

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI**

Decision No. [2021] NZEnvC 164

IN THE MATTER of the Resource Management Act 1991

AND of a notice of motion under section 149T(2) to decide proposed Plan Change 7: Water for Otago (referred to the Environment Court by the Minister for the Environment under s 142(2)(b) of the Act)

BETWEEN OTAGO REGIONAL COUNCIL

(ENV-2020-CHC-127)

Applicant

Court: Environment Judge J E Borthwick
Environment Commissioner K A Edmonds
Environment Commissioner D J Bunting

Hearing: at Dunedin on 8–26 March 2021, 17–28 May 2021,
28 June 2021–7 July 2021
at Cromwell on 12–21 April 2021, 10–14 May 2021

Final submissions: 30 July 2021

Decision reserved: 10 September 2021

Appearances: Listed on pages 144-145

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INTERIM DECISION OF THE ENVIRONMENT COURT



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Abbreviations used in the decision

CA Rule	Controlled activity rule
DA Rule	Discretionary activity rule
EPA	Environmental Protection Authority
FMU	Freshwater Management Unit
Freshwater – NES	Resource Management (National Environmental Standards for Freshwater) Regulations 2020
HEG	Hydro-electricity generation
Kāi Tahu ki Otago	Te Runanga o Moeraki, Kati Huirapa Runaka ki Puketeraki, Te Rūnanga o Ōtākou, Hokonui Rūnanga
NCA Rule	Non-complying activity rule
‘New’ or ‘future’ regional plan	Land and Water Regional Plan (ORPS, LF-FW-M6)

Ngāi Tahu ki Murihiku	Waihōpai Rūnaka, Te Rūnanga Ōraka Aparima and Te Rūnanga o Awarua
Ngā Rūnanga	Kāi Tahu ki Otago, Ngāi Tahu ki Murihiku and Te Rūnanga o Ngāi Tahu
NOF	NPS-FM 2020: National Objectives Framework
NPS-FM 2020	National Policy Statement for Freshwater Management 2020
NPS-REG 2011	National Policy Statement for Renewable Electricity Generation 2011
NPS-UD 2020	National Policy Statement on Urban Development 2020
Operative regional plan or RWP ORC or Regional Council	Regional Plan: Water for Otago Otago Regional Council
OWRUG	Otago Water Resources User Group
PC7 or plan change	Proposed Plan Change 7 (Water Permits) to the Regional Plan: Water for Otago
Proposed policy statement or ORPS	Proposed Otago Regional Policy Statement 2021
RDA Rule	Restricted discretionary activity rule
RMA or Act	Resource Management Act 1991
RPS	Operative regional policy statement
Skelton Report	Professor Peter Skelton <i>Investigation of Freshwater Management and Allocation Functions at Otago Regional Council: report to the Minister for the Environment</i> (Ministry for the Environment, Wellington, 1 October 2019)
Territorial Authorities or TAs	Dunedin City Council, Queenstown Lakes District Council, Central Otago District Council, Clutha District Council, Waitaki District Council

REASONS

Introduction

[1] Over the next five years a significant proportion of permits authorising the take and use of water in Otago will expire. Included among these are hundreds of deemed permits, many of which originated during Otago's goldrush. They authorise the taking of water in quantities large enough to sluice a goldfield and few, if any, conditions are attached as to the use of water.

[2] This plan change responds to the concerns held by the Minister for the Environment and by the Otago Regional Council that, were the expiring permits to be replaced, or indeed consent applications filed for previously unconsented activities, they will be considered under an operative regional plan that is not fit for purpose.

Summary of key findings

[3] The court has reached the position that upon finalising the drafting of provisions, we will approve the insertion of Chapter 10A into the Regional Plan: Water for Otago.

[4] In response to submissions, Plan Change 7 has been substantially rewritten. Attached to and forming part of this decision is a set of amended provisions.

[5] The court has approved policies seeking either to 'only grant' or to 'avoid' (as the case may be) consents exceeding six years' duration. This means the relief sought by many in the primary sector to allow for the grant of consent for durations exceeding six years is not approved.

[6] A limited exception to the policy on duration has been made for existing hydro-electricity generation activities. No exception has been made for community water supplies, other than existing supplies which may increase

historical take and use volume and rate limits in line with their current permits to provide for population growth.

[7] While relief for orchard and viticulture activities enabling the expansion of land under irrigation is approved, the general relief sought by many to delete the restriction on the expansion of irrigable land is not.

[8] Deemed permits expired 1 October 2021. The court has approved new provisions that apply to those seeking to replace a deemed permit with a resource consent. The conditions of consent are to ensure that flow sharing between holders of deemed permits can continue.

[9] The court has rejected relief to introduce minimum levels or flows that would apply to Otago's water bodies and indeed the relief in general seeking to improve the state of the environment. These are matters to be addressed under the proposed policy statement and in a future regional plan.

[10] Finally, we acknowledge that, as a result of the changes to the plan change made by this decision, most, if not all, of the hundreds of permit holders who have already applied for resource consent in respect of expiring permits, will need to amend their applications if they wish to have the security of the applications being granted as a controlled activity.

Overview of the decision

Main part of the decision

[11] Grouped by sector interests, the decision is set out in four main parts:

- (a) primary sector, including:
 - (i) deemed permits;
 - (ii) dams;
 - (iii) other miscellaneous relief; and
 - (iv) the provisions of the plan change;
- (b) hydro-electricity generation;
- (c) Territorial Authorities; and
- (d) evaluation and outcome.

[12] Most decisions on the plan change are set out in the primary sector part, including decisions on relief sought by parties not affiliated with this sector. We do this for two reasons. First, in this part the court is *working on* the drafting of the plan change and the provisions approved here have general application. Second, most of the relief sought by non-affiliated parties overlaps with the primary sector's relief.

Annexures

[13] Attached to and forming part of the decision are several annexures. Other than the aim of improving the readability of the decision, which will be received by a wide audience, there is no general rule followed as to which parts are set out in the main decision and which are left for annexures.

[14] The annexures include matters that are:

- (a) uncontroversial (e.g. the law and the final wording of Schedule 10A.4);

- (b) what appear to be challenges to the court's jurisdiction, but which are not accepted;
- (c) of interest only to individual submitters (e.g. scope challenges and legislation relevant to the Territorial Authorities); and
- (d) general findings of fact related to water quality and quantity.

[15] The annexures also include:

- (a) the provisions of the plan change; and
- (b) the court's decisions on submissions.

A process or process + plan change?

[16] In 2019 the Minister for the Environment, the Honourable David Parker, recommended Otago Regional Council:¹

- (a) takes all necessary steps to develop a fit for purpose freshwater management planning regime that gives effect to the relevant national instruments and sets a coherent framework for assessing all water consent applications, including those that are to replace any deemed permits; and
- (b) prepare a plan change, that would provide an adequate interim planning and consenting framework to manage freshwater.

[17] The Minister recommended this be a narrow plan change to secure the low cost, fast issuing of new consents on a short-term basis, and that this be done as an interim measure until sustainable allocation rules are in place.

[18] Accepting the Minister's recommendations, the Regional Council agreed to

¹ Letter from Hon D Parker (Minister for the Environment) to Hon M Hobbs and Councillors (Chair and Councillors of Otago Regional Council) regarding Section 24A Report: Investigation of Freshwater Management and Allocation Functions at Otago Regional Council under section 24A of the Resource Management Act at Common Bundle: Vol 5, Tab 12C.

prepare a plan change which would be informed by the following key principles:²

- (a) with a focus on the bigger picture, the plan change should be concise;
- (b) water allocation should be based on existing use and not paper allocation;
- (c) there would be consideration of potential impacts on existing water abstractors and existing priorities in deemed permits;
- (d) the plan change would be efficient (time and cost) for both the Regional Council, applicants and other parties; and
- (e) it would provide opportunities for data gathering to inform a future water plan should one be pursued.

[19] With those principles in mind, after the hearing commenced it soon became apparent that the notified plan change was deficient in two key respects:

- (a) it did not address rights of priorities that support flow sharing between holders of deemed permits; and
- (b) the architecture of the plan change was fundamentally flawed insofar as it contained rules that did not implement any policy.

[20] At the end of the first week of hearing, the court invited the Regional Council to confirm the scope of the plan change: was it a ‘process’ plan change or a process ‘+’ plan change? If it was process ‘+’, then plus what? Acknowledging that there had been scope creep, the Regional Council’s policy planner confirmed a narrower ‘process’ mandate and consequently recommended a substantial review of its provisions.³

[21] This (now) narrower plan change responds to many of the concerns held

² Letter from Office of the Chairperson (Otago Regional Council), to Hon D Parker (Minister for the Environment) regarding Investigation of Freshwater Management and Allocation Functions at Otago Regional Council under s 24A of the Resource Management Act 1991: Otago Regional Council Response to Recommendations (16 December 2019). CB Vol 5: Tab 12E.

³ De Pelsemaecker, supplementary evidence dated 14 March 2021.

by submitters, and the changes proposed by the Regional Council are within scope of the plan change. That being said, the court has decided to make limited exceptions to the plan change's process focus.

[22] We make next a few brief comments about the scheme of the Resource Management Act 1991 ('RMA') and planning instruments created under this Act.

The scheme of the Act

[23] The purpose of the Act is to promote the sustainable management of natural and physical resources.⁴

[24] The Act envisages a cascade of planning documents, each intended, to give effect to the Act's purpose and more generally to its principles:⁵

... These documents form an integral part of the legislative framework of the RMA and give substance to [the Act's] purpose by identifying objectives, policies, methods and rules with increasing particularity both as to substantive content and locality...: per Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*

National policy statements

[25] National policy statements are the senior most planning document. Their purpose is to state objectives and policies for matters of national significance that are relevant to achieving the purpose of the Act.⁶ Local authorities are to amend their plans if directed by the national policy statement⁷ and make all other amendments, as required, to give effect to a national policy statement.⁸ This is to

⁴ RMA, s 5.

⁵ *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [30].

⁶ RMA, s 45.

⁷ RMA, s 55(2)-(2A).

⁸ RMA, s 55(2B).

be done either as soon as practicable, or within or by the time/event specified in the national policy statement.⁹

[26] No party seriously argued against the proposition that Otago's Regional Policy Statement and Regional Plan: Water for Otago, do not give effect to the NPS-FM 2020 or NPS-UD 2020, and only give partial effect to NPS-REG 2011. This omission means the Regional Council cannot claim that through its planning instruments it is necessarily giving effect to the purpose and principles of the Act.

National Policy Statement for Freshwater Management 2020

[27] Gazetted after PC7 was notified, NPS-FM 2020 is a detailed statement about Te Mana o te Wai; objectives and policies pertaining to freshwater management and the framework to implement the same.

[28] The concept of Te Mana o te Wai refers to the:¹⁰

... fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.

[29] Te Mana o te Wai's framework encompasses six core principles concerning the roles of tangata whenua and other New Zealanders in the management of water. Informing the NPS and its implementation, is the principle that those in governance with authority for making decisions about freshwater, do so in a way that prioritises the health and well-being of freshwater, now and into the future.¹¹

⁹ RMA, s 55(2B)-(2D).

¹⁰ NPS-FM 2020, cl 1.3(1).

¹¹ NPS-FM 2020, cl 1.3(3) and (4)(d).

[30] While expressed differently in earlier iterations of the NPS-FM, the centrality of Te Mana o te Wai to freshwater management is a constant.

[31] The NPS-FM 2014 (amended 2017) was closely considered by the Environment Court in *Aratiatia Livestock Ltd v Southland Regional Council* on appeal from decisions on the proposed Southland Land and Water Plan. The court's observations in *Aratiatia Livestock Ltd* remain relevant and bear repeating here:

- (a) Te Mana o te Wai is not a Māori centric but a water centric approach;¹²
- (b) while expressed in te reo Māori, Te Mana o te Wai benefits all New Zealanders;¹³
- (c) Te Mana o te Wai is a concept that requires natural and physical resources be managed in a way that recognises that by protecting the health of freshwater, the health and well-being of the wider environment is also protected.¹⁴ This concept entails a fundamental shift in societal perspectives on sustainable management of fresh water.¹⁵

[32] The NPS-FM 2020's sole objective is directive – it is to 'ensure' natural and physical resources are managed in a way that prioritises:

- (a) first, the health and well-being of water bodies and freshwater ecosystems;
- (b) second, the health needs of people (such as drinking water); and

¹² *Aratiatia Livestock Ltd v Southland Regional Council* [2020] NZEnvC 93 at [6].

¹³ *Aratiatia Livestock Ltd v Southland Regional Council* [2020] NZEnvC 93 at [6].

¹⁴ NPS-FM 2020, cl 1.3.

¹⁵ *Aratiatia Livestock Ltd v Southland Regional Council* [2019] NZEnvC 208 at [61]–[64].

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

[33] Te Mana o te Wai is relevant to all freshwater management¹⁶ and must inform the interpretation of the NPS-FM 2020.¹⁷ Its objective is implemented through policies, Policy 1 being that “freshwater is managed in a way that gives effect to Te Mana o te Wai”. In addition, the NPS-FM has an implementation process, the provisions of which are very prescriptive – the Regional Council “must” undertake certain actions.¹⁸

Regional Policy Statement (RPS)

[34] A regional policy statement is to give effect to a national policy statement.

[35] No party contends that the partly operative regional policy statement gives effect to the NPS-FM 2020 or NPS-UD 2020 or gives more than partial effect to NPS-FM (2017 amendment) and NPS-REG 2011.

Proposed Otago Regional Policy Statement

[36] When making our decision, we are to have regard to the recently notified proposed policy statement.

[37] The submissions on the proposed policy statement have recently closed and its provisions are yet to be tested through independent decision-making or appeal processes. Nevertheless, we find that its provisions are to be accorded some weight in acknowledgement of the significant shift in regional policy it represents. Indeed, the Director-General and the Territorial Authorities say greater weight can

¹⁶ NPS-FM 2020, cl 1.3.

¹⁷ NPS-FM 2020, cl 3.2(4).

¹⁸ NPS-FM 2020, pt 3.

be given to the proposed policy statement than to the operative statement.¹⁹

[38] Anything we say here about the provisions of the proposed policy statement is not to indicate a view on the appropriateness of the same; that would be beyond the scope of this decision. For present purposes we do not need to reach a finding on whether or how well the proposed policy statement gives effect to the national policy statements. It is enough to record the agreement of all parties making submissions, that a purpose of the proposed policy statement is to give effect to the NPS-FM 2020, NPS-UD 2020, NPS-REG 2011 (among other national policy statements).²⁰

[39] The proposed policy statement commences with a series of significant resource management issues, issues of particular note are:

- (a) climate change is likely to impact Otago’s economy and environment;
- (b) freshwater demand exceeds capacity in some places;
- (c) declining water quality has adverse effects on the environment, on communities, and the economy; and
- (d) economic and domestic activities use natural resources but do not always properly account for the environmental stresses or the future impacts they cause.

¹⁹ Legal submissions for the Minister for the Environment Regarding Notified Regional Policy Statement [‘MfE supplementary submissions (July)’] at [8]. Legal submissions for the Otago Regional Council in relation to the proposed Otago Regional Policy Statement dated 23 July 2021 (‘ORC supplementary submissions (23 July)’) at [9]-[14], [17]. Legal submissions of Otago Water Resources User Group in relation to proposed Otago Regional Policy Statement dated 28 July 2021 (‘OWRUG supplementary submissions (July)’) at [2]. Legal submissions for Trustpower Ltd in relation to the proposed Otago Regional Policy Statement dated 28 July 2021 (‘Trustpower supplementary submissions (July)’) at [2.3]. Legal submissions of Otago Fish and Game Council and the Central South Island Fish and Game Council on the proposed Otago Regional Policy Statement dated 28 July 2021 (‘Fish and Game supplementary submissions (July)’) at [1]-[2]. Director-General of Conservation *Tumuaaki Aburei* re the proposed Otago Regional Policy Statement dated 28 July 2021 (‘Director-General supplementary submissions (July)’) at [6]-[9]. Legal submissions on behalf of Territorial Authorities – Proposed Regional Policy Statement dated 28 July 2021 at [7]-[8].

²⁰ See national direction instruments statement at ORPS at p 44ff.

[40] The first response by the proposed policy statement to these and other issues is to adopt integrated management.²¹ While all provisions are relevant, Policy IM-P1 – Integrated approach, is noteworthy as it is addressing the interpretation and implementation of the proposed policy statement. It provides:

Policies IM–P1 – Integrated approach

The objectives and policies in this RPS form an integrated package, in which:

- (1) all activities are carried out within the environmental constraints of this RPS;
- (2) all provisions relevant to an issue or decision must be considered;
- (3) if multiple provisions are relevant, they must be considered together and applied according to the terms in which they are expressed; and
- (4) notwithstanding the above, all provisions must be interpreted and applied to achieve the integrated management objectives IM–O1 to IM–O4.

[41] The decision priorities for the proposed policy statement follow:

IM–P2 – Decision priorities

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

- (1) firstly, secure the long-term life-supporting capacity and mauri of the natural environment,
- (2) secondly, promote the health needs of people, and
- (3) thirdly, safeguard the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

[42] The proposed policy statement identifies three domains, one of which is the domain of land and fresh water.

