

BEFORE THE ENVIRONMENT COURT  
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2019] NZEnvC 208

IN THE MATTER of the Resource Management Act 1991  
AND of appeals under clause 14 of the First  
Schedule of the Act  
BETWEEN ARATIATIA LIVESTOCK LIMITED  
(ENV-2018-CHC-029)  
... (continued on last page)  
Appellants  
AND SOUTHLAND REGIONAL COUNCIL  
Respondent

Court: Environment Judge J E Borthwick  
Environment Commissioner R M Bartlett  
Environment Commissioner S G Paine  
Special Advisor W R Howie

Hearing: at Invercargill on 4, 5, 6, 7, 10, 11, 12, 13, 14, 18, 19, 20, 21 June  
and 29, 30, 31 July 2019  
Site visits held on 27 and 28 July 2019

Appearances: P A C Maw and K J Wyss for Southland Regional Council  
B J Matheson and K S Brown for Fonterra Co-operative Group  
Limited and DairyNZ Limited  
H A Atkins for Horticulture New Zealand  
D A Allan for Aratiatia Livestock Limited  
A D E Hitchcock for Wilkins Farming Co  
M R Garbett for Gore District Council, Southland District Council  
and Invercargill City Council  
P D Williams and D van Mierlo for Director-General of Conservation  
S Ongley for Southland Fish and Game Council  
S W Christensen for Meridian Energy Limited and Alliance Group  
Limited  
C Lenihan for Federated Farmers of New Zealand (Southland)  
M Russell for Heritage New Zealand Pouhere Taonga  
J G A Winchester and S K Lennon for Waihopai Rūnaka, Hokonui  
Rūnaka, Te Rūnanga o Awarua, Te Rūnanga o Oraka Aparima  
(collectively Ngā Rūnanga) and Te Rūnanga o Ngāi Tahu  
S R Gepp for Royal Forest and Bird Protection Society of New  
Zealand Incorporated  
R Donnelly for Waiau Rivercare Group  
V J Hamm for Ballance Agri-Nutrients Limited  
M R G Christensen for Ravensdown Limited



Date of Decision: 20 December 2019

Date of Issue: 20 December 2019

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**INTERIM DECISION OF THE ENVIRONMENT COURT**

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## REASONS

### Introduction

[1] The proposed Southland Water and Land Plan is a regional plan intended to give direction and guidance on the sustainable use, development and protection of land and water resources in the Southland Region.<sup>1</sup> Twenty-four persons appealed Southland Regional Council's decision to accept recommendations from a Hearing Panel appointed to hear the submissions on the proposed plan. This decision concerns ten of those appeals and addresses the higher order provisions of the plan including most of its objectives and certain key policies.<sup>2</sup>

[2] Unless otherwise indicated, the court has not made a final determination on the merits of any appeal. This is necessarily so because the court is not yet fully seized of all matters on appeal, with the majority of plan provisions under appeal adjourned for a future hearing or for alternate dispute resolution processes. Secondly, significant issues of plan interpretation and implementation are outstanding.

[3] A summary of the court's findings on individual provisions is attached to this decision and labelled Annexure 1.

### Scope of the pSWLP

[4] The scope of this plan is important. While many objectives address the management of fresh water,<sup>3</sup> they are not "freshwater objectives" established in accordance with Policy CA2 of the 2017 NPS-FM. Therefore, the provisions of this plan do not introduce limits or targets for the six Freshwater Management Units recognised by the plan. The Regional Council intends to promulgate a plan change to introduce limits and targets and anticipates this separate process will be completed by December 2025.<sup>4</sup>

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<sup>1</sup> McCallum-Clark, EIC at [16].

<sup>2</sup> In addition to the ten appellants and the respondent, Southland Regional Council, nine parties joined the appeals pursuant to s 274 of the Act. The parties joining are Ballance Agri-Nutrients Limited, DairyNZ Limited; Fonterra Co-Operative Group Limited, Horticulture New Zealand, Ravensdown Limited, Gore District Council, Southland District Council, Invercargill District Council and the Waiau Rivercare Group.

<sup>3</sup> We adopt the language of the NPS-FM for "fresh water" as a single word and "freshwater" only when used as an adjective.

<sup>4</sup> pSWLP (Decisions Version 4 April 2018), Introduction, Purpose of this Plan at 7, see also Policies 44 to 47.



[5] If not limit setting, then what guidance and direction can this plan provide?

[6] This plan has the potential to deliver vital change in the way land and water resources are managed. In the past, it has very likely been assumed that the effects of change from an individual's use of land and water were measurable and so we talk about activities having a minor effect, less than minor effect, significant effect *etcetera* on the environment. But attributing an actual effect on water quality to an individual property or person can be problematic.

[7] This plan redirects the usual RMA focus on the scale and significance of effects of resource use onto the mauri or life force of water and the enquiry becomes how do users of resources protect the water's mauri and health. Secondly, while many persons within the farming sector will rightly consider themselves good environmental stewards, by defining what is meant by 'degraded' water quality with reference to the attributes of ecosystem, cultural and human health<sup>5</sup> this should afford resource users a better more holistic understanding of those attributes and their interactions. This will facilitate the focus on the causes of degradation, which may not be the same for every waterbody, and promote a more desirable state of the environment. Finally, while the farming sector may be regarded as contributing a disproportionate volume of contaminants to waterways relative to other sectors, this plan requires all people to work on the causes of degradation.

[8] The characteristics of the waterbodies in Southland have changed significantly over time and many are likely degraded.<sup>6</sup> Acknowledging urban and rural communities must each "recognise that current practices will need to change"<sup>7</sup>, the Regional Council, through this plan, is working on both the structural and behavioural causes of degradation throughout the region.

[9] The proposed Southland Water and Land Plan anticipates a long-term process of change. Through its objectives the plan sets in place a new paradigm for the way people and communities regard water and use land and water resources. Once implemented, the plan will place users of land and water in a better position to engage in limit and target

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<sup>5</sup> This work is ongoing and is the subject matter of the Topic B hearing.

<sup>6</sup> JWS for Water Quality and Ecology (Lakes, Intermittently Closed and Open Lakes and Lagoons (ICOLLs) and estuaries) held 9-10 May 2019 at Appendices 3 and 4; JWS for Water Quality and Ecology (Rivers and Wetlands) held 7-9 May 2019 at [40]-[48].

<sup>7</sup> Regional Council, opening submissions at [4]-[5].



setting in the FMU process and in any future plan change.

### **2019 draft National Policy Statement for Freshwater Management and proposed National Environmental Standards for Freshwater**

[10] In September 2019 the Government announced a new draft National Policy Statement for Freshwater Management and proposed National Environmental Standards for Freshwater. We are not able to consider the 2019 draft policy and proposed standards in our decision and so when we talk about the Regional Council's Freshwater Management Unit processes, we are referring to the processes set out in the proposed Southland Water and Land Plan.

### **Abbreviations used in this decision**

[11] The following abbreviations are used in this decision:

- "DV" means decision version of the proposed Southland Water and Land Plan;
- "FMU" means Freshwater Management Unit;
- "Hauora" means health, particularly the health of the environment, the health of the waterbody and the health of the people;
- "MTADA" means the Manapōuri Te Anau Development Act 1963;
- "Ngā Rūnanga" refers to four hapū that are Waihopai Rūnaka, Hokonui Rūnaka, Te Rūnanga o Awarua, Te Rūnanga o Oraka Aparima and Te Rūnanga o Ngāi Tahu;
- "NPS-FM" means the National Policy Statement for Freshwater Management 2014 (amended 2017);
- "NZCPS" means New Zealand Coastal Policy Statement 2010;
- "pSWLP", "proposed plan" and "plan" are used interchangeably when referring to the proposed Southland Water and Land Plan which is a regional plan;
- "Regional Council" means Southland Regional Council;
- "RMA" or "the Act" means the Resource Management Act 1991;
- "RPS" means Southland Regional Policy Statement;
- "territorial authorities" refers to Gore District Council, Southland District Council and Invercargill City Council.



### The role of the court on a regional plan appeal

[12] The court “has the same power, duty, and discretion in respect of a decision appealed against ... as the person against whose decision the appeal or inquiry is brought”<sup>8</sup> and has the same duty as a local authority to evaluate the proposed plan under s 32 and s 32AA RMA. Schedule 1, clauses 14 and 15 govern the jurisdiction and procedure of the court. Part 5 RMA, in particular ss 63 to 70 set out matters relevant to the purpose, contents and preparation of regional plans, as well as matters to be considered in preparing or changing a regional plan.

[13] The directions in s 67(3) and (4) RMA require that a regional plan must give effect to any national policy statement, any New Zealand coastal policy statement, and any regional policy statement; and that the regional plan in question must not be inconsistent with (relevantly for present purposes) any other regional plan for the region. In addition, the court must take into account any relevant planning document recognised by an iwi authority.<sup>9</sup> The following planning framework is therefore relevant to determining the appeals on the pSWLP:

- (a) National Policy Statement for Freshwater Management 2014 (as amended 2017);
- (b) New Zealand Coastal Policy Statement 2010;
- (c) National Policy Statement for Renewable Electricity Generation 2011;
- (d) National Policy Statement for Electricity Transmission 2008;
- (e) Southland Regional Policy Statement 2017;
- (f) Te Tangi a Taura (Ngāi Tahu ki Murihiku National Resource and Environmental Management Plan 2008); and
- (g) Te Rūnanga o Ngāi Tahu Freshwater Policy 1992.

[14] In determining these appeals, we must also have regard to the Commissioners’ decision that is the subject of these appeals.<sup>10</sup> However there is no presumption in favour of the provisions of the proposed plan.<sup>11</sup>

<sup>8</sup> RMA, s 290(1).

<sup>9</sup> RMA, s 66(2A)(a).

<sup>10</sup> RMA, s 290A.

<sup>11</sup> *Hibbit v Auckland Council* [1996] NZRMA 529 (PT) at 533.



[15] Finally, because the pSWLP was publicly notified in June 2016, the applicable version of the RMA includes all amendments up to that date, inclusive of the Resource Management Amendment Act 2013 (but does not include the extensive amendments made by the Resource Legislation Amendment Act 2017).

### **National significance of fresh water and Te Mana o te Wai**

[16] The health and wellbeing of our freshwater bodies is vital for the health and wellbeing of our land, our resources and our communities.<sup>12</sup> In te ao Māori,<sup>13</sup> water is the life-blood of the whenua (land).<sup>14</sup> When water is in a healthy state it provides for the health and wellbeing of the land and people.<sup>15</sup>

[17] The purpose of a national policy statement is to state objectives and policies for matters of national significance that are relevant to achieving the purpose of the RMA (s 45(1)).<sup>16</sup> Under the National Policy Statement for Freshwater Management (NPS-FM), it is a matter of national significance that fresh water is managed through a framework that considers and recognises Te Mana o te Wai as an integral part of freshwater management.<sup>17</sup> When we speak about Te Mana o te Wai we are referring to the integrated and holistic wellbeing of a freshwater body.<sup>18</sup> Upholding Te Mana o te Wai acknowledges and protects the mauri of water. While mauri is not defined under the NPS-FM, and we will return to this shortly, the mauri of water sustains hauora (health): the health of the environment, the health of the waterbody and the health of the people. As a matter of national significance the NPS-FM requires users of water to provide for hauora and in so doing, acknowledge and protect the mauri of water. This is our first key understanding.

[18] The NPS-FM leads with the objective that Te Mana o te Wai is to be considered and recognised in the management of fresh water (Objective AA1). Objective AA1 does not use the s 6 RMA language of recognising and providing for Te Mana o te Wai, but it is our understanding that the pSWLP does provide for Te Mana o te Wai and that the

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<sup>12</sup> NPS-FM, National significance of fresh water and Te Mana o te Wai at 7.

<sup>13</sup> Te ao Māori means the Māori world including the key elements of te reo Māori, tikanga and te Tiriti o Waitangi.

<sup>14</sup> Te Tangi a Taurira, Section 3.5: O Te Wai at 147, Cain EiC at [37] and [59], Transcript (Cain) at 1492.

<sup>15</sup> Transcript (Cain) at 1492; NPS-FM, National significance of fresh water and Te Mana o te Wai at 7.

<sup>16</sup> Section 45(1) RMA.

<sup>17</sup> NPS-FM, National significance of fresh water and Te Mana o te Wai at 7.

<sup>18</sup> NPS-FM, National significance of fresh water and Te Mana o te Wai at 7.



NPS-FM and the pSWLP intend for the health and wellbeing of freshwater bodies to be at the forefront of discussion and decisions about fresh water.

[19] Te Mana o te Wai will be achieved when regional policy statements and plans consider and recognise Te Mana o te Wai, and in doing so recognise the connection between water and the broader environment – te hauora o te taiao (the health of the environment), te hauora o te wai (the health of the waterbody) and te hauora o te tangata (the health of the people) – noting that values identified by the community, including tangata whenua, will inform the setting of freshwater objectives and limits (policy AA1).<sup>19</sup>

[20] While expressed in te reo Māori, Te Mana o te Wai benefits all New Zealanders.

[21] In summary, it is a matter of national significance that the management of fresh water is through a framework that considers and recognises Te Mana o te Wai as an integral part of freshwater management. By upholding Te Mana o te Wai the mauri of the water is acknowledged and protected.<sup>20</sup>

### **Treaty of Waitangi**

[22] The Treaty of Waitangi is the underlying foundation of the relationship between the Crown and iwi and hapū with regard to freshwater resources.<sup>21</sup> In furtherance of this, s 8 RMA provides that 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 take into account the principles of the Treaty of Waitangi (te Tiriti o Waitangi). Te Mana o te Wai expresses Treaty principles, including the principles of rangitiratanga and active protection.

### **Regional Policy Statement (“RPS”)**

[23] The RPS, to which the pSWLP must give effect,<sup>22</sup> explains that the Crown, exercising governance, has established a system of delegated authority with the functions delegated to regional councils and territorial authorities set out in ss 30 and 31

<sup>19</sup> NPS-FM, Objective AA1 and Policy AA1.

<sup>20</sup> NPS-FM, National significance of fresh water and Te Mana o te Wai at 7.

<sup>21</sup> NPS-FM, Preamble at 4.

<sup>22</sup> RMA, s 67(3).



of the Act.<sup>23</sup> This proceeding is concerned with a regional plan for water and land, encompassing most (if not all) of the extensive provisions of s 30.<sup>24</sup>

[24] The RPS identifies resource management issues of significance to Ngāi Tahu. Of particular importance in this proceeding are the following:<sup>25</sup>

- (a) degradation of mauri and wairua of natural resources used for customary purposes, and loss of quality and access to mahinga kai;<sup>26</sup> and
- (b) destruction, damage and modification to wāhi tapu, wāhi taonga and sites of significance to tangata whenua.<sup>27</sup>

[25] Responding to those issues, and in accordance with, *inter alia*, Part 2 of the Act,<sup>28</sup> the RPS has two objectives:

**Objective TW.3 – Tangata whenua spiritual values and customary resources**

Mauri and wairua are sustained or improved where degraded, and mahinga kai and customary resources are healthy, abundant and accessible to tangata whenua.

**Objective TW.4 – Sites of cultural significance**

Wāhi tapu, wāhi taonga and sites of significance are appropriately managed and protected.

[26] The RPS explains that the RMA identifies “the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga as a matter of national importance”.<sup>29</sup> We go further than this and record not only that these are matters of national importance, but that the relationship, culture and traditions with ancestral lands, water, sites, wāhi tapu, and other taonga must also be recognised

<sup>23</sup> RPS, Chapter 3, 3.3 Policies, Policy TW.1 Explanation/Principal Reasons.

<sup>24</sup> Environment Southland *Updated Evaluation Report, Proposed Southland Water and Land Plan* (19 October 2018) (“s 32AA report”) at [2.1.2].

<sup>25</sup> RPS, Chapter 3, 3.1 Issues at 22. The other issues and associated objectives besides which we have not lost sight.

<sup>26</sup> Issue TW.4.

<sup>27</sup> Issue TW.3.

<sup>28</sup> RMA, s 61 (2) RMA.

<sup>29</sup> RPS, Chapter 3, 3.4 Methods, Explanation/Principal Reasons at 28.



and provided for under the pSWLP (s 6 RMA). In furtherance of s 7 of the Act, as the RPS correctly states, particular regard must be had for kaitiakitanga.<sup>30</sup>

[27] Indeed, the RPS sets out to do exactly this in Policy TW.4 and provides:

When making resource management decisions, ensure that local authority functions and powers are exercised in a manner that:

- (a) recognises and provides for:
  - (i) traditional Māori uses and practices relating to natural resources (e.g. mātaihai, kaitiakitanga, manaakitanga, matauranga, rāhui, wāhi tapu, taonga raranga);
  - (ii) the ahi kā (manawhenua) relationship of tangata whenua with and their role as kaitiaki of natural resources;
  - (iii) mahinga kai and access to areas of natural resources used for customary purposes;
  - (iv) mauri and wairua of natural resources;
  - (v) places, sites and areas with significant spiritual or cultural historic heritage value to tangata whenua;
  - (vi) Māori environmental health and cultural wellbeing.
- (b) recognises that only tangata whenua can identify their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga.

[28] What may not be clear from the RPS' glossary of te reo Māori, is that this policy is addressing values that are core to tangata whenua about which there is tikanga – a correct way of doing things. The challenge for Ngā Rūnanga, and we think the Regional Council and the other parties to this proceeding, concerns how well current legislation and processes understand and weigh resource management models that have developed over centuries of learning.<sup>31</sup>

[29] In his opening address, Mr Maw for the Regional Council, submitted, without elaboration, that the plan was intended to take into account the principles of the Treaty of Waitangi.<sup>32</sup> While the Act identifies as a matter of national importance "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" (s 6(e)); protections for historic heritage and protected customary

<sup>30</sup> Kaitiakitanga is defined in the RPS Glossary of Māori words as "the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship".

<sup>31</sup> Skerrett, EiC at [39].

<sup>32</sup> Regional Council, opening submissions dated 4 June 2019 at [33].



rights (s 6(f-g)) and s 7 addresses kaitiakitanga – s 8 is a different type of provision, and the principles of the Treaty may have an additional relevance to decision-makers; per *Environmental Defence Society Incorporated v New Zealand King Salmon Company Limited & ors*.<sup>33</sup>

[30] The RPS's objective that the principles of the Treaty are to be taken into account in a systematic way through effective partnerships between tangata whenua and local authorities is a good example of where the principles of the Treaty have been brought to bear.<sup>34</sup> The Treaty's principle of partnership is well-established in jurisprudence. Partnerships also provide capacity for tangata whenua to be fully involved in council decision-making processes (Objective TW.1) and in a manner consistent with the principles of the Treaty (Policy TW.1). Embodying the principle of partnership, the Regional Council and Te Ao Mārama Incorporated ("TAMI"), Ngāi Tahu ki Murihiku resource management consultants, agreed to develop the pSWLP in partnership, not collaboration.<sup>35</sup> While this partnership relationship, built on trust and good faith,<sup>36</sup> accords with the Treaty principles it did not extend to mana whenua the power to accept or decline the recommendations of the Hearing Panel. The recommendations, which were accepted by the Regional Council – in Ngā Rūnanga's view – considerably weakened the outcomes of the plan.<sup>37</sup>

[31] The Treaty establishes principles in addition to partnership. Witnesses for Ngā Rūnanga noted that the principles of active protection and rangatiratanga are also relevant to the pSWLP.<sup>38</sup> The principle of active protection is expressly addressed in the Charter of Understanding between Ngā Rūnanga and the local authorities and defined there as being the duty of active protection of the tangata whenua rights and interests in resource management. This is not simply a passive duty, but is "in all senses active to the fullest extent practicable".<sup>39</sup>

[32] The Regional Council did not explain, and we could find no discussion in the

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<sup>33</sup> *Environmental Defence Society Incorporated v New Zealand King Salmon Company Limited & ors* [2014] NZSC 38, [2014] 1 NZLR 593 at [27].

<sup>34</sup> RPS, Chapter 3, 3.2 Objectives, Objective TW.1.

<sup>35</sup> Skerrett, EIC at [100]-[110].

<sup>36</sup> Skerrett, EIC at [118].

<sup>37</sup> Transcript (Winchester for Ngā Rūnanga) at 1367-1368.

<sup>38</sup> Skerrett, EIC at [41]-[42] and [86]; Davidson EIC (corrected version) at [19] and [22]; Cain EIC at Appendix A.

<sup>39</sup> Skerrett, EIC at [42] and Appendix B: He Huarahi mō Ngā Uri Whakatupu The Charter of Understanding. Davidson, EIC at [19].



decision of the Hearing Panel, how the principles of the Treaty were taken into account. For example, are the principles of the Treaty relevant to Objective 15 which recognises and provides for taonga species? Taonga species are of fundamental importance in practice of mahinga kai as indicators of the health of the resources and of the wellbeing of the people. Many species are included in the Ngāi Tahu Deed of Settlement and Ngai Tahu Claims Settlement Act 1998.<sup>40</sup> Does this objective extend to their active protection under subsequent policies – particularly those taonga species that are vulnerable or threatened (eg kanakana) and where the failure to protect may be inimical to Māori health and wellbeing?<sup>41</sup> The parties are to expect that the court will seek further submissions on whether, or how, the Treaty principles are taken into account in this plan.

[33] Returning to the NPS-FM, it appears that the RPS was made operative prior to the 2017 amendments to the NPS-FM and has not been reviewed since.<sup>42</sup> Only Southland Fish and Game Council's ("Fish and Game"), Royal Forest and Bird Protection Society of New Zealand Incorporated's ("Forest and Bird") and Meridian's planning witnesses consider whether RPS gives effect to the NPS-FM as amended in 2017, all concluding that the RPS does.<sup>43</sup>

[34] For Meridian, Ms M J Whyte's analysis of Te Mana o te Wai centres on water quality objectives in the RPS and does not address resource management issues of significance to Ngā Rūnanga and their associated objectives. She observes that Te Mana o te Wai is not a new concept to the NPS-FM and that the only difference between the 2014 and 2017 version of the NPS-FM is the inclusion of a new specific objective and policy recognising Te Mana o te Wai (Objective and Policy AA1). She has not analysed whether the relocation of the 'national significance' statement in the operative provisions of the NPS-FM, together with a detailed explanation of and guidance on processes in respect to Te Mana o te Wai, is a substantive change – as we strongly think that it is. For Fish and Game and Forest and Bird, Mr Farrell concludes, without setting out his analysis, that the RPS and NPS-FM (as amended in 2017) are not in conflict.<sup>44</sup>

[35] On the evidence before us we are not in a position to conclude that the RPS does give effect to NPS-FM (as amended in 2017), and consequently we have borne in mind

<sup>40</sup> Skerrett, EIC at [56].

<sup>41</sup> Transcript (McArthur) at 826.

<sup>42</sup> Whyte, EIC at Appendix 4.

<sup>43</sup> Whyte, EIC at Appendix 4 and rebuttal evidence at [16]; Farrell, EIC at [38].

<sup>44</sup> Farrell, EIC at [38].



the NPS-FM in our analysis and recommendations on the pSWLP's provisions.

[36] Giving planning evidence on behalf of the Regional Council, Mr M McCallum-Clark advised that only after the NPS-FM was amended did the "significance" of Te Mana o te Wai become obvious to him.<sup>45</sup> Even so, the proposed plan was not changed in response to the amended NPS-FM, as the Regional Council considered the plan already appropriately responded to Te Mana o te Wai.<sup>46</sup> For reasons we will come to, we agree, in part with his assessment and attribute this to the process the Regional Council followed in developing the notified plan in partnership with Ngā Rūnanga.

### **Proposed Southland Regional Water and Land Plan**

[37] This proceeding is concerned with a regional plan. The purpose of the preparation, implementation, and administration of a regional plan is to assist the Regional Council to carry out its functions in order to achieve the purpose of the Act (s 63 RMA). All regional plans must be prepared in accordance with Part 2 of the Act and any national policy statements (s 66 RMA) and must give effect to the national policy statement (s 67 RMA).

[38] The pSWLP states that Te Mana o te Wai is "fundamental to the integrated framework for freshwater management in Southland. It provides a way of expressing Southland's aspirations for fresh water, now and into the future".<sup>47</sup> It was the intention of the plan drafters to put to the forefront of freshwater management the mauri of the waterbody and its ability to provide for the health of the environment, of the waterbody and of the people.<sup>48</sup>

[39] More particularly, Te Mana o te Wai is said to have three key functions in this plan:<sup>49</sup>

- (a) it is a korowai (cloak) or overarching statement associating the values relating to a particular waterbody and freshwater management unit;
- (b) it provides a platform for tangata whenua and the community to collectively

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<sup>45</sup> Transcript (McCallum-Clark) at 1532.

