective LF-FW-O1A(8) which states direct discharges of wastewater to water bodies "are phased out to the extent reasonably practicable".[27]

[51] The joint memorandum notes the policy, as notified (then LF-FW-P15) provided for a reference for discharges of wastewater to be to land rather than to water, unless adverse effects associated with a discharge to land are greater than a discharge to water. The policy, as decided, requires all new discharges containing sewage or industrial and trade waste are required to be to land.

[52] The joint memorandum refers to evidence from Oceana Gold that noted discharges may be to artificial water bodies (silt ponds) with no discharge to a natural water body. Such discharges, that prevent the release of contaminants into the wider environment, would be contrary to this policy. In its appeal, Oceana Gold submitted the decision was not one that the Panel could have been reached on the available evidence.

[53] In its notice of appeal, Queenstown Lakes took issue with (2)(a), submitting that the policy should retain some flexibility as opposed to stipulating an absolute policy directive. Queenstown Lakes noted Kāi Tahu's requested wording for LF-FW-P15(1) (as the policy was then known) as follows:[28]

> new discharges containing sewage or industrial and trade waste to be to land, unless adverse effects associated with a discharge to land are demonstrably greater than a discharge to fresh water,

[54] The proposed policy was amended following the Panel's receipt of a reply report. Queenstown Lakes noted the lack of justification for the removal of any exemption in cl (2)(a) by the Panel. It also noted that every change from the notified version of the proposed RPS is footnoted to the original submission that provided the

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27 At 136.

28 The s 42A report recommended splitting the rule into two policies, a new LF-FW-P15 dealing with stormwater discharges and LF-FW-P16 dealing with wastewater discharges.

Panel with the necessary scope to make the change.[29] The Panel's recommendation footnote here refers to Kāi Tahu's submission that sought to narrow the exemption, but not remove it altogether.

[55] The publicly notified version of this policy stipulated a preference for discharges of wastewater to land over water unless the adverse effects with a discharge to land were greater than a discharge to water. Queenstown Lakes submitted that no party expressly sought the wholesale removal of the exemption listed above at [53] from clause (2).

[56] The parties submit the following errors of law have occurred:

(a) the Panel's recommendation removed the ability in the proposed RPS for new discharges to be to water when the adverse effects of a discharge to land are greater without a proper basis in the evidence and submissions to do so;

(b) the policy does not refer to wastewater, despite the policy's purpose being to give effect to LF-FW-O1A(8) and the Panel's report referring to wastewater being addressed in this policy;[30]

(c) the Panel did not refer to or consider the evidence that cl 2 would prevent discharges to constructed water bodies from which there is no discharge to natural water; and

(d) clause (2)(a) is inconsistent with clause 1 and objective LF-FW-O1A(8) in that cl (2)(a) prevents the phasing out of existing discharges by replacing existing discharges in a way that reduces adverse effects.

[57] I am satisfied that the Panel erred in law by removing the originally listed exemption without sufficient justification for doing so. There appears to have been no scope to make the change. I am also satisfied that the Panel failed to consider relevant matters, such as those raised by Oceana Gold, about discharges into non-natural water

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29 Resource Management Act, sch 1, cl 49(4)(a).
30 March 2024 Report, above n 19, at [138]–[158].

bodies and the lack of attention to wastewater. Accordingly, I agree to substitute the Panel's recommendation for the following:

> LF-FW-P16 – Discharges containing animal effluent, sewage, greywater and industrial trade waste
>
> Minimise the adverse effects of direct and indirect discharges of wastewater, animal effluent, sewage, greywater and industrial and trade waste to fresh water by:
>
> (1) phasing out existing discharges of wastewater, sewage or industrial and trade waste directly to fresh water to the extent practicable,
>
> (2) requiring:
>
> (a) new discharges of wastewater, sewage or industrial and trade waste to be to land, unless:
>
> (i) the adverse effects associated with a discharge to land are demonstrably greater than a discharge to fresh water or
>
> (ii) the adverse effects associated with a discharge to water are significantly less than and replace an existing discharge(s) or
>
> (iii) the discharge is to a constructed water body from which there is no discharge of water or contaminants.

LF-FW-M6 – Regional plans

[58] Oceana Gold submitted on this instrument and appealed the provision in the regional plan. The decisions version of LF-FW-M6 reads:[31]

> **LF-FW-M6 – Regional plans**
>
> Otago Regional Council must publicly notify a Land and Water Regional Plan 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,
>
> (3) identify water bodies that are over-allocated 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,
>
> (5A) provide for the allocation and use of fresh water in accordance with LF-FW-P7A, including by providing for off-stream water storage,

[31] Proposed RPS, above n 1, at 144–145.

(7) identify and manage natural wetlands in accordance with LF-FW-P7, LF-FW-P9 and LF-FW-P10 while recognising that some activities in and around natural wetlands are managed under the NESF and the NESCF,

(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.