[43] In the domain of land and water, integrated management is returned to in the first objective (LF-WAI-O1 – Te Mana o te Wai) – “... the management of land and water recognises and reflects that [amongst other matters] (4) water and land have a connectedness that supports and perpetuates life”. Four policies set out how this objective is to be achieved, one of which is to put beyond contention

²¹ ORPS at IM-Integrated management.

the centrality of Te Mana o te Wai for all persons exercising functions and powers under the proposed policy statement and also to persons who use, develop or protect resources.²² This objective is implemented through policies that prioritise the outcomes of fresh water management (LF-WAI-P1 Prioritisation)²³ and through integrated management/ki uta ki tai (LF-WAI-P3).

[44] Dividing Otago into five freshwater management units, the vision for and management of those units are given (LF-VM – Visions and management). The sole objective for fresh water is implemented by policies to phase out existing over-allocation, avoid future over-allocation and allocate fresh water within environmental limits and use it efficiently (LF-FW-P7 Fresh water). The methods include a direction to the Regional Council to publicly notify a Land and Water Regional Plan by 31 December 2023.

Regional Plan

[45] A regional plan, in its turn, is to give effect to the regional policy statement. The operative regional plan's response to the regional policy statement is variable, on occasions giving only partial effect to the policy statement.²⁴

[46] By way of a general observation, if the regional policy statement does not give effect to the national policy statements, then it is unlikely that the regional

²² ORPS, LF-WAI-P4 – Giving effect to Te Mana o te Wai.

²³ Under this policy the health and well-being needs of people, te hauora o te tangata; interacting with water through ingestion (such as drinking water and consuming harvested resources) and immersive activities (such as harvesting resources and bathing) – is the second priority of fresh water management.

²⁴ To illustrate, RPS Objective 3.1 states the values (including intrinsic values) of Otago's ecosystems and natural resources are recognised, and maintained, or enhanced where degraded. Policy 3.1.1. is to safeguard the life-supporting capacity of fresh water and manage fresh water to (a) maintain good quality water and enhance water quality where it is degraded ... and Policy 3.1.3 that provides for water allocation and use that (b) avoids over-allocation and phases out existing over-allocation. With that in mind, the RWP has little control over land uses the effect of which may be to degrade water quality. While there are policies promoting efficient use of water, the RWP's flow and catchment-wide limits (where provided for in the plan) have not been implemented through the consent review process.

plan will. Hence the direction that the Regional Council notify a Land and Water Regional Plan (referred to in this decision as the ‘new’ or ‘future’ regional plan).

[47] The purpose of this plan change is set out in its objective: facilitate an efficient and effective transition from the operative freshwater planning framework toward a new integrated regional planning framework. This process has commenced with the notification of the proposed policy statement in June 2021.

[48] With that said, we turn to the primary sector case.

Primary sector

Introduction

[49] The primary sector is dealing with a lot right now and for many it will seem like their future is beset with uncertainty.

Economic uncertainty

[50] For decades regional policies supported increasing farm production, fuelled in parts of the region²⁵ by virtually unregulated access to water.²⁶ Security around access to water has been all but assumed, including by lending institutions.²⁷ In more recent times policy signalling by the Regional Council encouraged farmers to convert from inefficient (e.g. wild flooding and border dykes) to more efficient (e.g. spray) irrigation systems in anticipation of securing long-term replacement consents.²⁸

[51] As regional policy pivots from laissez faire (particularly, the seeming indifference towards the exercise of deemed permits) to tight control under PC7, this has given rise to uncertainty within the primary sector. Some permit holders worry over the return on investment in irrigation infrastructure made prior to PC7's notification.²⁹ Others who have yet to undertake planned development, are concerned that the six-year duration may prove unattractive to potential

²⁵ In Central Otago (in particular) hundreds of deemed water permits are being exercised subject to few, if any, conditions, other than allocations of water granted when the rights were first issued as mining permits. See discussion in Perkins, EiC dated 5 February 2021 at [26].

²⁶ The past president of Federated Farmers Otago reports that since the 1980s there has been a production at all costs message (that is, until recently). See also Craw, EiC dated 4 February 2021 at [9]-[15]. Transcript Cromwell WKS 4/5 (Hunt) at 842.

²⁷ In the years immediately prior to the notification of PC7, many witnesses gave evidence of significant lending by banks even though existing deemed permits lapse on 1 October 2021.

²⁸ For example, see transcript Cromwell WK 6 (C Tamblyn) at 1332. S Dicey, EiC dated 5 February 2021 at [87]. See also transcript Dunedin WKS 1-3 (De Pelsemaeker) at 402-403; (S Dicey) at 1331. In addition, we note the RWP policies to ensure that the quantities of water taken are no more than what is required for the use proposed (e.g. Policy 6.4.0A).

²⁹ See for example, transcript Cromwell WK 6 (Currie) at 1232.

investors³⁰ or that the terms of repayment to fund the capital cost of development over six years will be unaffordable (either that or lending will not be available).³¹

[52] PC7's freeze on expansion of irrigable areas may further depress investment in irrigation, as farmers cannot look to increased returns from irrigating larger areas of land.³² Deferred capital investment in infrastructure, such as the Falls Dam on the Manuherekia River, is likely to remain on hold while uncertainties around future minimum flow(s) of water bodies persist.³³ In short, uncertainty around access to water and the reliability of future supply, is eroding business (farmer) confidence.

[53] Meantime, PC7 not only impacts decisions requiring significant capital outlay, e.g. irrigation infrastructure and storage, but also less visible decisions by farmers to do with realising plans for their family and the farm. This includes investment in staff training and recruitment, riparian planting and fencing, maintenance of existing inefficient infrastructure³⁴ and succession planning. Without the opportunity to grow profits, downstream spending in the wider community may be delayed or, at the very least, is uncertain.³⁵

³⁰ See for example, transcript Cromwell WK 6 (Collier) pp 1222-1229.

³¹ A number of witnesses gave evidence that bank lending terms are now heavily weighted on consent duration. See for example, transcript Cromwell WK 6 (A Gillespie) at 1079; (Groundwater) at 1271-1272; (Paterson) at 1476-1479. See also Craw, EiC at [31]-[32].

³² Transcript Cromwell WK 6 (Groundwater) at 1273, 1279 and 1283. Giving evidence on behalf of three properties farmed by the Groundwater family, Ms B J Groundwater said that following the conversion of flood and border dyke irrigation to pivot plus storage dam, they doubled the area under production. See also transcript Cromwell WK 6 (Kelly) at 1417; Dunedin WKS 7/8 (MacGregor) at 55.

³³ Transcript Cromwell WKS 4/5 (Sole) at 1023-1024; Cromwell WK 6 (V Hore) at 1310.

³⁴ Transcript Cromwell WKS 4/5 (Reilly) at 740-741.

³⁵ Patterson, EiC dated 3 February 2021. Transcript Cromwell WK 6 (Collier) at 1224; (V Hore) at 1308; (T Davis) at 1383; (Kelly) at 1417. Scott, EiC dated 5 February 2021 at [58], [69].

Stability of regional policy

[54] Regional plans feed into farm business plans; it is on the farm that many policies are given practical effect.³⁶ Investment by the primary sector requires a stable policy platform³⁷ and trust and confidence in the regulator to administer the planning instruments.³⁸ Many witnesses talked about their generalised anxiety that, after six years, some permits will not be re-consented or if they are, then conditions of consent will reduce reliability of supply by imposing new restrictions around access to water.³⁹ This anxiety is compounded by the widespread belief that by the time the short-duration permits expire, the Regional Council will not have notified a new regional plan.⁴⁰

[55] Meanwhile several witnesses expressed frustration over processing of applications to re-consent existing water permits under the operative regional plan, including difficulties around engagement with other stakeholders/affected persons.⁴¹ In saying that, it is our experience that this is not an uncommon occurrence when a district or regional council has signalled that it is reviewing its planning documents.

Reliability of supply

[56] Hundreds of applications to re-consent deemed permits due to expire on 1 October 2021 have now been filed with the Regional Council.

[57] In readiness for this, and with the encouragement of the Regional Council, water user groups were formed whose membership comprises all permit holders

³⁶ Transcript Cromwell WKS 4/5 (McDiarmid) at 855.

³⁷ Transcript Cromwell WKS 4/5 (Hunt) at 843.

³⁸ Transcript Cromwell WKS 4/5 (McDiarmid) at 854-855.

³⁹ Restrictions include flow and catchment wide limits. See also transcript Cromwell WK 6 (M Hore) at 1159-1160.

⁴⁰ Transcript Cromwell WKS 4/5 (Reilly) at 768-769; transcript Cromwell WK 6 (Manson) at 1131, and 1145; (Parcell) at 1264.

⁴¹ See for example, transcript Cromwell WK 6 (J Herlihy) at 1168-1169; (G Herlihy) at 1434; OWRUG, closing submissions at [28]-[31].

within entire catchments/sub-catchments and, in many cases, these groups have worked for several years to agree on flow sharing between members of the group.⁴² While the need to leave flowing water in water bodies is accepted,⁴³ the process of reaching consensus has been difficult not least because one consequence of flow sharing may be a change to existing farm systems to offset any reduction in the reliability of supply.

[58] If the existing reliability of supply is reduced – as we understand that it may be under many of the proposals to re-consent existing permits – this will likely necessitate significant investment in on-farm and/or community water storage, investment in efficient irrigation infrastructure and the replacement/upgrading of conveyancing infrastructure.⁴⁴

[59] It is not necessarily the case, however, that infrastructure offsetting a reduction in reliability is to be built in advance of a water permit issuing; there may be delays of several years before any proposed flow and take limits apply. When re-consenting permits in the Lindis and Kyeburn catchments, the decision-makers deferred the application of new flow limits imposed on replacement permits for five years, to allow farmers time to build capacity to offset a decrease in reliability of supply⁴⁵ and to build major conveyancing infrastructure.⁴⁶ Determined prior to the notification of PC7, the above consents were granted with 35-year terms.

[60] Many witnesses say it is unfair that PC7 deprives them of the same opportunities water users in the Lindis and Kyeburn have had. But it is not that straightforward. We were told by one farmer that his “biggest threat” was a future

⁴² There are also catchments/water bodies that are not working in any collective sense. See transcript Cromwell WK 6 (J Herlihy) at 1170.

⁴³ The evidence was that in some water bodies, most or all available surface flow was being diverted for abstraction. For example, Lauder Creek see transcript Cromwell WK 6 at 1094 and 1101-1102. Also Thomsons Creek see transcript Cromwell WKS 4/5 at 1018.

⁴⁴ Transcript Cromwell WK 6 (Heckler) at 1102; WK 6 (Manson) at 1113.

⁴⁵ Transcript Cromwell WK 6 (Mackenzie) at 1189-1199 discussing Kyeburn and McKeague, EiC at [53] discussing Lindis. In the case of Kyeburn, the conditions of consent provided for more restrictive flow and take limits after five years.

⁴⁶ Transcript Dunedin WKS 7/8 (McKeague) at 276-278.

change in minimum flow of the Taieri River, of which the Kyeburn is a tributary. Were that to occur, the Kyeburn flow sharing arrangement would be “thrown in the bin ... and we’ll have to start again and that’s where we are really vulnerable”.⁴⁷

[61] If, as we were also told, some applicants in the Manuhereikia catchment have not proposed to transition to new limits by allowing time for infrastructure upgrade, then the prospect of immediate compliance with proposed conditions of consent, was said to be “daunting”.⁴⁸ As with the Kyeburn and Lindis catchments, the position of individual farmers and of irrigation schemes will differ, but to achieve compliance with the proposed conditions of consent, it seems likely that some permit holders (at least) will need to build storage, convert to efficient irrigation infrastructure and upgrade conveyancing infrastructure.⁴⁹ On the other hand, for those applicants who have proposed that infrastructure upgrades occur over the next five to ten years,⁵⁰ then it is unlikely that the full benefit to the environment will be realised any time soon.

Personal costs

[62] The momentum of water user groups who, having worked hard to achieve a common goal of reconsenting long-term permits, is slowing, in part as a reaction to the new planning instruments.⁵¹ While this does not mean necessarily that the groups will fall apart,⁵² the enormity of the change to come is such that at a time

⁴⁷ Transcript Cromwell WK 6 (Mackenzie) at 1204, 1207-1209. Reliability of supply may be impacted by the implementation of a flow regime under a future regional plan or as proposed by applicants seeking to re consent existing permits. Transcript Dunedin WKS 1-3 (S Dicey) at 1267-1268; transcript Cromwell WKS 4/5 (S Dicey) at 13 and 30. See also transcript Cromwell WK 6 (Mulholland) at 1391 regarding concerns held in relation to the Pigburn were development to proceed with no certainty as to the allocation after six years.

⁴⁸ McKeague, summary of evidence dated 18 May 2021; transcript Dunedin WKS 7/8 (McKeague) at 276-279. It may be that in common with other applicants she intends on “nutting something out” as she put it with the Council and interested parties.

⁴⁹ Note: the amount of change depends, amongst other factors, on the type of irrigation infrastructure installed. See transcript Cromwell WKS 4/5 (Perkins) at 214-215.

⁵⁰ Transcript Cromwell WKS 4/5 (S Dicey) at 60.

⁵¹ Planning instruments include NPS-FM 2020, Freshwater – NES, proposed NPS-Biodiversity together with PC7. See for example, transcript Cromwell WK 6 (M Hore) at 1156-1157.

⁵² See for example transcript Cromwell WK 6 (Smith) at 1374.

when people need to come together in the community, some are withdrawing and disengaging. Feelings of stress and anxiety were widely reported by witnesses, as was “worrying beyond belief”, “severe fatigue”,⁵³ “frustration and powerlessness”,⁵⁴ and “depression”.⁵⁵ People are being worn down;⁵⁶ their confidence undermined and they are feeling disconnected from their own experiences (a result of being ‘told what to do’).⁵⁷

Risk to primary sector investments

[63] We accept that farmers are fully aware that change is coming.⁵⁸ While it will take the whole of the community working together to improve the outcome for fresh water, farmers point out that in the meantime somebody must pay to realise those outcomes.⁵⁹

[64] Acknowledging the Regional Council’s powers to review those consents under s 128 RMA, we were told by one consultant that the risk to investment – including a reduction in the reliability of supply – was one that farmers are willing to take.⁶⁰ This assertion, which is in no way binding on the consultant’s clients, warrants further scrutiny.

[65] The reduction in reliability of supply is one consequence of PC7’s methodology to calculate usage of surface water takes for irrigation purposes (notified version); indeed, the potential decrease in reliability of supply was a major issue at this hearing. Unless Schedule 10A.4 to the plan change is amended, farmers will either adapt their use of water to accommodate any change in

⁵³ Transcript Cromwell WK 6 (Young) at 1402.

⁵⁴ Transcript Cromwell WK 6 (McAuley) at 1464.

⁵⁵ Transcript Dunedin WKS 7/8 (Lord) at 392ff. Depression and suicide being reported.

⁵⁶ Transcript Dunedin WKS 7/8 (Lord) at 394. Mr M Lord is a farmer and Chairman of the Otago Rural Support Trust also past President of Federated Farmers.

⁵⁷ Transcript Cromwell WK 6 (R Weir) at 1298. Also Dunedin WKS 7/8 (Doolan-Noble) at 383 and (Lord) at 394.

⁵⁸ Transcript Cromwell WKS 4/5 (Hunt) at 849.

⁵⁹ Transcript Cromwell WK 6 (Manson) at 1144.

⁶⁰ Transcript Dunedin WKS 7/8 at 266.

reliability, or introduce infrastructure (storage) to address the reliability problem.⁶¹ We received evidence that if the Schedule was not amended, the majority of pumped and electrical infrastructure and, secondly, irrigation infrastructure, would also need upgrading and/or reworking.⁶² Not adapting (retooling) infrastructure risks economic hardship that is not just foreseeable but highly probable.⁶³ Numerous submissions were received on that point, including from OWRUG.⁶⁴ The same or similar risks are said to arise if the Regional Council attempts to *claw back* water by reviewing permits under a future regional plan.⁶⁵

Wider primary sector case

[66] Many permit holders have incurred substantial costs in developing proposals to consent existing permits, including investing in irrigation and storage infrastructure. They seek an opportunity for their applications to consent existing permits to be considered on their merits. Many advanced the position that there is no need for an interim framework and the court should reject PC7 because there are better alternatives such as:

- the current planning framework under the regional plan;
- assessing consent applications by having regard to the NPS-FM 2020 and the recently notified proposed policy statement; and

⁶¹ McIndoe, EiC at [101]. Transcript Cromwell WKS 4/5 (S Dicey) at 58. See also 1st JWS Planners dated 24-25 March 2021 at [8]-[9] where risks are discussed.

⁶² Graham, EiC dated 5 February 2021.

⁶³ See for example, OWRUG submission on PC7 at 53ff and McIndoe, EiC dated 5 February 2021 at [95]. Ford, EiC dated 5 February 2021 at [51]-[52] (Hort NZ). Hume, EiC dated 5 February 2021 (Federated Farmers).

⁶⁴ See for example, Blackstone Irrigation Company, summary of submission dated 13 May 2021 – up to 50% (est) reduction in some years would cause severe hardship. Hamilton Runs Ltd (Weir) submission on PC7 dated 4 May 2020, with adverse economic and related social effects. Puketoi Farming Co (Crutchley) submission addressing effects of reduced water security impacting decisions made in respect of finishing lambs. See also Cromwell WKS 4/5 (Phillips) at 414.