<sup>46</sup> Transcript (McCallum-Clark) at 1532-1533.

<sup>47</sup> pSWLP, Te Mana o te Wai at 5-6.

<sup>48</sup> pSWLP, Te Mana o te Wai at 5.

<sup>49</sup> pSWLP, Te Mana o te Wai at 5.



- express their values for fresh water; and
- (c) it aligns management tools with values and aspirations to maintain and improve both water quality and quantity.

### ***Ki uta ki tai***

[40] The proposed plan seeks also to manage water in a way that encompasses the Ngāi Tahu philosophy of “ki uta ki tai”.<sup>50</sup> Ngāi Tahu are tangata whenua of Murihiku (including all of Southland).<sup>51</sup> In accordance with ki uta ki tai water, land and people are interconnected and natural resources are to be managed in a way that responds to their connectivity.<sup>52</sup> We understand the architecture of the plan, in particular the notified objectives and policies, to express this philosophy. Consequently, there is no specific or separate section in the proposed plan that “deals with” tangata whenua.<sup>53</sup> To reinforce this approach, the plan acknowledges that tangata whenua values and interests have been identified and reflected in the management of fresh water and associated ecosystems<sup>54</sup> and – we were told – ‘threaded’ through these higher order provisions.

[41] Several witnesses referred to ki uta ki tai as meaning ‘Mountains to the Sea’. This literal translation is, however, problematic for the reasons given by Ms A Cain, on behalf of Ngā Rūnanga. Ki uta ki tai does not imply that water is managed within a lineal framework i.e. from the mountains to the sea. Rather, ki uta ki tai requires managers of natural resources to consider, at the same time, both what is happening in and around the headwaters of a catchment, along its length, and at the estuary (or outlet to the sea).<sup>55</sup> Put another way, ki uta ki tai is concerned with each of the parts, and the sum of the parts. Thus, regardless of scale, each sub-catchment, catchment or freshwater management unit<sup>56</sup> is to be managed holistically.<sup>57</sup>

[42] Applying the principle of ki uta ki tai to this plan will require the integrated

<sup>50</sup> pSWLP, Te Mana o te Wai at 5 and 8.

<sup>51</sup> pSWLP, Te Mana o te Wai at 8.

<sup>52</sup> Cain, EiC at [18].

<sup>53</sup> pSWLP, Te Mana o te Wai at 8.

<sup>54</sup> pSWLP, Te Mana o te Wai at 8 and Objective AA1.

<sup>55</sup> Transcript (Cain) at 1378.

<sup>56</sup> While referred to in policies, ‘freshwater management unit’ is not defined. Under the NPS-FM, the ‘freshwater management unit’, is the water body, multiple water bodies or any part of a water body determined by the regional council as the appropriate spatial scale for setting freshwater objectives and limits and for freshwater accounting and management purposes. ‘Catchment’ is defined under the proposed plan and means ‘the land area that contributes to the river’s flow’.

<sup>57</sup> Transcript (Cain) at 1389. See also Kitson, EiC for illustration of the concept generally including at [44].



management of fresh water with the use of land in whole catchments (NPS-FM, Objective C1). Indeed, the Regional Council is tasked with recognising the interactions between fresh water, land, associated ecosystems and the coastal environment and second, managing fresh water and land use and development in an integrated and sustainable way (NPS-FM, Policies C1 and C2).

[43] That said, a major issue for the court concerns *how* Te Mana o te Wai and ki uta ki tai have been addressed in this plan.

### ***Ngā Rūnanga – definitions of key concepts***

[44] In *Sustainable Matatā v Bay of Plenty Regional Council and Waikato District Council*<sup>58</sup> the court records an observation made by Dr Daniel Hikuroa, that Te Mana o Te Wai would need to be defined by reference to tāngata whenua values and from a mātauranga Māori (Māori knowledge/wisdom) base which is context specific. This accords with our understanding. Because the proposed plan is the product of a partnership between the Regional Council and Ngā Rūnanga, it is important that parties understand the depth and meaning of key terms and concepts employed by the plan's authors. We refer in particular to water, mauri, ki uta ki tai, Te Mana o te Wai, kaitiakitanga, and mahinga kai.

[45] In Murihiku (Southland), Ngā Rūnanga regard water this way:<sup>59</sup>

Water is a taonga, or treasure of the people. It is the kaitiaki responsibility of tangata whenua to ensure that this taonga is available for future generations in as good as, if not better quality.

Water has the spiritual qualities of mauri and wairua. The continued wellbeing of these qualities is dependent on the physical health of the water. Water is the lifeblood of Papatūānuku, and must be protected. We need to understand that we cannot live without water and that the effects on water quality have a cumulative effect on mahinga kai and other resources.

[46] Mauri is referred to in the NPS-FM and in Objective 3 to the pSWLP but not defined and so now we tread lightly in offering our understanding of this concept. We

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<sup>58</sup> *Sustainable Matatā v Bay of Plenty Regional Council and Waikato District Council* [2015] NZEnvC 90 at [398].

<sup>59</sup> Cain, EIC at [37] quoting from Te Tangi a Taurira, section 3.5 at 147.



understand all things (animate and inanimate) have mauri, a life force.<sup>60</sup> Being interconnected, the mauri of water provides for the hauora and mauri of the environment and of the waterbodies and of the people.

[47] Ki uta ki tai was developed by Ngāi Tahu as a key tool to assist iwi to address a wide range of compounding issues with regards to environmental management.<sup>61</sup> The Regional Council is seeking to manage water and land in a way that encompasses the Ngāi Tahu philosophy of ki uta ki tai.<sup>62</sup> Like the concept of integrated management under the Resource Management Act, ki uta ki tai reflects the mātauranga (knowledge/wisdom) that all environmental elements are connected and must be managed as such.<sup>63</sup> More particularly, Ngāi Tahu understands ki uta ki tai as:<sup>64</sup>

... a paradigm and an ethic. It's a way of understanding the natural environment, including how it functions, how people related to it and how it can be looked after appropriately ...

Ki Uta Ki Tai gives reference to the Ngāi Tahu understanding of the natural world and the belief that all things are connected – a belief shared by many other iwi and indigenous people. It also highlights the central importance of mahinga kai, the traditional seasonal food gathering rituals of Ngāi Tahu and the role this played in the traditional understanding and management of natural resources.

While being founded on traditional values and understanding, Ki Uta Ki Tai is also a modern management framework that involves the creation of a number of tools, such as natural resource management plans, monitoring and reporting processes and resource inventories and their associated strategies to address the continuing challenges and threats faced by all aspects of the natural environment from the mountains to the sea – ki uta, ki tai.

... Ki Uta Ki Tai, as a concept, comes from the traditions, customs and values of Ngāi Tahu Whānui in relation to the natural environment, and in particular the custom of mahinga kai and transferred between generations through purakau, whakatauki, waiata, korero and on-going practices is the foundation upon which this modern Ngāi Tahu natural resource management framework is built.

[48] Section 66(2A)(a) of the RMA requires the Regional Council to take into account any relevant planning document recognised by an iwi authority when preparing a plan or

<sup>60</sup> Te Tangi a Tauria at 27, 50, and elsewhere. Transcript (Cain) at 1497.

<sup>61</sup> Cain, EIC at [26]; Skerrett, EIC at [86].

<sup>62</sup> pSWLP, Preamble at p 5.

<sup>63</sup> Cain, EIC at [41].

<sup>64</sup> Kauapapa Taiao (2003) *Ki Uta Ki Tai: Mountains to the Sea Natural Resources Management* p 9-10 cited in Cain, EIC at [40].



plan change. In Southland there are two iwi management plans; namely Te Rūnanga o Ngāi Tahu Freshwater Policy and Te Tangi a Tauria (Ngāi Tahu ki Murihiku Natural Resource and Environmental Iwi Management Plan). The kaupapa of Te Tangi a Tauria is ki uta ki tai.<sup>65</sup>

[49] The proposed plan records that kaitiakitanga is central to Ngāi Tahu and is key to their mana whenua. Kaitiakitanga describes “the exercise of guardianship/stewardship by the tangata whenua of an area and resources in accordance with tikanga Māori”.<sup>66</sup> The plan explains kaitiakitanga this way:<sup>67</sup>

Kaitiakitanga is central to Ngāi Tahu and is key to their mana whenua. By exercising kaitiakitanga, Ngāi Tahu ki Murihiku actively work to ensure that spiritual, cultural and Mahinga kai values are upheld and sustained for future generations. Kaitiakitanga in this context includes ensuring the protection, restoration and enhancement of the productivity and life-supporting capacity of mahinga kai, indigenous biodiversity, air, water, land, natural habitats and ecosystems, and all other natural resources valued by Ngāi Tahu ki Murihiku.

[50] Importantly, tikanga goes beyond any rights or obligations that may attach to the use of water. As explained above, it is the kaitiaki responsibility to ensure that water is available for future generations in as good as, if not better quality.

[51] Ngā Rūnanga’s nomadic lifestyle, based on mahinga kai, meant association with the land and waterbodies was not confined to a small spatial scale.<sup>68</sup> It was and is the expectation of Ngā Rūnanga that the landscape and environment sustain the traveler no matter where they went.<sup>69</sup>

[52] For Ngā Rūnanga provision for mahinga kai is elemental; it is of central importance to their identity, mātauranga and social cohesion.<sup>70</sup> Mahinga kai is about:<sup>71</sup>

... places, ways of doing things, and resources that sustain the people. It includes the work that is done (and the fuel that is used) in the gathering of all natural resources (plants, animals, water, sea life, pounamu) to sustain well-being. This includes the ability to clothe, feed and provide shelter.

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<sup>65</sup> Davidson, EIC at [37].

<sup>66</sup> Cain, EIC at [47].

<sup>67</sup> Environment Southland (2016) 8 and cited by Cain, EIC at [48].

<sup>68</sup> Cain, EIC at [54].

<sup>69</sup> Skerrett, EIC at [76].

<sup>70</sup> Skerrett, EIC at [49].

<sup>71</sup> Cain, EIC at [42].



[53] Water is a significant feature in mahinga kai with the preferential sites for mahinga kai being hāpua (estuaries, lagoons), repo (wetlands) and the riparian zones of rivers, streams and lakes.<sup>72</sup> The land and the water are part of the person and “symbols of the group and therefore of kinship and self-view”.<sup>73</sup> Saliiently, degradation of the waterbodies and land has negatively impacted the mana of the people, their hapū and iwi, as well as their collective cultural identify.<sup>74</sup>

[54] Drawing these key concepts together, mahinga kai persists under ki uta ki tai and kaitiakitanga as the basis of Ngāi Tahu’s long-term planning and environmental ethos. The inclusion of Te Mana o te Wai in the NPS-FM resonated with Ngā Rūnanga, as one witness put it – “Te Mana o te Wai disrupts the regulation of the status quo by RMA tools as it makes the mana of water, its health and status, the paramount priority”.<sup>75</sup>

#### **Interpretation – Te Mana o te Wai and ki uta ki tai in the pSWLP**

[55] In June 2018, we sought the respondent’s assistance to understand the underpinnings of the pSWLP and design approach.<sup>76</sup> The respondent did not reply as directed but instead furnished the court with an updated s 32AA report. Neither the updated s 32AA report nor the decision on appeal address the NPS-FM beyond a bare recital of its provisions.

[56] We do not think it inaccurate to reflect that some planning witnesses and counsel had comparatively little regard for the scheme of the plan or to the wider context of the higher order planning instruments preferring instead to debate the substantive wording of the individual plan provisions. We posit that all provisions of the plan are to be interpreted and applied in a manner that gives effect to Te Mana o te Wai and implemented in accordance with ki uta ki tai. This is what the plan means when it talks about Te Mana o te Wai being “fundamental to the integrated framework for freshwater management in Southland”.<sup>77</sup> If this is not the correct interpretation, then we can only

<sup>72</sup> Cain, EIC at [45].

<sup>73</sup> Skerrett, EIC at [21] citing Tā Tipene o Regan in Wilson, J ed. (1987) *From the Beginning: The Archaeology of the Maori*, 23.

<sup>74</sup> Cain, EIC at [71].

<sup>75</sup> Cain, EIC at [85].

<sup>76</sup> Minute dated 25 July 2018 at [6] and [8]; and Record of Pre-Hearing Conference dated 12 September 2018 at [4]-[7].

<sup>77</sup> pSWLP, Introduction at 6. Oxford English Dictionary (Online) defines “fundamental”, a noun, as meaning “A basic or primary principle, rule, law, or article, which serves as the groundwork of a system: an essential part”.



say again it behooves the parties to set out their understanding of the scheme of the proposed plan (in other words its plan's architecture) so that the court has a basis upon which to assess their planning evidence.

[57] The clearest evidence on the role of Te Mana o te Wai and ki uta ki tai in this plan was from Mr B Farrell, giving evidence on behalf of Forest and Bird and Fish and Game. He said:<sup>78</sup>

The suite of Objectives in the pSWLP are to be read together. No Objective overrides any other Objective. The Objectives are wound together by the concept of "*ki uta ki tai*" and the concept of "*Te Mana o te Wai*" was placed at the top of the plan structure. This is evidenced in the pSLWP's [sic] preamble which has not been substantively amended since it was agreed by the Council after various Councillor workshops undertaken in 2014-2015.

[58] While not referred to directly, ki uta ki tai is almost certainly expressed in Objective 1 and Te Mana o te Wai in Objective 3. In addition, witnesses for the Regional Council and Ngā Rūnanga talked about a "golden thread" woven through the fabric of the plan<sup>79</sup> – addressing provisions beyond these two objectives. This "thread" or the "korowai", may be those parties' particular approach to plan interpretation and implementation, but if correct this may not have been understood by other parties.

[59] As a matter of national significance, the health and wellbeing of water are to be placed at the forefront of discussion and decision-making. Only then can we provide for hauora by managing natural resources in accordance with ki uta ki tai. This is our second key understanding. This understanding is consistent with the evidence of Kaiwhakahaere and Upoko of Waihopai Rūnaka and Murihiku Marae, Mr M Skerrett. He said:<sup>80</sup>

... We all know the values and they are enshrined in Te Mana o te Wai – the mana/prestige and the ability of wai and its mauri to sustain human health, animal health, instream values, riparian values, transport (not transport pollutants) to name a few. [our emphasis].

[60] Returning to the NPS-FM, the section addressing the matter of national

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<sup>78</sup> Farrell, EIC at [8].

<sup>79</sup> Transcript (Skerrett) at 950; Transcript (McCallum-Clark) at 1530-1531 and 1557. See also Transcript at 1557 where counsel for Meridian cross-examining Mr McCallum-Clark elicited the response that both Objective 1 and 3 were intended to be and are the golden thread woven through the plan.

<sup>80</sup> Skerrett, EIC at [115].



significance has several parts.<sup>81</sup> Having defined Te Mana o te Wai,<sup>82</sup> the NPS-FM records that upholding Te Mana o te Wai acknowledges and protects the mauri of the water.<sup>83</sup> Thus, acknowledgement and protection of mauri is an outcome of upholding Te Mana o te Wai. The mauri of water is, therefore, expressly linked with its use.

[61] In directive language the NPS-FM “requires that in using water you must also provide for” the health of the environment, the health of the waterbody and the health of the people.<sup>84</sup> We interpret the direction “you must also provide for” [our emphasis] as applying to local authorities in their capacity to make policy statements and plans and consequently, consent authorities whose permission is needed in order to carry out an activity for which consent is required and ultimately, every user of water.

[62] We interpret ‘also’ as meaning ‘in addition’,<sup>85</sup> thus in using water you must in addition provide for the health of the environment, of the waterbody and of the people. Subject to what the parties may say about how the Treaty principles are taken into account in this plan, this direction appears in line with the Treaty principle of active protection and would impose a positive obligation on all persons exercising functions and powers under the Act to ensure that when using water people also provide for health. This may have been what Ngā Rūnanga’s planning witness was meaning when she referred to the Treaty principles.<sup>86</sup> This direction juxtaposes with the usual line of inquiry as to how health will be impacted by a change in water quality (i.e. the effects of the activity on the environment). The NPS-FM makes clear that providing for the health and wellbeing of waterbodies is at the forefront of all discussions and decisions about fresh water.<sup>87</sup> This is our third key understanding.

[63] If we are correct in our understandings, and this approach is indeed threaded through the proposed plan, this is a fundamental shift in perspective around management of this natural resource. The correctness of our interpretation above may well be of moment on appeals addressing policies (i.e. the course of action to implement objectives) and rules (i.e. the methods to give effect to the objectives and policies).

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<sup>81</sup> “The matter of national significance to which this national policy statement applies is the management of fresh water through a framework that considers and recognises Te Mana o te Wai as an integral part of freshwater management”.

<sup>82</sup> “Te Mana o te Wai, is the integrated and holistic well-being of a freshwater body”.

<sup>83</sup> NPS-FM, National significance of fresh water and Te Mana o te Wai at 7.

<sup>84</sup> NPS-FM, National significance of fresh water and Te Mana o te Wai at 7.

<sup>85</sup> New Zealand Oxford Dictionary (Oxford University Press, 2005).

<sup>86</sup> Davidson, EIC at [19].

<sup>87</sup> NPS-FM, National significance of fresh water and Te Mana o te Wai at 7.



[64] This understanding of a shift in perspective appears to be shared by the Regional Council who put to Mr M Skerrett in cross-examination, “the proposed plan is an evolutionary step forward in terms of incorporating the golden thread ... in terms of Te Mana o te Wai”.<sup>88</sup> Mr Skerrett accepted this statement as being correct.

***Plan scheme (architecture)***

[65] Given the above, we posit that the plan was drafted in a way that all objectives and policies were intended to express Te Mana o te Wai and ki uta ki tai. The structure (architecture) of the plan is to progressively elaborate on these outcomes with each successive objective building on the foregoing. If we are correct, the construction of the plan is atypical and needs careful explanation.

[66] We illustrate this possible interpretation, through three examples.

[67] First, Objective 15<sup>89</sup> states “Taonga species, as set out in Appendix M, and related habitats, are recognised and provided for”. Ordinarily we would regard phrases such as ‘recognise and provide for’ as lacking meaning when they appear in an objective. The uncertain future for taonga species is underscored by Policy 3 (the implementing policy), which states “... manage activities that adversely affect taonga species, identified in Appendix M.” On the other hand, is the outcome for taonga species secured through the implementation of Te Mana o te Wai and ki uta ki tai? There may be more than one course of action and method in the policies and rules to give effect to objectives, but all objectives, policies and rules assume effect is given to Te Mana o te Wai and ki uta ki tai is implemented. If this is the case, does the outcome for taonga species need any further elaboration?

[68] Again by way of illustration, Objective 2 (DV) provides “Water and land is [sic] recognised as an enabler of primary production and the economic, social and cultural wellbeing of the region”. Merely *recognising* something in an objective, does not breathe meaning into the outcome that is to be achieved. Are not the three wellbeings expanded upon by Objectives 9 and 13 which in turn implement Te Mana o te Wai and ki uta ki tai?




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<sup>88</sup> Transcript (Skerrett) at 951.

<sup>89</sup> Objective 15 is not under appeal.

[69] Finally, there will be access to and sustainable use of mahinga kai, nohonga, mātaītai and taiāpure (Objective 5)<sup>90</sup> when (we interpolate) the interconnection between land, water and people is recognised and natural resources are managed accordingly. While Objective 5 does not refer to Te Mana o te Wai or ki uta ki tai, the objective is promulgated on the basis that land and water resources are managed in a way to give effect to Objectives 1 and implement Objective 3.<sup>91</sup>

[70] If the scheme of the plan, properly interpreted, is not to progressively give effect to Te Mana o te Wai and to implement ki uta ki tai, then in our view many of the objectives are weakly drawn. That is because objectives usually have the purpose of clearly stating what it is that a plan is intent on achieving. At the simplest level an objective is a goal or aim of the plan.<sup>92</sup> Policies are the course of action to achieve or implement the same. An alternative drafting style adopted by several parties in this hearing would instead leave the outcomes to be articulated by the policies. Thus, planners espoused that something be “recognised”, “provided for” and “recognised and provided for” in the plan. This is with the apparent intention that the policies particularise the outcomes. The planning evidence before us tended to adopt one of the two drafting styles, with the latter creating conflict where probably none actually exists or simply creating uncertainty for the other parties.

[71] We return to Objective 15 again by way of illustration. Objective 15 states “Taonga species, as set out in Appendix M, and related habitats, are recognised and provided for”. The implementing policy, Policy 3, provides for taonga species through the management of activities that adversely affect the same. If Te Mana o te Wai is not the foundational principle, implemented in the way we posit, then the outcomes for the taonga species are uncertain because the health and mauri of water and its ability to sustain taonga species is not to the fore. Rather, Te Mana o te Wai and ki uta ki tai are two of 18 objectives, the relevance of which is to be argued case by case. If this is the correct interpretation, then we would have anticipated a more conventional drafting approach wherein the objective, in positive language, clearly states the outcomes for taonga species, e.g. taonga species are abundant and their habitat intact.

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<sup>90</sup> Objective 5 is not under appeal.

<sup>91</sup> pSWLP, Preamble at 5.

<sup>92</sup> See Judge J Hassan et al *Plan drafting – A Guide to Best Practice* (paper presented to RMLA-NZPI Roadshow, Powerful Plans – Perspectives on Best Practice Plan-Making, July 2019).



## Objectives 1 and 3

### Objective 1 (DV)

Land and water and associated ecosystems are sustainably managed as integrated natural resources, recognising the connectivity between surface water and groundwater, and between freshwater, land and the coast.

### Objective 3 (DV)

The mauri of waterbodies provide for te hauora o te tangata (health and mauri of the people), te hauora o te taiao (health and mauri of the environment) and te hauora o te wai (health and mauri of the waterbody).

[72] While we received no evidence on point, Objective 1 of the pSWLP appears to be a clear expression of the ki uta ki tai philosophy.

[73] Objective 3 responds to the matters of national significance in the NPS-FM, ss 6(e)<sup>93</sup> and 7(a)<sup>94</sup> of the Act.<sup>95</sup> The s 32AA report records that while the objective is well aligned with the community's views there is confusion as to how it is measured and achieved.<sup>96</sup>

[74] In its current form Objective 3 does not fully give effect to the matter of national significance and Objective AA1.<sup>97</sup>

[75] In line with the language used in the NPS-FM, mauri is to be "acknowledged and protected" under Objective 3. In this regard we prefer the proposed wording of Forest and Bird, Fish and Game and the Department of Conservation as meaning that the mauri itself is protected so that mauri can sustain hauora.

[76] Secondly, we wonder whether the sense of Objective 3 could be improved by

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<sup>93</sup> Section 6: 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 Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

<sup>94</sup> Section 7: 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 have particular regard to — (a) Kaitiakitanga.

<sup>95</sup> Section 32AA report at [5.3.3].

<sup>96</sup> Section 32AA report at [5.3.3].

<sup>97</sup> Transcript (McCallum-Clark) at 1534-1535, and 1537.



referring to the mauri of “water” rather than “waterbodies”.

[77] Thirdly, the plan likens Te Mana o te Wai to a korowai (cloak). If Te Mana o te Wai is a korowai does this mean all other objectives and policies are to be read in light of Objective 3 (i.e. the plan is to be interpreted and applied this way)? It is our tentative view that this approach would better accord with the matters of national significance in the NPS-FM and is a more appropriate way to ensure that the integrated and holistic wellbeing of a freshwater body will be directly connected with the use of water and land. Fundamentally, what the court is looking for here is guidance on the plan scheme (architecture) .

[78] While there are no direct appeals on these objectives there appears to be scope under Ngā Rūnanga’s appeal, to align the provisions of the plan (from its objectives through to the rules) better with the NPS-FM and Te Mana o te Wai and ki uta ki tai.<sup>98</sup>

### Outcome

[79] We recommend Objectives 2 and 3 be reordered and the Te Mana o te Wai objective (presently Objective 3) reworded as follows:

The mauri of waterbodies will be acknowledged and protected so that it provides for te hauora o te taiao (health and mauri of the-environment) and te hauora o te wai (health and mauri of the waterbody) and te hauora o te tangata (health and mauri of the people).

[80] Secondly, we will seek further submissions and evidence on whether Objectives 1 and 3 (Te Mana o te Wai) should be identified as the Korowai Objectives and korowai be defined as a method of plan interpretation.