(emphasis added)

[59] In its appeal, Oceana Gold took issue with (7), submitting that it fails to correctly reference the policy it is to implement, namely LF-FW-P10A, and the former policies (LP-FW-P9 and LF-FW-P10) are referenced, those policies not existing in the notified decisions version. As well, Oceana Gold submitted that the policy does not refer to the NPSFM 2020. Oceana Gold submits this is a simple drafting error with a straightforward solution. I agree. Oceana Gold have proposed the following amendment, which I accept is appropriate:

(7) identify and manage wetlands in accordance with LF-FW-P7 and LF-FW-P10A while recognising that some activities in and around wetlands are managed under the NPSFM, NESF and NESCF.

LF-LS-P21–Land use and freshwater

[60] The decisions version of LF-LS-P21 reads:[32]

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 *maintaining the* adverse effects of direct and indirect discharges of contaminants to water from the use and development of land,

(2) managing land uses that may have adverse effects of direct on the flow of water in surface bodies or the recharge of groundwater,

(3) recognising the drylands nature of some of Otago and the resulting low water availability, and

[32] Proposed RPS, above n 1, at 151.

(4) maintaining or, where degraded, enhancing the habitat and biodiversity values of riparian margins.

(emphasis added)

[61] In their appeal document, Kāi Tahu and Forest & Bird both contend the policy fails to give effect to Policy 5 of the NPSFM 2020, "to ensure that the health and well-being of degraded water bodies and freshwater ecosystems is improved". I agree an error has occurred.

[62] Oceana Gold's appeal is in relation to (4) of the policy. The Panel recommended that the provision be worded as "maintaining or, where degraded, enhancing the values of riparian margins" but Oceana Gold submitted "habitat and biodiversity" are additions without any basis in submissions, evidence or the panel's report. Oceana Gold submits that there is a failure to recognise that there may be effects on riparian margins as a result of activities carried out in accordance with the provisions of the NPSFM 2020 and NESFW.

[63] The joint memorandum also notes that the use of the word "maintaining" in cl (1) is a clear typographical error that should read "managing". I agree.

[64] I am satisfied that errors of law have been established and that the following proposed wording is acceptable:

> The health and well-being of water bodies and freshwater ecosystems is maintained or, if degraded, improved 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,
>
> (2) managing land uses that may have adverse effects of direct on the flow of water in surface bodies or the recharge of groundwater,
>
> (3) recognising the drylands nature of some of Otago and the resulting low water availability, and
>
> (4) maintaining or, where degraded, enhancing the values of riparian margins.

LF-VM-O4 and LF-VM-O2 – Clutha (Mata-au) and Taiari

[65] LF-VM-O4 concerns the vision statement for the Taiari Freshwater Management Unit (FMU), while LF-VM-02 does the same for the Clutha/Mata-au. Kāi Tahu appealed both current iterations in the proposed RPS submitting that the Panel's adopted versions are not consistent with the evidence.

[66] The proposed Clutha amendment is supported by Contact Energy Ltd, the Regional Council and Kāi Tahu. Seven other parties that represent a cross section of societal interests agree to abide the Court's decision on this matter.[33]

[67] Kāi Tahu appealed the Panel's amendment to LF-VM-O2(6) that included specific reference to the potential for future hydroelectricity development "within this modified catchment".[34]

[68] The parties have agreed that adopting a catchment wide approach where there was no evidence or basis to do so was an error. The Clutha Freshwater Management Unit (FMU) catchment covers five areas, whereas the hydro-electricity scheme covers only a small portion of the catchment.[35] While a small portion of presented evidence did advocate for enhancing electro-development on the main Clutha stem and lakes, that evidence has not been said to advocate for a catchment-wide approach to new development.

[69] I am satisfied an error of law has been established and I agree the amendment proposed by these parties should be made to substitute the Panel's decision (noting it best accommodates the evidence given regarding future development[36] while recognising Kāi Tahu concerns[37]):

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33 Manawa Energy Ltd, Beef + Lamb NZ, Otago Water Resource Users Group, Federated Farmers, Forest & Bird, Real NZ and NZSki Ltd and Oceana Gold.

34 Proposed RPS, above n 1, at 137.

35 Limited to Lake Hawea and part of the Clutha River. The Clutha catchment covers a far wider area including Lakes Wakatipu, Wānaka, Hāwea, Dunstan, the Manuherekia River and other tributaries of the Clutha, St Bathans and more.

36 Giving effect to ss 32, 61(1), 62(3) (by virtue of the National Policy Statement for Renewable Electricity Generation) and 61(2A)(a) (giving effect to iwi management plans) of the Resource Management Act.