⁶⁵ How a *claw back* of consented water is to be achieved is a matter for the future regional plan. In over-allocated catchments this is likely to involve new environmental flows and levels and take limits (NPS-FM 2020 NOF processes). The attainment of new flows and limits is multi-faceted and depends in part on the type of irrigation installed and secondly, land use. See transcript Cromwell WKS 4/5 (Perkins) at 214; Dunedin WKS 7/8 (McKeague) at 266-267.

- the Regional Council reviewing resource consents (granted long-term) when a new regional plan becomes operative.

[67] Representing many permit holders in Otago,⁶⁶ and lacking confidence that a future regional plan will be informed by better information than is currently available, OWRUG submits the most appropriate course is for the farming community to get on with their consent applications guided by the NPS-FM 2020 and the proposed policy statement directly.^{67,68} They say, applicants should continue to make progress rather than waiting on the Regional Council's 'regulatory machinery' to catch up: "A good horse should not be made to move at the same pace as a lame one".⁶⁹

[68] While OWRUG maintained its primary relief that the plan change should be rejected, their consultant planner, Ms S Dicey, said PC7 was inevitable; an interim planning framework was necessary pending a significant reset of planning policy.⁷⁰ Neither she nor Ms C Perkins (Landpro) support the rejection of the change,⁷¹ Ms Dicey saying:⁷²

I'm now of the opinion that an interim framework is necessary, I think consenting under the current plan, particularly within the RD rule ... is problematic. ... As I said already I agree that the RPW is out of date and actually consenting in that space is actually not good for anybody at the moment, stakeholders or applicants.

⁶⁶ Its members extend from the Upper Clutha through to the Alexandra basin and include the Cardrona, Arrow, Bannockburn, Pisa area, Teviot, Manuherekiā and Taieri catchments. OWRUG's members include all of the irrigation companies in the Manuherekiā Catchment.

⁶⁷ OWRUG closing submissions at [31]-[32] asserts that the scale is wrong, with FMUs and rohe scale policy settings and flow limits unlikely to be helpful in deciding applications. It says that each river and tributary is different, the hydrology is different, cultural and ecological values are different, takes are different and land use patterns and history are different.

⁶⁸ See the evidence of S Dicey, S McKeague and M Hickey in particular, making claims about what is proposed to be delivered in lodged resource consent applications that are not before us.

⁶⁹ OWRUG, closing submissions at [62].

⁷⁰ Transcript Dunedin WKS 1-3 (S Dicey) at 1323, 1348.

⁷¹ Transcript Dunedin WKS 1-3 (S Dicey) at 1269. Transcript, Cromwell WKS 4/5 (Perkins) at 125. While this is Ms Perkins' opinion, it is not clear whether Landpro amended its submission seeking PC7 be rejected.

⁷² Transcript Dunedin WKS 1-3 (S Dicey) at 1268-1269.

So yes I think an interim framework is inevitable really.

Should PC7 be rejected?

[69] Recalling the significant resource management issues that PC7 would address, three are critical when considering relief to reject the entire plan change. They are:⁷³

- (a) the fact of the pending expiry of hundreds of water permits;⁷⁴
- (b) the adequacy of the current regional planning framework and environmental outcomes the framework secures; and
- (c) the current regional planning framework is yet to give effect to the NPS-FM 2020 and to that we add, NPS-REG 2011 and NPS-UD 2020.

Pending expiry of hundreds of water permits

[70] We are unaware of any other Regional Council which is tasked with replacing hundreds of water-permits expiring on 1 October 2021, with yet more to come before 1 January 2026.⁷⁵

The adequacy of the current regional planning framework and environmental outcomes the framework secures

[71] The deficiencies of the operative regional plan are well summarised in the evidence of Ms S McIntyre (Ngā Rūnanga). Ms McIntyre considers the regional

⁷³ De Pelsemaeker, EiC at [44].

⁷⁴ As noted elsewhere, estimates of the number of permits expiring varied. Mr T De Pelsemaeker, EiC at [93]-[94] gives a total of 552 surface water permits expiring before 1 January 2026. There are 332 deemed permits expiring on 1 October 2021.

⁷⁵ Gilroy, EiC dated 13 March 2021 at [23]-[24] estimated a total of 1495 permits would expire by end of 2025, of these 821 expiring this year.

plan is inconsistent with the higher order direction for managing freshwater, or hampers the ability to give effect to that direction, in the following ways:⁷⁶

- (a) it does not recognise and address over-allocation, and the approach to setting flow and allocation regimes is inadequate to protect instream values;⁷⁷
- (b) there is an apparent priority for consumptive use over instream values, with only narrow provisions, in policies and rules, to consider the effects of abstraction on natural and cultural values;⁷⁸
- (c) in consent decision-making, there is a strong focus on effects at the abstraction point and inadequate consideration of effects, including cumulative effects, on the broader freshwater system.⁷⁹ Hydrological

⁷⁶ McIntyre, amended EiC at [45].

⁷⁷ First, while there are policies addressing ‘fully allocated’ or ‘under allocated’ catchments relative to the primary allocations, none concern themselves with NPS-FM (2017 and 2020) ‘over-allocation’ (see discussion in De Pelsemaeker, EiC at [81]-[88]). Second, the RWP policies to determine minimum flows and primary allocation, are unlikely to be in accordance with the NPS-FM 2020’s NOF processes. We understand that applications to take and use water may still be granted from catchments that exceed their primary allocation, provided that the applicant is a person who holds an existing resource consent to take that water (Rule 12.0.1.1). Third, the policies to reduce the quantity of water taken, including policies requiring efficient use of water, rely on voluntary actions of the existing consent holders or the removal of unused ‘paper’ allocations. The potential for over-allocation is heightened by the failure of RWP to prioritise objectives, including those in key Chapters 5 and 6 (See transcript Dunedin WKS 1-3 (S Dicey) at 1324).

⁷⁸ The problem is compounded by the rules that apply to the taking and use of water. In the first instance, the taking and use of water is a restricted discretionary activity, with the matters of discretion set out in rule 12.1.4.8. Ms McIntyre, (Ngā Rūnanga) amended EiC at [55]-[56] notes that while RWP, Schedule 1D does identify spiritual and cultural beliefs, values and uses of significance to Ngā Rūnanga and Policy 5.4.2 prioritises avoiding effects on the same, Rule 12.1.4.8 does not clearly link back to Schedule 1D. Consequently, the consent authority has taken the narrow interpretation of the rule, excluding from consideration Ngā Rūnanga’s beliefs, values and uses. See also Fish and Game’s planning witness Mr B Farrell discussion on the topic at EiC at [14(b)]. MfE planner Mr T Ensor, EiC at [32] gave evidence that the values set out in RWP, Schedules 1A-1D do not respond either to the partly operative RPS nor NPS-FM 2020. Bartlett (Ngā Rūnanga), EiC at [46] states that not all Ngāi Tahu ki Murihiku Papatipu Rūnanga are referenced in the regional plan as mana whenua within the Otago region. Bartlett, EiC at [49] records that ki uta ki tai and Te Mana o te Wai is not referenced in the regional plan. While there are policies on integrated management these bear little relationship to Ngāi Tahu ki Murihiku’s understanding of ki uta ki tai framework of land and water management across an entire catchment.

⁷⁹ A cursory review of the RDA Rule 12.1.4.8’s matters for discretion reveals this to be the case. For example, Rule 12.1.4.8 does not include, as a matter for discretion, consideration of cumulative effects.

and ecological information is often inadequate to assess such broader effects;

- (d) policies incentivise increased use and increased dependence on water consumption;⁸⁰ and
- (e) policy on consent duration gives inadequate direction and provides an expectation of long consent terms.⁸¹

[72] Expanding on the above, whether the operative regional plan's flow and catchment-wide allocation limits (where these exist) will ever be implemented is a moot point. This seems highly unlikely given the National Objectives Framework ('NOF') processes mandated by the NPS-FM 2020. That said, many applicants applying to re-consent existing permits are not offering up the regional plan's flow and allocation limits, proposing instead new minimum flows,⁸² albeit ones that have not been determined following the NOF process. While deficiencies in the operative regional plan's provisions may have led applicants to take this course, as the author of the Skelton Report said, this leads to unsatisfactory ad hoc 'planning by consent'.⁸³

[73] The regional plan provides little policy direction regarding integrated land and freshwater management. The plan has policies concerning under or fully allocated catchments, however the approach to managing 'over-allocation' is uncertain.⁸⁴ The existing planning framework does not manage resources in an

⁸⁰ Referred to in the Skelton Report as the 'use it or lose it' policies. See discussion in De Pelsemaeker, EIC at [86]; Farrell, EIC at [14(f)].

⁸¹ The explanation to Policy 6.4.19 reads: "The duration of each resource consent to take and use water should have regard to the particular circumstances of the activity and its likely environmental effects, but there needs to be good reason for Council to reduce the duration of consents from that required for the purpose of use". Note: De Pelsemaeker, EIC at [75(e)] and [88] evidence that the current planning framework has created an expectation of granting consents with long-term durations.

⁸² S Dicey, EIC at [42] says this is the approach proposed for the Manuherekia catchment. As an aside, while we were told new minimum flows are proposed in many applications for resource consent, we do not know whether catchment-wide allocation limits or other types of limits described in the NPS-FM 2020 are also proposed.

⁸³ Skelton Report at 4.

⁸⁴ De Pelsemaeker, EIC at [69]-[74].

integrated way – *ki uta ki tai*.⁸⁵ While the measures in PC8 and the Freshwater – NES go some way to redressing the general absence of land use policy, policy gaps remain.⁸⁶

[74] We accept the submission of Fish and Game that determining consents on a case-by-case basis risks pre-empting the Freshwater Management Unit-wide identification of the values, outcomes/objectives, limits and targets required to restore Te Mana o te Wai over time.⁸⁷ Praying in aid of NPS-FM 2020 or the proposed policy statement directly, as OWRUG and others would do, is still ad hoc planning by consent, as it will be the applicant(s) for resource consent, not communities and tangata whenua, who will determine *how* ‘Te Mana o te Wai’ applies to water bodies and ecosystems in the region⁸⁸ – but this would not be the *concept* that is mandated by the NPS. Ranking the operative regional plan’s objectives to better accord with the NPS priorities,⁸⁹ as proposed by OWRUG’s planner Ms Dicey, will not redress the plan’s deficiencies when considering a consent application. That is because the plan’s objectives (Objective 6.3.1 in particular) do not provide for NPS-FM 2020, Appendix 1A: Compulsory values.

⁸⁵ ORC, closing submissions at [21(b)].

⁸⁶ Transcript Dunedin WKS 1-3 (De Pelsemaeker) at 344. Also, Ms Marr (Beef & Lamb) policy gaps could include measures such as no control over fertiliser use and application; or discharges from farm activities; or intensification of farm activities; or grazing controls. No requirement to adopt best practice for farm management or best practice for fertiliser application (transcript Cromwell WKS 4/5 (Marr) at 489-512).

⁸⁷ Transcript Dunedin WKS 1-3 (Baker-Galloway) at 833.

⁸⁸ OWRUG, submissions ‘in relation to the proposed Otago Regional Policy Statement’ dated 28 July 2021.

⁸⁹ Ms Dicey’s evidence was that the RWP did not prioritise its objectives. She proposed Objective 6.3.1 – which is about the retention of flows sufficient to maintain rivers’ life-supporting capacity for aquatic ecosystems, and their natural character – be prioritised over Objective 6.3.2 which concerns the provision of water for Otago’s primary and secondary industries. See S Dicey, EiC at [37]-[39]. Also transcript WKS 1-3 Dunedin (S Dicey) at 1324.

The current regional planning framework is yet to give effect to the NPS-FM 2020 and to that we add, NPS-REG 2011 and NPS-UD 2020

[75] That the operative regional plan does not give full effect to any of the national policy statements (or predecessors), is not a matter in dispute.

Other matters raised in support of relief to reject the plan change

[76] First, several submitters and witnesses for the primary sector complained about a recent lack of willingness by Ngā Rūnanga (and others including the Director-General of Conservation and Fish and Game) to engage in resource consent processes. There are challenges to making good decisions where one or more parties do not engage or do not have adequate resources to engage. However, this criticism is to overlook that Ngā Rūnanga's planning paradigm⁹⁰ – Te Mana o te Wai – is not embodied by the regional plan.⁹¹

[77] Second, even if applicants referred directly to the higher order documents, there is potential for argument around the weight to be given to the NPS-FM 2020 and the proposed policy statement.⁹² Many of the policies in the NPS-FM have more relevance to plan making than resource consent applications, which will necessarily go to the weight that is ultimately placed on those policies when assessing a consent application.⁹³ The proposed policy statement has been recently notified and notwithstanding a clear change in policy, there will likely be differing views on how much weight is to be given to its provisions.⁹⁴

[78] Third, the consent authority, when considering applications under s 104 of the Act, is only to *have regard* to any relevant provisions of the NPS-FM 2020 and

⁹⁰ Also, at this hearing the planning paradigm of the Director-General of Conservation and Fish and Game.

⁹¹ Transcript Dunedin WKS 9/10 (Winchester) at 519-520.

⁹² ORC, closing submissions 7 July 2021 at [21]; transcript Dunedin WKS 9/10 at 693-694.

⁹³ Related to this is the highly prescriptive implementation (NOF) process set out in pt 3 that is to be followed in plan making.

⁹⁴ ORC, closing submissions at [21(e)].

the recently notified proposed policy statement; an applicant for resource consent need not 'give effect' to them.

Decision – should PC7 be rejected?

[79] We agree with the Skelton Report that overall, the operative regional plan neither gives effect to the NPS-FM 2020 nor provides a comprehensive framework to support the deemed permit replacement process.⁹⁵ Given the above, we decline to reject PC7 and secondly, decline also the related submission seeking to exclude specific catchments from its provisions.⁹⁶

[80] PC7 creates a new chapter, Chapter 10A, in the regional plan. The objective of PC7 is to facilitate an efficient and effective transition from the present operative freshwater planning framework to a new integrated regional planning framework, and one wherein the Regional Council does give effect to NPS-FM 2020.

[81] This means:

- (a) applications for water permits to replace deemed permits or to replace water permits that expire before 31 December 2025 will be assessed in accordance with the objective, policies and rules set out in Chapter 10A of the Regional Plan: Water; and
- (b) all other applications will be assessed in accordance with the provisions in Chapters 5, 6, 12 and 20, except that the duration of any water permit will be determined in accordance with the policies in Chapter 10A.

⁹⁵ Skelton Report at 18.

⁹⁶ For example, submitters sought to exclude the Taieri catchment: G Crutchley (71006); Sowburn Water Co Ltd (71014); Concept Farms Limited (71065) and Patearoa Station Ltd (71066)); to exclude Strath Taieri catchment (Lone Star Ltd (71013)); Michelle and Stephen Holland (71077); and B J Graham trust no.1 (71126); and finally, to exclude Kakanui and Waianakarua catchments (MFS Ventures Ltd (71053)).

[82] The continuing adverse effects on the environment of activities for which replacement consents will be sought and granted (if controlled activities) are not minor. We come back to this later in the decision.

Issue: Is PC7, as proposed to be amended by ORC and others in support, permissible?

and

Issue: Is cl 3.17(3)(a) of the NPS-FM 2020 a mandatory requirement to be given effect to by this plan change?

[83] Submissions made by OWRUG are addressed in Annexure 1: The Law. We have not accepted the submission that the plan change is *impermissible* because – OWRUG asserts – its purpose is to delay the implementation of the NPS-FM 2020. Nor have we accepted the submission that the plan change must identify flows and levels at which the taking of water is no longer allowed.

Should there be an alternative pathway for longer term consents?

[84] OWRUG and Landpro propose an alternative pathway for long term consents to, among other matters, *protect* threatened galaxiids.⁹⁷ We were told that if protection requires significant change to irrigation infrastructure, irrigators will only have confidence to make the change required if the consent authority grants long-term consents.⁹⁸

[85] In supplementary evidence, Ms Dicey and Ms Perkins proposed a new objective, policy and discretionary⁹⁹ activity rule, together with associated

⁹⁷ Transcript Dunedin WKS 1-3 (S Dicey) at 1309.

⁹⁸ Transcript Cromwell WKS 4/5 (Perkins) at 182.

⁹⁹ Ms Dicey appeared to contemplate either a discretionary or non-complying rule. We have not given serious thought to the non-complying pathway as we would have through it a fraught process to have detailed policy support of this nature for non-complying activities.

definitions intended to allow the consideration of an application for consent duration of up to 20 years.¹⁰⁰ Later Ms Perkins amended her view to recommend a 15-year duration (with no ability for consents longer than 15 years to be granted).¹⁰¹ Ms Dicey also considered 15 years might be appropriate.¹⁰²

[86] By way of introduction to the proposed pathway, Ms Dicey said:¹⁰³

I still remain concerned that an interim framework delays environmental improvements even where these may be critical, particularly where this involves a risk to threatened indigenous species. This latter point has the potential to put PC7 in direct conflict with the NPS-FM.

This means in my opinion that there may be some circumstances where a substantive consent process may be justified or even desirable. I have proposed an objective, policy and discretionary activity rule which tries to anticipate and allow for what might fall within the circumstance.

I also think that the s 128 power of review is a useful tool in the tool box, and can be utilised for any longer term permits granted under PC7.

[87] They are not suggesting that their draft provisions are intended to give full effect to Te Mana o te Wai. Extensive cross-examination and questioning of Ms Dicey and Ms Perkins revealed major deficiencies with the drafting, with concessions being made by both witnesses.