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<sup>98</sup> Ngā Rūnanga, notice of appeal at [8(d) and (e)].



## Objective 2

### Objective 2 (DV)

Water and land is recognised as an enabler of primary production and the economic, social and cultural wellbeing of the region.

[81] The Hearing Panel, without giving reasons, amended the notified version of Objective 2 to recognise water and land as an enabler of “primary production”. The inclusion of primary production was appealed by Fish and Game and Ngā Rūnanga who both sought its deletion.<sup>99</sup> The appellants argue that reference to primary production could be interpreted as giving greater weight to the use of land and water for this activity above other values and uses, including those that rely on the health of the environment.<sup>100</sup> They point out that the attainment of economic, social and cultural wellbeing is not prioritised under this objective but each wellbeing is afforded equal weight.<sup>101</sup> The enablement of primary production does not, therefore, appropriately recognise Te Mana o te Wai which places the needs of the waterbody first and requires users of water to provide for hauora.<sup>102</sup>

[82] The primary sector, on the other hand, would retain primary production within the objective and they recommend amendments to address the appellants’ concerns. They proposed to amend the objective to read:

Water and land are recognised as enablers of the economic, social and cultural wellbeing of the region, including through primary production and other economic opportunities.

[83] Horticulture New Zealand argued that relocating “primary production” together with the new phrase “or other economic opportunities” at the end of the objective, should allay concerns that the objective will be interpreted so that “primary production” is given precedence over general economic, social and cultural wellbeing.<sup>103</sup>

<sup>99</sup> Mr Farrell, giving planning evidence on behalf of Fish and Game and Forest and Bird, could support the retention of primary production within limits. He later changed his evidence and in line with Forest and Bird’s appeal advised the reference to primary production should be deleted.

<sup>100</sup> Davidson, EiC at [57]; Farrell, EiC at [56]; Transcript (McCallum-Clark) at 425.

<sup>101</sup> Forest and Bird, closing submissions at [18].

<sup>102</sup> Davidson, EiC at [53]-[55].

<sup>103</sup> Horticulture New Zealand, closing submissions at [6]-[8]; Ballance Agri-Nutrients Limited at [4]-[8]; Ruston, EiC at [25]-[26].



[84] Farming makes a significant contribution to the economic and social wellbeing of the region and Federated Farmers is particularly concerned about the regional impact regulation may have – which we were told will be greater than in other regions.<sup>104</sup> Federated Farmer’s planning witness, Mr D Sycamore, cited RPS Issue RURAL.1 and Objective Rural 1 in support of the Objective referencing the enabling of primary production. However, on closer examination we could find no direct support in these provisions for the express recognition of primary production. We did note, however, his observation that the objective is not one that seeks to manage activities or outcomes and that the objective is not to be read in isolation, but as one in a suite of objectives that have a focus on maintaining or improving water quality.<sup>105</sup>

[85] DairyNZ and Fonterra hold similar concerns to those of Federated Farmers, submitting that the reference to primary production in the objective is to provide “an appropriate basis for subsequent policies and rules relating to primary production, and how this activity needs to be sustainably managed within limits”.<sup>106</sup> They point out that the objective as originally notified, does little more than repeat part of s 5 of the Act.<sup>107</sup> In seeking to refer to “primary production” this is no different to other objectives and policies which also list particular activities to which the provision is to apply. That said, planning witnesses for the primary sector agree that primary production is not the only or necessarily the most important contributor to a region’s economic wellbeing.<sup>108</sup>

[86] While the Regional Council takes no position on the outcome of these appeals, its planning witness, Mr McCallum-Clark, acknowledged this recognition had the potential to “skew” the objective towards primary production.<sup>109</sup>

### **Discussion**

[87] As earlier noted, it appears to us that the structure of this plan is to elaborate on the outcomes progressively with each successive objective building on the foregoing.

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<sup>104</sup> Federated Farmers, opening submissions at [4]-[6] and closing submissions at [7]-[8].

<sup>105</sup> Sycamore, as s 274 party in opposition at [28].

<sup>106</sup> Transcript (Matheson) at 179.

<sup>107</sup> DairyNZ and Fonterra Co-operative Group Limited, closing submissions at [5]-[8]. Willis, EIC at [6.9].

<sup>108</sup> See for example Transcript (Sycamore) at 556-558; Transcript (Ruston) at 608-609; Willis, EIC at [6.9].

<sup>109</sup> Transcript (McCallum-Clark) at 1555.



[88] While the enabling of land use activities, including those associated with primary production, may support economic and social wellbeing, in common with the witness for Federated Farmers, we do not interpret Objective 2 as being concerned with the enablement of activities *per se*. The objectives for Te Mana o te Wai and ki uta ki tai form the immediate context for Objective 2. Economic, social and cultural wellbeing are aspects of te hauora o te tangata (the health of the people). If the mauri of water is acknowledged and protected then it will provide for the health of the people (Objective 3), and integrated management of water and land will enable economic, social and cultural wellbeing of the region (Objective 2).

[89] The retention of primary production will obscure the objective if it is interpreted as being concerned with the enablement of activities. This interpretation is reasonably available to users of the plan, as one purpose advanced for retaining reference to primary production in the text is to support (on appeal) subsequent policies, rules and methods that enable primary production and manage the effects of the same.<sup>110</sup> The proposed amendment would create tension with other objectives that address the circumstances in which land and water may be used for productive purposes (see in particular Objectives 9/9A and 13).

### Outcome

[90] We do not approve the inclusion of primary production in Objective 2 but approve instead the objective as notified (corrected for grammar):

Water and land are recognised as an enablers of the economic, social and cultural wellbeing of the region.



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<sup>110</sup> DairyNZ and Fonterra Co-operative Group Limited, closing submissions at [6].

## Objectives 6 and 7

### Objective 6 (DV)

There is no reduction in the overall quality of freshwater, and water in estuaries and coastal lagoons, by:

- (a) maintaining the quality of water in waterbodies, estuaries and coastal lagoons, where the water quality is not degraded; and
- (b) improving the quality of water in waterbodies, estuaries and coastal lagoons that have been degraded by human activities.

### Objective 7 (DV)

Any further over-allocation of freshwater (water quality and quantity) is avoided and any existing over-allocation is phased out in accordance with freshwater objectives, freshwater quality limits and timeframes established under Freshwater Management Unit processes.

[91] The above objectives are subject to a number of appeals. While there was large agreement at the hearing that there were grounds for those appeals, the final wording of both objectives remained in contention. We return to a discussion of the wording after considering the state of the environment next.

### ***State of the environment***

[92] Water quality is changed, and the environment adversely affected, by the cumulative discharge of contaminants into water, or onto or into land, in circumstances where the contaminant may enter water.

[93] In their Report and Recommendations to the Regional Council, the Hearing Panel discussed Southland's declining water quality, identifying agricultural land use as a significant contributor to the state of water quality. Indeed, the Panel found it incontrovertible that water quality had declined between 2000–2016 in the region's rivers, lakes and estuaries. Even so, the Panel was unable, on the evidence before it, to reach any conclusion on the direction of trend including whether, as some experts had contended, water quality had improved or had become stable.<sup>111</sup>

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<sup>111</sup> Report and Recommendation of the Hearing Panel, dated 29 January 2018 at [148]-[150].



[94] The pSWLP contains an issues statement, the purpose of which is to “[highlight] the importance of maintaining good water quality in upstream rivers”.<sup>112</sup> There are three sources of water contamination noted; namely point source and secondly non-point source both of which are said to contribute significant levels of contaminants to waterbodies and finally, land use intensification which “tends” to increase the amount of contaminants.<sup>113</sup> The pSWLP does not actually identify any waterbody as being degraded. The closest the plan comes is in the statement “[d]egraded estuary, lagoon and lake water quality and habitats are particularly difficult and expensive to reverse”.<sup>114</sup>

[95] We do not understand any witness to take issue that the quality of water in many waterbodies is likely degraded<sup>115</sup> and nor did any party oppose in principle the objective that where water quality is degraded then it must be improved.<sup>116</sup>

[96] The objective begs the question: what is meant by ‘degraded’? The salience of this question should be self-evident: the mauri of water is neither acknowledged nor provided for where water is allowed to or has become degraded by human activities.<sup>117</sup>

### ***Expert conferencing***

[97] Expert conferencing is continuing as a matter of urgency given what we were told about the likely state of the environment in Southland. The experts are to report on (amongst other matters):

- (a) a recommended classification systems for rivers, lakes and estuaries on an interim basis (pending the FMU processes to follow);
- (b) attributes and thresholds to be used as the basis of defining degradation on an interim basis; and
- (c) estimated levels of confidence in any recommended attribute thresholds.

[98] On the topic of water quality, the court received expert opinion from a large number of scientists. While we have considered everything they said, we will not be

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<sup>112</sup> pSWLP, Issues at 15.

<sup>113</sup> pSWLP, Issues at 15.

<sup>114</sup> pSWLP, Issues at 15.

<sup>115</sup> Transcript (McCallum-Clark) at 382;

<sup>116</sup> Transcript (McCallum-Clark) at 426;

<sup>117</sup> Transcript (McCallum-Clark) at 1539.



discussing their evidence in any detail but instead will focus on the outcomes of joint witness conferences convened ahead of the hearing. Before we do that, we record our gratitude for the way the experts have engaged during expert conferencing.

[99] We return next to the wording and operation of Objectives 6 and 7.

***What is “overall” water quality?***

[100] As became apparent during the hearing it was unclear from the language of Objective 6 whether the objective applied before or after the FMU limit-setting processes, or is intended to apply at all times. The uncertainty arises because of the inclusion of the term “overall water quality”. That wording suggests that the provision is directed at NPS-FM’s Objective A2 which provides “overall quality of fresh water within a freshwater management unit is maintained or improved”. Water quality within a FMU is for a later plan change.

[101] Objective 6 was amended by the Hearing Panel to include the term “overall” as the Panel thought this would give better effect to Objective A2 of the NPS-FM. We observe that the Regional Council will not be assisted in carrying out its functions by successive planning instruments merely repeating the content of the higher order planning documents. Rather, as the Supreme Court said in *Environmental Defence Society Incorporated v New Zealand King Salmon Company Limited & ors*:<sup>118</sup>

As we have said, the RMA envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to s 5, and to pt 2 more generally. These documents form an integral part of the legislative framework of the RMA and give substance to its purpose by identifying objectives, policies, methods and rules with increasing particularity both as to substantive content and locality.

[102] There was general uncertainty at this hearing as to the meaning of the term “overall” with the most relevant RPS objective, WQUAL.1, not even referring to “overall water quality”. Experts giving evidence on water quality and ecology considered the term “overall water quality” problematic. Ecosystem health can be described by one or a combination of specific attributes. The NPS-FM defines an “attribute” as meaning a measurable characteristic of fresh water, including physical, chemical and biological




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<sup>118</sup> *Environmental Defence Society Incorporated v New Zealand King Salmon Company Limited & ors* [2014] NZSC 38 at [30].

properties, which support particular values.<sup>119</sup> At that time, the experts agreed that if one attribute does not meet the relevant criterion the water quality is considered degraded.<sup>120</sup>

[103] Commenting on ecosystem health, they said<sup>121</sup> the aggregation of multiple attributes may mask the effects of an exceedance of a single attribute state. There is no repeatable methodology to aggregate data across multiple attributes or sites and the development of such an assessment framework would be a substantial and complex body of work requiring significant agreement across multiple disciplines. Any attempt to spatially aggregate water quality data across multiple sites limits the ability to consider locality-specific effects at an appropriate level of detail. Such an approach is limited by the representativeness of the monitoring network. Moreover, the assessment of “overall water quality” would be subjective and the outcome could be interpreted in a number of ways, including spatially, temporally and across multiple attributes.<sup>122</sup>

[104] It is the experts’ view that water quality and ecology must be considered using both a whole-of-catchment and site-specific approach. This involves consideration of historic and current land use, the quality and quantity of groundwater and all freshwater bodies and the sea on an integrated basis. As all waterbodies are interconnected, not adopting a holistic whole of catchment approach risks drawing incorrect conclusions.<sup>123</sup>

[105] For completeness, we were referred by one party to guidance published by the Ministry of Environment on what it means to “maintain” in the context of the NPS-FM Objective A2 but were not assisted by this publication as to how “overall water quality” could be implemented by policies and rules in a regional plan.<sup>124</sup>

[106] At the end of the hearing, the parties proposed to delete the opening part of Objective 6 “[t]here is no reduction in the overall quality of fresh water”. We consider this part may be severed without altering the meaning of the balance of the objective, which is to maintain water quality where not degraded and to improve water quality where it is. The amendment addresses concerns with the meaning of the term “overall” and does so

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<sup>119</sup> NPS-FM, Interpretation.

<sup>120</sup> JWS – Water Quality and Ecology (Rivers and Wetlands) at [47].

<sup>121</sup> JWS – Water Quality and Ecology (Rivers and Wetlands) at [23].

<sup>122</sup> JWS – Water Quality and Ecology (Rivers and Wetlands) at [24].

<sup>123</sup> JWS – Water Quality and Ecology (Rivers and Wetlands) at [25].

<sup>124</sup> A guide to the National Policy Statement for Freshwater Management 2014 (as amended 2017) <https://www.mfe.govt.nz/publications/fresh-water/guide-national-policy-statement-freshwater-management-2014> cited in the closing submissions of the territorial authority at [19].



without imposing any “no reduction” test as this would be unable to be achieved for point-source discharges within the zone of reasonable mixing.<sup>125</sup>

[107] In addition to deleting “overall” from the objective, the primary sector proposed water quality would be maintained or improved in *each* freshwater body. The reference to “each” freshwater body was to put beyond doubt that the objective could not be met by water quality *overall*, (or across all waterbodies) being maintained, thus ensuring that improvement in one freshwater body could not be “traded off” against declining water quality in another.<sup>126</sup> The proposed amendment addresses the concern raised by the Regional Council which was to ensure that the spatial scale of assessment not be at a region-wide level or at the level of an individual FMU.<sup>127</sup>

### ***Holding the line***

[108] A critical issue for Forest and Bird is whether the pSWLP intends only to “hold the line”, or whether the plan requires improvement of degraded waterways in advance of the FMU processes.<sup>128</sup>

[109] The Hearing Panel records in its decision that the pSWLP policies and rules directed at farming are intended to halt any further decline in water quality and that this intention had given rise to a planning ethos colloquially referred to as “holding the line”. The realisation of this outcome is now in doubt. Dr A H Snelder, a land and water consultant giving evidence on behalf of the Regional Council,<sup>129</sup> said any reduction in nutrient loadings achieved through changes in land management could be eroded within two to five years by subsequent intensification in land use and improvement in farm productivity.<sup>130</sup> While we acknowledge the witnesses for the Regional Council were not briefed to address the effectiveness of the plan’s policies and rules, and that the pSWLP has land management provisions in addition to those considered by Dr Snelder, we were not made aware of any modelling undertaken by the Regional Council that has verified that the provisions of the proposed plan could indeed ‘hold the line’.

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<sup>125</sup> Territorial authorities, closing submissions at [12]-[16].

<sup>126</sup> DairyNZ Limited and Fonterra Co-Operative Group Limited, closing submissions at [9]-[12].

<sup>127</sup> McCallum-Clark, supplementary evidence at [11].

<sup>128</sup> Forest and Bird closing submissions at [23].

<sup>129</sup> This evidence was originally presented in 2014 in a report to the Regional Council. See exhibit Ngā Rūnanga 1.

<sup>130</sup> Transcript (Snelder) at 302-304.



[110] Ms R J Millar, giving planning evidence on behalf of the Regional Council, said staff at the Council knew as early as 2013 that “holding the line” would be difficult “[let] alone achieving improvements”.<sup>131</sup> Mr M McCallum-Clark, also giving planning evidence for the Regional Council, said while there would be improvement in water quality through the pSWLP’s regulatory and non-regulatory methods, any improvement in water quality would likely be “quite limited” and of short duration, being eroded over time.<sup>132</sup> In his opinion, the rule framework was in need of “considerable reassessment”.<sup>133</sup> He said many of the plan’s non-regulatory initiatives (such as the adoption of good management practices) were a “light touch on existing farming activities”.<sup>134</sup>

[111] We acknowledge and appreciate the witnesses’ candor on this topic. As we have recorded, at the conclusion of the hearing no party advocated there should not be improvement in the quality of water (where degraded) in advance of the FMU processes.

#### ***The duration of Objective 6***

[112] The issue that arises in relation to duration concerns whether Objective 6 is to be restricted to the period prior to any plan change establishing freshwater objectives, limits and targets for the six FMUs. Those in support of this proposition say the proposed plan “loses nothing” by restricting the operation of Objective 6 this way.<sup>135</sup> They say this will ensure there is no confusion about how “degraded”<sup>136</sup> water relates to the FMU process and avoids risking the “locking in” of an outcome contrary to the NPS-FM freshwater management unit requirements.<sup>137</sup>

[113] The parties opposing this course say the objective should not be limited in this way because not all contaminants are allocable and therefore some may not be the subject matter of freshwater objectives, limits and targets developed in accordance with Objective 7.<sup>138</sup> *E.coli* and phosphorus were given as examples of contaminants that

<sup>131</sup> Transcript (Millar) at 1513.

<sup>132</sup> Transcript (McCallum-Clark) at 436.

<sup>133</sup> Transcript (McCallum-Clark) at 412.

<sup>134</sup> Transcript (McCallum-Clark) at 408. See also Transcript (McCallum-Clark) at 407 for discussion on likely effectiveness of non-regulatory methods.

<sup>135</sup> By way of example, the Regional Council’s preferred wording is: “Prior to the establishment of freshwater objectives, limits and targets under Freshwater Management Unit processes, ...”.

<sup>136</sup> What is meant by ‘degraded’ water quality is being considered in conferencing of expert witnesses, currently underway.

<sup>137</sup> Ravensdown Limited, closing submissions at [7]–[16]. McCallum, supplementary evidence and table attached.

<sup>138</sup> McCallum-Clark, supplementary evidence at [9]. Transcript (McArthur) at 853-854.



cannot be allocated or will be difficult to allocate under the FMU process. The continuation of Objective 6 post-FMU would not, in their view, cause tension with Objective 7.<sup>139</sup>

[114] The Director-General of Conservation supported the continuation of Objective 6 post-FMU for the specific reason that Objective 7 (which is addressing the future FMUs) does not apply to waterbodies that are not subject to any limit. “Over-allocation” is an NPS-FM term being the situation where the resource:

- (a) has been allocated to users beyond a limit; or
- (b) is being used to a point where a freshwater objective is no longer being met.

[115] For water that is not over-allocated, Objective 7 does not require water quality to be maintained (where not degraded) or improved.<sup>140</sup> Responding to this, the Regional Council and Ravensdown proposed amending Objective 7 by including a new sub-clause “(aa) where water quality limits are met, water quality is maintained or improved”. We will come back to this shortly.

#### ***Discussion on the duration of Objective 6***

[116] We do not agree with the submission that the continuation of Objective 6 post-FMU risks policies or methods developed for the period prior to the FMU processes being wrongfully or unmeritoriously incorporated in a future plan change. The pSWLP makes clear that policies and methods may be changed under a future FMU process. There is a real risk, however, were Objective 6 not to extend beyond the establishment of freshwater objectives under the FMU processes, that contaminants not amenable to an allocation regime, such as *E.coli*, may not be subject to any control.




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<sup>139</sup> Fish and Game, closing submissions at [22].

<sup>140</sup> Director-General of Conservation, closing submissions at [28].

***Bridging the gap***

[117] As noted, it is not seriously contested that many of the region's waterbodies are likely degraded. The risk to ecosystem health, if improvement in water quality was deferred until after the completion of a future FMU process, was described by one witness as "devastating, particularly for the region's unique and threatened freshwater ecology".<sup>141</sup>

[118] This plan does not propose an allocative regime (i.e. limits or targets) wherein the amount of improvement required to attain ecosystem health and human health (for recreation) is set over a specified timeframe.<sup>142</sup> It is conceivable that under the FMU process, improvement in ground water quality may take decades if not generations to achieve.<sup>143</sup>

[119] A key issue raised by many parties is whether there are methods under the pSWLP that are capable of ensuring, now, that the trajectory of change is towards improvement of a degraded waterbody. In the absence of an allocative regime it will be difficult to relate the magnitude of in-stream improvement to change in the land management of individual properties.<sup>144</sup> If there is to be improvement in degraded waterbodies ahead of the FMU process then our preliminary view is that it is essential the narrative and numeric attributes for degraded water are known and that land management of individual properties address the linkages between those attributes and the contaminant pathways.

[120] Essentially Fish and Game and Forest and Bird are proposing this through their "bridging the gap" initiative.<sup>145</sup> While these parties initially sought to introduce limits and targets into this plan, they now advocate for rules and methods that require identification of contaminant pathways to surface waterbodies and the taking of practicable measures to reduce existing sources of contaminants and avoid increased losses. This may require additional policy defining what is meant by degradation<sup>146</sup> and further rule support.

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<sup>141</sup> McArthur, EIC at [67].

<sup>142</sup> Transcript (McArthur) at 802-804, 827-831. Forest and Bird is no longer pursuing relief on this basis.

<sup>143</sup> NPS-FM, Preamble at 5.

<sup>144</sup> Transcript (McArthur) at 803. Transcript (McCallum-Clark) at 450-451.

<sup>145</sup> Forest and Bird and Fish and Game paper dated 11 June 2019.

<sup>146</sup> DairyNZ Limited and Fonterra Co-operative Group Limited, closing submissions at [11].



[121] This is a very different approach to managing the effects of change brought about by resource use. Under the RMA when we talk about the effects of change, change typically has yet to occur. Effects language is often employed to describe the consequence of change brought about by the use of resources. So when we say the effect of the resource use on the environment will be minor, for example, this usually is a prediction about the future.

[122] We think the initiative highlights the need for pre-emptive risk management. This may be to lessen the reliance made on predictive assessments about the future environment with greater emphasis given to the evaluation of risk. A matter for Topic B hearing is whether the initiative is more effective and practicable than the effects-based assessment methods employed by the Regional Council.

### ***2010 Baseline Environment***

[123] Central to Ngā Rūnanga's appeal is the question whether the present-day state of the environment in Southland<sup>147</sup> should be the benchmark against which water quality is assessed.

[124] While no relief was proposed we understand Ngā Rūnanga would use the state of the environment at 2010 as the benchmark environment and so it is convenient to deal with the issue at this juncture. The reason for this benchmark is that under the Regional Water Plan (made operative in 2010), the Regional Council made a commitment to maintain or improve water quality across a range of variables. It seems probable these outcomes have not been achieved.<sup>148</sup> It may be that the removal of the introductory part of Objective 6<sup>149</sup> will address Ngā Rūnanga's concern. Presently, we are not attracted to any time-bound benchmarking of water quality at 2010, which may set a very low bar relative to the cultural and ecological indicators of freshwater health. We can revisit this issue if Ngā Rūnanga decides to pursue this matter by proposing relief.

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<sup>147</sup> More particularly, the date that the pSWLP was notified.

<sup>148</sup> Davidson, EIC at [41]-[51].

<sup>149</sup> "There is no reduction in the overall quality of fresh water [etc]".



### ***Naming of waterbodies***

[125] Finally, different iterations supported by individual parties did not take a consistent approach when listing the waterbodies. For example, the primary sector would include aquifers in the wording of the objective whereas Forest and Bird and Fish and Game do not. Aside from water in estuaries and coastal lagoons, Ngā Rūnanga does not list other water bodies. On the other hand, the Regional Council would exclude aquifers claiming there is too much uncertainty spatially (where) or even whether this objective is being met for aquifers<sup>150</sup> and that groundwater is addressed in Objective 8.

[126] Save in relation to the Regional Council, it is not clear from the evidence and submissions whether these differences are purposeful.

[127] As for the Regional Council's reason to exclude aquifers, Objective 8 is limited in scope in that it addresses the quality of groundwater relative to the drinking water standards only. Given the connectivity between all waterbodies, excluding aquifers appears inconsistent with the management philosophy of *ki uta ki tai* and Objective 1 and it is our provisional finding that types of waterbodies should not be listed in the objective.

### **Outcome**

[128] We accept the submission that Objective 6 is to endure beyond the FMU processes. We further accept that the objective should be amended to refer to "each" waterbody. We will seek submissions on whether the omission of certain types of waterbodies was intentional on the part of some parties and secondly, whether the omission could frustrate the approach of recognising the inter-connectedness of the water bodies and addressing water holistically.