37 Giving effect to ss 6(e), 8 of the Resource Management Act and the Ngāi Tahu Claims Settlement Act 1998

> (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 its contribution to climate change mitigation is recognised, provided for and protected, and potential further development of the scheme in Lake Hāwea, on the Hāwea River, and on the Clutha River/Mata-au mainstem, upstream of Roxburgh (within existing consented upper operating levels as at the date this Regional Policy Statement is made operative) is provided for

[70] The Taiari FMU provision in the proposed RPS contains the same alleged error of law. The amendment proposed is supported by Manawa Energy Ltd, the Regional Council and Kāi Tahu with seven other parties agreeing to abide the Court's decision on this matter.[38]

[71] Kāi Tahu appealed the Panel's amendment to LF-VM-O4(4A) that stated:[39]

> (4A) the national significance of the Waipōuri 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, and*
>
> (emphasis added)

[72] Following mediation before Judge Borthwick on 19 August 2024, the parties agreed that the Panel erred in failing to identify the out-of-scope nature of its recommendation. Manawa Energy's expert witness proposed a new (4A) as follows:

> (4A) the national significance of the Waipori hydroelectric power scheme and the regional significance of the Deep Stream, and Paerau / Patearoa hydroelectric powers schemes are recognised,

[73] This amendment was accepted by the s 42A officer at the 28 August 2023 hearing. Mr Cameron submits the Panel appears to have included its reference to potential further development to achieve consistency with LF-VM-02 (though reasons were not expressly stated). Mr Cameron notes:

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38 Contact Energy, Otago Water Resource Users Group, Forest & Bird, Beef + Lamb NZ, Real NZ and NZ Ski, Federated Farmers and Oceana Gold.

39 Proposed RPS, above n 1, at 137.

(a) the evidence upon which the Panel relied on to make its addition related specifically to the Clutha catchment, not the separate and distinct Taiari; and

(b) no party sought the inclusion of reference to "potential further development" (above at [71]).

[74] I agree that the Panel's recommendation was not available to it. It is appropriate to substitute the Panel's recommendation for the following:[40]

> (4A) the national significance of the Waipōuri 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, and potential future development of these schemes is provided for in so far as is consistent with LF-FW-O1A(1)–(6) and LF-VM-O4(3).

[75] The amendment resolves the potential conflict which may otherwise have arisen between competing vision statement outcomes (such as those noted in the amendment).

[76] The relief is within the scope of the Panel's powers to make recommendations on any other matters relating to the freshwater planning instrument identified by the Panel or any other person during the hearing.[41] To the extent that the Court is being asked to substitute its own judgment for that of the Regional Council, the agreed relief is within the scope of powers conferred under the freshwater planning instrument process.

Conclusion

[77] I have considered the joint memorandum dated 30 September 2024, as well as the two additional joint memoranda dated 7 October 2024. I am satisfied it is appropriate to amend the proposed RPS in accordance with the submissions of counsel and as I have noted in this judgment.

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40 Giving effect to the law identified above at n 42 and n 43 and avoiding conflict between policies by making further development subject to the stated objectives: *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112, [2023] 1 NZLR 205 at [72]–[74].

41 Resource Management Act, sch 1, cls 49(2)(b), 51(1)(a) and (4).

[78] I am satisfied approval of the proposed amendments is appropriate because:[42]

(a) the orders sought by consent address the issues raised in each respective appeal;

(b) the proposal to settle the appeals by making the proposed amendments represents a just, speedy and inexpensive way to determine this proceeding;

(c) agreement has been reached by all parties with an interest in the amendments and all other parties abide, with all parties accepting errors of law have been made by the Panel;

(d) the proposed amendments are consistent with the Act in that they give effect to the Act and policies created under it (such as the NPSFM 2020 and NZCPS); and

(e) it is unnecessary to remit the matter to the Regional Council

[79] In *Meridian Energy Ltd v Canterbury Regional Council,* Whata J noted:[43]

> I should note for completeness that there should not be an expectation that in every case consent orders are suitable for approval via appeals to this Court. This is a public law process and there must be due consideration given to the wider public interest in the promulgation of planning instruments. I am, however, satisfied that in this case that interest has been served by the consensus achieved.

[80] Each of the amendments made assists in implementing the Act and/or better aligns provisions within the RPS. Signatures have been obtained from counsel representing a broad cross-range of parties and interests. I am satisfied the public interest has been served by these proceedings.

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42 *Waitaki Irrigators Collective Limited v Canterbury Regional Council* [2018] NZHC 2064 at [31]; *Combined Canterbury Provinces, Federated Farmers of New Zealand Incorporated v Canterbury Regional Council* [2016] NZHC 1965 at [9].

43 *Meridian Energy Ltd v Canterbury Regional Council* HC Christchurch CIV-2010-409-2604, 23 May 2011 at [11].

Outcome

[81] I am satisfied it is appropriate to exercise the Court's power under r 20.19 to amend the text of the proposed RPS as outlined in this judgment.

Harland J

Counsel:
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C Ford and A Cameron for Kāi Tahu Rūnanga
J Campbell and B Watts, Meredith Connell for Queenstown Lakes District Council
J St John and S Christensen for Oceana Gold (New Zealand) Ltd
M Downing and P Anderson for Royal Forest & Bird Protection Society of New Zealand Inc
S J Anderson and T M Sefton, Ross Dowling Marquet Griffin for Otago Regional Council.

Interested Parties:
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