[88] Mr T De Pelsemaeker, who had the benefit of considering the questioning and cross-examination, did not support the suggested amendments. His key points

¹⁰⁰ S Dicey, supplementary evidence dated 19 March 2021 (updated 24 March 2021).

¹⁰¹ Transcript Cromwell WKS 4/5 (Perkins) at 154.

¹⁰² Transcript Cromwell WKS 4/5 (S Dicey) at 34. Footnoting by De Pelsemaeker in his EiR said: Ms Dicey in her supplementary evidence dated 19 March 2021 at [28] and during questioning by the parties has stated that the suggested 20-year maximum term for consents may be required to be shortened, depending on the timeframes and objectives set out in the proposed new Regional Policy Statement when notified in June 2021.

¹⁰³ Transcript Dunedin WKS 1-3 (S Dicey) at 1264-1265.

of evidence, which we accept, follow:¹⁰⁴

- (a) relying on s 128 review processes to bring activities in line with a future regional plan will not achieve the outcome sought by permit holders, which is to have more certainty around long-term availability of water and greater investment in security;¹⁰⁵
- (b) while the “limbs” of Policy 10A.2.3 (as proposed by OWRUG and Landpro planners) are intended to provide guidance for decision-makers when considering applications for a consent term up to 2041, the criteria in the proposed policy, and secondly, the absence of entry conditions in the proposed discretionary rule, will unlikely be effective in limiting the number of consents granted, putting at risk environmental outcomes set in the new regional planning framework;
- (c) the objective, policy and rule framework focuses on the management of freshwater ecosystems (in particular the management of threatened species), but does not explicitly provide a framework that seeks to manage other values (e.g. cultural values, amenity and recreational values) supported by freshwater;
- (d) in the absence of a comprehensive planning framework within PC7 to manage environmental effects, and without any certainty around the articulation of Te Mana o te Wai and the wider environmental outcomes in a future regional plan, when assessing resource consents it will be difficult for the consent authority to:
 - (i) establish where improvements to freshwater ecosystems are required; or
 - (ii) establish the point to which, and the timeframe within which, improvements need to happen.

¹⁰⁴ De Pelsemaeker, EIR 25 June 2021 at [18].

¹⁰⁵ In that regard we note the evidence given by Beef and Lamb’s economist, Mr Burtt, that farmers prefer the uncertainty that comes from the market over the uncertainty from *political processes* (we interpolate as Regional Council’s regulatory plans). See transcript Cromwell WKS 4/5 at 468.

- (e) the suggested deletion of the restriction on increases in irrigated areas and the requirement to align the rates of take and volumes allocated in new consents with historical use, removes two instruments that seek to:
- (i) reduce allocation and avoid the re-allocation of unused water;
 - (ii) reduce the risk of further environmental degradation; and
 - (iii) reduce the risk of unforeseen economic hardship for water users by discouraging further investment in irrigation expansion or land use intensification until a new regional planning framework has been introduced that is fully compliant with the NPS-FM (and other national directions).

[89] While significant issues around drafting were revealed under cross-examination, we said we would consider, in principle, a pathway for longer term consents.

Decision – should there be an alternative pathway for longer term consents?

[90] Expanding on Mr De Pelsemaeker’s key points, we find:

- (a) rules are to implement policies, and policies implement the plan’s objectives;¹⁰⁶
- (b) in order to ‘protect’ threatened species, all the components of ecosystem health must be managed, as well as (if appropriate) specialised habitat or conditions needed for only part of the life cycle of the threatened species.¹⁰⁷ This is not proposed by OWRUG or Landpro;¹⁰⁸

¹⁰⁶ RMA, s 67(1).

¹⁰⁷ NPS-FM 2020, Appendix 1A, cl 3.

¹⁰⁸ If there are threatened species likely to be affected by the application, then the policy is to propose measures to enhance or protect the habitat of the species (Policy 10A.3.(viii)). In the absence of an objective which states the outcome for threatened species, the policy leaves it for the applicant to decide whether and the degree to which enhancement or protection is to be provided. Likewise, the policy for degraded or degrading waterways (Policy 10A.2.3(ix)).

- (c) rather, OWRUG and Landpro's basic assumption is that the activity's proposed discretionary status enables full consideration of the effects of an activity on environment;
- (d) while a discretionary activity rule does not preclude the consideration of any effect on the environment (including effects on tangata whenua and the community), unless those effects are addressed by objectives and policies, the outcomes for the environment are at the discretion of the applicant. This is what we mean by ad hoc planning by consent. To illustrate, if consent applicants have proposed a minimum flow of 1,100 l/s in the mainstem of a river, it is doubtful that a consent authority, having heard from all parties, could grant the application subject to a higher minimum flow – say 2,000 l/s – without the applicant's agreement. That is because (a) that is not what is proposed and (b) the regional plan does not set this minimum flow nor does it contain a process that could lead to this result;
- (e) Ngā Rūnanga's interests are not *better facilitated* by a policy that does not implement Te Mana o te Wai;¹⁰⁹ and, in the absence of comprehensive policies requiring the consent authority to have regard to their interests and values, their position will not be secured even were Ngā Rūnanga to be appointed decision-makers;¹¹⁰
- (f) a long-term pathway is likely to further incentivise investment in irrigation;
- (g) should long-term consents be reviewed under a future regional plan the risk of economic hardship cannot be ruled out any more than can hardship to others, including Ngā Rūnanga, if the implementation of NPS-FM 2020 is effectively deferred into the next planning cycle.¹¹¹

¹⁰⁹ Transcript Dunedin WKS 1-3 (S Dicey) at 1326.

¹¹⁰ OWRUG, supplementary submissions 'in relation to the proposed Otago Regional Policy Statement' at [18] and elsewhere in submissions. Ngā Rūnanga, transcript Dunedin WKS 9/10 at 519-520.

¹¹¹ That is, after 10 years.

[91] More generally, we find what is proposed to be in opposition to the six principles informing the NPS-FM and its implementation.¹¹² We speculate, OWRUG and others do not appear to recognise that Te Mana o te Wai is a *concept*. The plan change objective is to facilitate an efficient and effective transition from the operative freshwater planning framework to a new integrated regional planning framework and in that way the plan change *is* giving effect to the *concept* and therefore to the NPS-FM. In short, we agree with Ms McIntyre (Ngā Rūnanga) that giving effect to Te Mana o te Wai includes allowing time for its implementation through the appropriate planning instruments.¹¹³ This approach accords with the scheme of the Act, which envisages a cascade of planning documents, each intended to give effect to s 5, and to pt 2 more generally: per Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*.¹¹⁴

[92] Given the above and taking into consideration also our findings in relation to the effectiveness of the s 128 review process, it is our decision that there should not be an alternative pathway for longer term consents.

Should there be a permitted activity rule?

[93] Many parties/submitters sought to introduce a simple permitted activity rule to allow existing water users to continue to take and use water until a new regional plan is notified and becomes operative.¹¹⁵ Cogent reasons were given by the Regional Council for not recommending this approach.¹¹⁶

[94] Issues around a permitted activity status for primary sector activities were

¹¹² NPS-FM 2020, cl 1.3: fundamental concept.

¹¹³ Transcript Dunedin WKS 1-3 (McIntyre) at 1235.

¹¹⁴ *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [30].

¹¹⁵ Submitters 70045, 71015, 71043, 71046, 71053, 71065, 71066, 71068, 71069, 71080, 71112, 71116, 71120, 71127, 71161, 71178, 71185 and 71230. (Footnote 99 in De Pelsemaeker, EiC on page 73).

¹¹⁶ De Pelsemaeker, EiC at [243]-[244].

explored early on in the hearing. The approach risks placing existing water users in a materially disadvantaged position relative to permit holders, should a rule in a new regional plan:

- (a) require resource consent to authorise what was previously a permitted activity; or
- (b) prohibit the taking and use of water from water bodies that are over-allocated in relation to water quantity or water quality.¹¹⁷

[95] The Regional Council led evidence that many water bodies in this region are likely to be over-allocated.¹¹⁸ That the risk exists is evident from the proposed policy statement's phasing out of existing over-allocation and avoiding future over-allocation (ORPS, LF-FW-P7).

[96] On 17 March 2021, OWRUG abandoned relief seeking a permitted activity.¹¹⁹

Decision – permitted activity rule

[97] Long-term, the economic interests of hundreds of farmers could be imperilled if a permitted activity rule was approved; with downstream effects on local and regional economies (at least). Farmers would be left without the surety of s 124 RMA and any relative priorities that currently exist as between permit holders would be expunged.¹²⁰ The rule would undermine the objective of the plan change and leave the Regional Council without any semblance of function in relation to freshwater management.¹²¹

¹¹⁷ Interchanges between Mr Page and the court, transcript Dunedin WKS 1-3 at 938-945.

¹¹⁸ See Annexure 4: Water Quality and Annexure 5: Water Quantity.

¹¹⁹ OWRUG, memorandum 'as to relief' dated 17 March 2021.

¹²⁰ By priorities we are referring to the first come, first served approach adopted in the Act.

¹²¹ We note also, the rule was opposed by the Minister for the Environment and the Director-General of Conservation.

[98] In addition, we also accept the Regional Council's reasons for not recommending the approach. They are:¹²²

- (a) the cost of permitted activity monitoring is typically borne by the community, not the user of the resource;
- (b) it is unclear whether all water takes exercised under a permitted activity rule will achieve the purpose of the RMA,¹²³ as the effects of these takes would be more difficult to control under a permitted activity regime;
- (c) it is uncertain whether all existing conditions on resource consents to take and use water can be provided for through permitted activity conditions; and
- (d) holders of a current water permit would lose the priority provided under section 124C of the RMA over persons who are not existing holders of resource consents, when applying for a new consent under the framework of [a new regional plan].

[99] The Regional Council's revised approach is preferred as this is a simple and low risk, controlled activity pathway to roll over existing consents. Discussed elsewhere in the decision, we record that the matters over which the Regional Council reserves control are (now) constrained. As are the matters over which the Regional Council reserves discretion under proposed restricted discretionary activity rules.

Is the s 128 process an efficient and effective alternative?

[100] Many submitters sought to retain the opportunity to be granted resource consent up to the maximum 35-years duration (RMA, s 123(d)).

¹²² De Pelsemaeker, EiC at [243].

¹²³ For water bodies in relation to which there is over-allocation, we find this would not achieve the purpose of the Act.

[101] OWRUG advanced the proposition that a review clause on longer term consents is advantageous, if not preferable to an alternative of a short-term consent. Pursuant to s 128(2A) of the Act, the Regional Council could review the entirety of a catchment, enabling comprehensive consideration of cumulative effects.¹²⁴

What are consent condition reviews?

[102] Section 128 of the RMA enables ORC to initiate a review of consent conditions in specified circumstances, and as is relevant here:

- for a purpose specified in a condition of consent;¹²⁵ or
- where certain rules are made operative (e.g. rules relating to maximum or minimum levels or flows or rates of use of water, or minimum standards of water quality).

[103] The Regional Council has a discretion and is not required to initiate a review. The consent holder can object to and subsequently appeal to the Environment Court against the Regional Council's decision.

What can be achieved through a consent condition review?

[104] The fundamental difference between use of a s 128 review compared with an application to re-consent an expiring permit under ss 104-104D, is that provided the consent application is not for a controlled activity, it can be declined. Whereas an existing permit can only be cancelled on review if there are both material inaccuracies in the consent application and adverse effects on the environment resulting from the exercise of the consent.¹²⁶ Subject to this qualification, any

¹²⁴ OWRUG, opening submissions 23 March 2021, at [87].

¹²⁵ RMA, s 128(1)(a). Note: if more than one resource consent is affected, the Regional Council may review the conditions of those resource consents together for the purpose of managing the effects of the activities carried out under those resource consents (RMA, s 128(2A)).

¹²⁶ *Genesis Power Ltd v Manawatu-Wanganui Regional Council* (2006) 12 ELRNZ 241 (HC) at [81], [83]. See ss 128(1)(c) and 132(4), or ss 17 and 314(1)(e) of the RMA.

change to a consent condition cannot have the effect of preventing the activity for which the resource consent was granted in the first place.

Security of access and reliability of supply

[105] On review the consent authority must have regard to whether the activity allowed by the consent will continue to be viable after the change (s 131(1)(a)) and may have regard to the manner in which the consent has been used (s 131(1)(c)).

[106] The change to be brought about by a review of existing permits is likely to be greatest in drier and/or over-allocated catchments and secondly, where the use of water is in association with irrigation. The effect of change will depend (in part) on the type of irrigation infrastructure installed and land use taking place.¹²⁷ Because land use and the irrigation efficiency are correlated, there will be a range of potential responses a permit holder may adopt in order that the activity remains *viable*. For example, a permit holder efficiently irrigating land, may need to reduce the area under irrigation or change their land use to achieve new flow/level or rates of use.¹²⁸ Inefficient irrigation systems may need to be upgraded to ensure that water is reliably available,¹²⁹ or infrastructure built (e.g. storage) to offset the loss in reliability.¹³⁰

[107] Thus relative efficiency and effectiveness of relying on s 128 review of a long-term consent versus short-term consents is a function of the degree of change from the status quo¹³¹ and secondly, we find, the permit holder's objectives for their business, together with their personal values and circumstances.¹³² In this

¹²⁷ See discussion at transcript Cromwell WKS 7/8 (Craw) at 347-350.

¹²⁸ Transcript Cromwell WKS 4/5 (Dicey) at 13, 32, 58; (Perkins) at 213-215. Dunedin WKS 7/8 (McKeague) at 266-267.

¹²⁹ For example, build on-farm and/or community water storage, improve efficient irrigation infrastructure and replacement/upgrading of inefficient conveyancing infrastructure.

¹³⁰ McIndoe, EiC at [101]. See, for example, transcript Dunedin WKS 1-3 (S Dicey) at 1267; Cromwell WKS 4/5 (S Dicey) at 13, 32, 58.

¹³¹ Transcript Dunedin WKS 1-3 (S Dicey) at 1351-1352.

¹³² Transcript Cromwell WKS 4/5 (Burt) at 471.

regard, the potential impact of a review of consent on capital investment made over the intervening years, was generally not well considered by economists giving evidence on this topic.¹³³

[108] The review option is also resource intense¹³⁴ and the risk of not implementing a new water management regime through the review process is borne by the environment.¹³⁵ Mr V Hodgson (Horticulture New Zealand) considered reliance on the s 128 review process to implement a future regional plan to be “very risky” because the grant of long-term consents creates the unrealistic expectation of water security, thereby encouraging investment. Given that potential for significant change in the region’s water management strategy, in his opinion the more efficient and effective process is the one proposed by the Regional Council in PC7, i.e. short-term consents, which will be renewed under the proposed policy statement and a new regional plan.¹³⁶

[109] Finally, permit holders seeking to better provide for long-term water security may find insecurities persist and that they are in no better a position, even with a long-term consent. Mr H Craw, Agribusiness Specialist giving evidence on behalf of OWRUG, put it this way:¹³⁷

... water and the reliability of that water underpins the value of the farm and the value of the farm is ... the bank’s security mechanism... [Farmers] need to keep investing in those schemes to make sure that the value in the farms is retained.

[110] For completeness, we record that the review option is not supported by the

¹³³ Patterson (TA, economist) responding to the court’s questions at transcript Dunedin WKS 7/8 at 781. Ford (Hort NZ economist) views water as a “commodity”, and acknowledged that there may be significant economic hardship if in six years’ time there is insufficient water to reliably operate irrigation infrastructure. See transcript Cromwell WKS 4/5 at 609.

¹³⁴ Transcript Cromwell WKS 4/5 (Perkins) at 157.

¹³⁵ Transcript Dunedin WKS 1-3 (S Dicey) at 1319.

¹³⁶ Transcript Cromwell WKS 4/5 (Hodgson) at 653-654.

¹³⁷ Transcript Cromwell WKS 7/8 (Craw) at 350.

Minister for the Environment;¹³⁸ Fish and Game;¹³⁹ Ngā Rūnanga¹⁴⁰ or ORC.¹⁴¹

Decision – is the s 128 process an efficient and effective alternative?

[111] The consent review route is proposed by permit holders to afford them more certainty around long-term access to water and secondly, investment security; however, this would be a false sense of security.

[112] Enabling of long-term consents will likely encourage permit holders to invest in activities that may ultimately be found to be unsustainable. It is easy to imagine that a review would be resisted on grounds that the activity authorised by the consent would no longer be viable. It troubles us that the economic and social impact on permit holders, should the conditions of their consents be changed on review, was not adequately explored by its proponents.

[113] We find relying on s 128 RMA to implement a future regional plan is not an appropriate response to the problems and issues confronting water users and the environment in Otago. Section 128 is limited in its scope¹⁴² and may not include the full range of methods that a future regional plan has to manage fresh water.¹⁴³ A short-term consent is more certain, efficient and effective in terms of the ability to set and achieve the outcomes for the new regional plan.

Decision – should there be a phasing of consent expiry dates?

[114] Ms K Scott (OWRUG) raised the possibility of staggering consent expiry dates on a catchment, sub-catchment or FMU basis.¹⁴⁴ This is to address her concerns about the practicality of reconsenting water permits, should they all

¹³⁸ MfE, opening submissions at [58]-[59].

¹³⁹ Transcript Dunedin WKS 1-3 (Baker-Galloway) at 834-835.

¹⁴⁰ Transcript Dunedin WKS 1-3 (Winchester) at 464-467.

¹⁴¹ ORC, opening submissions at [93]-[94]; closing submissions at [192]-[196].