[129] Thus, Objective 6 as proposed to be amended by the court would read:

Water quality in each freshwater body will be:

- (a) maintained where the water quality is not degraded; and
- (b) improved where the water quality is degraded by human activities.

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<sup>150</sup> McCallum-Clark, supplementary evidence at [11].



[130] In relation to Objective 7 we accept the amendments proposed by the Regional Council, the primary sector and Ravensdown and further amend new sub-clause (aa) to include both freshwater objectives and limits.

[131] Objective 7 as proposed to be amended by the court would read:

Following the establishment of freshwater objectives, limits, and targets (for water quality and quantity) in accordance with the Freshwater Management Unit processes:

- (a) where water quality objectives and limits are met, water quality is maintained or improved;
- (b) any further over-allocation of fresh water is avoided; and
- (c) any existing over-allocation is phased out in accordance with freshwater objectives, targets, limits and timeframes.



## Objectives 9 and 9A

### Objective 9 (DV)

The quantity of water in surface waterbodies is managed so that aquatic ecosystem health, life-supporting capacity, outstanding natural features and landscapes and natural character are safeguarded.

### Objective 9A (DV)

Surface water is sustainably managed to support the reasonable needs of people and communities to provide for their social, economic and cultural wellbeing.

[132] These objectives are concerned with the quantity of water in surface waterbodies. At the time of notification two objectives were contained in a single provision which effectively prioritised the environment above the use of water. The creation of two separate objectives removed this prioritisation.

[133] At the conclusion of the hearing all parties accepted that Objectives 9 and 9A should be re-merged with the prioritisation restored. It was also agreed that the objective be amended and refer to "waterbody margins" as per the notified version. Accepting the reasons in support of this outcome, our analysis proceeds on this basis.

### ***Life-supporting capacity – proposed sub-clause (a)***

[134] Sub-clause (a) as proposed by the Regional Council and others reads:

The quantity of water in surface waterbodies is managed so that:

- (a) aquatic ecosystem health, life-supporting capacity, outstanding natural features and landscapes, natural character of waterbodies and their margins and human health for recreation are safeguarded; and

[135] By way of observation, the number of discrete values to be safeguarded under sub-clause (a) renders this provision cumbersome. This criticism can be levelled at other objectives too.

[136] The sub-clause refers to both "aquatic ecosystem health" and "life-supporting capacity" [we interpolate "the life-supporting capacity of water"]. We heard evidence that



the term “life-supporting capacity” is unique to the RMA and is not a term used by ecologists who refer instead to ecosystem or ecological health.<sup>151</sup> Moreover, the term does not appear to be defined under the Act, NPS-FM, RPS or the pSWLP. The Environment Court summarised its meaning as part of a broader consideration of biodiversity under Part 2 RMA in *Director-General of Conservation v Invercargill City Council*<sup>152</sup> as follows:

... safeguarding (or protecting) the life-supporting capacity of ecosystems includes in each case having particular regard to each of its components including – as the definition of ‘intrinsic values’ implies – ... its biological and genetic diversity, and in particular, the essential (biotic and abiotic) characteristics of:

- the ecosystem’s integrity (e.g. what space does it occupy at a given time? Is an occurrence at the limit of the ecosystem’s extent of occurrence?);
- its form (what are the characteristics of its environment – the geomorphology, topography, soils, climate, indigenous and other species of flora and fauna, patterns of distribution, natural processes and other relevant constituents identified in the definition of “environment” in s2 RMA;
- its functioning (e.g. is it a seral or ‘climax’ ecosystem? What are the external processes that apply to it? – climate change? pests? weeds? How are the natural cycles and feedback loops – the Carbon, Nitrogen, Phosphorus cycles and others – being changed?); and
- Its resilience (e.g. at what point is a degraded ecosystem irretrievably doomed to “collapse” or can it recover?).

[Footnotes omitted]

[137] Furthermore, in *Lindis Catchment Group Incorporated v Otago Regional Council*<sup>153</sup> the Environment Court noted:

Section 5(2)(b) RMA refers to “life-supporting capacity”. The word used is “capacity” not “ability”. The latter is a qualitative word, whereas capacity is both qualitative and quantitative. It is not merely the ability of (in this case) water to support life which is to be protected, but the volume of water in any given factual matrix.

[138] Also, pertinently, that:<sup>154</sup>

<sup>151</sup> See Transcript (Death) at 862. Ecologists would refer to “ecosystem health” and not “life-supporting capacity”.

<sup>152</sup> *Director-General of Conservation v Invercargill City Council* [2018] NZEnvC 84 at [47].

<sup>153</sup> *Lindis Catchment Group Incorporated v Otago Regional Council* [2019] NZEnvC 166 at [166].

<sup>154</sup> *Lindis Catchment Group Incorporated v Otago Regional Council* [2019] NZEnvC 166 at [168].



It is also worth noting that ecosystems are incredibly complex and that the descriptive pigeonholes ('integrity', 'form', 'functioning', 'resilience') as used in section 2 RMA are (still) often over-simplistic despite their apparent sophistication. Further, ecosystems may be nested or may overlap. These complexities make translating protection of indigenous biodiversity into policies (and under other instruments, rules) very difficult.

[139] If life supporting capacity means the same as aquatic ecosystem health, then the term is redundant and should be deleted; if life supporting capacity is an aspect of Te Mana o te Wai then the term may be redundant if this objective is implementing Te Mana o te Wai as is our understanding. That aside, while the term "life supporting capacity" appears in the higher order documents, presently we do not see how it assists the Regional Council to carry out its functions if this plan does not enlarge on the same.

[140] We will seek submissions / evidence on the meaning of this term within the context of a water quantity objective and to identify the policies that implement the same.

***The loss of a parent objective (proposed sub-clause (c))***

[141] During the course of the hearing it became apparent that if Objective 7 was amended to apply after the FMU process, then there was no objective (that is, no "parent objective") addressing present-day over-allocation of water quantity.<sup>155</sup> Consequential amendments to Objective 9 were proposed in response. The Regional Council would include a new sub-clause so that water quantity is sustainably managed in accordance with Appendix K of the plan.<sup>156</sup> Appendix K sets out the methodology for establishing minimum flow in waterbodies and allocating water from the same. The Director-General of Conservation and others,<sup>157</sup> proposed alternative wording for a new sub-clause.

[142] We do not recall the parties' amendments version being tested in evidence, which is not a criticism. All parties changed their position on the objectives and policies during the course of the hearing and there is yet to be a full opportunity to consider the amendments proposed in light of s 32AA of the Act.




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<sup>155</sup> Transcript (McCallum-Clark) at 1543.

<sup>156</sup> Transcript (McCallum-Clark) at 1543.

<sup>157</sup> Ngā Rūnanga, Forest and Bird and Fish and Game.

[143] We interpret “over-allocation” in the decision version of Objective 7 as referring to both pre and post FMU processes, in other words the objective does not apply the definition of “over-allocation” in the NPS-FM. The term “over-allocation” is peculiar to the NPS-FM and contemplates methods to avoid over-allocation (both quantity and quality) being developed as part of the FMU process (see Objective A2 and Policies A2 and A3; Objective B2 and Policies B5 and B6).

[144] Objective 6 (as proposed to be amended by the court) addresses degradation of water quality only. Objective 7 addresses the over-allocation of fresh water both in terms of its quantity and quality post-FMU. The parties are correct to say there is no objective addressing present-day allocation of water in terms of quantity. With the minor edits track-changed,<sup>158</sup> we prefer the Regional Council’s proposed amendment addressing that gap. The alternative version proposed by the Director-General of Conservation and several other<sup>159</sup> parties wants for its grammatical construction.<sup>160</sup>

[145] We turn next to the two key issues in dispute, commencing with historic heritage.

### **Historic Heritage**

[146] The notified version of the objective listed historic heritage values in Objective 9(a). The Hearing Panel recommended the deletion of all references to historic heritage values from the objectives and policies having accepted a submission that the pSWLP could not impose land use rules for the purpose of controlling effects on heritage.<sup>161</sup> The imposition of land use rules is a function of the district councils pursuant to s 31(1)(b) of the Act.

[147] Heritage New Zealand Pouhere Taonga (Heritage NZ) is not seeking that the potential effects of land use or development *per se* be controlled by this objective. Rather, it seeks that the quantity of surface water is managed so that the historic heritage values of waterbodies and their margins are safeguarded.<sup>162</sup> Ngā Rūnanga seeks the

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<sup>158</sup> We delete a comma: “-, in accordance with Appendix K,”.

<sup>159</sup> Director-General of Conservation, Ngā Rūnanga, Forest and Bird and Fish and Game.

<sup>160</sup> Appendix K refers at several parts to a precautionary approach being adopted in the absence of quality information.

<sup>161</sup> Report and Recommendations of the Panel, 29 January 2018 at [292].

<sup>162</sup> Anderson, EIC at [18]-[20].



same relief. The Regional Council adopted a neutral stance on the inclusion of historic heritage values in this objective.<sup>163</sup>

[148] While there were a number of interested parties in this appeal only Federated Farmers addressed the matter in written evidence.<sup>164</sup> Opposing the inclusion of historic heritage values in the objective, the planning witness for Federated Farmers appeared to say that there was protection for these values under the Heritage New Zealand Pouhere Taonga Act 2014.<sup>165</sup> However, Heritage New Zealand Pouhere Taonga Act 2014 affords protection to archaeological sites.<sup>166</sup> As the definition in the RMA makes clear, historic heritage is concerned with more than New Zealand's built environment:<sup>167</sup>

- (a) ... 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.

[149] Moreover, the direction to recognise and provide for the protection of historic heritage from inappropriate subdivision, use and development is a matter of national importance (s 6(f)) and embodies the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga (s 6(e)). In fairness

<sup>163</sup> Regional Council, opening and closing submissions at [140] and [37] respectively.

<sup>164</sup> Sycamore, EIC as s 274 party in opposition at [59]-[68].

<sup>165</sup> Transcript (Sycamore) at 555.

<sup>166</sup> Archaeological sites are defined under the Heritage New Zealand Pouhere Taonga Act 2014 in relation to buildings or structures associated with human activity that occurred before 1900.

<sup>167</sup> Resource Management Act 1991, s 2.



to Federated Farmer's planning witness, he conceded the omission of historic heritage from the objective.<sup>168</sup>

[150] We approve the relief sought by Heritage NZ and Ngā Rūnanga. The inclusion of historic heritage gives effect to RPS objectives and policies on the same subject-matter.<sup>169</sup> The proposed plan does not identify the values of the region's historic heritage and it may be these sites are too numerous for their values to be comprehensively recorded. In saying that, many of the historic heritage sites are identified in the plan as Statutory Acknowledgement Areas of importance to Ngā Rūnanga.

[151] The section in the plan dealing with the significant resource management issues in the region is to be amended to identify issues arising in relation to historic heritage and where information identifying those sites may be held.

### ***Recreational values***

[152] Finally, there was controversy between the parties over an appeal to include "recreational values" in the objective. The proposed safeguarding of recreational values goes considerably further than what is contemplated under RPS Objective and Policy WQUAN.1 and Policy WQUAN.7.<sup>170</sup> All interested parties agree, as do we, that the quantity of surface water should be managed so that human health for recreation (at least) is safeguarded. As noted elsewhere, human health for recreation is a compulsory national value under the NPS-FM:<sup>171</sup>

In a healthy waterbody, people are able to connect with the water through a range of activities such as swimming, waka, boating, fishing, mahinga kai and water-skiing, in a range of different flows.

The NPS-FM goes on to describe matters to take into account in regard to a healthy waterbody.

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<sup>168</sup> Transcript (Sycamore) at 555-556.

<sup>169</sup> RPS Objective HH.1, Policy HH.2 and Method HH.1 that state: "Historic heritage values are identified and protected from inappropriate subdivision, use and development" (Objective HH.1) and "Avoid, mitigate and, where appropriate, remedy adverse effects on historic heritage values from inappropriate subdivision, use and development. On a case-by-case basis take into account factors such as the significance of heritage values, financial cost and technical feasibility when making decisions relating to the protection of historic heritage." (Policy HH.2).

<sup>170</sup> McCallum-Clark, EIC at [83].

<sup>171</sup> NPS-FM, Appendix 1.



[153] The primary sector submitted that human health for recreation is *primarily* a water quality matter rather than a water quantity matter. In our experience water quantity and water quality interact to determine the health of the waterbody with potential consequential effects for human health when people recreate in water. The interaction and consequential environmental effects exist along a continuum. Some water quality effects may exceed the attributes that support human health for recreation (e.g. *E.coli*) without over use of the water resource. Other water quality effects are the consequence of changes both to water quality and water quantity.

[154] The primary sector proposes a new sub-clause linking water quality and quantity. While we have not had the benefit of detailed submissions from other parties on this matter, we see merit in the amendment, lest water quality and water quantity be managed in separate 'silos' under this plan. The reference to "freshwater quality objectives" in the proposed sub-clause makes clear the integration of quantity and quality occurs under the FMU processes. The new sub-clause would read:

The quantity of water in surface waterbodies is managed so that:

[sub-clause] there is integration with the freshwater quality objectives and values (including human health for recreation).

[155] Forest and Bird does not support the proposed amendment as it would not provide for recreational values of water. Forest and Bird interprets "human health for recreation" in the NPS-FM as being concerned with both the effects on human health as a consequence of exposure to contaminants as well as people's ability to connect with water through a range of activities in a range of different flows.<sup>172</sup> We disagree with Forest and Bird that this compulsory national value can be interpreted as safeguarding recreational values *per se*. The interpretation is not directly supported by the NPS-FM matters local authorities are required to take into account in assessing a healthy waterbody for human use (e.g. pathogens, clarity, deposited sediments)<sup>173</sup> or by the numeric or narrative attribute states for "human health for recreation" in the different freshwater bodies.

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<sup>172</sup> Forest and Bird, closing submissions at [34]; Transcript (Gepp) at 1767.

<sup>173</sup> The NPS-FM sets out the matters to be taken into account for human health for recreation in Appendix 1.



## Outcome

[156] Subject to parties making further submissions on sub-clause (a) and (b), the following drafting has provisional approval (changes shown):

The quantity of water in surface waterbodies is managed so that:

- (a) the aquatic ecosystem health, life-supporting capacity,<sup>174</sup> the values of outstanding natural features and landscapes, the natural character and historic heritage values of waterbodies and their margins are safeguarded;
- (b) there is integration with the freshwater quality objectives ~~and values~~<sup>175</sup> (including the safeguarding of human health for recreation); and
- (c) provided that (a) and (b) are met, surface water is sustainably managed,—in accordance with Appendix K to support the reasonable needs of people and communities to provide for their economic, social and cultural wellbeing.<sup>176</sup>

[157] We will make directions seeking further submissions on:

- (i) the meaning of “life-supporting capacity” in sub-clause (a);
- (ii) support for proposed sub-clause (b).

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<sup>174</sup> Seeking further submissions on meaning of life-supporting capacity.

<sup>175</sup> Submissions are sought on sub-clause (b) introduced by the primary producers. “Values” does not appear to imply “freshwater quality objectives”.

<sup>176</sup> Reordered in line with Objective 2.



**Objective 9B****Objective 9B (DV)**

The effective development, operation, maintenance and upgrading of Southland's regionally significant, nationally significant and critical infrastructure is enabled.

[158] The above objective is one of two concerning infrastructure.

[159] Fish and Game, Forest and Bird and Ngā Rūnanga have appealed Objective 9B. A large number of parties have joined the appeals pursuant to s 274 of the Act.

**Submissions on Objective 9B**

[160] There were no objectives relating to infrastructure in the notified plan. In response to submissions by three territorial authorities the Hearing Panel recommended a new objective enabling the effective development of infrastructure. While labelled Objective 9B, the outcomes for infrastructure are not part of the water quantity sequence in Objective 9 and 9A (DV).

[161] It was the Hearing Panel's view that the new objective would give effect to Objectives A4 and B5 of the NPS-FM by better enabling communities to provide for their economic wellbeing, including through the development of productive economic opportunities, and thereby also give effect to the purpose of the Act.<sup>177</sup>

[162] While the Regional Council's functions include the strategic integration of infrastructure and land use (s 30(1)(gb)),<sup>178</sup> the pSWLP does not identify any issue arising in relation to infrastructure.

[163] For the territorial authorities the provision of infrastructure was extensively canvassed in evidence and without detracting from anything that their witnesses said, the salient points made were as follows:

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<sup>177</sup> Report and Recommendation of the Hearing Panel, dated 29 January 2018 at [141].

<sup>178</sup> This is wrongly referred to in the pSWLP at 11 as the "the integration of strategic infrastructure and land use."



- (a) infrastructure provides for the health and wellbeing of people as well as environmental protection and enables economic development across the region;<sup>179</sup>
- (b) the operation and upgrade of community water supply, wastewater and stormwater is necessarily continuous;<sup>180</sup>
- (c) the community's expected level of service has changed since the majority of the infrastructure was constructed, including with regards to impact on the environment;<sup>181</sup>
- (d) each District Council holds consents for water supply, wastewater and stormwater schemes and drainage networks. Those consents authorise the discharge of wastewater to land, streams and rivers and also to the coastal marine area;<sup>182</sup>
- (e) well managed, maintained and upgraded infrastructure is the cornerstone of any thriving healthy community and will be required for as long as that community remains.<sup>183</sup> That said, the infrastructure within the districts the territorial authorities manage is aging and in need of replacement;<sup>184</sup>
- (f) it is important that the consenting pathway enable consents for essential infrastructure to be obtained at minimum cost and for maximum duration.<sup>185</sup>

[164] The territorial authorities support Objective 9B (DV) as the objective gives effect to RPS Objective INF.1 and Policies INF.1 to INF.4.<sup>186</sup> By "enabled", they submit the plan makes clear that the development, maintenance, upgrade and ongoing operation of infrastructure is expected.<sup>187</sup> Indeed, one method in the RPS is to include objectives and other provisions in regional plans that *enable* infrastructure (Method INF.1). The territorial authorities say the non-complying activity status of its infrastructure activities is incongruent with this enabling method.

[165] The Director-General of Conservation, accepting the importance of this infrastructure to the region, does not support the enablement of activities *per se*. The

<sup>179</sup> Evans EIC at [33].

<sup>180</sup> Evans EIC at [8] and [27]; Loan EIC at [5] and [16].

<sup>181</sup> Evans EIC at [31 (c)].

<sup>182</sup> Evans EIC at [19]; Bayliss EIC at [21], [26] and [36]; Loan EIC at [9].

<sup>183</sup> Evans EIC at [30]; Bayliss EIC at [39]; Loan EIC at [16].

<sup>184</sup> Evans EIC at [27]; Loan EIC at [18]; Bayliss EIC at [51]-[56].

<sup>185</sup> Evans EIC at [41]; Bayliss EIC at [99]-[106].

<sup>186</sup> Territorial authorities, opening submissions at [7].

<sup>187</sup> Territorial authorities, closing submissions at [31].



Director-General of Conservation submits that an enabling element directed towards infrastructure activities does not sit comfortably within a regional plan whose outcomes are otherwise addressing sustainable use, development and protection of land and water resources in the Southland Region.<sup>188</sup> The Director-General of Conservation would amend the objective focusing on the “effective” development of infrastructure:

Recognise Southland’s regionally significant, nationally significant and critical infrastructure and provide for their effective development, operation, maintenance and upgrading.

[166] Likewise, Forest and Bird submitted that infrastructure will be appropriate where it provides for hauora and is not contrary to the water quality and quantity objectives of the plan.<sup>189</sup> They say an objective stating that infrastructure is to be provided for sets an expectation that it should be able to continue in the future, which they consider appropriate. But, they submit, that in providing for hauora, the objective needs to include “managing adverse effects within limits” to avoid a potential conflict between the objectives, as follows:

The effective development operation, maintenance and upgrading of Southland’s regionally and nationally significant infrastructure<sup>190</sup> is provided for while managing adverse effects within limits.

Alternatively, amend Objective 9B as follows:

The importance of Southland’s regionally and nationally significant infrastructure is recognised, and its development, operation, maintenance and upgrading is provided for sustainably and effectively.

[167] Ngā Rūnanga, which supports the Director-General of Conservation’s amendments, is concerned that the territorial authorities’ support for the enabling objective is simply to secure the least restrictive activity status when seeking resource consent.<sup>191</sup>

<sup>188</sup> Director-General of Conservation, closing submissions at [43].

<sup>189</sup> Forest and Bird, closing submissions at [45]. The submission actually talks about a policy to provide for infrastructure, and not an objective. We think this is an error.

<sup>190</sup> Forest and Bird omit reference to “critical infrastructure” as this is included in the RPS definition of “regionally significant infrastructure”.

<sup>191</sup> Ngā Rūnanga, closing submissions at [61]–[64]; Transcript (Kyle) at 1268-1271.



[168] The benefits of infrastructure notwithstanding, the respondent was also concerned that the territorial authorities' position may be that infrastructure should be enabled without limitation as to effects.<sup>192</sup> While the Regional Council recognises those benefits, it says the development of infrastructure should be "appropriately" provided for.<sup>193</sup> The Regional Council's planning witness gave evidence that "enable" would be interpreted as giving strong direction that – without "limitation", the intended outcome was the development, operation, maintenance and upgrade of infrastructure and this outcome would be given greater weight than the plan's other objectives.<sup>194</sup> In furtherance of this, the Regional Council proposed that effective development of infrastructure be "appropriately provided for" by that, the Regional Council means that it would provide for infrastructure in the policies and rule framework in a way that gives effect to the other objectives in the pSWLP.<sup>195</sup> The objective, as amended by the Regional Council, would read:

The benefits of regionally or nationally significant and critical infrastructure are recognised and its effective development, operation, maintenance and upgrade are appropriately provided for.

[169] That said, it should be emphasised that none of the parties disputed the importance of infrastructure to the region.

### **RPS**

[170] There are four issues pertaining to infrastructure identified in the RPS. They are:

#### **Issue INF.1**

Land use change and development is not always integrated with local, regional and national infrastructure and this can affect the communities' social and economic wellbeing or health and safety.

#### **Issue INF.2**

The impact of climate change and natural hazard events are a risk to critical infrastructure.

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<sup>192</sup> Regional Council, closing submissions at [42] and [46].

<sup>193</sup> Regional Council, closing submissions at [46].

<sup>194</sup> Transcript (McCallum-Clark) at 357.

<sup>195</sup> McCallum-Clark, Supplementary at [17].



**Issue INF.3**

The provision of infrastructure and associated activities are important to enable people and communities to provide for their social, economic and cultural wellbeing, but where not appropriately managed, can result in significant adverse effects on land use and the environment.

**Issue INF.4**

Subdivision, use and development can result in adverse effects, including reverse sensitivity effects, on existing or planned infrastructure development and activities.

[171] Responding to those issues, Objective INF.1 is concerned not only that infrastructure is secure and operates efficiently, but that it is "appropriately integrated with land use activities and the environment". We note, by way of explanation the RPS states that recognition of the importance of significant infrastructure will lead to greater weight being given to its requirements.<sup>196</sup>

[172] The benefits derived from infrastructure are to be recognised and provision is to be made for their development (Policy INF.1)<sup>197</sup> and where practicable, the adverse effects of infrastructure are to be avoided, remedied or mitigated (Policy INF.2). Importantly, the policy goes onto identify considerations that are relevant when determining whether a measure addressing effects is practicable and, in this way, the requirements of infrastructure are given greater weight. Given this, we would not accept a submission that the RPS prioritises or gives greater weight to development of infrastructure over other environmental outcomes. If a measure to address the effects of infrastructure is practicable then it must be taken. Whether that measure is to avoid, remedy or mitigate an adverse effect is, we understand, the subject matter of other policy.

[173] The RPS has other methods to be used to implement its policies (s 62(1)(e)). In furtherance of the above, there is a method directing the Regional Council to include in its regional plans objectives, policies and methods that enable infrastructure development, "whilst ensuring the management of any associated adverse effects" (Method INF.1).

[174] The RPS provisions for renewable energy are also relevant. Objective ENG.1 and Policy ENG.2 do not place lesser weight on environmental outcomes. Policy ENG.2

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<sup>196</sup> RPS, 15.2 Objective, Objective INF.1 Explanation/Principal Reasons at 172.

<sup>197</sup> Policy and Method INF.1 each refer to 'development' as well as 'maintenance, upgrade and operation'.



states development of renewables is to be provided for “while” – we interpret as meaning at the same time – appropriately addressing adverse effects.

### **Discussion**

[175] It is not the case that the territorial authorities intend developing infrastructure without having regard to the effects of their activities. Indeed, their infrastructure witnesses<sup>198</sup> talked about the communities changing expectations as to the level of services to be provided and the impact of those services on the environment. Further their planning witness, Mr J Dunning, accepted that infrastructure may adversely affect the environment,<sup>199</sup> and that these effects require careful management.<sup>200</sup> Mr Dunning supported the “enabling” language of the objective because it provides stronger direction to the consent authority than the alternatives proffered by the other parties.<sup>201</sup> As he says, all other objectives will likely be relevant to an infrastructure proposal and the consent authority is to have regard to them. However, we can find no support from the RPS that environmental outcomes should necessarily be given lessor weight than enabling infrastructure. To the contrary, the RPS objective is for infrastructure to be, *inter alia*, secured and appropriately integrated with land use activities and the environment. Where practicable, the adverse effects of infrastructure are to be avoided, remedied or mitigated (Policy INF.2) and indeed the latter is provided for under pSWLP Policies 26 and 26A.

[176] This objective is a good illustration of the different approaches to plan drafting as between the planning witnesses, i.e. whether objectives state outcomes or whether outcomes are left to be elaborated upon in the policies and rules.<sup>202</sup> For example, Ms Whyte, giving planning evidence for Meridian, could not conceive of an enabling objective without limitation. Rather, the extent to which the activity is enabled depends on the policies and rules. Whereas it is our view – and the view of some other planners – that it is the function of an objective to clearly state what is to be achieved through a plan, preferably in response to an identified issue. That said, because she does not support

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<sup>198</sup> Messrs Bayliss, Evans and Loan.

<sup>199</sup> Transcript (Dunning) at 719.

<sup>200</sup> Transcript (Dunning) at 701 and at 719.

<sup>201</sup> Transcript (Dunning) at 720. See also discussion in Transcript about the need to have regard to pSWLP as a whole at 721-722 and 735-736.

<sup>202</sup> Transcript (Whyte) at 1155.



the unqualified enablement of infrastructure, Ms Whyte had no difficulty with the proposition that the objective should itself be qualified.<sup>203</sup>

[177] We did not find the NPS-FM Objectives A4 and B5 to be particularly relevant as these apply where limits are set and we were not addressed on how the RPS responds to Te Mana o te Wai (bearing in mind the RPS was promulgated before the NPS-FM 2017 amendments).

[178] In principle, we have no difficulty with the proposition that the pSWLP may recognise and provide for infrastructure by enabling the same. However by not addressing infrastructure's integration with land use activities and the environment, Objective 9B (DV) does not give full effect to Objective INF.1.

[179] If the plan, properly constructed, is interpreted and applied in a manner that gives effect to Te Mana o te Wai and is implemented in accordance with ki uta ki tai, there may be no issue with the decision-version objective. If that is not the correct interpretation, the outcomes sought by Forest and Bird and the Director-General of Conservation respond to the issues identified in the RPS and better give effect to the RPS than does Objective 9B (DV). We would reorder Forest and Bird's proposed amendment as follows:<sup>204</sup>

The importance of Southland's regionally and nationally significant infrastructure is recognised and its sustainable and effective development, operation, maintenance and upgrading enabled.

[180] We intend the meaning of "sustainable and effective" to be both the infrastructure and the manner of its development relative to the environment. If development is neither sustainable nor effective, it will be contrary to this objective.

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<sup>203</sup> Transcript (Whyte) at 1156.

<sup>204</sup> Forest and Bird omit "critical infrastructure" from the objective.



### **Definition of terms**

[181] The objective contains a number of defined terms for infrastructure. To assist in explaining the potential scope of the provision we set out the meaning of those terms next:

- (a) “regionally significant infrastructure” is not defined by the pSWLP. The RPS defines “regionally significant infrastructure” as meaning “[i]nfrastructure in the region which contributes to the wellbeing and health and safety of the people and communities of the region, and includes all critical infrastructure;
- (b) “nationally significant infrastructure” means infrastructure which contributes to the development and wellbeing and health and safety of people and communities extending beyond the region; and
- (c) “critical infrastructure” means infrastructure that provides services which, if interrupted, would have a significant effect on the wellbeing and health and safety of people and communities and would require reinstatement, and includes all strategic facilities. Note: “strategic facilities” are not defined by the pSWLP.

[182] If the plan was amended to include the definition of “regionally significant infrastructure” the objective could be simplified by omitting critical infrastructure. This is a matter on which we seek submissions.

### **Outcome**

[183] We will direct the parties to file submissions that:

- (i) identify the resource management issues addressed by this objective;
- (ii) respond to the court’s proposition that properly constructed, Objective 9B is to be interpreted and applied in a manner that gives effect to Te Mana o te Wai and can be implemented in accordance with ki uta ki tai; and
- (iii) comment on the court’s proposed wording for Objective 9B at paragraph [179] including the amending of the pSWLP to include the term “regionally significant infrastructure” and consequential deletion of “critical infrastructure” from the objective.



**Objective 10****Objective 10 (notified version)**

The national importance of the existing Manapōuri Power Scheme in the Waiau catchment is provided for, and recognised in any resulting flow and level regime.

**Objective 10 (DV)**

The national importance of existing hydro-electric generation schemes, including the Manapōuri hydro-electric generation scheme in the Waiau catchment, is provided for, recognised in any resulting flow and level regime, and their structures are considered as part of the existing environment.

[184] For ease of reference we have set out above both the notified version and decision-version of the objective, noting that Objective 10 (DV) has two parts:

- (a) a requirement that the national importance of existing hydro-electric generation schemes are provided for, and recognised in any resulting flow and level regime; and
- (b) a direction that the structures of existing hydro-electric generation schemes are considered as part of the existing environment.

[185] Whereas the notified version of the objective referred only to the Manapōuri hydro-electric generation scheme, the Hearing Panel amended the scope of the provision to include all hydro-electric generation schemes. Meridian submitted that the scale and significance of the Manapōuri hydro-electric generation scheme ("Scheme") is such that it warrants particular provision, and that this follows from the RPS.<sup>205</sup> Other renewable energy in the catchment, such as the Lake Monowai hydro-electric scheme, would come within Objective 9B.<sup>206</sup>



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<sup>205</sup> Meridian, opening submission [18b].

<sup>206</sup> Meridian, closing submissions [10].

[186] Meridian also sought that a new objective, Objective X, be included in the plan as follows:

**Objective X**

Recognise and make provision for the national significance of renewable electricity generation activities.

[187] We understand Meridian does not pursue Objective X, if Objective 9B is retained in the plan.<sup>207</sup> We have earlier confirmed the retention of Objective 9B.

[188] Our decision proceeds on the basis, therefore, that the scope of Objective 10 is limited to the Manapōuri hydro-electric generation scheme and secondly, that Meridian no longer pursues Objective X.

***The issues***

[189] Of all the objectives before us Objective 10 generated the greatest level of uncertainty for the parties. Despite the evidence presented by Meridian and by the other parties our sense is that no party has a proper understanding of the outcomes being pursued under this provision.

[190] Part of the activities that make up the Scheme are enabled by s 4 of the Manapōuri Te Anau Development Act 1963 (MTADA) which – amongst other matters – provides the state enterprise with full power and authority to raise or lower the levels of:

- (i) Lakes Manapōuri and Te Anau;
- (ii) the Waiau and Mararoa Rivers and their tributaries; and
- (iii) all other rivers flowing into the said lakes and their tributaries.

Further, the MTADA authorises the Scheme's land use activities for all purposes (albeit the Building Act 2004 still applies).<sup>208</sup> Unless otherwise provided for, MTADA does not extend to activities requiring resource consent under ss 12, 14 or 15 RMA.

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<sup>207</sup> Whyte, in response to s 274 parties at [11(d)].

<sup>208</sup> *Meridian Energy Ltd v Southland District Council* [2014] NZHC 3178 at [38] and [45].



[191] In general terms, we understand Meridian to be seeking the greatest level of flexibility under the RMA to generate hydro-electricity.<sup>209</sup> By *providing* for something in the objective – specifically, the opportunity for Scheme enhancement – Meridian is seeking that appropriately worded policies be included in the plan. Whereas, other parties seek clarity in the objective for the outcomes for natural and physical resources were the Scheme to be enhanced. This basic difference in plan drafting and interpretation underlies their dispute.

[192] We will set out the issues as we understand them to be.

***Issue 1: what outcome is Meridian seeking through amending the objective to provide that the Scheme<sup>210</sup> is considered part of the environment?***

[193] Meridian appealed Objective 10 being concerned, *inter alia*, that the provision failed to adequately recognise the importance of allowing for enhancement of the scheme where adverse effects are able to be appropriately managed in a way that gives effect to the RPS and the NPSREG.<sup>211</sup>

[194] In the notice of appeal, Meridian sought to amend Objective 10 as follows:<sup>212</sup>

The national importance of ~~the existing hydro-electric generation schemes, including the~~ Manapōuri hydro-electric generation scheme in the Waiau catchment, is provided for, ~~recognised in any resulting flow and level regime, and opportunities for enhancement of the scheme are provided for where the effects can be appropriately managed;~~ and

1. is recognised in any resulting flow and level regime, and
2. the Scheme and its components and activities is considered as part of the existing environment, including that water takes, use, diversions and discharges are an integral part of the scheme; and
3. allows for enhancement of the scheme where the effects of these can be appropriately managed.

[195] Sub-clause 2's recognition of the Scheme as part of the existing environment, was hotly contested. Counsel for Meridian said the motivation for the amendment was

<sup>209</sup> Transcript (Whyte) at 1165.

<sup>210</sup> When referred to in the context of Objective 10, "Scheme" is referred to in its widest sense and includes all lawfully established activities whether authorised under the RMA, MTADA or by any other legislative instrument.

<sup>211</sup> Notice of appeal at [9].

<sup>212</sup> Whyte, in response to s 274 parties at [60].



because his client "... does not want to find itself in the position where it is asked to compare the effects of the ongoing operation of the [Scheme] against a fictional and uncertain pre-Scheme environment"<sup>213</sup>. Furthermore, many aspects of the Scheme are authorised under MTADA and not the RMA, and the interaction between activities authorised under the different legislation means assessing applications for resource consent (coastal, discharge or water permits)<sup>214</sup> on a with and without the Scheme basis, is "unrealistic, fanciful, and speculative".<sup>215</sup> Counsel for Meridian, Mr S Christensen, submitted:<sup>216</sup>

... it is entirely unrealistic and artificial to expect Meridian or the council to proceed in the re-consenting on the basis that you have to imagine what the world would be like if the scheme wasn't there and against that, to assess the effects. So in other words, [to] create an artificial environment and then overlay what's already there on top of that is fanciful and unrealistic.

[196] Mr S Christensen's 'starting point' for what constitutes the existing environment when assessing a future consent application is "the environment as it exists at the time replacement consents are considered, including the effects of activities undertaken pursuant to existing water and discharge permits".<sup>217</sup>

[197] Ms Whyte, giving planning evidence on behalf of Meridian, drew a distinction between the Scheme and the environment. Her view of the objective was more nuanced than counsel. We understand that it was not her purpose, in supporting amendments to the objective, for the effects of the Scheme – including the exercise of any consent – to be deemed part of the environment. Rather her purpose was simply to describe the Scheme, i.e. that it is a diversionary scheme authorised by certain permits etc. The actual volume or flow of water consented is immaterial to the description of the Scheme.<sup>218</sup>

[198] In supporting the amendments Ms Whyte did not want to – as she put it:<sup>219</sup>

<sup>213</sup> Meridian, closing submissions at [45].

<sup>214</sup> Meridian, opening submissions at [10].

<sup>215</sup> Meridian, closing submissions at [48].

<sup>216</sup> Transcript (Christensen) at 1920.

<sup>217</sup> Meridian, closing submissions at [45].

<sup>218</sup> Transcript (Whyte) at 1160-1161. Noting that for other purposes under the Act, while the Scheme is operating under existing authorisations, the effects of its activities on the environment would be considered part of the existing environment (see Transcript (Whyte) at 1162).

<sup>219</sup> Transcript (Whyte) at 1162. See also transcript (Whyte) at 1161.



... convolute this objective ... at the time of consenting or at the time of anything else, the fact and circumstances around the existing environment may be different or may have changed and so my objective is to ensure that that can be considered at the appropriate time...

[199] It was her opinion that the effects of the take and discharge of water need to be considered on consenting, but that the options available to respond to effects may depend on what the rules say.<sup>220</sup>

[200] During the course of the hearing Meridian proposed alternative relief, the final iteration being:<sup>221</sup>

The national importance of the existing Manapōuri hydro-electric generation scheme in the Waiau catchment is provided for, recognised in any resulting flow and level regime, and opportunities for enhancement of the scheme are provided for where the effects can be appropriately managed.

[201] The key difference between this iteration and the relief sought in the notice of appeal, is that the physical components of the Scheme together with coastal, discharge and water permits are no longer “considered as part of the existing environment”. We understand this relief was advanced by way of alternative to the notice of appeal.<sup>222</sup>

### *Discussion*

[202] Meridian’s position is that any evaluation of the environment without the Scheme is neither realistic nor appropriate. If Meridian is correct, it would follow that there is no need to include the scheme as part of the existing environment, as it is ineluctable that it is.

[203] This was not the view of the Hearing Panel who found that the structures only, are part of the environment and recommended they should be included in the objective. Evidently, this was to give better effect to the NPS REG and the RPS. They did not consider it appropriate to refer to the Scheme takes and discharges in Objective 10 as those activities will be revisited when new consents are applied for in 2031.<sup>223</sup>

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<sup>220</sup> Transcript (Whyte) at 1163.

<sup>221</sup> Exhibit 1.

<sup>222</sup> See discussion in Meridian, closing submissions at [11].

<sup>223</sup> Report and Recommendations of the Panel, 29 January 2018 at [143].



[204] We recall Justice Fogarty has cautioned practitioners and judges against the use of the term “existing environment” as it is not a term appearing in the RMA. He regarded the term as a “shorthand” reference certain Court of Appeal decisions about the range of activities to be taken into account when examining any actual or potential effects of allowing the activity that is the subject of an application. He disagreed with the application of one of those decisions – *Hawthorn*<sup>224</sup> to every case as if were statute; per *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council & ors* [2013] NZHC 1324, (2013) 18 ELRNZ 540, [2013] NZRMA 275 at [13]–[14] and [23].

[205] We gained no real sense of how Meridian would apply “existing environment” in any future FMU process or in the consenting of its activities or applications to consent new or varied activities.

[206] We agree with the Court of Appeal’s reflection in *Far North District Council v Carrington Farms Ltd* [2013] NZCA 221 at [80] that the “environment” is not a static concept and “[it] is constantly changing, often as a result of implementation of resource consents for other activities in and around the site and cannot be viewed in isolation from all operative extraneous factors”. This, of course, is the point made by Ms Whyte in her evidence.

[207] “Environment” is defined in s 2 of the RMA and includes physical resources and the term is used extensively throughout the Act’s provisions. It may well be that the Scheme’s structures are properly regarded as part of the environment in the sense that they are physical resources.<sup>225</sup> The linking of the Scheme to the “existing environment” in Objective 10 could, however, be interpreted as extending the meaning of “environment” in the administration of the pSWLP. If that were to happen it may have unintended or unforeseen consequences. Several parties addressed the court on this potential.

[208] Meridian does not support limited reference in the objective to its structures (only) being part of the existing environment.<sup>226</sup> It submits the objective should either be silent as the existing environment or it should specify all parts of the Scheme as comprising part of the existing environment.<sup>227</sup> Given our uncertainty as to the meaning and

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<sup>224</sup> *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424.

<sup>225</sup> Section 2 RMA.

<sup>226</sup> Meridian, closing submissions at [11].

<sup>227</sup> Meridian, closing submissions at [11].



application of the “existing environment”, we would approve the former outcome and amend Objective 10 (DV) by deleting, “and their structures are considered as part of the existing environment”.

***Issue 2: what is to be “enhanced” – is it the Scheme, the Scheme’s electricity generating capacity or something else?***

[209] The Hearing Panel did not consider it necessary to include any provision of enhancement opportunities.

[210] Meridian disagrees with the Hearing Panel for the reasons outlined in the evidence of Ms Whyte. She acknowledges that water within the Waiau catchment is fully allocated. If enhancement of the Scheme requires resource consent(s) to take, dam, divert or use water from the catchment, the enhancement would be assessed as a non-complying activity. This activity status, in combination with the objectives and policies addressing over-allocation of water, would render the obtaining of such consents challenging. From Meridian’s perspective it needs to be in a position to respond to changes in circumstance, including future hydrological conditions.

[211] We were told enhancement could:<sup>228</sup>

- allow the Scheme to make better or more efficient use of its available water;
- provide greater flexibility in the storage of water; but not necessarily make more water available for generation;
- result in a change in the amount of water used and also change the manner of resource use; but without necessarily increasing the amount of water taken.

Enhancement may also require new resource consents or a change or cancellation of one or more of the existing conditions under s 127 of the RMA. The relevant objective and policy framework in the pSWLP will be a consideration in any such application.<sup>229</sup>

[212] Ms Whyte set out the provisions of the RPS that support recognition of enhancement opportunities, as below:

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<sup>228</sup> Transcript (Whyte) at 1164-1165.

<sup>229</sup> Whyte, in response to s 274 parties [29]-[33].



**Objective ENG.3 – Generation and use of renewable energy**

Generation and use of renewable energy resources is increased.

**Objective ENG.4 – National significance**

Recognise and make provision for the national significance of renewable electricity generation activities.

**Policy ENG.2 – Benefits of renewable energy**

Recognise and make provision for the development of renewable energy activities, and their benefits, which include:

- maintaining or increasing electricity generation capacity while avoiding, reducing or displacing greenhouse gas emissions;
- maintaining or increasing security of electricity supply at local, regional and national levels by diversifying the type and/or location of electricity generation;
- using renewable natural resources rather than finite resources;
- the reversibility of the adverse effects on the environment of some renewable electricity generation technologies;
- avoiding reliance on imported fuels for the purposes of generating electricity;

while appropriately addressing adverse effects.

**Policy WQUAN.3 – regional plans**

Recognise the finite nature of water resources and catchments and identify management regimes in accordance with the National Policy Statement for Freshwater Management 2014 that:

- (a) provide for the freshwater objectives for surface water and groundwater that derive from flows and levels of water;

...

- (h) recognise the need for availability of water to enable the Monowai and nationally significant Manapōuri hydro-electricity power generation activities in the Waiau catchment to continue, and be enhanced where over-allocation will not occur;

...



[213] Ms Whyte summarised Policy WQUAN.3(h) this way:<sup>230</sup>

Clause (h) of this policy explicitly requires that the opportunity for the enhancement of the MPS generation activities on the basis that overallocation not occur be recognised.

[214] Ms Whyte explained that the “enhancement” and “upgrading” of the Scheme are different. Upgrading concerns changing physical *things* whereas enhancement relates to the resource itself and the way that is it used.<sup>231</sup> That interpretation makes sense if MTADA, not the RMA, authorises the use of land.

[215] Other salient points of evidence are accurately summarised by counsel for Aratiatia who we quote next:<sup>232</sup>

Importantly, Meridian’s witnesses agreed with the proposition that enhancement involves improvements to the efficiency and effectiveness of the Power Scheme but without increasing the water take.<sup>233</sup> Ms Whyte went on to agree that if a provision that enabled “enhancement” is to be addressed in an objective or policy it should be defined in that provision;<sup>234</sup> that a provision that enabled enhancement if no further allocation occurs would involve taking a precautionary approach pending knowledge as to what the true allocated state of the catchment is;<sup>235</sup> and that she would support that approach.<sup>236</sup>

### **Discussion**

[216] It is not pedantry to observe that the subject matter or focus of Policy WQUAN.3(h) is on the need for water to be available for power generation – and not the Scheme *per se*. Water is to be available so that power generation activities can continue. Power generation activities may be enhanced where this does not result in over-allocation of water. Couched in the language of the NPS-FM, Policy WQUAN.3 is addressing FMU processes.

[217] Objective 10, as proposed to be amended by Meridian, becomes “... opportunities

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<sup>230</sup> Whyte, in response to s 274 parties at [36].

<sup>231</sup> Transcript (Whyte) at 1164-1165.

<sup>232</sup> Aratiatia closing submissions at [4.20].

<sup>233</sup> Transcript (Feierabend) at 1122 to 1123; Transcript (Whyte) at 1171-1172.

<sup>234</sup> Transcript (Whyte) at 1173.

<sup>235</sup> Transcript (Whyte) at 1173.

<sup>236</sup> Transcript (Whyte) at 1173.



for enhancement of the scheme are provided for where the effects can be appropriately managed”<sup>237</sup> or “... and allows for enhancement of the scheme where the effects can be appropriately managed and overallocation does not result”.<sup>238</sup>

[218] We wish to have more clarity around the ambit of this objective. Mr Feierabend’s understanding is that Meridian intends Objective 10 be a “one stop shop”. The purpose of the objective was to encapsulate all matters that would pertain to the Scheme, rather than also addressing the Scheme under Objective 9B.<sup>239</sup> By that we think he means that Objective 10 applies to activities requiring resource consent under the RMA, and not to activities – such as land use activities – authorised under the MTADA or under other legislative instruments. Inferentially the objective is limited to coastal, discharge and water permits granted under the RMA. Objective 9B does not apply to the Scheme, as Mr Feierabend interprets it.

[219] Meridian is to confirm whether, from its perspective, we have correctly understood Objectives 9B and 10 outlined in the previous paragraph. Secondly, Meridian will make clear what is “enhancement”. The objective does not talk about the use of the water resource being, for example, to increase electricity generating capacity (RPS Objective ENG.3 and Policy ENG.2). Lack of clarity around what is meant by “opportunities for enhancement” caused confusion and uncertainty during the hearing.

[220] Recalling the first part of the objective which is that the national importance of the Manapōuri hydro-electric generation scheme is provided for and “recognised in any resulting flow and level regime”, the pSWLP has a flow and level regime for the Waiau catchment in which the Scheme is situated.<sup>240</sup> The Waiau catchment is fully allocated. Mr S Christensen confirmed on behalf of his client, that it is not seeking to “step outside” the FMU processes<sup>241</sup> and that any application for future resource consent will be subject to the regime established under the FMU process.<sup>242</sup> If that is not the case then we tend towards the outcome advocated by the Regional Council and Ngā Rūnanga who caution against providing for an enhancement outcome where there is uncertainty over the

<sup>237</sup> Whyte, in response to s 274 parties at [39] and Exhibit 1.

<sup>238</sup> Whyte, in response to s 274 parties at [41].

<sup>239</sup> Transcript (Feierabend) at 1144-1145.

<sup>240</sup> Transcript (Christensen) at 1917. The Waiau Catchment is fully allocated. While the pSWLP does not prohibit applications for water or discharge permits within a fully allocated catchment, an application for resource consent has the status of a non-complying activity.

<sup>241</sup> Transcript (Christensen) at 1917-1918.

<sup>242</sup> Transcript (Christensen) at 1917.



allocation of water.

[221] Finally, we are unclear by what yardstick the *appropriate* management of effects is to be judged if it is not Te Mana o te Wai, which we will come to shortly.

***Issue 3: is its Meridian's position that under the pSWLP, the Scheme is to acknowledge and protect the mauri of water?***

[222] The court put to Meridian's counsel, Mr S Christensen, Ngā Rūnanga's submission that Te Mana o te Wai was a new paradigm or way of approaching planning for water resources and that the court is to bear in mind Te Mana o te Wai when evaluating each objective and indeed all of the plan provisions. Mr Christensen agreed, although in his submission that did not "translate though to needing to say something different in the objectives from what's there now".<sup>243</sup>

[223] Acknowledging Te Mana o te Wai 's "broad and overarching nature" he said the "paradigm is going to be necessarily reflected through the rest of the plan". More particularly, Te Mana o te Wai is implemented through the policies, as it is the policies that are to give effect to the objectives.<sup>244</sup> The Regional Council has considered and recognised Te Mana o te Wai in the management of fresh water (Objective AA1 and Policy AA1), but, Mr Christensen submits, the design of the plan is not to rank objectives. Instead Te Mana o te Wai fits alongside all other objectives and – as we have noted – is to be reflected *appropriately* through the provisions of the plan.<sup>245</sup>

[224] Constructing the plan's scheme this way bears one of two implications. On the one hand, Te Mana o te Wai – while always relevant – is only one of 18 objectives to be considered, weighed and balanced against the benefits of renewable energy resources and the national significance of renewable electricity generation activities (RPS Objectives ENG.3 and ENG.4). In which case, the proposed amendment would likely support an interpretation giving relative greater weight to Scheme enhancement than the acknowledgement and protection of the mauri of water.<sup>246</sup> On the other hand, Meridian may be saying the policies are to articulate how any enhancement of the Scheme will acknowledge and protect the mauri of the waterbodies. For reasons that we have given

<sup>243</sup> Transcript (Christensen) at 1934.