¹⁴² RMA, s 128(1)(b).

¹⁴³ Such as the introduction of allocation blocks or controls on taking from tributary waterbodies.

¹⁴⁴ Scott, summary of evidence dated 19 May 2021.

expire on the same date, in circumstances where neither the Regional Council nor farm advisors¹⁴⁵ may have the capacity to respond to the volume of consenting work and the associated complexity that may come with the new planning framework.¹⁴⁶

[115] Ms Scott advised that she had not considered the details of the concept, or indeed whether there is scope for such an approach.¹⁴⁷

[116] In closing, counsel for Regional Council advised that conceptually (at least) the approach had merit, but that there is no evidence to support its implementation and the proposed policy statement provides no clear guidance on this matter.¹⁴⁸

[117] In the absence of evidence to support the regime or consideration of its potential consequences, we find against the approach and recommend instead consideration be given to this in a future regional plan.

Decision – should presumptive flow standards be included as sought by Fish and Game?

[118] Fish and Game seek presumptive flow standards (or limits) be introduced to the plan change to ‘signpost’ what is likely to constitute a ‘more than minor adverse effect on the ecological health of a water body’¹⁴⁹ when applying the non-complying gateway test (s 104D(1)(a)) or secondly, when considering whether an application for consent is to be publicly notified in accordance with s 95A(8)(b).¹⁵⁰

[119] The Regional Council’s position is that the presumptive flow standards (or

¹⁴⁵ By farm advisors we mean persons whose expertise may be called upon to lodge and support an application for resource consent.

¹⁴⁶ Transcript Cromwell WKS 7/8 (Scott) at 365 – 367.

¹⁴⁷ Transcript Cromwell WKS 7/8 (Scott) at 371.

¹⁴⁸ ORC, closing submissions 7 July 2021, at [167].

¹⁴⁹ ORC, closing submissions 7 July 2021, at [175].

¹⁵⁰ Farrell, supplementary evidence 23 March 2021, at [13].

limits) are ambiguous and uncertain for plan users¹⁵¹ and consider it inappropriate to include them for the following reasons:¹⁵²

- (a) the figures in the table rely on the seven day Mean Annual Low Flow ('MALF') being capable of being calculated in all of the circumstances where the table might be applied (other than for intermittent streams).¹⁵³ Dr J Hayes, a freshwater fisheries scientist, accepted that the practicalities of this approach would be a 'considerable challenge',¹⁵⁴ and that it is simply not possible to estimate MALF in all locations in Otago;¹⁵⁵
- (b) the table does not identify whether it is in relation to a cumulative allocation rate or block;
- (c) the table does not identify whether total allocation is from a tributary, or all water bodies in a catchment, nor does it identify the flow recorder site which would be required to be incorporated into a regional plan;¹⁵⁶
- (d) while the table has been proposed as a proxy for 'no more than minor effects', it is only dealing with a subset of the potential adverse effects that might occur in relation to the take of water, and significant care would need to be taken when allocating in accordance with the thresholds not to preclude natural and development values attributed to a water body by Māori and the wider community;¹⁵⁷
- (e) there is a risk that the way in which the policy only focuses on the ecological assessment, may result in other values (i.e. cultural, amenity and recreational) not being appropriately considered;¹⁵⁸ and

¹⁵¹ ORC, closing submissions 7 July 2021, at [176].

¹⁵² ORC, closing submissions 7 July 2021, at [176]-[177].

¹⁵³ Transcript Dunedin WKS 1-3 (Hayes) at 860.

¹⁵⁴ Transcript Dunedin WKS 1-3 (Hayes) at 860.

¹⁵⁵ Transcript Dunedin WKS 1-3 (Hayes) at 863.

¹⁵⁶ Transcript Dunedin WKS 1-3 (Hayes) at 862.

¹⁵⁷ Transcript Dunedin WKS 1-3 (Hayes) at 868.

¹⁵⁸ Transcript Dunedin WKS 7/8 (Farrell) at 450.

- (f) the thresholds recommended should not be seen as the thresholds that represent the acceptable or appropriate level of allocation for the abstraction of water into the future in Otago.¹⁵⁹

[120] Even if there was scope to consider the relief, which we have found that there is not,¹⁶⁰ we agree with the Regional Council that the relief is too ambiguous and uncertain to be included in PC7.

Decision – should a new environmental flow regime and second, an allocation limit based on Net Zero Carbon Emission Policy be included in PC7?

[121] The relief sought by Wise Response is that before any consents are granted, an environmental flow regime based on the best available hydrological or ecological information or modelling be established for each river. This then would be reviewed once the future regional plan becomes operative.¹⁶¹ Also, that allocations should not be based simply on past use but on demonstrating that the land use system is genuinely sustainable, including under the “sinking lid” Net Zero Carbon emission policy by 2050.

[122] Without taking away from the seriousness of issues raised by Wise Response, the new flow and allocation regime would not give effect to Te Mana o te Wai, NPS-FM 2020 and, if it is changed in a future regional plan, this would be a costly, inefficient process for applicants and the Regional Council. Again, the Act contemplates that successive planning documents are to give effect to the national policy statements. The issues raised by Wise Response are better considered in the context of the proposed policy statement and future regional plan when the outcomes to be achieved by a flow regime can be properly grounded in the objectives of this plan. For this reason also, we have not approved relief

¹⁵⁹ Transcript Dunedin WKS 1-3 (Hayes) at 868.

¹⁶⁰ Annexure 2: Scope Challenges.

¹⁶¹ Wise Response, closing submissions 2 July 2021, at [8].

sought in relation to the protection of natural character and the life supporting capacity of water bodies.¹⁶²

¹⁶² Billee Marsh (71167).

Deemed permits and rights of priorities

*Introduction*¹⁶³

[123] Noted earlier, approximately 312¹⁶⁴ deemed permits will expire on 1 October 2021.¹⁶⁵ Most of these are exercised in seven catchments¹⁶⁶ and are subject to conditions based on historical mining requirements and secondly, certain rights of priority relative to other permit holders.¹⁶⁷

Should the plan change make provision for new flow sharing arrangements?

[124] Deemed water permits are held subject to deemed conditions, one of which is the so-called ‘rights of priority’.¹⁶⁸ Broadly speaking, a permit holder with a superior right of priority may require an inferior upstream permit holder to cease or reduce taking water. The right may be exercised where the flow in the

¹⁶³ We do not essay the history of deemed permits which is well known to the parties.

¹⁶⁴ The estimate of the number of existing deemed permits varied between witnesses. For our purposes, the actual number is immaterial to the decision.

¹⁶⁵ For the purpose of this decision, deemed permits are former mining privileges and include water permits and discharge permits (s 413(1)(c) and (d)). RMA, s 413(3) provides that deemed permits resulting from a mining privilege under subs (1)(c) or (d) shall be deemed to include a condition to the effect that it finally expires on the 30th anniversary of the date of commencement of this Act. See also Dr Somerville QC, memorandum of amicus curiae dated 19 May 2021; ORC, legal submissions ‘in relation to the expiry of deemed permits and rights of priority’ dated 15 June 2021; OWRUG, legal submissions ‘in response to the memorandum of amicus curiae’ dated 14 June 2021; Trustpower, legal submissions ‘in response to memorandum of amicus curiae on deemed permits and rights of priority’ dated 14 June 2021; MfE, legal submissions ‘regarding priorities’ dated 15 June 2021; Director-General, legal submissions ‘in reply to memorandum of amicus curiae’ dated 15 June 2021.

¹⁶⁶ See, Peter Skelton *Investigation of Freshwater Management and Allocation Functions at Otago Regional Council – Report to the Minister for the Environment* (Ministry for the Environment, 1 October 2019) (‘Skelton Report’). CB Tab 12D at 12. The catchments are Taieri, Manuharekia, Cardrona, Lindis, Lowburn, Arrow and Luggate.

¹⁶⁷ Gilroy, EiC dated 13 March 2021.

¹⁶⁸ See RMA, s 413(2).

water body is insufficient to supply fully all the races lawfully connected to the same.¹⁶⁹

[125] The exercise of the rights of priority is a form of flow-sharing between the holders of deemed permits.¹⁷⁰ If the flow-sharing enabled by those rights is discontinued, then permit holders, who have acted in reliance on those rights, may be adversely affected.¹⁷¹ Specifically, the reliability of water for a downstream permit holder may be altered by upstream permit holders continuing to take water during declining flows.¹⁷²

Submissions on the plan change

[126] The objective of the plan change is to facilitate the transition from the operative freshwater planning framework to a new integrated regional planning framework by managing the replacement of deemed permits.¹⁷³ Deemed permits are within the scope of the plan change, with submissions on the topic of the rights of priority received from OWRUG, the Director-General of Conservation and Marian Weaver.¹⁷⁴

Exercise of the right

[127] Lacking understanding as to how deemed permits were actually being

¹⁶⁹ RMA, s 413(3) and Water and Soil Conservation Amendment Act 1971, ss 11 and 13. On any water body there may be one or more deemed permits authorising the taking of water, with each successive permit holder taking subject to the rights of a superior deemed permit. These rights are date ordered, thus a permit with a superior right relative to another deemed permit, may be either upstream or downstream. The potential for a change in flow regime only arises in situations where there is a superior downstream permit holder.

¹⁷⁰ 6th JWS: Planners Expert Conferencing on Deemed Permits and Associated Rights of Priority dated 3 and 17 May 2021 at [26].

¹⁷¹ Transcript Cromwell WKS 4/5 (S Dicey) at 39ff.

¹⁷² Transcript Cromwell WKS 4/5 (S Dicey) at 58.

¹⁷³ 12th JWS dated 12 July 2021, Objective 10A.1.1.

¹⁷⁴ De Pelsemaeker, supplementary evidence on behalf of ORC dated 24 March 2021 ('supplementary evidence (March 2021)'). Mr De Pelsemaeker also notes other submissions and further submissions on deemed permits (generally) and on the co-ordination of the taking of water by water management groups.

exercised, the Regional Council assumed that the metered data record would capture periods when the rights were being exercised and therefore the taking and use would be caught by Schedule 10A.4 to the plan change.¹⁷⁵ While this assumption is correct for the years in which the rights were exercised, the notified version of the plan change does not respond to the coercive nature of the right which – in some water bodies – is exercised at will by permit holders while in others, the rights have provided the impetus for permit holders to form water user groups and collectively manage access to water.

[128] OWRUG's submission on the plan change makes the following salient points:¹⁷⁶

- (a) deemed permits have determined the flow regime observed in many water bodies;
- (b) few deemed permits are subject to minimum or residual flows;
- (c) when deemed permits expire, the legal obligation to pass water downstream to other permit holders with a higher priority will cease; and
- (d) the existing flow regime may be significantly altered if there is no replacement flow regime upon consenting.

[129] Many people appearing before us either hold or have held rights of priority and gave evidence about their exercise. Some have exercised those rights on a regular basis;¹⁷⁷ some have exercised them on an infrequent basis;¹⁷⁸ some have

¹⁷⁵ De Pelsemaeker, EiC dated 7 December 2020 at [498]; De Pelsemaeker, reply evidence dated 19 February 2021 at [75(b)]. Transcript Dunedin WKS 1-3 (De Pelsemaeker) at 265-268 and 325.

¹⁷⁶ OWRUG submission on PC7 at [127]-[135].

¹⁷⁷ Transcript Cromwell WKS 4/5 (Webb) at 664-665 talking about the Parkburn; transcript Cromwell WK 6 (Heckler) at 1101-1102 talking about Lauder Creek.

¹⁷⁸ Transcript Cromwell WK 6 (S Weir) at 1301-1302 has exercised rights in relation to the Pigburn three-four times over the past decade.

never exercised those rights;¹⁷⁹ some have never needed to exercise those rights because there is enough water to meet their current needs;¹⁸⁰ and some have rights that have been subsumed under formal arrangements between members of a water user group or informally as a result of good communication and neighbourliness.¹⁸¹ Yet others have had those rights replaced by resource consents issued under the RMA.¹⁸²

[130] The exercise of rights of priority – particularly by water user groups across a catchment/sub-catchment – may change the hydrological environment and, if that occurs, affect the habitat of non-diadromous galaxiids. Giving evidence on the related topics of hydrology and ecological flow settings on behalf of OWRUG, it was Mr M Hickey’s opinion that habitat suitability for galaxiids may also be a consequence of land use and use of water, including improved efficiency of irrigation infrastructure together with climate induced variation in flows.¹⁸³ We think it generally agreed that non-migratory galaxiids are also impacted by the presence of salmonids in the water body which predate upon the same.¹⁸⁴

[131] That said, if the exercise of rights of priority had the potential to change the habitat of non-diadromous galaxiids or influence reliability of supply (and we find that it did), these are important considerations in this case.

¹⁷⁹ Transcript Cromwell WK 6 (Paterson) at 1482 talking about Ned’s Creek. Transcript Cromwell WK 6 (Lane) at 1505 talking about (we think) Manuherehia catchment. Transcript Dunedin WKS 7/8 (A Armstrong and M MacGregor) are the only take on the Nenthorn River and therefore have never needed to exercise the priority.

¹⁸⁰ Transcript Cromwell WK 6 (C Davis) at 1386-1387.

¹⁸¹ Transcript Cromwell WK 6 (Manson) at 1127 – 1130. Although not personally holding deemed permits gave detailed evidence of the flow-sharing arrangements in the Manuherehia catchment. Transcript Cromwell WK 6 (R Hore) at 1304-1320 talking about the Manuherehia catchment. Transcript Cromwell WK 6 (Smith) at 1372 talking about the Manuherehia catchment. Transcript Cromwell WK 6 (R Tamblyn) at 1333-1339 talking about Coal Creek. Transcript Cromwell WK 6 (McAuley) at 1461 talking about the Lowburn. Transcript Cromwell WKS 4/5 (Paulin) at 1000-1001 talking about the Lowburn.

¹⁸² Transcript Cromwell WK 6 (MacKenzie) at 1186-1187 and 1197 talking about the reconsenting of deemed permits in the Kyeburn.

¹⁸³ Transcript WKS 1-3 (Dunedin) at 1018.

¹⁸⁴ Allibone, EiC dated 7 December 2020 at [22].

Relief

[132] Seeking the rejection of the plan change, OWRUG is effectively advocating for the opportunity to reconsent deemed permits subject to minimum/residual flows proposed in its members' applications for resource consent.¹⁸⁵ If, on the other hand, PC7 is to be approved, then OWRUG submits it is necessary to make provision for rights of priority,¹⁸⁶ rather than risk *chaotic* accessing of water by permit holders.¹⁸⁷

[133] For different reasons, the Director-General of Conservation would ensure PC7 does not result in changes to existing flow patterns in a way that could worsen the outcomes for threatened non-diadromous galaxias.¹⁸⁸ Perhaps more realistically, while acknowledging that there can be no certainty of outcome for galaxias, the enabling of existing flow patterns under PC7 was supported by the Minister for the Environment as being the "best insurance" against inadvertently further degrading galaxiid habitat.¹⁸⁹ We have noted also Forest and Bird's submissions on this point.¹⁹⁰

[134] In closing, the Regional Council accepted that PC7 must contain provisions that reflect the effect of the existing priority arrangements, subject to those arrangements not having been superseded by a replacement consent.¹⁹¹ While conceptually a simple sounding task, the drafting of provisions challenged the parties and the court.

[135] The task is challenging because deemed permits and their associated

¹⁸⁵ OWRUG, opening submissions at [66]-[67]. See also, S Dicey, EiC at [42] and [144].

¹⁸⁶ OWRUG, closing submissions at [55].

¹⁸⁷ OWRUG, opening submissions at [74].

¹⁸⁸ Director-General, closing submissions at [3] and [7]. See also, Brass, supplementary evidence dated 18 March 2021 at [13]-[19].

¹⁸⁹ MfE, closing submissions at [21]. See also Ensor, EiC at [46], [77] and [84].

¹⁹⁰ Forest and Bird, legal submissions dated 2 July 2021 at [33]-[36].

¹⁹¹ ORC, closing submissions at [60]-[61].

deemed conditions¹⁹² are *creatures of statute* that expired on 1 October 2021.¹⁹³ We will not traverse the efforts of parties to find a solution but record our gratitude to counsel and to the planners who participated in conferencing to explore the legal and planning approaches.¹⁹⁴ We record also our special thanks to Dr R Somerville QC for facilitating a conference of counsel at short notice and for furnishing the court with opinions on issues of law in the capacity of *amicus curiae*.

Decision – should the plan change make provision for new flow sharing arrangements?

[136] We are clear that there must be provision for the continuation of flow-sharing and in this regard, there are two options:

- (a) amend PC7 and include suitable provisions; or
- (b) reject PC7, and determine applications for consent under the operative regional plan.

[137] Seeking rejection of the plan change and the determination of consent applications under the regional plans, submitters would substitute flow sharing under rights of priority for proposed new minimum/residual and cessation flows to be imposed as conditions of consent. If done across a catchment/sub-catchment the new flow regime created will drive desired physical and ecological responses in the water bodies.

[138] We find the Regional Council has well-founded concerns that the regional plan's limits may not manage environmental effects and secondly, that these limits are likely to change under the NPS-FM 2020 NOF process. The Environment

¹⁹² The rights of priority are deemed conditions under RMA, s 413(2).

¹⁹³ See Dr R Somerville QC, memorandum of *amicus curiae* dated 19 May 2021 at [36] he submits "In the case of section 413(1), the legislature has used a deeming provision to create a statutory fiction, as it deems a mining privilege is deemed to be something (a water permit granted under the RMA) that it is not." He submits at [38], therefore, deemed permits are *a creature of statute*.