<sup>244</sup> Transcript (Christensen) at 1934.

<sup>245</sup> Transcript (Christensen) at 1936-1937. Meridian, closing submissions at [6].

<sup>246</sup> Waiau Rivercare Group Ltd, closing submissions at [12].



earlier, this is not the same as saying that the effects will be *appropriately managed* or *will be avoided, remedied or mitigated*. Rather, within the allocative regime, the needs of water are to be at the forefront of all discussions and decisions on fresh water.

### Outcome

[225] We will direct Meridian to file submissions and evidence in response to the court's discussion above and also to address directly the following matters:

- (a) with reference to the outcomes sought under Objective 10, is the opportunity sought to increase electricity generation capacity by using water more efficiently or effectively?
- (b) is an outcome of using water more efficiently or effectively that the mauri of the water is acknowledged and protected?
- (c) does Objective 9B apply to any of Meridian's activities and if so which?

[226] As recorded above at paragraph [208], we amend Objective 10 (DV) by deleting "and their structures are considered as part of the existing environment".



## Objectives 13, 13A and 13B

### Objective 13 (DV)

Enable the use and development of land and soils to support the economic, social, and cultural wellbeing of the region.

### Objective 13A (DV)

The quantity, quality and structure of soil resources are not irreversibly degraded through land use activities or discharges to land.

### Objective 13B (DV)

The discharges of contaminants to land or water that have significant or cumulative adverse effects on human health are avoided.

[227] The above objectives concern the outcomes of land and soil use. Together with water, land is also an enabler of economic, social and cultural wellbeing (Objective 2).

[228] As notified, the objective was contained in a single provision and the use of land and soils was subject to an important proviso controlling when those resources could be used. The Hearing Panel recommended dividing the objective into three separate provisions and in the course of doing so lost the proviso.<sup>247</sup> While we may have overlooked the same, again we could not find the Hearing Panel's reasons for recommending the change to the notified version of Objective 13. At the conclusion of the hearing all parties proposed, and we agree, to reinstate the proviso and have the three objectives remerged.

[229] We address next three specific issues arising in relation to the wording of the remerged objective.

### ***Soil Resources (proposed sub-clause (a))***

[230] This sub-clause addresses the quantity, quality and structure of soil resources. All parties agree the soil resource should not be irreversibly degraded by land use or

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<sup>247</sup> The objective commenced "Enable the use and development of land and soils, provided".



discharges. We find this outcome well-stated, and not needing of any amplification as proposed by Forest and Bird, Fish and Game and Heritage NZ.

[231] We approve the wording tendered by the Regional Council and others:

- (a) the quantity, quality and structure of soil resources are not irreversibly degraded through land use activities or discharges to land; and

***Human Health (proposed sub-clause (b))***

[232] Objective 13B (notified version) provides that significant or cumulative adverse effects on human health are to be avoided.

[233] The parties proposed several variations of this provision, and the version that finds favour with the court is as follows:

- (b) the health of people and communities is safeguarded from the adverse effects of discharges of contaminants to land or water; and

[234] While the Regional Council and territorial authorities preferred wording couched in the language of effects, the question is not whether the discharge(s) will have a more than minor effect but what is the *probability* of a discharge occurring and the *consequences* to human health were the discharge to occur. The determination of this follows a risk-based assessment. The term “safeguard” is an appropriate standard against which the acceptability of risk can be measured.<sup>248</sup>

[235] We agree with the Regional Council that the clause should not be limited to the health of people and communities as they may be affected by contact with fresh water.<sup>249</sup> The adverse health effects may be experienced through discharges to both land and water.<sup>250</sup>



<sup>248</sup> Forest and Bird, closing submissions at [50]-[51].

<sup>249</sup> Sub-clause (b) as proposed to be amended by the primary sector.

<sup>250</sup> Regional Council, closing submissions at [70].

***Safeguarding of ecosystems (proposed sub-clause (c))***

[236] All parties agree to reinstate provision for the safeguarding of ecosystems, amended to refer to “indigenous biological diversity” as per s 30(1)(ga) of the Act.

[237] Fish and Game and Forest and Bird propose a new sub-clause to the effect that adverse effects on ecosystems are to be avoided, remedied or mitigated to ensure that ecosystem values are safeguarded or enhanced. The phrase “avoid, remedy or mitigate” is an unnecessary adjunct to the direction that ecosystems are to be safeguarded.<sup>251</sup> How ecosystems are safeguarded is/should be the subject matter of policy.

[238] We approve the wording preferred by the other parties:

Ecosystems (including indigenous biological diversity and integrity of habitats), are safeguarded.

***A chapeau and proposed sub-clause (d)***

[239] The Hearing Panel recommended the deletion of Objective 13(c) (notified version). This provision made the use of land and soil contingent upon the maintenance or enhancement of ecosystems, amenity values, cultural values and historic heritage values.<sup>252</sup> Forest and Bird, Fish and Game, and Heritage NZ seek reinstatement of the provision as sub-clause (d) expanding the same to include recreational values. The relief they seek follows:<sup>253</sup>

Enable the use and development of land and soils, provided:

- a) ...
- b) ...
- c) ...
- d) adverse effects on amenity values, recreation [sic] values, cultural values and historic heritage values are avoided, remedied or mitigated to ensure these values are maintained or enhanced.

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<sup>251</sup> See Transcript (Farrell) at 878–888, where their planning witness also agreed the phrase adds an unnecessary layer of complexity that could be avoided.

<sup>252</sup> Objective 13(c) of the pSWLP as notified.

<sup>253</sup> Forest and Bird, Fish and Game and Heritage NZ.



[240] The other parties take a very different tack. They propose to refer to recreational opportunities and historic heritage (only) as aspects of social and cultural wellbeing in a chapeau to the objective. Under this formulation, the maintenance or enhancement of recreational or historic heritage values are not outcomes *per se* but aspects of social and cultural wellbeing which land and soil use are to support. No mention is made of amenity or cultural values. They propose the following:<sup>254</sup>

Enable the use and development of land and soils to support the economic, social (including through recreation) and cultural (including through recognition of historic heritage) wellbeing of the region provided that:

Or:

Enable the use and development of land and soils to support the economic, social and cultural wellbeing of the region (including recreational opportunities and historic heritage) provided that:<sup>255</sup>

[241] The evidence raised the following issues:

- (a) whether the use of land and soil is contingent on maintaining an existing level of amenity<sup>256</sup> or if the maintenance of amenity is an outcome of the use and development of land and soils; and
- (b) if maintenance of amenity is an outcome of use and development, is the “support” for this in the objective’s chapeau sufficiently clear as to the desired outcome?

The two issues are addressed in the discussion following.

[242] The Regional Council’s concerns over the reinstatement of the deleted sub-clause were not clearly articulated except in cross-examination and we draw principally on that. Counsel for the Regional Council put to two planning witnesses supporting the reinstatement of the deleted sub-clause, that the word “provided” means amenity values

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<sup>254</sup> Regional Council and Ngā Rūnanga.

<sup>255</sup> Primary Sector and the Director-General of Conservation.

<sup>256</sup> For brevity of expression, we refer to “amenity” meaning “amenity values, recreational values, cultural values and historic heritage values.



(etc.) would be “prioritised” ahead of the use of land and soils.<sup>257</sup> Counsel questioned Ms Davidson, who gave planning evidence on behalf of Ngā Rūnanga, this way:<sup>258</sup>

- Q. Was it your intention in seeking to include those values in your clause (d) that they were to be elevated above the use of land and soils so they were to be dealt with first as a matter of priority?
- A. No because I only sought them to be avoided, remedied or mitigated so they weren't to be elevated above, they were to be considered within the suite of considerations as well.
- Q. This objective uses the words “provided that” so these things are elevated above the use?

[The response to the last question was inaudible].

[243] Similarly, questions were put to the Director-General of Conservation's planning witness, Ms Kirk:<sup>259</sup>

- Q. ... Perhaps I'll put my question a different way. What's your basis for elevate or prioritising amenity values over the use and development of soils?
- A. So I'm not trying to prioritise them over and above the use of the land and soils. This needs to – you need to consider as part of using the land and soils what is the effect of that on those other values that I've listed.
- Q. So if you look at your clauses B and C, is it fair to say that the matters contained in there should be clearly prioritised prior to use and development occurring?
- A. You need to consider how that use and development of the land and soils is safeguarding the human health, so how are the effects of that land use and development.

[Emphasis added]

[244] The Regional Council's planning witness gave evidence that amenity should not be elevated above enabling people and communities to use land and soils to provide for their economic, social and cultural wellbeing.<sup>260</sup> Even so, he was critical of the limited provision for amenity and cultural values in the plan<sup>261</sup> and sought to address this by identifying recreational and historic heritage values as aspects of economic, social and cultural wellbeing in the proposed chapeau.

<sup>257</sup> See Transcript (Davidson) at 1452; Transcript (Kirk) at 1292.

<sup>258</sup> Transcript (Davidson) at 1452.

<sup>259</sup> Transcript (Kirk) at 1292–1293.

<sup>260</sup> Transcript (McCallum-Clark) at 349–350; Regional Council, opening submissions at [159]–[160]; Regional Council, closing submissions at [66].

<sup>261</sup> McCallum-Clark, EiC at [65] and [156].



[245] None of the planning witnesses explained how a remerged Objective 13 demonstrates Te Mana o te Wai or the management philosophy of ki uta ki tai. The court received little evidence by way of policy analysis of the higher order planning documents or the Act.

#### *Discussion*

[246] Forest and Bird and others seek the reinstatement of Objective 13(c) that was deleted on the recommendation of the Hearing Panel. Sub-clause (c), as notified, provided “adverse effects on ecosystems (including diversity and integrity of habitats), amenity values, cultural values and historic heritage values are avoided, remedied or mitigated to ensure these values are maintained or enhanced”.

[247] If Forest and Bird and others were intending to address the control of discharges of contaminants into or onto land or water (s 30(1)(f)), an outcome that amenity and cultural values (including recreational and historic heritage values) are to be maintained or enhanced would reasonably follow.

[248] It would be a surprising result if this plan did not in some way address historic heritage values given that they are matters of national importance.<sup>262</sup> Amenity values (which we note includes recreational values)<sup>263</sup> are matters to which we are to have particular regard (s 7).

[249] The relief pursued by all parties is problematic. On the one hand a proposed chapeau favoured by the Regional Council and others, to “support” of economic, cultural and social wellbeing is uncertain, and it is this uncertainty that lies at the heart of the parties’ dispute. On the other hand, while not intended, the new sub-clause (d) proposed by Forest and Bird *et al.* makes amenity a pre-condition of land and soil use. Whereas what is intended is that the use and development of land and soils maintain amenity.



<sup>262</sup> See RMA, s 6(e) and (f).

<sup>263</sup> Section 2 of the RMA defines “amenity values” as those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

[250] We have noted Mr Maw's line of cross-examination suggesting that the objective is to secure certain environmental outcomes before land and soils may be used.<sup>264</sup> In other words the three sub-clauses are conditions that must be satisfied before land and soils may be used. This has the effect that:

Provided that

- Sub-clause (a);
- Sub-clause (b); and
- Sub-clause (c)

Then *something* ...

[251] Consistent with Objective 2, should not the focus of the enabling element be on economic, social and cultural wellbeing? If correct, the objective read would read:

Provided that

- Sub-clause (a);
- Sub-clause (b); and
- Sub-clause (c)

then land and soils are used and developed to enable the economic, social and cultural wellbeing of the region.

[252] Addressing the concerns raised by all parties, we suggest the use and development of land and soils to enable wellbeing – as opposed to activities that depend on the resources – has greater resonance with Te Mana o Te Wai and ki uta ki tai than the alternatives proposed. This focus brings more clarity around the outcomes for wellbeing than the proposed chapeau which is simply to “support” wellbeing. If the objective were amended this way there would be no need to address amenity, recreation, cultural and historic heritage values in the text of the objective, as these are aspects of social and cultural wellbeing and the policies can be left to address how these aspects of wellbeing are to be enabled.

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<sup>264</sup> Ms Ruston gave similar evidence at [66].



**Outcome**

[253] We would approve the wording for the following sub-clauses:

- (a) the quantity, quality and structure of soil resources are not irreversibly degraded through land use activities or discharges to land; and
- (b) the health of people and communities is safeguarded from the adverse effects of discharges of contaminants to land and water; and
- (c) ecosystems (including indigenous biological diversity and integrity of habitats), are safeguarded.

[254] Otherwise, we will seek further submissions/evidence responding to the structure of the objective as set out at paragraph [251].



## Objective 14

### Objective 14 (DV)

The range and diversity of indigenous ecosystem types and habitats within rivers, estuaries, wetlands and lakes, including their margins, and their life-supporting capacity are maintained or enhanced.

[255] Fish and Game and Forest and Bird support an amendment to the objective to refer to ecosystem types and habitats within dryland environments, rivers, estuaries, wetlands and lakes.<sup>265</sup>

[256] The parties' planning witnesses see a gap in the provisions pertaining to the management of critical source areas. Critical source areas<sup>266</sup> include dryland environments which can become wet or flood during rainfall events. These areas are very likely pathways for contaminants to enter waterbodies.<sup>267</sup>

[257] The importance of integrated management is accepted.<sup>268</sup> There does not, however, appear to be a policy gap because under Objective 13(c) the use and development of land and soil is only enabled provided that "ecosystems (including indigenous biological diversity and integrity of habitats) are safeguarded". We interpret "safeguarding" in Objective 13(c) as a more protective outcome than "maintaining" or "enhancing" ecosystems under this objective particularly in circumstances where the system is already deleteriously affected by land use.

### Outcome

[258] Given this, we would decline to amend the objective as sought by Fish and Game and Forest and Bird.

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<sup>265</sup> The Director-General of Conservation was also in support of the amendment, later withdrawing the same. See Transcript (Williams) at 1278.

<sup>266</sup> "Critical source area" is defined in the pSWLP and means:

- (a) a landscape feature like a gully, swale or a depression that accumulates runoff (sediment and nutrients) from adjacent flats and slopes, and delivers it to surface water bodies (including lakes, rivers, artificial watercourses and modified watercourses) or subsurface drainage systems; and
- (b) areas which arise through land use activities and management approaches (including cultivation and winter grazing) which result in contaminants being discharged from the activity and being delivered to surface water bodies.

<sup>267</sup> Farrell, EIC at [117].

<sup>268</sup> NPS-FM, Objective C1; RPS, Policy BIO.7 and Policies WQUAL.12, WQUAN.8.



[259] In relation to the retention of "life supporting capacity" in this objective we will reconsider that in the light of any submissions made on that term in Objectives 9 and 9A.



## Objective 17

### Objective 17 (DV)

The natural character values of wetlands, rivers and lakes and their margins, including channel and bed form, rapids, seasonably variable flows and natural habitats, are protected from inappropriate use and development.

[260] As the objective ultimately derives from s 6(a), Forest and Bird and Fish and Game would amend the objective to require natural character values to be both preserved and protected from inappropriate use and development in line with the language of the Act. Pursuant to s 6, the pSWLP is to both recognise and provide for:

The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development.

[261] It is the Regional Council's view that "preserve" does not add to the objective's protective outcome and indeed, Mr Maw submits there is no material difference in meaning between "preserved" or "protected" – at least as the objective is proposed to be amended by the appellants.<sup>269</sup>

[262] Mr McCallum-Clark, citing in support Meridian's notice to become an interested party in the Forest and Bird appeal, said that he *tended* towards the view that the:<sup>270</sup>

... decision version of the Objective allows for reasonable decisions to be made on a case by case basis as to the level of appropriate protection of natural values to be applied, ranging from preservation where the values are very high, to little protection where the natural character values are very low.

We do not recall Meridian calling evidence in support of its notice.

[263] Ms Kirk, giving planning evidence on behalf of the Director-General of Conservation, points out that under s 6(a) it is not the natural character in and of itself that is subject to use and development, rather it is the environment. The use and development of the environment may impact natural character. In her opinion, without

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<sup>269</sup> Regional Council, opening submissions at [169]-[170].

<sup>270</sup> McCallum-Clark, EIC at [179].



the “preserve” element, the objective lacks direction as to what is to be protected from inappropriate development.<sup>271</sup>

### **Discussion**

[264] The planning witnesses do not address the provision within the context of the higher order planning documents and so we have had recourse to the s 32AA report to understand the import of this provision. The s 32AA report states that Objective 17 is one of four objectives addressing wetlands, the other Objectives being 1, 3 and 14. We set out all four for context.

#### **Objective 1 (DV)**

Land and water and associated ecosystems are sustainably managed as integrated natural resources, recognising the connectivity between surface water and groundwater, and between freshwater, land and the coast.

#### **Objective 3 (as proposed to be amended by the court)**

The mauri of waterbodies will be acknowledged and protected so that it provides for te hauora o te taiao (health and mauri of the-environment) and te hauora o te wai (health and mauri of the waterbody) and te hauora o te tangata (health and mauri of the people).

#### **Objective 14 (DV)**

The range and diversity of indigenous ecosystem types and habitats within rivers, estuaries, wetlands and lakes, including their margins, and their life-supporting capacity are maintained or enhanced.

#### **Objective 17 (DV)**

The natural character values of wetlands, rivers and lakes and their margins, including channel and bed form, rapids, seasonably variable flows and natural habitats, are protected from inappropriate use and development.

[265] The s 32AA report records that the objective is to achieve the direction in Objective B4 of the NPS-FM that provides:

#### **Objective B4**

To protect significant values of wetlands and of outstanding freshwater bodies.



<sup>271</sup> Kirk, EIC as s 274 party in support at [70]-[71].

[266] The s 32AA report mentions NZCPS Policy 13.<sup>272</sup> This policy helpfully describes natural character in the following way:

- (2) Recognise that natural character is not the same as natural features and landscapes or amenity values and may include matters such as:
  - a. natural elements, processes and patterns;
  - b. biophysical, ecological, geological and geomorphological aspects;
  - c. natural landforms such as headlands, peninsulas, cliffs, dunes, wetlands, reefs, freshwater springs and surf breaks; ...

[267] The natural character of the coastal environment is preserved under the NZCPS when certain adverse effects – *inter alia* – are avoided; per Policy 13(1):

- (1) To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:
  - a. avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and
  - b. avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment; including by:
    - c. assessing the natural character of the coastal environment of the region or district, by mapping or otherwise identifying at least areas of high natural character; and
    - d. ensuring that regional policy statements, and plans, identify areas where preserving natural character requires objectives, policies and rules, and include those provisions.

[268] Policies 11, 14 and 15 of the NZCPS are also said to be relevant and we have had regard to the same.

[269] Finally, RPS Objective WQUAL.2 is noted in the s 32AA report. This objective does not talk about preserving or protecting lowland waterbodies but halting their decline.

**Objective WQUAL.2:**

Halt the decline in lowland water bodies and coastal lakes, lagoons, tidal estuaries, salt marshes and coastal wetlands.

[our emphasis]




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<sup>272</sup> Section 32AA report at 113.

[270] While not referred to in the s 32AA report (or in evidence), the following RPS objectives and policies also appear relevant:

**Policy WQUAL.3**

Identify and protect the significant values of wetlands and outstanding freshwater bodies.  
[our emphasis]

**Policy WQUAN.1**

Maintain instream values of surface water that derive from flows and levels, while recognising the special circumstances of the Waiau catchment.  
[our emphasis]

**Objective BRL.1**

All significant values of lakes and rivers are maintained and enhanced.  
[our emphasis]

[271] The Act protects against “inappropriate” use and development. What is “inappropriate” is to be assessed by reference to what it is that is sought to be protected.<sup>273</sup> What is to be protected under s 6(a) is the coastal environment and wetlands, lakes and rivers and the margins of the same. The outcome of the protection is the preservation of the natural character of the coastal environment and the relevant waterbodies.<sup>274</sup>

[272] Fundamentally, we do not agree with the Regional Council and others that there is no material difference in meaning between “preserve” or “protect”. The Oxford Dictionary defines “preserve” as being to maintain something in its original or existing state and “protect” as meaning to “defend or guard from danger or injury ...; to keep safe; take care of”.<sup>275</sup> Thus, by protecting the coastal environment and the relevant waterbodies, their natural character is kept in its original or existing state.

[273] The higher order planning documents expand, to some limited degree, on what is to be protected (see our emphasis above).

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<sup>273</sup> *Environmental Defence Society Incorporated v New Zealand King Salmon Company Limited* [2014] NZSC 38, [2014] 1 NZLR 593 at [105].

<sup>274</sup> Similarly, the Cambridge Dictionary (Online) defines “preserve” as meaning to keep something as it is, especially in order to prevent it from decaying or being damaged or destroyed and ‘protect’ as meaning to keep someone or something safe from injury, damage, or loss.

<sup>275</sup> “protect, v.” and “preserve, v.” *OED Online* (Oxford University Press, September 2019).



[274] The pSWLP defines natural character values as “the qualities of the environment that give it recognisable character”. Natural character is said to embrace ecological, physical, spiritual, cultural, intrinsic and aesthetic values, and includes modified and managed environments. Objective 17 would protect these “values” from inappropriate use and development but to what end?

[275] In ordinary parlance, natural character may be understood in terms of being the full expression of the natural environment. Knowing natural character – however it is valued – is essential to understanding the interconnection of water, land and people and consequently managing natural resources in a way that responds to their connectivity (ki uta ki tai).

[276] We have taken note of Mr Dunning’s evidence for the territorial authorities, that Objective BRL.1 of the RPS is to maintain and enhance only the “significant” values of lakes and rivers. The definition of “natural character values” in the proposed plan is all encompassing and not limited to values that are of significance to the region.<sup>276</sup> Further, preservation of all natural character values will not assist in giving effect to the direction in Objective INF.1 that infrastructure be appropriately integrated with land use and the environment.<sup>277</sup>

[277] On the other hand we accept Ms Kirk’s evidence that Objective 17 lacks direction. Echoing the words of the late Environment Judge J Bollard, there is an ever-present call for environmental compromises and trade-offs at the individual level and of changes that all too often belatedly disclose mediocre environmental qualities, if not irreversible degrading outcomes.<sup>278</sup> Policy-making should be an informed response; one that assists decision-makers on the amount of change the environment can accommodate without substantively altering its natural character. Absent this direction in the pSWLP, natural character values may all too easily be written off or undervalued as being of ‘low’ quality, whereas even residual values may be worthy of protection if those values are sustaining natural character. Unfortunately, the plan does not appear to identify what is of value and therefore what is to be protected.

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<sup>276</sup> Dunning EIC at [94].

<sup>277</sup> Dunning EIC at [99].

<sup>278</sup> John Bollard “Climate changes issues from the perspective of the Environment Court” (2008) 7 BRMB 127 at 130, cited by the (then) Chief Justice in “Righting Environmental Justice” (Address to Resource Management Law Association: Salmon Lecture, Auckland, 25 July 2013) at 10.



[278] Taking wetlands, by way of example, the experts agreed the loss of wetlands was a critically important issue and that urgent and effective action was required to enhance, restore and increase the extent of wetlands.<sup>279</sup> The area of wetlands in Southland is known to have declined to 11% of its historical extent, and it is continuing with no apparent decrease in the rate of clearance.<sup>280</sup> Clearance and drainage for agriculture is considered the primary cause, along with afforestation, peat mining and horticulture. Activities are focused mainly on the Southland Plains and particularly, near the Awatua-Waituna RAMSAR Wetland of International Significance. To increase and restore wetlands *per* RPS WQUAL2 is likely to require that any remaining marginal wetland land is not subject to new drainage and that some drainage works need to be reversed, even where these areas are not currently classed as being significant. Such wetlands have the potential for restoration and even if not dominated by indigenous species provide additional habitat and connectivity. The Director-General of Conservation's proposed change encourages such an outcome by preserving such areas based on their natural character (which includes the landform, drainage pattern and vegetation pattern of wetlands whether or not they contain significant biodiversity currently).