¹⁹⁴ While we do not discuss the same, we have had regard to the 6th JWS dated 3 and 17 May 2021; 8th JWS dated 18 June 2021; and 10th JWS dated 2 and 5 July 2021.

Court's reflection on the regional plan in *Lindis Catchment Group Inc v Otago Regional Council* is particularly damning. The regional plan:¹⁹⁵

...can barely be said to make any effort to manage water volumes in many Otago catchments (including the Lindis River) because in most cases the primary allocation of water for irrigation is simply set as the sum of all existing water takes granted in the catchment.

[139] PC7 will be amended to include a new policy, the purpose of which is to enable flow sharing between former deemed permit holders to continue after 1 October 2021.

The flow sharing provisions

[140] Having extensively canvassed with counsel and planners on the topic, we have decided to approve an amendment to the plan change to allow for a downstream permit holder with a higher right of priority, to have the ability to give notice to an upstream permit holder requiring them to cease taking water when there is insufficient flow at their point of take.

[141] The measure requires all permit holders within a given water body agreeing to the imposition of the condition (where it applies). The 'encouragement' given to applicants to agree to this course is the controlled activity status for applications to replace existing permits.

[142] Whether notice is given when flows are declining will likely be a function of (as it is now) the cohesiveness of existing social structures within catchments or water user groups formed to collectively administer the rights for the benefit of all users.

¹⁹⁵ *Lindis Catchment Group Inc v Otago Regional Council* [2019] NZEnvC 166 at [3].

[143] The restricted discretionary activity status for applications to replace deemed permits has the same approach.

[144] It goes without saying that the policy only applies to holders of deemed permits whose permits included rights of priority and only those deemed permits that have not been replaced by a resource consent. All of the key terms used in the policies and associated rules are defined.

Applications and enforcement

[145] We have considered Ms A King's (Regional Council, Team Leader Consents) evidence concerning deemed permits. To take advantage of the controlled activity rule, most, if not all, applications will need to be re-filed. We anticipate this process will not be without its challenges because:¹⁹⁶

- (a) the Regional Council has not enforced priorities and does not hold a complete register of those rights. It will be time-consuming for the Regional Council to identify from its records all rights held in any given catchment;
- (b) the Regional Council is aware that not all surrendered permits or transfers of deemed permits are captured on their records; and
- (c) the location of take-points may also differ from what is recorded on the deemed permit.

[146] The Regional Council accepts, as it must, that it has a duty to keep its records correctly and to ensure that water allocations are properly recorded; per *Sutton v Canterbury Regional Council*.¹⁹⁷ In saying that, it is possible, if not probable, some permit holders have not sought approval nor informed the Regional Council before making changes.

¹⁹⁶ King, supplementary evidence dated 24 June 2021.

¹⁹⁷ *Sutton v Canterbury Regional Council* [2015] NZHC 313 at [59], also see RMA, s 35.

[147] Finally, we record that in the past the Regional Council has not been called upon to enforce the exercise of the rights of priority and counsel for OWRUG postulates this will continue to be the case. On the matter of enforcement, the court sought advice on this from the Regional Council's compliance monitoring officer, Mr M Cummings.¹⁹⁸ Cross-examination teased out practical responses to the concerns that he raised, and we took these into account when proposing new wording of the provisions.

[148] That said, we are satisfied that the condition we propose to be imposed on a resource consent to replace a deemed permit would satisfy the requirements of s 108AA insofar as:

- (a) the applicant for consent proposes and agrees to confer the benefit on the downstream consent holder;
- (b) the condition is directly connected to an adverse effect on the environment, namely maintaining reliability of supply of a downstream user and secondly, insofar as it is possible, supporting the habitat of the threatened galaxias; and
- (c) the parties, making minor drafting suggestions which we accept, confirmed the final wording of the provisions.¹⁹⁹

Concluding remarks

[149] Finally, we accept Mr M Brass' evidence that flow sharing does not guarantee an outcome for galaxiids; it is simply working on one element of risk to local galaxiid populations.²⁰⁰ At the same time, the continuation of flow sharing in some form is addressing the risk of economic hardship where the reconsenting

¹⁹⁸ Cummings, EiC at 24 June 2021.

¹⁹⁹ Minute 'deemed permits and rights of priority' dated 13 July 2021 and joint memorandum 'in relation to deemed permits and rights of priority' dated 30 July 2021.

²⁰⁰ Transcript Dunedin WKS 1-3 (Brass) at 1159-1161.

of hundreds of permits is in advance of a regional plan containing flow regimes governing all users and developed in accordance with the NPS-FM 2020.

Dams

Should dams be excluded from PC7?

[150] OWRUG seeks to exclude deemed permits that authorise damming activities from PC7.²⁰¹

[151] In their joint submission on dams, counsel for the Regional Council and OWRUG identified a list of factual, planning and legal issues to be determined.²⁰² We now evaluate whether dams should be included in the rule regime for deemed permits in terms of these issues.

Which dams are captured by PC7 and what is the bundle of permits (both deemed and RMA permits) associated with these dams?

[152] There are currently 16 deemed permits²⁰³ remaining which authorise the damming of water²⁰⁴ and at least one deemed permit for the discharge of water (although Mr De Pelsemaeker said that there was uncertainty about the exact number of deemed permits which authorised discharges of water from the dams).²⁰⁵ By way of example, there are deemed permits for nine dams in the Manuherekia catchment, two in the Taieri catchment and one in each of the Teviot River, Fraser/Earnsclough and Roaring Meg catchments. In addition, there is one deemed permit for the discharge of water for the Teviot River (which we understand to be from the Fraser Dam).

²⁰¹ Curran, EiC dated 5 February 2021.

²⁰² Submissions for ORC and OWRUG dated 21 May 2021.

²⁰³ Mr Curran said that, having consulted with Mr Leslie of ORC, he had identified 16 deemed permits for impounding water behind dam structures and one deemed permit for the discharge of water over or through a dam (the Old Onslow Dam).

²⁰⁴ For the most part, the wording of the deemed permits for dams attached as Appendix A to Mr Curran's supplementary evidence of 24 May 2021 states that the deemed permits are to dam water bodies for the purpose of irrigation, stock water, hydro-electric power generation and domestic supply – or various combinations of these uses.

²⁰⁵ De Pelsemaeker, EiC in reply dated 25 June 2021 at [31].

[153] Giving planning evidence on behalf of OWRUG, Mr M Curran provided details of a range of other deemed permits and RMA permits for the taking and discharge of water, which he said appeared to be related to the 16 deemed dam permits. All of these “other” permits expire on 1 October 2021 except for nine permits granted under the RMA and held by Pioneer Energy for the Fraser and Teviot Rivers which expire in 2041.²⁰⁶

What is the potential impact classification of those dams under the NZSOLD Dam Safety Guidelines and what is the relevance of the PIC of a dam?

[154] Civil engineer, Mr B Sheehan (OWRUG), provided assessments of the potential impact classification for each of the 16 deemed permit dams. He advised that ‘potential impact classification’ was a term used in the NZSOLD Dam Safety Guidelines to describe the impact on the downstream receiving environment in the event that there was a dam failure.²⁰⁷ He cautioned that the application of the potential impact classification for dams should not be confused with the likelihood that the dams themselves might fail.

[155] Mr Sheehan assessed one of the dams as having a high potential impact classification (Fraser Dam) and three having a low classification. He said that the remaining dams were not classified as these were all small dams which did not register as a large dam under the NZSOLD Dam Safety Guidelines or the Building Act criteria.

Is there evidence that establishes an imminent risk of dam failure in the absence of capital investment and if it is established that there is an identified risk of imminent dam failure, in the absence of capital investment, is a long-term permit required to secure capital to address that risk?

[156] Mr Sheehan was not aware of any imminent risk of a dam failing arising from a lack of capital investment, but the dams would still require significant

²⁰⁶ Curran, supplementary evidence dated 24 May 2021 at [8] to [12].

²⁰⁷ Sheehan, supplementary evidence dated 24 May 2021 at [9].

investment over the likely term of PC7 to ensure that the NZSOLD Dam Safety Guidelines are complied with. These guidelines are directed at lifecycle management to ensure that the risk of dam failure is appropriately managed.²⁰⁸ There are ongoing requirements for dam owners to undertake maintenance to ensure the safety of their damming structures, both under the Building Act and as a condition of the permitted activity rule in the operative regional plan, irrespective of any terms and conditions of a resource consent.²⁰⁹

Does a six-year consent duration present a barrier to managing dams in accordance with the NZSOLD Dam Safety Guidelines through discouraging investment or constraining access to funds and what other difficulties might arise for the management of dams if six-year permits are granted?

[157] In Mr Curran’s opinion, applying PC7’s policies on duration to dams will render repairs, maintenance and upgrades of existing dams “unbankable” from a funding perspective and would seriously impact on the responsibilities of dam owners to meet their operational, health and safety obligations. He supported relief to exclude from PC7 deemed permits which authorised the damming or impoundment of water and associated discharge of water passed over or through dam structures.

[158] Mr Curran was not able to identify evidence before this court that he had relied on to support his statement that six-year consents would seriously impact on the ability of dam owners to obtain finance to invest in dam maintenance and upgrades. Under cross-examination, he said that in coming to this view he had relied on the Falls Dam re consenting application (which included dam safety and hydrological reports), and in respect of which he was a contributing author and secondly, on the evidence of Mr Sheehan. In doing so, he acknowledged that he had not provided the court with a copy of this application nor any other factual

²⁰⁸ Sheehan, supplementary evidence dated 24 May 2021 at [11].

²⁰⁹ De Pelsemaeker, reply (June) 2021 at [36(c)(i) and (ii)].

reports on dam safety²¹⁰ and agreed that Mr Sheehan had not provided evidence in relation to the maintenance work that is required in relation to the dams that he is supervising.²¹¹

[159] Mr Curran accepted that there were health and safety obligations for dam owners irrespective of the duration of the consent for the dam and that owners could not opt out of these obligations.²¹² Indeed, under the operative regional plan the use of dam structures is a permitted activity provided that the structures are maintained in good repair.²¹³

Why does PC7 capture only deemed permits for damming and discharge of water, and not RMA permits for damming and discharge of water? Is there a resource management reason for that difference in approach?

[160] Mr Curran said that he was at a loss to explain why PC7 captured deemed permits for the damming and the associated discharge of water but not resource consents issued under the RMA for damming and discharge, including in particular consents which expire prior to 31 December 2025.

[161] This issue of the exclusion of dams with RMA permits from PC7 was responded to by Mr De Pelsemaeker²¹⁴ and followed up by counsel for OWRUG.²¹⁵

[162] Mr De Pelsemaeker said that the reason RMA consented dams had been excluded from PC7 was that unlike dams with deemed permits, consents for the RMA dams had been processed more recently and included conditions for managing environmental, cultural and amenity values. Dams are part of an

²¹⁰ Transcript Dunedin WKS 7/8 (Curran) at 746-747.

²¹¹ Transcript Dunedin WKS 7/8 (Curran) at 747-748. We note also Mr Sheehan does not supervise the Falls Dam – see Dunedin WKS 7/8 (Sheehan) at 723.

²¹² Transcript Dunedin WKS 7/8 (Curran) at 748-749.

²¹³ RWP, Rule 13.1.1.1

²¹⁴ De Pelsemaeker, reply (June) 2021.

²¹⁵ OWRUG, closing submissions dated 5 July 2021.

interconnected network and their inclusion within PC7 enables a more holistic and integrated regime for managing resources on a catchment-wide basis under a future regional plan.²¹⁶

[163] That said, Mr De Pelsemaeker did not include any details of the timing of the processing of the consents for the RMA dams nor a list of these dams, with counsel for OWRUG submitting that none of these dams could be classified as “recently consented”.²¹⁷ The parties’ evidence is such that the court is unable to form a view as to the point of distinction between RMA dams and dams authorised by deemed permits, but nor do we consider this a matter we need to determine in order to reach a view on the issue at hand.

What is the nature of the inter-dependence between the damming of water and subsequent discharge, take, and use of stored water? On reconsenting, is it appropriate to consider the damming and subsequent discharge of water separately to the take and use of the stored water?

[164] The Regional Council’s position was that a six-year term of consent allows damming to be considered under the new regional plan and proposed policy statement, both of which are to give effect to Te Mana o te Wai including the consideration of the interconnected effects of damming discharges and water takes in a way that is consistent with the principle ki uta ki tai.²¹⁸

[165] Aligning the expiry dates of damming activities with other associated consents (all granted on a short-term basis) would also enable an efficient and effective transition towards a more holistic and integrated regime for managing water resources in the affected catchments.²¹⁹

²¹⁶ De Pelsemaeker, reply (June) at [30] and [31].

²¹⁷ OWRUG, closing submissions at [44].

²¹⁸ ORC, closing submissions at [171]-[172].

²¹⁹ De Pelsemaeker, reply (June) at [31].

Are reservoirs created by the exercise of damming permits a water body for the purposes of Objective 2.1 of the National Policy Statement for Freshwater Management 2020?

[166] The Regional Council's position was that reservoirs created by damming permits constituted water bodies and therefore fell within the ambit of the NPS-FM management regime. It was counsel's understanding that this issue was not in dispute.²²⁰

If reservoirs are a water body for the purposes of Objective 2.1 of the National Policy Statement for Freshwater Management 2020, should PC7 anticipate that permits to dam water may not be renewed at all after the new land and water regional plan is made operative?

[167] OWRUG said that it did not perceive any party to be advocating for a position under which, at the end of the six years, drainage of Falls and Fraser Dams would be in serious contemplation.²²¹ And further, it would seem reasonable to extrapolate that when a new regional plan is made operative, applications to renew permits for the damming of water would not be precluded. That may be so, however the classification of a reservoir as being a water body is not germane to the central issue of whether dams are to be excluded from the plan change.

Decision – should dams be excluded from PC7?

[168] OWRUG contends that there were a number of reasons why dams should be excluded from PC7. These include that damming permits leave water in the system and therefore the environmental effects are different from other forms of water takes and uses,²²² and that reservoirs formed by dams were water bodies and therefore their needs had to be considered under tier 1 of Objective 2.1 of the

²²⁰ ORC, closing submissions at [169].

²²¹ OWRUG, closing submissions at [51].

²²² OWRUG, closing submissions at [46].

NPS-FM 2020.²²³ Counsel for OWRUG also submitted the s 32 Report did not identify that dam permits were ever intended to be part of PC7.²²⁴

[169] It is beyond contention that dams are integral components of the infrastructure established to service most, if not all, irrigation schemes, and for this reason alone there could be no justification for excluding dams from consideration under PC7 as sought by OWRUG. By way of example: Falls Dam Company Limited's submission on the plan change notes that Falls Dam provides storage for the irrigation of around 10,000 ha of land in the Manuherekia Valley and that its operation requires a "difficult and delicate" balancing act to optimise use of run of river supplies, meet water demand where possible, maintain minimum flows in the system above an informal target flow and secondary, to maximise hydro-electricity generation.²²⁵

[170] We understand that dam owners/operators want security of a long-term consent before making capital investment in infrastructure. However, as Mr Curran properly conceded, dam owners could not opt out of their operational health and safety obligations even if replacement consents were limited to a six-year term. This concession was consistent with Mr De Pelsemaeker's evidence on the same topic.

[171] To satisfy ourselves that the exclusion of RMA permits for the damming and discharge of water in PC7 was not an oversight by the Council, we refer to the s 32 Report which states that:²²⁶

PC 7 does not introduce any additional provisions for the management of damming, diversion or discharge activities other than providing for the replacement of deemed permits that authorise those activities through Rules

²²³ OWRUG, closing submissions at [47].

²²⁴ OWRUG, closing submissions dated 5 July 2021 at [45].

²²⁵ Falls Dam Company Limited Submission on PC7 dated 4 May 2020 at [7] and [8].

²²⁶ Section 32 Report at 20.

10A.3.1 and 10A.3.2. [our emphasis]

[172] This is reflected in Rule 10A.3.1.1 (the controlled activity rule) of the notified plan change which provides for “(a) any activity that is currently authorised under a Deemed Permit” and the more limited “(b) the take and use of surface water ... that is currently authorised by an existing water permit” with Rule 10A.3.2 (the non-complying activity rule) having equivalent wording. [Our emphasis].

[173] The s 32 Report, the notified plan provisions and Mr De Pelsemaeker’s evidence²²⁷ are consistent with each other in supporting replacement deemed permits for damming activities to be provided for in PC7, whereas permits issued under the RMA are excluded.

[174] Clearly there is an inter-relationship and inter-dependence between the damming of water and subsequent discharge, take, and use of stored water. What is to happen in relation to impounded water is a matter better addressed under the NPS-FM 2020, proposed policy statement and a new regional plan, including consideration of resource consenting on an integrated rather than piecemeal basis.

[175] We do not accept OWRUG’s submission that s 128 can be relied on to bring dam operational conditions in line with future take and use permits.²²⁸ We find reconsenting dams under the regional plan runs the risk that the applicant for resource consent (i.e. dam owner) will strongly influence the determination of minimum flows and levels of water bodies under a future regional plan. The better course is to adopt an integrated management approach as required by Te Mana o te Wai (NPS-FM 2020, cl 3.5) and by the proposed policy statement.

²²⁷ De Pelsemaeker, reply (February 2021) at [116].

²²⁸ OWRUG, closing submissions at [51].

Other miscellaneous relief

[176] In this section of our decision we address a range of issues raised in submissions and in evidence,²²⁹ but not discussed during the hearing.

Consumptive takes for community and domestic supplies

[177] Several submitters on the plan change requested that PC7 be amended to better provide for commercial potable water supplies and domestic and community supplies.²³⁰ These included all of the Territorial Authorities in the region, Maniototo East Side Irrigation Company,²³¹ and Heritage Park Water Users.

[178] Our response on the submissions from the Territorial Authorities is addressed in a separate section and not repeated here.

[179] While Mr De Pelsemaecker's evidence was that the Maniototo East Side Irrigation Company sought that the Water Plan Schedules 1B and 3A be updated to include all existing community water supplies,²³² this submission was made by the Territorial Authorities and we have not accepted the same.

[180] Heritage Park Water Users hold a water permit which expires in August 2025. This submitter sought that the plan change be amended to provide for the renewal of existing authorised takes for rural residential properties where no other water is available. Under the final set of provisions for the plan change, applications for a replacement consent from this submitter would be considered

²²⁹ Primarily the evidence of Mr De Pelsemaecker.

²³⁰ De Pelsemaecker, EiC at [336].

²³¹ Clutha District Council and Waitaki District Council (submitter 71173), Central Otago District Council (submitter 70026), Queenstown Lakes District Council (submitter 70048) and Dunedin City Council (submitter 70026), Heritage Park Water Users (submitter 71020), Maniototo East Side Irrigation Company (submitter 71026).

²³² De Pelsemaecker, EiC at [336(e)]. Note: we were unable to find reference to this in this submission. We assume that the incorrect submitter number was referenced (which is entirely understandable in the context of the large number of submissions made).

as either a controlled activity or a restricted discretionary activity provided that entry conditions are met.²³³ Otherwise a non-complying activity would be required and the policy on duration (Policy 10A.2.3) would apply.

Retakes

[181] While he did not refer to any specific submissions on this issue, and we do not recollect seeing any, Mr De Pelsemaeker gave evidence that a ‘retake’²³⁴ is usually considered as part of the take and use application for the ‘parent’ take(s) and therefore would be considered within the envelope of the rule(s) which apply to the ‘parent’ take(s).²³⁵

[182] In the absence of any evidence to the contrary, that appears sensible and given the purpose of the plan change a different approach is not warranted.

Diversions²³⁶

[183] There are no deemed permits that specifically provided for the diversion of water and PC7 does not seek to manage applications for resource consents for new or existing diversions of water. If consent is required under the operative regional plan rules, then PC7’s policies on duration would apply.

[184] Aside from Mr De Pelsemaeker, we do not recall receiving any evidence on the treatment of diversions or seeing any submission on the plan.

²³³ The entry conditions include that the consent is not to exceed six-years in duration.

²³⁴ De Pelsemaeker, EiC at [307] where he sets out his understanding that retakes are generally understood to be takes of irrigation run-off water.

²³⁵ De Pelsemaeker, EiC at [308] (unless the activity is permitted by Rule 12.1.2.3 – takes from artificial lakes).

²³⁶ In the operative regional plan the term ‘divert’ means the process of redirecting flow from its existing course to another.

*Augmented flows*²³⁷

[185] Mr De Pelsemaeker lists a range of conditions under which flow augmentation might occur.²³⁸ Augmented takes are provided for under Rule 12.1.4.1 of the regional plan as a restricted discretionary activity (these being separate from takes from races or reservoirs which are not specifically provided for by this rule).²³⁹ He considered it plausible, as some submitters had suggested,^{240,241} that where surface flows are augmented, the take of augmented water has little effect on the water body and may have a positive impact on the surface flow and habitat availability, especially at times when inflows in the catchment are low.²⁴²

[186] Mr De Pelsemaeker advised that there was no consistency or clarity in terms of the legal relationship between the water permit that authorises the augmented take and the permit which provides for the parent take or the supply of the augmented water.²⁴³ While submitters sought the exclusion of augmented flows from the plan change, the submissions had not provided enough information for him to support this relief.²⁴⁴

²³⁷ The regional plan defines the term ‘augmentation’ as ‘increasing the supply of available water through the active management of water resources’.

²³⁸ De Pelsemaeker, EiC at [301].

²³⁹ De Pelsemaeker, EiC at [303].

²⁴⁰ Loganbrae Limited (71120)’s, permit to take and use water from Logan Burn for irrigation expires in 2023. It states that takes from Logan Burn are augmented by the Maniototo Irrigation Company storage in the headwaters of the Logan Burn (the Loganburn Dam) and that this dam discharges into the Logan Burn and uses the Logan Burn and the Taieri River as a transport mechanism until the water is abstracted at the Paerau Weir. Loganbrae Limited seeks that its water together with the whole of the Taieri catchment take be excluded from consideration under PC7.

²⁴¹ SEE Enterprises Ltd (71127) holds water permits for takes and uses from three sources in the Upper Taieri catchment. It has already lodged applications for replacement consents for two of these permits. Its submission mirrors that of Loganbrae Limited in that it states that takes from the Logan Burn are augmented with water from the Loganburn Dam. It also seeks that its water takes with the whole of the Taieri catchment be excluded from consideration under PC7.

²⁴² De Pelsemaeker, EiC at [305].

²⁴³ De Pelsemaeker, EiC at [306].

²⁴⁴ De Pelsemaeker, EiC at [306].

[187] Having reviewed the submissions, we agree that augmented flows should not be exempt from consideration under PC7; this would be inconsistent with the processes mandated by the NPS-FM 2020. These matters are better left for the future regional plan.

Non-consumptive takes

[188] The operative regional plan defines a take as being ‘non-consumptive’ when:²⁴⁵

- (a) the same amount of water is returned to the same water body at or near the location from which the water was taken; and
- (b) there is no significant delay between the taking and the returning of the water.

[189] This definition is consistent with the description of ‘non-consumptive takes’ in Regulation 4 of the Resource Management (Measurement and Reporting of Water Takes) Regulations 2010.²⁴⁶

[190] Mr De Pelsemaeker listed examples of non-consumptive takes as including dewatering takes for mining or construction pits, takes for hydro-electricity generation, and takes for amenity enhancement, with the size of these takes varying from very small to very large.²⁴⁷

[191] On the issue of whether amendments should be made to the notified version of PC7’s framework to accommodate submitter requests for the management of non-consumptive takes, Mr De Pelsemaeker said that before making a recommendation, he would prefer to wait and see if any relevant further information on this issue might emerge through evidence exchange and the

²⁴⁵ De Pelsemaeker, EiC at [311].

²⁴⁶ De Pelsemaeker, EiC at [312].

²⁴⁷ De Pelsemaeker, EiC at [320].

hearing process.²⁴⁸

[192] We do not recall sighting any such evidence nor any discussion on this issue during the hearing, however we have reviewed submissions on this topic.²⁴⁹ On the evidence before us we are unable to conclude, as many urge, that this activity has no effects on the environment. A replacement consent for a non-consumptive take expiring prior to 31 December 2025, if compliant with the rule's entry conditions and standards, will be assessed as a controlled activity, meaning consent will be granted.

Unmetered takes

[193] Mr De Pelsemaeker noted that consent holders who held a consumptive take that was not required to be metered²⁵⁰ were unlikely to comply with the entry conditions of the notified controlled activity Rule 10A.3.1.1.

[194] In response, the final set of the PC7 provisions approved by the court now provides for those situations where metering is not required under the 2010 Regulations.²⁵¹

Fire risk

[195] Mr De Pelsemaeker responded to concerns raised by submitters about increased fire risk if users were to lose part of their consented water allocation as a result of PC7. He noted that under s 14(3)(e) RMA, a person is allowed to take

²⁴⁸ De Pelsemaeker, EiC at [322].

²⁴⁹ Benjamin Harding Oliver Keenan (71193), Chris Dignan (71197), Paydirt (71205), Karl Benjamin Lawrence (71220), Samuel Counsell Stephens (71245), Tim Le Comte (71248), Cold Gold Clutha Limited (71007), Mark Skinner (71002), Darryl Sycamore (71003), Graeme Hutchins (71004), Russell Irwin Knight and Doug Jones (71005), Benjamin Harding Oliver Keenan (71193), Tony Sewhoy (71252), Mitchell Grierson (71227).

²⁵⁰ Regulation 4(1) of the Resource Management (Measurement and Reporting of Water Takes) Regulations 2010 exempts holders of a consent to take water at a rate of less than 5 l/s from the requirement to measure their water use.

²⁵¹ Rule 10A.3.1.1(vii).

water at any time if the water is required to be taken for emergency or training purposes in accordance with s 48 of the Fire and Emergency New Zealand Act 2017.

Artificial snowmaking and water harvesting

[196] To the best of our knowledge, Cardrona Alpine Resort Limited through its consultants, Land and Water Limited, is the only submitter on the topic of taking and storing of water for artificial snowmaking.²⁵² A related topic is water harvesting, often for storage purposes.²⁵³

[197] Cardrona said it was essential that it maintained its present limited water allocation into the future and proposed to exclude its activities from the plan change. Cardrona's submission was based on the notified version of PC7 which included average rates of takes and volumes in the methodology of Schedule 10A.4, whereas in the final version of the schedule averages have been replaced with historical maximums.

[198] More generally, Cardrona's water permits are consented as primary allocation. We are not satisfied that the case for exempting Cardrona from PC7 and proceeding under the operative regional plan has been made out.

[199] Mr De Pelsemaecker said that water takes for storage are also often authorised by supplementary allocation consents or further supplementary allocation consents. His evidence was that it would not be appropriate to exempt supplementary allocation takes from the framework of PC7. We agree that water takes for storage, be it for snowmaking or harvesting activities, should not be exempt from the provisions of PC7.

²⁵² Submission 70046.

²⁵³ Michelle and Stephen Holland (71077), Dennis Anthony Cairns – Kynlallan Farming Co Ltd (71103) and Otago Water Users Resource Group (71161).

[200] The harvesting of water for storage purposes at times of high flow is important to ensure reliability of supply. The future regional plan is likely to review the circumstances as to when and where this may occur. Mr De Pelsemaecker cautioned against users making further investments in water storage or snowmaking because the conditions under which water might be taken for such purposes might need to be reconsidered under the new regional plan.

Calendar months

[201] Southern Lakes Holdings submitted that the use of a moving average to represent any phenomena or any scientific or natural phenomena was a very common measure rather than having an arbitrary timeframe that did not relate to natural weather patterns. While this proposition may well have merit, it was not pursued by the technical experts in their conferencing with their decision being to base monthly volumes on calendar months. For the purposes of PC7 we conclude that the use of calendar months is straightforward.

Farm Management plans

[202] Wise Response and others support the use of farm management plans. The plan change does not settle the outcomes these plans are to implement. So while we acknowledge their value and important contribution to sustainable land and water management practices, their introduction into this plan change is premature.

The provisions of the plan change

The Objective(s)

10A.1.1 Facilitate an efficient and effective transition from the operative freshwater planning framework toward a new integrated regional planning framework, by managing:

- (a) the take and use of water ~~not previously authorised by a water permit;~~
and**
- (b) the replacement of deemed permits; and**
- (c) the replacement of water permits for takes and uses of freshwater where those water permits expire prior to 31 December 2025.**

[203] All planners agreed that splitting the objective into multiple elements, clarifies the specific outcomes that are sought to be achieved through PC7.²⁵⁴ Its outcome will be the transition from the current planning framework for managing freshwater under the operative regional plan and the regional policy statement to a future planning framework that provides for an integrated approach to the management of land and fresh water. That way the Otago Regional Council will give effect to the higher order planning documents.

Has the Objective been inadvertently narrowed?

[204] It occurs to us that the Objective is proposed to be amended in a way that inadvertently narrows the plan change.

[205] The notified version of the Objective talked about an interim framework to manage ‘new water permits’. ‘New water permits’ are distinguished from grants of consent for activities formally authorised by a deemed permit or a water permit

²⁵⁴ 9th JWS Planners dated 4 and 21 June 2021 at [6].

expiring prior to 31 December 2025 (which we will refer collectively to as ‘replacement permits’).

[206] The Regional Council’s policy planner proposed to amend the Objective deleting ‘new water permits’ and inserting ‘water permits for takes and uses of freshwater not previously authorised by a water permit’ and this drafting has been refined in subsequent Joint Witness Statements (‘JWS’s’).²⁵⁵

[207] The category of ‘new water permits’ in the notified plan is a clumsy expression in the sense that any grant of a resource consent is a ‘new’ grant, including grant of consents for ‘replacement permits’.

[208] That said, the Objective (as notified) applied to both ‘new water permits’ and ‘replacement permits’ and the policies and rules maintain these two classes of permits with the effect that everything outside of the narrower class of ‘replacement permits’ is captured by the general ‘new water permit’ class. If correct, the class of activity ‘new water permits’ includes any application in relation to activities authorised by water permits that expire after 1 January 2026.

[209] Few counsel/parties addressed the scope of the objective and policies directly, for those that did:

- (a) the Regional Council said the plan change establishes a requirement for short duration consents for all new water permits. Policies 10A.2.2 and 10A.2.3 are distinguished: Policy 10A.2.2 applies to resource consent applications for new surface water and groundwater takes, whereas Policy 10A.2.3 applies to replacement permits;²⁵⁶
- (b) Ngā Rūnanga addressed the plan change as providing direction on duration for all water permits and replacement permits;²⁵⁷ and

²⁵⁵ De Pelsemaeker, EiC at Appendix B.

²⁵⁶ ORC, opening submissions at [114].

²⁵⁷ Ngā Rūnanga, opening submissions at [10] and [27].

- (c) Minister for the Environment considered the plan change as providing for short duration consents for all new water permits granted under the operative regional plan rules and also for replacement permits.²⁵⁸

[210] We have found no submission seeking to narrow the ‘new water permit’ class in the way proposed. Otago Fish and Game Council, Central South Island Fish and Game Council, and Forest and Bird each made submissions on the plan change requesting the word ‘new’ be deleted from the provisions, but we understand this was proposed to clarify (not change) the provisions. Fish and Game interpreted Policy 10A.2.2 as a policy on duration applying to all resource consents and noted the interchangeable use of “new resource consents” and “resource consents” in three policies created uncertainty.

[211] See also the s 32 Report at pp 5 and 7 as providing “direction on the consent duration for all water permits to take and use water”.

Possible solution – if the Objective has been inadvertently narrowed

[212] If the plan change has been inadvertently narrowed, then we think the solution is straightforward. The scope of the plan change would be clarified by amending sub-clause (a) to simply read ‘the take and use of water;’ and making consequential amendments to Policy 10A.2.2 and to the explanatory material. This amendment respects the language used in Policy 10A.2.2 and we have track changed the amendments in Annexure 8: Plan Change 7 Provisions.²⁵⁹

[213] There are consequential amendments to:

- (a) how to use the Regional Plan: Water [2];
- (b) duration Policy 10A.2.2;

²⁵⁸ MfE, opening submissions at [20] and [21.2] and [21.3].

²⁵⁹ All amendments are tracked.

- (c) 10A.3 advice Note [1] to Rules; and
- (d) table of minor and consequential changes Section 1.4.

Those amendments make it clear that the plan change has a new policy on duration that applies to all applications to take and use water lodged under the rules of Chapter 12 of the regional plan (i.e. applications other than those to which Rule 10A.3.1.1 of Chapter 10A applies).

Should there be objectives in addition to Objective 10A.1.1?

[214] The planners participating in the 9th joint witness conference proposed additional objectives, although were not agreed on the same.²⁶⁰ The conference went well beyond the court's directions²⁶¹ with participants proposing new objectives for what appeared to us to be a range of purposes, not all of which were recorded in the JWS, and without addressing whether there was scope to amend the plan this way.

[215] We divine the additional objectives versions from this joint witness conference are to create an exception to the policies on duration and secondly to promote a pathway for non-complying activities. Version A allowed exceptions for 'where the risk of additional adverse environmental effects resulting from any proposed increase in the scale or duration of the take and use ... is low'. Version B (with two objectives) allowed for increasing scale and rate or volume and duration 'if this does not compromise the implementation of an integrated regional planning framework that prioritises the health and well-being of water bodies and freshwater ecosystems'.

²⁶⁰ 9th JWS Planners dated 4 and 21 June 2021 at [7].

²⁶¹ The directions were given in court.

Decision – should there be objectives in addition to Objective 10A.1.1?

[216] The court considered the alternative versions put forward by the planners at the 9th joint witness conference, including the reasons for a change in opinion of those who earlier supported a single objective. Both alternatives gave rise to serious questions over their possible interpretation and application in practice. The potential for unforeseen consequences was extensively explored with the planning witnesses.²⁶²

[217] Subject to finalising the drafting, the court would approve the amended version of Objective 10A.1.1 as more clearly describing the purpose and nature of the plan change than the notified version.²⁶³ This Objective and PC7 as a whole, is only an interim step towards achieving the purpose of the RMA and giving effect to the NPS-FM 2020 (and other relevant higher order planning documents), but it is a critical measure if this is to be done in an efficient and effective manner.

[218] The breadth of Objective 10A.1.1 encompasses the policies enabling short duration consents as well as the exception from a duration policy for hydro-electricity generation and the specific provision made for stranded assets. Activities not caught by the rules for controlled and restricted discretionary activities are non-complying activities. Having heard extensively from the planning witnesses, we are firm in our view that this plan change should not attempt to provide policy support for non-complying activities.