### Outcome

[279] This objective, like many others in the pSWLP, simply restates provisions in the higher order instruments without particularly advancing the same. We would approve the amendment proposed by the Director-General of Conservation as this more clearly draws the distinction between "preserve" and "protect". Bearing in mind that natural character values may be of significance because of their attributes of rarity, representativeness, distinctiveness and ecological context, we invite parties to consider limiting the values to be preserved to those that are of regional significance and in doing so provide substantive direction on the outcome. Thus:

Preserve the natural character values of wetlands, rivers and lakes and their margins, including channel and bed form, rapids, seasonably variable flows and natural habitats that are of significance to the region, and protect them from inappropriate use and development.

[280] We will direct the parties file further submissions and/or evidence in response to the court's discussion and to address whether the objective, properly directed, is to address natural character values that are significance to the region.

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<sup>279</sup> JWS for Water Quality and Ecology (Rivers and Wetlands) held 7-9 May 2019 at [82].

<sup>280</sup> JWS – Ecology (Rivers and Lakes) at [30]-[33].



## Objective 18

### Objective 18 (DV)

All activities operate in accordance with "good management practice" or better to optimise efficient resource use, safeguard the life supporting capacity of the region's land and soils, and maintain or improve the quality and quantity of the region's water resources.

[281] Objective 18 is of critical importance to the outcomes for water quality under this plan. Appealed by Alliance Group Limited, Ngā Rūnanga and Fish and Game, the objective attracted considerable debate. We have considered the objective together with policies 4-12A which, for farming activities at least, will implement Objective 18.

[282] Evidently the intent of Objective 18 is to provide a high-level expectation of behaviour for all activities.<sup>281</sup> Beyond this the s 32AA report does not shed much light on the objective, the report simply states that the objective is addressing the purpose of the Act. There is no discussion of the objective in the decision of the Hearing Panel.

[283] The directive that all activities operate in accordance with good management practice is to secure three outcomes; namely efficient resource use, safeguarding of the life supporting capacity of the region's land and soils, and maintenance or improvement of the quality and quantity of the region's water resources. It was Ms Kirk's view the objective could be deleted in its entirety because the outcomes are covered by the other objectives in the pSWLP.<sup>282</sup>

[284] While the objective would have good management practice apply to all activities, it is common ground that "good management practice" is a management approach that is typically applied to farming activities. This guidance has generated uncertainty as to the extent of objective's remit – does the objective apply to all activities or is it to be read down as applying to the agricultural sector?

[285] Beyond what we say above, it is not necessary to traverse the evidence on this objective, as much of it concerned responses to the objective by, for example, amending the term to "good environmental practice" to make clear the approach was of general

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<sup>281</sup> McCallum-Clark, EIC at [195] and rebuttal at [27].

<sup>282</sup> Kirk, as a s 274 party in support [9(h)].



application or alternatively, amending the objective to refer to both “good management practice” and “best practicable option” thus drawing in the industrial sector. For the moment, neither approach finds favour with the court as the amendments proposed are addressing matters best left for policy.<sup>283</sup>

***“Improve” or “maintain or improve” water quality?***

[286] We divert briefly to specific relief proposed by Ngā Rūnanga who sought to amend the objective requiring water quality and quantity to be improved (as opposed to maintained or improved). Ngā Rūnanga is concerned that there be continual striving to improve land use management and thereby improve water quality and quantity.<sup>284</sup> We were told this striving for improvement is typical under a “good management approach”. Ms Davidson, giving planning evidence for Ngā Rūnanga, said that by referring to maintaining or improving water quality or quantity, this does not so much support a “good management approach”<sup>285</sup> as it does business-as-usual.<sup>286</sup>

[287] The discretion to “maintain or improve” water quality and quantity better aligns with the objectives. Prior to the FMU processes water quality is to be improved only when water is degraded (Objective 6). We are not aware of any objective or policy that requires users to reduce the volume of water taken where water is presently over-allocated. Over-allocation both in terms of water quantity and quality is to be phased out under the FMU process and the targets, limits and timeframes for achieving this will be set following engagement and discussion with the community (Objective 7).

***Discussion***

[288] That said, Ngā Rūnanga’s concerns resonate with the Regional Council. Counsel for the Regional Council opened the hearing by submitting on behalf of his client that: “The community, both rural and urban, needs to recognise that current practices will need to change if water quality is to be maintained, and improved where it is degraded”.<sup>287</sup> We find water quality is unlikely to be maintained – even where it is not degraded – without change. This need for change may well have become lost in the debate over how the

<sup>283</sup> Kirk, EIC as s 274 party in support at [79].

<sup>284</sup> Transcript (Davidson) at 1489.

<sup>285</sup> Transcript (Davidson) at 1453 and 1489.

<sup>286</sup> Transcript (Davidson) at 1488.

<sup>287</sup> Regional Council, opening submissions at [4].



objective is to be implemented – whether under a good management practice or by adopting the best practicable option.

[289] While Objectives 6 and 7 address water quality and/or quantity, there is no objective to safeguard the life-supporting capacity of the region’s land and soils or to optimise efficient resource use. How then are people and community to know what is the intended outcome of their behavioural change? Ms Kirk’s opinion about this matter is compelling: the objective, as worded, does not add “value, clarity or certainty” and indeed, the objective could be deleted in its entirety.<sup>288</sup>

[290] If the goal of the objective is to bring about behavioural change, this outcome is not made certain by rephrasing inaccurately some – but not all – objectives. Assuming Objective 18 is to give effect to Te Mana o te Wai (Objective 3) and implementing ki uta ki tai (Objective 1) if change is the desired outcome, we wonder why the objective just does not say “all persons will demonstrate improved land use and water management practice” or words to that effect? This is not to establish any standard or process for compliance purposes.<sup>289</sup> Acknowledging that the language of “improved” land use and water management is not perfect, we will seek submissions/evidence on whether the objective would be strengthened by focusing on behavioural change outcome.



<sup>288</sup> Kirk, as a s 274 party in support at [9(h)] and [81].

<sup>289</sup> See McCallum-Clark, EIC at [195].

## Policies 4–12A – Physiographic Zone Policies

### Introduction

[291] Policies 4-12A address farming, and possibly other activities, taking place within nine physiographic zones. The pSWLP explains that the physiographic zones were developed to better understand the region's water, how it moves across the landscape and why water quality is better in some places than in others. Each of the nine zones represents areas of the landscape with common attributes that influence water quality, such as climate, topography, geology and soil type.<sup>290</sup>

[292] This understanding is expanded upon by Dr Snelder, who developed a model of the physiographic zones:<sup>291</sup>

- 14 The Physiographic Zones are based on an underlying conceptual model that postulates that physiographic characteristics (topography, geology and soils) broadly control transport, dilution and attenuation processes at landscape scales. This conceptual model is also the basis for mapping the distribution of the Physiographic Zones across the region. I note that the approach taken to developing the Physiographic Zones is similar to that taken for other environmental classification systems including the REC.
- 15 Statistical testing indicates the Physiographic Zones are a robust description of the broad (i.e., landscape-scale) variation in water composition and water quality risk across the Southland region...

[Note: REC means River Environment Classification system]

[293] The s 32AA report records that the physiographic zone policies are to implement Objective 18. The Director-General of Conservation and Ngā Rūnanga submit, and we could accept, that the policies also implement Objective 1 and generally ki uta ki tai<sup>292</sup> and Objective 3 (Te Mana o te Wai).<sup>293</sup> The policies may implement other objectives as well.

<sup>290</sup> pSWLP, Physiographic Zones at 19.

<sup>291</sup> Snelder, EIC at [14]-[15].

<sup>292</sup> Director-General of Conservation, closing submissions at [59].

<sup>293</sup> Ngā Rūnanga, closing submissions at [50].



## Physiographic maps

[294] As noted, the policies address nine physiographic zones. Maps showing the location of the zones were included in the notified version of the pSWLP but were removed on the recommendation of the Hearing Panel. The maps' removal appears to follow from a finding that physiographic zones are not a suitable tool with which to inform the activity status of land use for farming activities at a property level.<sup>294</sup>

[295] Several parties seek reinstatement of the maps, together with a description of the characteristics of each zone in an appendix to the plan.<sup>295</sup> Maps are important if plan users are to ascertain whether these policies apply to them, however, the Regional Council opposes their inclusion.<sup>296</sup>

[296] The physiographic zones are principally a tool to manage the risk to water quality from land use.<sup>297</sup> Dr Snelder considered the maps a useful starting point for identifying the dominant flow paths, water quality risks and potential objectives for mitigation. While the pSWLP has some information about the characteristics of individual zones, more information is held by the Regional Council.<sup>298</sup> The crux of the problem appears to be that were farmers to rely solely on a property's membership in a particular physiographic zone, this may result in inappropriate or inadequate actions being taken in response to contaminant flow paths. The modelling used to derive the zone maps has limitations which will not be obvious to plan users,<sup>299</sup> the principal limitations being:<sup>300</sup>

- (a) the level of resolution of detail and spatial accuracy of the map boundaries means zone membership does not describe all sources of water quality risk at the scale of an individual property;
- (b) the zones are not distinctive entities, but instead are a coarse subdivision of continuously varying physiographic conditions. Physiographic zone boundaries are indicative of areas where there is a transition from one set

<sup>294</sup> Hearing Panel report at [123]-[124]. Regional Council, opening submissions at [202].

<sup>295</sup> Director-General of Conservation, closing submissions at [69]; Forest and Bird, closing submissions at [65].

<sup>296</sup> McCallum-Clark, rebuttal at [34].

<sup>297</sup> Regional Council, opening submissions at [2]; Transcript (Snelder) at 314.

<sup>298</sup> Transcript (Snelder) at 314.

<sup>299</sup> Snelder, EiC at [16]-[17].

<sup>300</sup> Snelder, EiC at [15].



of conditions to another and confirmation of those conditions requires on the ground judgment and interpretation; and

- (c) the boundaries of the physiographic zone may be inappropriate at a property scale.

[297] Dr Snelder was clear that the maps could not be relied on exclusively when assigning a property to a given zone.<sup>301</sup> In his view the risk of contaminant flow within / from each individual property must be considered together with the generic risks described for the assigned zone.<sup>302</sup> Dr Snelder thought Policy 12A (not under appeal) would require all applicants for resource consent to provide information that better identifies or delineates zone boundaries or contaminant loss pathways.<sup>303</sup>

### ***Discussion***

[298] Policies are to implement objectives (s 67(2) RMA); they set out the course of action to achieve the outcomes set out in the plan objectives and their relationship to the objectives they are to implement should be readily discernible.

[299] The physiographic zones do not ascribe outcomes for water quality in terms of limits or targets over a period of time.<sup>304</sup> Rather, the value of the physiographic zones lies in their identification of broad-scale risks to water quality for each zone. Land use practices,<sup>305</sup> at the scale of the individual property, also present risks to water quality. Risks at the scale of the individual property may overlap with, but are not the subject matter of, the physiographic zones.

[300] The policies do not use the language of risk but instead refer to avoiding, remedying or mitigating adverse effects. This effects-based language assumes an adverse effect can be directly attributed to the activities occurring on an individual property,<sup>306</sup> whereas the evidence does not support this. While the language of effects is familiar to planners, is it appropriate in context and will it invite inquiry into the contaminant pathways which exist within the receiving environment?

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<sup>301</sup> Transcript (Snelder) at 301.

<sup>302</sup> Snelder, EIC at [53-57]; Transcript (Snelder) at 307.

<sup>303</sup> Transcript (Snelder) at 311 and elsewhere.

<sup>304</sup> Transcript (Snelder) at 313-314.

<sup>305</sup> By "land use" we are referring generally to all aspects of farming activities including the discharge of contaminants.

<sup>306</sup> Transcript (McCallum-Clark) at 450-451.



[301] As presently worded Policies 4-12 are weighted towards consideration of contaminant risk within the nine physiographic zones. It seems doubtful that site-specific risk will be considered under these policies. Moreover, in our view Policy 12A is unlikely to be applied to require each applicant for resource consent to address site-specific risk. It will only be applied where information better defining the physiographic zones or contaminant pathways is available. Put another way Policy 12A does not oblige an applicant to investigate site-specific risks.

[302] If the need to address risk at the level of the physiographic zone and at the individual property level is addressed in the policies, the maps could confidently be reinstated into the plan. Plan users will be considerably assisted by the inclusion of the maps together with comprehensive description of risks arising in each zone. We give provisional approval for the inclusion of the physiographic zone maps in the plan, with the detail of those maps and the method of inclusion to be a matter referred to mediation/expert conferencing.

[303] If all risks are relevant, then the chapeau to the policies will need to be amended to make this clear. For example, Policy 4 could read:

In the Alpine physiographic zone:

1. Avoid where practicable risk to water quality from erosion and contaminants by:
  - i. identifying contaminant pathways to ground and surface water bodies;

[304] For both the risk-based or effects-based version we would accept the thrust of Ms Kirk's evidence that "in the first instance" adverse effects are to be avoided. We would rephrase the chapeau of each policy to say that where it is practicable to do so adverse effects are to be avoided.

#### **Dairy farming or dairy farming of cows?**

[305] Each policy refers to "dairy farming" and not "dairy farming of cows". "Dairy farming of cows" is a term broadly defined in the pSWLP and includes farming, grazing and milking of cows. The parties will confirm whether "dairy farming of cows" is intended.



### **Gleyed, Bedrock/Hill Country and Lignite-Marine Terraces Physiographic Zones**

[306] Policy 6 addresses three physiographic zones; being Gleyed, Bedrock/Hill Country and Lignite-Marine Terraces. The plan originally notified separate policies for each zone, but the policies being the same in each case, the Hearing Panel recommended they be rolled into a single provision.

[307] While the Regional Council supported this,<sup>307</sup> we find it will assist the users of the plan that they remain separate in common with other zones.

### **“Good management practice” or “good farming practice”?**

[308] If a risk-based approach is not adopted, an issue arises as to whether the policies should refer to “good management practice” or “good farming practice”. To make clear that the policies apply to farming activities only, the Regional Council would amend the term to read “good farming practice”.<sup>308</sup> Fish and Game and the Director-General of Conservation promote the use of “good management practice or the best practicable option to avoid as far as practicable” instead.<sup>309</sup>

[309] The term “best practicable option” is problematic not least because it is usually applied to point source discharges whereas “good management practices” is applied to diffuse source (non-point source) discharges.<sup>310</sup> Ms Kirk agreed in cross-examination that the reference to “best practicable option” could be deleted if Policies 4-12 were intended to apply to farming activities only. Further to this, she accepted that limiting the policies to farming activities would not leave a lacuna in the plan as other policies addressed industry and other non-farming activities.<sup>311</sup> Counsel for Forest and Bird advocated for both techniques to apply to farming activities as these activities may involve both point source and non-point source discharges. Forest and Bird is particularly concerned that good management practice does not typically allow for the consideration of the receiving environment.<sup>312</sup>

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<sup>307</sup> Regional Council, opening submissions at [200]; closing submissions at [114].

<sup>308</sup> Regional Council, closing submissions at [107].

<sup>309</sup> Kirk, EiC as s 274 party in support at [93] and Farrell, EiC at [156.3].

<sup>310</sup> Whether “best ‘practicable option’” it is intended to be limited this way under Policy A3 of the NPS-FM is a live question for the Topic B hearing.

<sup>311</sup> Transcript (Kirk) at 1298-1300.

<sup>312</sup> Forest and Bird, closing submissions at [56].



[310] While the definition of “good management practice” in this plan has been criticised and is a matter to be addressed in the Topic B hearing, we agree with the primary sector that the term should be retained. The term is reasonably well understood as applying to farming activities.<sup>313</sup> If Policies 4-12A apply to farming activities only, as was contended by some of the parties, would this be made clearer by amending the section heading to Policies 4-12 to read “Physiographic Zone Policies for Farming Activities”?

[311] Importantly, there is nothing of which we are aware that would preclude consideration of the receiving environment of point and non-point source agricultural discharges under a good management practice approach.

**“Good management practice or better”**

[312] Both the notified and decision versions of Objective 18 were concerned that all activities operate in accordance with “good management practice or better” to achieve certain outcomes. We recall that Ms Ruston’s evidence was that she was unclear what “or better” was meant to achieve beyond adopting good management practice.<sup>314</sup> One purpose of Forest and Bird’s proposal to amend the policies by referring to both “good management practice or the best practicable option to avoid as far as practicable” was to reinforce that land management was to improve under “good management practice”.<sup>315</sup> As noted in our discussion of Objective 18, this also accords with Ngā Rūnanga’s understanding.<sup>316</sup> The Director-General of Conservation, for similar reasons, proposed to amend the chapeau of Policy 4 to provide “In the Alpine Physiographic Zone, avoid in the first instance, remedy or mitigate erosion and adverse effects on water quality from contaminants...”.<sup>317</sup>

[313] Again, the witnesses are addressing an important issue for these proceedings concerning the direction of travel under this plan – is it “holding the line” or is it seeking improvement in the existing state of the environment? It is our view the issue is better addressed under Objective 18 and is one reason why we have proposed amendments to the Objective.

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<sup>313</sup> Taylor, EIC at [4.2].

<sup>314</sup> Ruston, EIC at [92].

<sup>315</sup> Transcript (Farrell) at 896-897, 977. See also Davidson, EIC at [123].

<sup>316</sup> Transcript (Davidson) at 1489.

<sup>317</sup> Transcript (Kirk) at 1299-1300.



**Clause 3 of Policies 4-12 and “Strongly discouraging”, “generally not granting”, “not grant”**

[314] The decision version of the policies adopts a position of “generally not granting” applications for resource consent in circumstances where there will be increased contaminant losses from additional dairy farming of cows or additional intensive winter grazing. Policy 4(3) (DV) is the exception. Applying to the alpine physiographic zone, this policy would prohibit dairy farming and intensive winter grazing while “generally not granting” applications for cultivation.<sup>318</sup>

[315] Generally speaking, policies are to guide people and communities as to the matters the consent authority will consider when deciding an application for resource consent. In each instance, the relevant sub-clause applies in narrow circumstances and provides direction on how the objective is to be implemented, addressing either substantive outcomes and/or the acceptability of certain activities occurring.

[316] The appeals on this clause sought relief that would make the policies more or less directive. With the primary sector supporting “generally not granting”; the Regional Council, Ngā Rūnanga and the Director-General of Conservation preferring “strongly discouraging” and Forest and Bird and Fish and Game advocating for “not grant”, the court was left with the strong impression that the phrases, not being well understood, would very likely become the stalking horse for future debate and may lead to unintended outcomes in the administration of the plan.<sup>319</sup>

[317] The integrity of the policies will not be undermined if the phrasing is deleted altogether. Indeed to do so would provide clear direction on how the objectives are to be achieved. In that regard we would approve the alternative wording put forward by Forest and Bird.

[318] Finally, we note the legal submission on behalf of Wilkins Farming Co Limited seeking to delete reference to particular activities in sub-clause 3.<sup>320</sup> We accept the submission of several parties that the policies have a deliberate and appropriately

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<sup>318</sup> Under the pSWLP “cultivation” means the “Preparing land for growing pasture or a crop by mechanical tillage, direct drilling, herbicide spraying, or herbicide spraying followed by over-sowing for pasture or forage crops (colloquially referred to as ‘spray and pray’), but excluding any spraying undertaken solely for the control of pest plant species.”

<sup>319</sup> Forest and Bird, closing submissions at [57].

<sup>320</sup> Wilkins Farming Company Ltd, closing submissions at [6].



narrowed focus on those activities with a high risk of discharging contaminants to the environment<sup>321</sup> and would not approve this amendment.

### Outcome

[319] The final determination of these policies is subject to Objective 18. Our analysis has proceeded on the basis that Objective 18 is directed (at least) towards improving existing land use and water management practice.

[320] Subject to confirmation that the policies apply only to farming activities, amend the heading to Policies 4-12 to read “Physiographic Zone Policies for Farming Activities”.

[321] Subject to confirmation, amend “dairy farming” to read “dairy farming of cows”.

[322] If policies are to retain their effects-based language, then restructure Policies 4-5 and 9-12 to make clear the chapeau applies to clauses (i) and (ii) only. Address separately those activities/effects that are to be prohibited or effects avoided. See Annexure 1 to this decision for suggested wording.

[323] Alternatively, if policies adopt risk-based language, likewise restructure Policies 4-5 and 9-12 to make clear the chapeau applies to clauses (i) and (ii) only. Address separately those activities/effects that are to be prohibited or effects avoided. See Annexure 1 to this decision for suggested wording.



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<sup>321</sup> Director-General of Conservation, closing submissions at [66].

**Policy 3 (DV) Ngāi Tahu ki Murihiku taonga species**

To manage activities that adversely affect taonga species, identified in Appendix M.

[324] Fish and Game have appealed this policy, seeking that it be amended to refer to taonga species and their related habitats. The Regional Council, together with Forest and Bird and Ngā Rūnanga, supports this relief. This policy implements Objective 15 which also refers to taonga species and their habitats.

[325] Federated Farmers is an interested party in this appeal, opposing the relief sought by the appellant. While it is possible that we have overlooked the same, Federated Farmers did not call evidence or make any submission in support of the decision version of the policy.

**Outcome**

[326] If the court's interpretation and implementation of Te Mana o te Wai and ki uta ki tai is accepted, we could accept the amendment as being the most appropriate way to achieve Objective 15. Thus:

**Policy 3 Ngāi Tahu ki Murihiku taonga species**

To manage activities that adversely affect taonga species, identified in Appendix M, and their related habitats.

If not, more fulsome wording articulating how the outcomes are to be provided is required.



### Policies 45 – 46

[327] These policies concern the FMU processes. As the parties' positions were generally aligned at the end of the hearing, and we agree with the reasons given for their alignment, we will approve the amendments proposed.

[328] Where there is any difference in substance remaining, we will indicate our findings on the same.

#### Policy 45 – Priority of FMU values, objectives, policies and rules

[329] Policy 45 addresses the content of FMU provisions to be introduced into the pSWLP by way of plan change.

[330] The Hearing Panel recommended that any provision on the same subject matter in a future FMU plan change may prevail over the region-wide objectives and policies. Forest and Bird appealed the policy, amending their relief during the course of the hearing to the effect that any provision on the same subject matter in the relevant FMU section (including freshwater objectives) must:<sup>322</sup>

- (i) give effect to the region-wide objectives; and
- (ii) safeguard ecosystem health and human health for recreation.

[331] At the beginning of the hearing Fish and Game's relief included numeric attributes for the two national values.<sup>323</sup> They are no longer pursuing this relief,<sup>324</sup> but ask the court to intervene in the FMU process by "providing strong guidance in the pSWLP on the 'bottom line' for freshwater outcomes..."<sup>325</sup> in particular, that the national compulsory values are 'safeguarded' under future FMU plan changes.

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<sup>322</sup> Fish and Game, closing submissions at [42]-[45], [47] and [52]; Forest and Bird, closing submissions at [8].

<sup>323</sup> Farrell, EIC at [7.2], [10.3], [80] and [165]; Death, EIC at section 8.

<sup>324</sup> Fish and Game, closing submissions at [24]. Similarly, Forest and Bird, closing submissions at [8].

<sup>325</sup> Farrell, EIC at [170].



[332] Counsel for Fish and Game submit the NPS-FM allows consideration of other values that may compete with the compulsory national values.<sup>326</sup> Consequently, Fish and Game is concerned to ensure that the compulsory national values are secured under a future FMU and not “traded off” for other values identified following engagement and discussion with the community.<sup>327</sup> Fish and Game does not say that the compulsory national values will not be provided for, but that other values may impact the *level* of their provision. To address this, they would amend the policies to say the national compulsory values are safeguarded.<sup>328</sup>

### **Discussion**

[333] We were unsure whether Fish and Game is claiming standing to pursue this relief as an appellant (the notice of appeal does not address the proposed amendment) or as a s 274 party.

[334] No party responded to the substance of the issue raised by Fish and Game and that may be because they were not anticipating the proposed amendment. The Regional Council, for example, interpreted the proposed amendment as being an example of poor drafting – one which merely repeats the provisions of the superior document.<sup>329</sup> Thus while the Regional Council changed its position to one of supporting an outcome that any provision on the same subject matter in the FMU section of the plan must give effect to the region-wide objectives, it does not go as far as to include reference to safeguarding the national compulsory values. The Council’s preferred wording of the policy is supported by the primary sector.<sup>330</sup>

### **Outcome**

[335] The arguments are complex and, as a matter of natural justice, we decline to give our finding on the matter without hearing further from interested parties.

[336] It may be the parties’ view that Objectives A1 and B1 of the NPS-FM already direct the safeguarding of the compulsory national values. Likewise, they may take the

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<sup>326</sup> Fish and Game, closing submissions at [46.3].

<sup>327</sup> Fish and Game, opening submissions at [15].

<sup>328</sup> Fish and Game, closing submissions at [45].

<sup>329</sup> Regional Council, closing submissions at [120].

<sup>330</sup> Ballance Agri-Nutrients Limited, closing submissions at [26].



view that the safeguarding of the compulsory national values in a future plan change is secured through Objective 9 (at least for ecosystem health and human health for recreation).

[337] That said, with minor changes to improve clarity, we would approve the amendments proposed by the Regional Council and Forest and Bird clarifying what is to occur where the FMU provisions are progressed in stages. Likewise, the advice notice. We make no decision whether to include a new provision sought by Forest and Bird to safeguard ecosystem health and human health for recreation.

[338] Thus, we would approve the following amendments to Policy 45:

In response to Ngāi Tahu and community aspirations and local water quality and quantity issues, FMU sections of this Plan may include additional catchment-specific values, objectives, policies, attributes, rules and limits which will be read and considered together with the Region-wide Objectives and Region-wide Policies.

Any provision on the same subject matter in the relevant FMU section of a plan (including Freshwater Objectives) must give effect to the Region-wide Objectives.

FMU provisions developed for a specific geographical area will not initiate a plan change to the Region-wide objectives or Region-wide policies.

Advice Note: It would be unfair if changes are made to Region-wide objectives and policies, based on decisions for individual FMUs in specific parts of Southland, which apply in other parts of Southland, without the involvement of the wider Regional and wider communities.

### Policy 46 – Identified FMUs

[339] The notified version of the plan contains five freshwater management units. We assume freshwater management unit or “FMU” has the same meaning as in the NPS-FM – “the water body, multiple water bodies or any part of a water body determined by the regional council as the appropriate spatial scale for setting freshwater objectives and limits and for freshwater accounting and management purposes”.<sup>331</sup>

[340] The Council had determined that the Waituna Lagoon catchment should be a sub-unit of the Maitara FMU. This decision was appealed by Forest and Bird who sought to



<sup>331</sup> NPS-FM, Interpretation at 8.

make the catchment subject to its own separate FMU process.<sup>332</sup> Waituna Lagoon forms part of the Ramsar Waituna-Awarua Wetland of International Importance.

[341] Forest and Bird, together with Ngā Rūnanga and the Director-General of Conservation, is concerned that the values of Waituna Lagoon may be lost were it to remain in the wider Maitara catchment FMU.<sup>333</sup> Indeed the court was directed to evidence that Waituna Lagoon has become increasingly vulnerable to regime shift in the last 10 to 15 years.<sup>334</sup> This is despite the Crown's acknowledgment in the Ngāi Tahu Claims Settlement Act 1998 of Ngāi Tahu's status as tangata whenua and its association with Waituna.<sup>335</sup> Within Waituna are urupā and wāhi tapu, and the:<sup>336</sup>

... mauri of Waituna represents the essence that binds the physical and spiritual elements of all things together, generating and upholding all life. All elements of the natural environment possess a life force, and all forms of life are related. Mauri is a critical element of the spiritual relationship of Ngāi Tahu Whānui with the area.

[342] At the end of the hearing no party opposed the Waituna Lagoon being separately identified as an FMU. While the Council is "cognisant of the urgent need to improve the health of Waituna",<sup>337</sup> and has been aware of the degraded state of the Waituna catchment since 2011, it intends notifying a single plan change for all FMUs and for the plan change process to be completed by 2025.<sup>338</sup> The Regional Council adopts a neutral position to signal its view that recognition of Waituna Lagoon as a separate FMU does not imply any alteration to its programme of work. On this basis the Regional Council no longer maintains there is a jurisdictional bar to the court amending the plan accordingly.<sup>339</sup>

## Outcome

[343] We accept the reasons put forward in support of amending Policy 46 to include Waituna Lagoon as a separate FMU. The Waituna Lagoon has international and national significance, is in a degraded state, and is at risk of further degradation. We further

<sup>332</sup> Forest and Bird, opening submissions at Issue 8.

<sup>333</sup> Davidson, EiC at [150]-[151]; Farrell, EiC at [180] and Kirk, EiC as s 274 party in support at [108].

<sup>334</sup> Forest and Bird, closing submissions at [70]; Transcript (Gepp) at 1786-1787 and Exhibit Ngāi Tahu 2.

<sup>335</sup> Ngāi Tahu Claims Settlement Act 1998, s 6 and Schedule 73.

<sup>336</sup> Ngāi Tahu Claims Settlement Act 1998, Schedule 73; pSWLP, Appendix B – Ngāi Tahu Statutory Acknowledgement Areas at 137.

<sup>337</sup> Regional Council, closing submissions at [132].

<sup>338</sup> Transcript (Maw) at 2084-2085.

<sup>339</sup> Transcript (Maw) at 2085-2086.



accept that the protection of ecosystems in the wider Awarua-Waituna complex is urgently required.<sup>340</sup> A management programme is already in place for Waituna Lagoon and a body of research has developed specific to the lagoon and its catchment, with a process for involving the community also well established.<sup>341</sup> The recognition of Waituna Lagoon as a separate FMU is consistent with Policy 11 of the NZCPS which requires protection of indigenous biodiversity in the coastal environment. Given this, we would approve the amendment to Policy 46 as follows:

The FMU sections of this Plan are based on the following identified Freshwater Management Units for Southland, as shown on Map Series 6: Freshwater Management Units:

- Fiordland and the islands;
- Aparima;
- Mataura;
- Ōreti;
- Waiau; and
- Waituna.

#### **Policy 47 – FMU processes**

[344] All parties agree to amend Policy 47 such that the FMU sections will give effect to the region-wide objectives. We would approve their proposed amendments and in line with other policies further amend the policy to clarify that “The FMU sections “of this Plan” will give effect to ...”.

[345] We would approve:

The FMU sections of this Plan will give effect to the region wide Objectives – and:

1. identify values and establish freshwater objectives for each Freshwater Management Unit, including where appropriate at a catchment or sub-catchment level, having particular regard to the national significance of Te Mana o te Wai , and any other values developed in accordance with Policies CA1-CA4 and Policy D1 of the National Policy Statement for Freshwater Management 2014 (as amended in 2017); and
2. set water quality and water quantity limits and targets to achieve the freshwater objectives; and
3. set methods to phase out any over-allocation, within a specified timeframe; and
4. assess water quality and quantity taking into account Ngāi Tahu indicators of health.

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<sup>340</sup> Farrell, EIC at [178] and [179]; and McArthur, EIC at [97]-[101].

<sup>341</sup> Farrell, EIC at [178] and [179]; and McArthur, EIC at [97]-[101].



**Directions**

[346] We have in mind to refer the objectives and policies to either mediation or expert conferencing. No referral will be made until there is a settled view on the scheme of the plan.

[347] We expect that parties will be taking a break over Christmas. On their return we will direct the Regional Council to liaise with them over the filing of submissions and evidence (if required) in response to this Interim Decision. Specifically, the parties are to address the interpretation and implementation of Te Mana o te Wai and ki uta ki tai in this plan and any other matter they consider relevant to the scheme of the plan in general. Secondly, the parties are to address how the plan is to take into account the principles of the Treaty. Finally, they will indicate whether they wish to be heard on these matters.

[348] If parties prefer, the court will convene a pre-hearing conference in Invercargill to discuss forward directions. If a pre-hearing conference is preferred, this will occur in the week commencing **Monday 10 February 2020**.

[349] We direct:

- (a) by **Monday 3 February 2020**, the Regional Council, having conferred with the parties, will file and serve a reporting memorandum setting out a proposed timetable for the exchange of evidence and submissions as discussed at paragraph [347] or request the proceedings be set down for a pre-hearing conference in the week commencing 10 February 2020.

For the court:

  
\_\_\_\_\_  
**J E Borthwick**  
**Environment Judge**



**List of appellants**

ENV-2018-CHC-26	Transpower New Zealand Limited
ENV-2018-CHC-30	Wilkins Farming Co
ENV-2018-CHC-36	Director-General of Conservation
ENV-2018-CHC-37	Southland Fish and Game Council
ENV-2018-CHC-38	Meridian Energy Limited
ENV-2018-CHC-39	Alliance Group Limited
ENV-2018-CHC-40	Federated Farmers of New Zealand
ENV-2018-CHC-41	Heritage New Zealand Pouhere Taonga
ENV-2018-CHC-47	Waihopai Rūnaka, Hokonui Rūnaka, Te Rūnanga o Awarua, Te Rūnanga o Oraka Aparima and Te Rūnanga o Ngāi Tahu
ENV-2018-CHC-50	Royal Forest and Bird Protection Society of New Zealand Incorporated



## Annexure 1

In this attachment the court sets out its findings on the individual provisions. If a provision has been “confirmed” or “amended”, subject to submissions on the scheme architecture, the decision is final.

For some provisions the court has proposed alternative wording, in which case we indicate that the provision is “proposed to be amended.” The parties are invited to respond to the same while respecting the court’s findings in relation to the wording proffered by the parties.

To assist the parties, substantive changes in wording are underlined.

### **Objective 2 (notified version) is confirmed with minor grammatical corrections**

Water and land are recognised as enablers of the economic, social and cultural wellbeing of the region.

### **Objective 3 is amended**

The mauri of waterbodies will be acknowledged and protected so that it provides for te hauora o te taiao (health and mauri of the-environment) and te hauora o te wai (health and mauri of the waterbody) and te hauora o te tangata (health and mauri of the people).

### **Objective 6 is proposed to be amended**

Water quality in each freshwater body will be:

- (a) maintained where the water quality is not degraded; and
- (b) improved where the water quality is degraded by human activities.

### **Objective 7 is proposed to be amended**

Following the establishment of freshwater objectives, limits, and targets (water quality and quantity) in accordance with the Freshwater Management Unit processes:



- (a) where water quality objectives and limits are met, water quality shall be maintained or improved;
- (b) any further over-allocation of freshwater is avoided; and
- (c) any existing over-allocation is phased out in accordance with freshwater objectives, targets, limits and timeframes.

**Objectives 9 and 9A is proposed to be amended**

The quantity of water in surface waterbodies is managed so that:

- (a) the aquatic ecosystem health, life-supporting capacity,<sup>1</sup> the values of outstanding natural features and landscapes, the natural character and historic heritage values of waterbodies and their margins are safeguarded;
- (b) there is integration with the freshwater quality objectives and values<sup>2</sup> (including the safeguarding of human health for recreation); and
- (c) provided that (a) and (b) are met, surface water is sustainably managed, in accordance with Appendix K to support the reasonable needs of people and communities to provide for their economic, social and cultural wellbeing.<sup>3</sup>

**Objective 9B is proposed to be amended**

The importance of Southland's regionally and nationally significant infrastructure is recognised and its sustainable and effective development, operation, maintenance and upgrading enabled.

**Objective 10 is decided in part and amended**

The national importance of the existing hydro-electric generation schemes, including the Manapōuri hydro-electric generation scheme in the Waiiau catchment, is provided for and recognised in any resulting flow and level regime., and their structures are considered as part of the existing environment.

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<sup>1</sup> Seeking further submissions on meaning of life-supporting capacity.  
<sup>2</sup> Submissions are sought on sub-clause (b) introduced by the primary producers. "Values" does not appear to imply "freshwater quality objectives".  
<sup>3</sup> Reconsidered in line with Objective 2.



**Objective 13 is proposed to be amended**

Provided that

- (a) the quantity, quality and structure of soil resources are not irreversibly degraded through land use activities or discharges to land; and
- (b) the health of people and communities is safeguarded from the adverse effects of discharges of contaminants to land and water; and
- (c) ecosystems (including indigenous biological diversity and integrity of habitats), are safeguarded:

then land and soils are used and developed to enable the economic, social and cultural wellbeing of the region.

**Objective 14 (DV) is confirmed**

The range and diversity of indigenous ecosystem types and habitats within rivers, estuaries, wetlands and lakes, including their margins, and their life-supporting capacity are maintained or enhanced.

**Objective 17 is proposed to be amended**

Preserve the natural character values of wetlands, rivers and lakes and their margins, including channel and bed form, rapids, seasonably variable flows and natural habitats that are of significance to the region, and protect them from inappropriate use and development.

**Objective 18 is proposed to be amended**

All persons will demonstrate improved land use and water management practice.

**Policy 3 is amended**

To manage activities that adversely affect taonga species, identified in Appendix M, and their related habitats.



## Policy 4 is proposed to be amended

### *Risk-based*

In the Alpine physiographic zone:

1. avoid where practicable risk to water quality from erosion and contaminants by:
  - i. identifying contaminant pathways to ground and surface water bodies;
  - ii. requiring implementation of good management practices to manage erosion and adverse effects on water quality from contaminants transported via overland flow;
  - iii. having particular regard to adverse effects of contaminants transported via overland flow when assessing resource consent applications and preparing or considering Farm Environmental Management Plans; and
  
2. prohibiting dairy farming of cows and intensive winter grazing and avoiding cultivation where contaminant losses will increase as a result of the proposed activity.

### *Or effects-based*

In the Alpine physiographic zone:

1. avoid where practicable, remedy, or mitigate erosion and adverse effects on water quality from contaminants, by:
  - i. identifying contaminant pathways to ground and surface water bodies;
  - ii. requiring implementation of good management practices to manage erosion and adverse effects on water quality from contaminants transported via overland flow;
  - iii. having particular regard to adverse effects of contaminants transported via overland flow when assessing resource consent applications and preparing or considering Farm Environmental Management Plans.

2. prohibit dairy farming of cows and intensive winter grazing and avoid cultivation where contaminant losses will increase as a result of the proposed activity.



## Policy 5 is proposed to be amended

### ***Risk-based***

In the Central Plains physiographic zone:

1. avoid where practicable risk to water quality from contaminants by:
  - i. identifying contaminant pathways to ground and surface water bodies;
  - ii. requiring implementation of good management practices to manage erosion and adverse effects on water quality from contaminants transported via overland flow;
  - iii. having particular regard to adverse effects of contaminants transported via overland flow when assessing resource consent applications and preparing or considering Farm Environmental Management Plans.
  
2. avoid dairy farming of cows and intensive winter grazing where contaminant losses will increase as a result of the proposed activity.

### ***Or effects-based***

In the Central Plains physiographic zone:

1. avoid where practicable, ~~remedy, or mitigate~~ adverse effects on water quality from contaminants, by:
  - i. requiring implementation of good management practices to manage adverse effects on water quality, from contaminants transported via artificial drainage and deep drainage;
  - ii. having particular regard to adverse effects on water quality from contaminants transported via artificial drainage and deep drainage when assessing resource consent applications and preparing or considering Farm Environmental Management Plans.
  
2. avoid dairy farming of cows and intensive winter grazing where contaminant losses will increase as a result of the proposed activity.



## Policy 6 is proposed to be amended

### *Risk-based*

In the Gleyed physiographic zone avoid where practicable risk to water quality from contaminants by:

1. identifying contaminant pathways to ground and surface water bodies;
2. requiring implementation of good management practices to manage erosion and adverse effects on water quality from contaminants transported via overland flow; and
3. having particular regard to adverse effects of contaminants transported via overland flow when assessing resource consent applications and preparing or considering Farm Environmental Management Plans.

### *Or effects-based*

In the Gleyed physiographic zone avoid where practicable remedy, or mitigate adverse effects on water quality from contaminants, by:

1. identifying contaminant pathways to ground and surface water bodies;
2. requiring implementation of good management practices to manage adverse effects on water quality from contaminants transported via artificial drainage, and overland flow where relevant; and
3. having particular regard to adverse effects on water quality from contaminants transported via artificial drainage, and overland flow where relevant when assessing resource consent applications and preparing or considering Farm Environmental Management Plans.

## Policy 7 is proposed to be amended

### *Risk-based*

In the Bedrock/Hill Country and Lignite-Marine Terraces physiographic zone avoid where practicable risk to water quality from contaminants by:



1. identifying contaminant pathways to ground and surface water bodies;
2. requiring implementation of good management practices to manage adverse effects on water quality from contaminants transported via artificial drainage, and overland flow where relevant; and
3. having particular regard to adverse effects on water quality from contaminants transported via artificial drainage, and overland flow where relevant when assessing resource consent applications and preparing or considering Farm Environmental Management Plans.

***Or effects-based***

In the Bedrock/Hill Country and Lignite-Marine Terraces physiographic zone avoid where practicable, remedy, or mitigate adverse effects on water quality from contaminants, by:

1. identifying contaminant pathways to ground and surface water bodies;
2. requiring implementation of good management practices to manage adverse effects on water quality from contaminants transported via artificial drainage, and overland flow where relevant; and
3. having particular regard to adverse effects on water quality from contaminants transported via artificial drainage, and overland flow where relevant when assessing resource consent applications and preparing or considering Farm Environmental Management Plans.

**Policy 8 is proposed to be amended**

***Risk-based***

In the Lignite-Marine Terraces physiographic zone avoid where practicable risk to water quality from contaminants by:

1. identifying contaminant pathways to ground and surface water bodies;
2. requiring implementation of good management practices to manage adverse effects on water quality from contaminants transported via artificial drainage, and overland flow where relevant; and
3. having particular regard to adverse effects on water quality from contaminants transported via artificial drainage, and overland flow where relevant when



assessing resource consent applications and preparing or considering Farm Environmental Management Plans.

***Or effects-based***

In the Lignite-Marine Terraces physiographic zone avoid where practicable, remedy, or mitigate adverse effects on water quality from contaminants, by:

1. identifying contaminant pathways to ground and surface water bodies;
2. requiring implementation of good management practices to manage adverse effects on water quality from contaminants transported via artificial drainage, and overland flow where relevant; and
3. having particular regard to adverse effects on water quality from contaminants transported via artificial drainage, and overland flow where relevant when assessing resource consent applications and preparing or considering Farm Environmental Management Plans.

**Policy 9 is proposed to be amended**

***Risk-based***

In the old Maitara physiographic zone:

1. avoid where practicable risk to water quality from contaminants by:
  - i. identifying contaminant pathways to ground and surface water bodies;
  - ii. requiring implementation of good management practices to manage adverse effects on water quality from contaminants transported via deep drainage;
  - iii. having particular regard to adverse effects on water quality from contaminants transported via deep drainage when assessing resource consent applications and preparing or considering Farm Environmental Management Plans.
  
2. avoid dairy farming of cows and intensive winter grazing where contaminant losses will increase as a result of a proposed activity.



***Or effects-based***

In the old Mataura physiographic zone:

1. avoid where practicable, remedy, or mitigate adverse effects on water quality from contaminants, by:
  - i. identifying contaminant pathways to ground and surface water bodies;
  - ii. requiring implementation of good management practices to manage adverse effects on water quality from contaminants transported via deep drainage;
  - iii. having particular regard to adverse effects on water quality from contaminants transported via deep drainage when assessing resource consent applications and preparing or considering Farm Environmental Management Plans.
  
2. avoid dairy farming of cows and intensive winter grazing where contaminant losses will increase as a result of the proposed activity.

**Policy 10 is proposed to be amended**

***Risk-based***

In the Oxidising physiographic zone:

1. avoid where practicable risk to water quality from contaminants by:
  - i. identifying contaminant pathways to ground and surface water bodies;
  - ii. requiring implementation of good management practices to manage adverse effects on water quality from contaminants transported via deep drainage, and overland flow and artificial drainage where relevant;
  - iii. having particular regard to adverse effects on water quality from contaminants transported via deep drainage, and overland flow and artificial drainage when assessing resource consent applications and preparing or considering Farm Environmental Management Plans.
  
2. avoid dairy farming of cows and intensive winter grazing where contaminant losses will increase as a result of a proposed activity.



### ***Or effects-based***

In the Oxidising physiographic zone:

1. avoid where practicable, remedy, or mitigate adverse effects on water quality from contaminants, by:
  - i. identifying contaminant pathways to ground and surface water bodies;
  - ii. requiring implementation of good management practices to manage adverse effects on water quality from contaminants transported via deep drainage, and overland flow and artificial drainage where relevant;
  - iii. having particular regard to adverse effects on water quality from contaminants transported via deep drainage, and overland flow and artificial drainage when assessing resource consent applications and preparing or considering Farm Environmental Management Plans.
  
2. avoid dairy farming of cows and intensive winter grazing where contaminant losses will increase as a result of the proposed activity.

### **Policy 11 is proposed to be amended**

### ***Risk-based***

In the Peat Wetlands physiographic zone:

1. avoid where practicable risk to water quality from contaminants by:
  - i. identifying contaminant pathways to ground and surface water bodies;
  - ii. requiring implementation of good management practices to manage adverse effects on water quality from contaminants transported via artificial drainage, deep drainage, and lateral drainage;
  - iii. having particular regard to adverse effects on water quality from contaminants transported via artificial drainage, deep drainage, and lateral drainage when assessing resource consent applications and preparing or considering Farm Environmental Management Plans.

avoid dairy farming of cows and intensive winter grazing where contaminant losses will increase as a result of a proposed activity.



***Or effects-based***

In the Peat Wetlands physiographic zone:

1. avoid where practicable, remedy, or mitigate adverse effects on water quality from contaminants, by:
  - i. requiring implementation of good management practices to manage adverse effects on water quality from contaminants transported via artificial drainage, deep drainage, and lateral drainage;
  - ii. having particular regard to adverse effects on water quality from contaminants transported via artificial drainage, deep drainage, and lateral drainage when assessing resource consent applications and preparing or considering Farm Environmental Management Plans.
  
2. avoid dairy farming of cows and intensive winter grazing where contaminant losses as a result of the proposed activity.

**Policy 12 is proposed to be amended**

***Risk-based***

In the Riverine physiographic zone:

1. avoid where practicable risk to water quality from contaminants by:
  - i. identifying contaminant pathways to ground and surface water bodies;
  - ii. requiring implementation of good management practices to manage adverse effects on water quality from contaminants transported via deep drainage, and overland flow where relevant;
  - iii. having particular regard to adverse effects on water quality from contaminants transported via deep drainage, and overland flow where relevant when assessing resource consent applications and preparing or considering Farm Environmental Management Plans.

avoid dairy farming of cows and intensive winter grazing where contaminant losses will increase as a result of a proposed activity.



***Or effects-based***

In the Riverine physiographic zone:

1. avoid where practicable, adverse effects on water quality from contaminants, by:
  - i. identifying contaminant pathways to ground and surface water bodies;
  - ii. requiring implementation of good management practices to manage adverse effects on water quality from contaminants transported via deep drainage, and overland flow where relevant;
  - iii. having particular regard to adverse effects on water quality from contaminants transported via deep drainage, and overland flow where relevant when assessing resource consent applications and preparing or considering Farm Environmental Management Plans.
  
2. avoid dairy farming of cows and intensive winter grazing where contaminant losses will increase as a result of the proposed activity.

**Policy 45 is proposed to be amended**

In response to Ngāi Tahu and community aspirations and local water quality and quantity issues, FMU sections of this Plan may include additional catchment-specific values, objectives, policies, attributes, rules and limits which will be read and considered together with the Region-wide Objectives and Region-wide Policies.

Any provision on the same subject matter in the relevant FMU section of a plan (including Freshwater Objectives) must give effect to the Region-wide Objectives.

FMU provisions developed for a specific geographical area will not initiate a plan change to the Region-wide objectives or Region-wide policies.

Advice Note: It would be unfair if changes are made to Region-wide objectives and policies, based on decisions for individual FMUs in specific parts of Southland, which ~~apply in other parts of Southland~~, without the involvement of the wider Regional ~~and~~ ese ~~wider communities.~~



### **Policy 46 is amended**

The FMU sections of this Plan are based on the following identified Freshwater Management Units for Southland, as shown on Map Series 6: Freshwater Management Units:

- Fiordland and the islands;
- Aparima;
- Mataura;
- Ōreti;
- Waiau; and
- Waituna.

### **Policy 47 is amended**

The FMU sections of this Plan will give effect to the region wide Objectives – and:

1. identify values and establish freshwater objectives for each Freshwater Management Unit, including where appropriate at a catchment or sub-catchment level, having particular regard to the national significance of Te Mana o te Wai, and any other values developed in accordance with Policies CA1-CA4 and Policy D1 of the National Policy Statement for Freshwater Management 2014 (as amended in 2017); and
2. set water quality and water quantity limits and targets to achieve the freshwater objectives; and
3. set methods to phase out any over-allocation, within a specified timeframe; and
4. assess water quality and quantity taking into account Ngāi Tahu indicators of health.