²⁶² Transcript Dunedin WKS 9/10 (Brass, De Pelsemaeker, S Dicey, Ensor, Farrell, King, McIntyre, Perkins, Styles, Twose, Hodgson) at 142-182.

²⁶³ The notified version of the objective is: Transition toward the long-term sustainable management of surface water resources in the Otago region by establishing an interim planning framework to manage new water permits, and the replacement of deemed permits and water permits to take and use surface water (including groundwater considered as surface water) where those water permits expire prior to 31 December 2025, until the new Land and Water Regional Plan is made operative.

[219] We see advantages in the single objective. The architecture of PC7 is to give the direction on duration in the policies including any exceptions as may apply. We find that is the most appropriate approach.

Policies

*Replacement consents*²⁶⁴

- 10A.2.1 Irrespective of any other policies in this Plan, avoid granting resource consents that replace Deemed Permits, or water permits for takes and uses of surface water (including groundwater considered as surface water under policy 6.4.1A (a), (b) and (c) of this Plan) where those water permits expire prior to 31 December 2025, except where:
- (a) The Deemed Permit or water permit that is being replaced is a valid permit; and
 - (b) There is no increase in the area under irrigation, except where any additional area to be irrigated is only for orchard or viticulture land uses and all mainline irrigation pipes servicing that additional area were installed before 18 March 2020; and
 - (c) Any existing residual flow, minimum flow or take cessation condition is applied to the new permit; and
 - (d) For takes other than community water supplies there is no increase in:
 - (i) ~~there is no increase in~~ the historical instantaneous rate of abstraction; and
 - (ii) ~~there is no increase in~~ any historical volume of water taken.

Should there be a limitation on total land area under irrigation?

[220] As notified, Policy 10A.2.1 limits any increase in area under irrigation. Many parties/submitters would delete this policy and its associated rules because farmers look to increase production by expanding the area under irrigation. This

²⁶⁴ Annexure 8: Plan Change 7 Provisions.

way they can afford to repay the debt incurred when upgrading to more efficient irrigation infrastructure.²⁶⁵

[221] In this section we concentrate on the case presented by Beef and Lamb, as they provided expert evidence to support an amendment to the policy. We do so, keeping in mind that a range of reasons were given for opposing this policy.

[222] Use of water for irrigation and losses of contaminants can be correlated.²⁶⁶ The expansion of irrigable area may result in an increase in contaminant loads.²⁶⁷

[223] Dr J Chrystal, Principal Science Advisor employed by Beef and Lamb, argued that with improved irrigation and management systems, such as moving from border dyke to centre pivot, it is possible to increase the irrigated area without necessarily increasing nutrient losses to water, indeed improved efficiency will likely see an overall decrease in losses, although this depends on the level of intensification of the land use on the expanded irrigated area.²⁶⁸ As noted, irrigation infrastructure is costly and typically a farmer will look to pay for that cost by increasing profitability.²⁶⁹ We accept this evidence as we do the opinion of Beef and Lamb's planner, Ms H Marr, that one consequence of Policy 10A.2.1(b) is that farmers will not upgrade their irrigation systems and therefore, a reduction in adverse effects from existing farming activities may not be realised (we interpolate, over the interim period).

[224] Importantly, Dr Chrystal is not advocating for an increase in irrigable area without also bringing to bear a range of measures to reduce the likelihood of contaminant losses.²⁷⁰ While it was Dr Chrystal's opinion that an increase in the area of land irrigated does not automatically lead to a high nutrient loss, her

²⁶⁵ See De Pelsemaeker, EiC dated 7 December 2020 at [365]-[376].

²⁶⁶ Transcript Cromwell WKS 4/5 (Phillips) at 424.

²⁶⁷ Transcript Cromwell WKS 4/5 (Marr) at 503.

²⁶⁸ Chrystal, EiC at [20].

²⁶⁹ Chrystal, EiC at [45].

²⁷⁰ Transcript Cromwell WKS 4/5 (Chrystal) at 452.

evidence does not demonstrate that there is no increase in loss. Indeed, she said that the available mitigation measures will reduce, but not necessarily eliminate, the risk of losses.²⁷¹

[225] While Beef and Lamb opposed the restriction on expansion of land under irrigation, they did not propose land use or contaminant controls. Indeed, Beef and Lamb expressly eschewed this lest farmers be locked into a nutrient load that is subsequently incorporated into a future regional plan. Beef and Lamb submitted the management of contaminants and land use is a matter best left for a future regional plan.²⁷²

[226] Ms Marr also put forward a proposed new policy to provide a decision-making framework for situations where an increase in the area to be irrigated could be provided for. Initially that was to apply where it can be demonstrated that the increased area has already been planned for and reasonable steps were taken to implement the increase, and secondly that it would result in more efficient use of water and reduce environmental impacts compared to the historical situation. She proposed an accompanying restricted discretionary activity rule. Later Ms Marr changed her original recommendation and removed the second limb of her proposed provisions relating to efficiency and environmental impacts from the policy and the rule.²⁷³ Ms Marr was extensively cross-examined, and both propositions, we find, were demonstrated to be unworkable. For the first limb that was principally because of the uncertainty about what were ‘reasonable steps’ to implement a planned increase and the extent of activities that might involve. For the second limb the policy parameters are uncertain. The policy would, we find, undermine the purpose for and objective of PC7.²⁷⁴ We take up the topic again in the context of stranded assets (below).

²⁷¹ Transcript Cromwell WKS 4/5 (Chrystal) at 437.

²⁷² Transcript Cromwell WKS 4/5 (Phillips) at 424.

²⁷³ Marr, EiC at [44]-[45]; supplementary at [21] and Appendix 1.

²⁷⁴ Transcript Cromwell WKS 4/5 (Marr) at 483-579.

[227] For some other parties, it became clear that that the extension of the qualifying period now supported by the Regional Council, which will include a greater area of land than what was notified, took care of their concerns, particularly in the light of amendments proposed to increase the limits on rate of take and volumes in Schedule 10A.4.

Decision – should there be a limitation on total land area under irrigation?

[228] We accept that there are a range of measures that could be applied to reduce contaminant losses from nutrient run-off and leaching.²⁷⁵ Beef and Lamb proposed that a restricted discretionary rule apply to increase irrigable area, however its draft rule does not reserve to the Regional Council a discretion in relation to water quality. While the Freshwater – NES has standards that could apply,²⁷⁶ the NES does not cover the full range of contaminant sources. The consent authority cannot, as may have been assumed, plug policy gaps by considering the higher order planning documents directly when determining the consent applications as (a) the policy does not exist and (b) Beef and Lamb’s proposed rule excludes this.²⁷⁷

[229] The court’s findings on the topic of water quality are set out in Annexure 4: Water Quality and we have borne these in mind in reaching this decision. The State and Trends Report²⁷⁸ highlights the need for new and replacement water permits under PC7 to be restricted to a term of six years to enable water quality to

²⁷⁵ Chrystal, EiC at [46]. Dr Chrystal included in her evidence two modelling exercises which she said highlighted that the range and degree of impact of irrigation in terms of nutrient losses through different systems was varied and depended on a range of factors.

²⁷⁶ We have in mind dairy conversion, dairy support and intensive winter grazing.

²⁷⁷ Transcript Cromwell WKS 4/5 (Marr) at 502-503.

²⁷⁸ Rachel Ozanne *State and Trends of River and Lake Water Quality in the Otago Region 2000-2020* (Otago Regional Council, Christchurch, 2021) (the State and Trends Report) attached to Snelder, supplementary evidence dated 20 May 2021.

be comprehensively addressed in a future regional plan. Water quality across the region is variable. We illustrate this with reference to the two rohe below:²⁷⁹

Dunstan rohe

For the majority of sites in this rohe, water quality is excellent.

The Cardona River has “*exceptionally unlikely*” or “*extremely unlikely*” improving trends for *E.coli*, TN, NNN, and SQMCI with similar trend assessments applying to turbidity in Mill Creek, Luggate Creek and the Kawarau and NNN in Luggate Creek. The NNN trend for the Cardona River is identified as possibly being linked to increasingly intensive land use associated with irrigation in the lower Cardona. Mill Creek has improving trends in DRP, *E.coli*, NNN, TN and TP. The report notes that the reasons for these trends have been difficult to assess in the absence of accurate information on changes in land use and land management practices around the river.

Manuherekia rohe

For the Manuherekia River, while water quality is excellent for all attributes measured above Falls Dam, bacterial water quality deteriorates downstream of the dam to below the national bottom line at Ophir and Galloway. Bacterial water quality is also below the national bottom line at all tributary sites (Hills Creek, Thomsons Creek and the Poolburn) with Thomsons Creek and Poolburn also having poor water quality below the NPS-FM bottom line across all attribute states other than toxicity. The poor water quality in Thomsons Creek is likely to be replicated in all creeks originating in the Dunstan Mountains as these tributaries flow over productive

²⁷⁹ Annexure 4: Water Quality. Note: acronyms are set out in the State and Trends Report.

farmland towards the Manuherekia.

In terms of trends, there are a number of sites in tributaries in this rohe which have degrading water quality below the national bottom line which, when combined, are likely to be contributing to the degrading trends in the main stem of the Manuherekia.

[230] Manuherekia is not the only catchment/rohe in Otago with attribute states below national bottom lines. That this is the case is not at all surprising given the general absence of land use and contaminant controls in the operative regional plan.²⁸⁰

[231] We find against the proposed expansion of land under irrigation because:

- (a) use of water for irrigation and losses of contaminants are correlated;
- (b) no controls on land use and contaminant losses are proposed;
- (c) the expansion of irrigable area may result in an increase in contaminant loads;²⁸¹ and
- (d) the findings on water quality and water quantity have informed our decision.²⁸²

Should there be any exception from the total land area under irrigation including for ‘stranded assets’?

Introduction

[232] In this section we are dealing with submissions in relation to Policy 10A.2.1(b) and related rules, but this time are considering whether an exception

²⁸⁰ See, for example, Cromwell WKS 4/5 (Marr) at 489-512 this includes having no controls over fertiliser use and application; or discharges from farm activities; or intensification of farm activities; or grazing controls. No requirement to adopt best practice for farm management or best practice for fertiliser application.

²⁸¹ Transcript Cromwell WKS 4/5 at 503.

²⁸² Annexure 4: Water Quality and Annexure 5: Water Quantity.

should be made for cases where cost has been incurred installing irrigation infrastructure (referred to in this decision as ‘stranded assets’).

[233] The planners conferenced on the topic of stranded assets and reported back in the 9th JWS. Their understanding from the evidence was that the mainline infrastructure on at least some orchard/viticulture properties had been sized and installed to irrigate all of the land planned for development.²⁸³ They noted also the potential for adverse water quality effects to arise from expanded irrigation areas, albeit with a lower risk of adverse effects for orchards and viticulture than for pastoral farming.

[234] There was general agreement among them that the operative regional plan does not adequately support a detailed assessment of the water quality effects associated with irrigation expansion. There was also agreement that a six-year consent duration in association with a limitation on land use type and allocation to historical use would limit the risks associated with water quality from irrigation expansion. Given that there was a lack of detailed information about the risk of adverse water quality effects arising from the irrigation of stranded asset areas, a precautionary approach was recommended if these areas were to be provided for under the plan change.

[235] The planners recommended that irrigation for areas which involved stranded assets for viticulture and orchards (but not increases in currently irrigated pastoral areas) could be provided for through the following amendments to the plan change:

²⁸³ We received evidence confirming this from orchardists and viticulturalists Strath Clyde Water Ltd, McArthur Ridge Vineyard Ltd and Mount Dunstan Estates Ltd (collectively Strath Clyde); Aotearoa New Zealand Fine Wine Estates Limited Partnership and Webb’s Fruit. Pastoral farmer, Southern Lakes Holdings Ltd, is in a similar position however director, Mr Enright’s, submission had not been given at the time of the conferencing.

for Policy 10A.2.1(b) to be amended to read:

there is no increase in the area under irrigation except where any additional area to be irrigated is only for orchard and/or viticulture land uses and all mainline irrigation pipes servicing that additional area were installed before 18 March 2020; and

for a new entry condition to RDA Rule 10A.3.1A.1(iii)(b) to read:

any additional area to be irrigated is only for orchard and/or viticulture land uses and all mainline irrigation pipes servicing that additional area were installed before 18 March 2020.

for a new matter of discretion to RDA Rule 10A.3.1A.1(ab) to read:

where (iii)(b) applies, the maximum size of the additional area to be irrigated and the use of good management practices on the additional area; and

for a new definition of mainline irrigation pipes to read:

The primary permanently installed pipelines delivering water to the irrigated area including the connections to the headworks at the pumping location.

[236] In closing, Mr Reid for Strath Clyde supported these amended provisions but submitted that these would be better dealt with as a controlled activity rather than as a restricted discretionary activity.²⁸⁴

[237] Drawing primarily on the evidence of Dr D Jordan, the viticulture specialist who gave evidence on behalf of McArthur Ridge, Mr Reid made the following points about vineyards (and by implication, orchards):²⁸⁵

- they do not involve the grazing of animals;
- the nutrient leaching rates are generally similar to or less than

²⁸⁴ Strath Clyde, closing submissions at [6].

²⁸⁵ Strath Clyde, closing submissions at [22] and [23].

- unirrigated sheep and beef farming;
- low impact horticulture crops use much less water than irrigated pasture;
 - where nitrogen is applied, this is low compared with pastoral applications, and leaching from vineyard activities is very low;
 - it is uncommon to apply phosphorus to vineyards; and
 - the takes and volumes of water will be restricted to historical use.

[238] He concluded by submitting that there was no real reason to take a precautionary approach for viticulture (and orchards) by adopting a restricted discretionary pathway when the stranded asset issue was so limited in scope. While he did not suggest any amendments to the wording recommended by the planners, his submission was that stranded assets for viticulture (and orchards) should be provided for under a controlled pathway.

[239] Ngā Rūnanga said that it would (with reluctance) accept a narrow restricted discretionary activity status for stranded assets for viticulture and orchards provided the consent duration did not exceed six years.²⁸⁶ We note that Wise Response did not consider that there was any basis for considering any allowance for stranded assets.²⁸⁷

[240] While the Regional Council supported the recommended amendments sought under the restricted discretionary activity pathway,²⁸⁸ when questioned by the court, Mr Maw said that he did not disagree that it was unlikely that an application for a replacement consent to include stranded assets for viticulture and orchards would be turned down by the Council. He said that if the court was so

²⁸⁶ Ngā Rūnanga, closing submissions at [29].

²⁸⁷ Wise Response, closing submissions at [17].

²⁸⁸ ORC, closing submissions at [190].

minded, with suitable drafting, he would not see any difficulties if a lesser restriction was to apply for stranded assets under a controlled activity pathway.²⁸⁹

Decision – should there be any exception from the total land area under irrigation, including for ‘stranded assets’?

[241] We accept the general consensus of the parties that stranded assets for viticulture and orchard land uses should be an exception to the total area of irrigation as at 18 March 2020 and be provided for in PC7 for a six-year term. The issue for us is whether these assets should be considered under a restricted discretionary activity pathway or available under both a controlled activity and restricted discretionary pathway.

[242] We accept that it is unlikely that an application to include stranded assets for viticulture and orchards would be declined by the Council and find, therefore, that an application for a consent seeking the inclusion of stranded assets for viticulture or orchard land uses should be provided for under a controlled activity pathway. The wording for the provisions is set out in Annexure 8: Plan Change 7 Provisions.

[243] Given the state of water quality in the region,²⁹⁰ and the absence of controls proposed for this activity, we are unable to provide relief sought by Southern Lakes. The potential contaminant losses consequential upon the use of a centre pivot in a pastoral setting are likely to be greater than viticulture and horticultural activities.

Policies on duration²⁹¹

Policy 10A.2.2 Irrespective of any other policies in this Plan concerning consent duration, only grant resource consents for takes and uses of

²⁸⁹ Transcript Dunedin WKS 9/10 (Maw) at 762, 763.

²⁹⁰ Annexure 4: Water Quality.

²⁹¹ Annexure 8: Plan Change 7 Provisions.

freshwater, where this activity was not previously authorised by a deemed permit or by a water permit expiring prior to 31 December 2025, for a duration of no more than six years.

Policy 10A.2.3 Irrespective of any other policies in this Plan concerning consent duration, avoid granting resource consents that replace Deemed Permits, or resource consents that replace water permits to take and use surface water (including groundwater considered as surface water under policy 6.4.1A (a), (b) and (c) of this Plan) where those water permits expire prior to 31 December 2025, for a duration of more than six years; except:

(x) where the take and use of water replaces a Deemed Permit associated with hydro-electricity generation infrastructure listed in Schedule 10A.5.1 and the applicant takes practicable steps to remedy or mitigate any adverse effects on the environment arising from the activity.

[244] The above are two duration policies, both setting a duration of no more than six years with a limited exception to be made for hydro-electricity generation activities from Policy 10A.2.3. There are no exceptions made to permits covered by policy 10A.2.2.

[245] We would approve the wording of these policies and do so taking into consideration our findings in relation to submissions:

- (a) seeking to reject PC7;
- (b) to provide an alternative policy pathway for long-term consents;
- (c) to provide a permitted activity rule,
- (d) having considered s 128 RMA;
- (e) Annexure 4: Water Quality; and
- (f) Annexure 5: Water Quantity.

[246] We discuss elsewhere the exception from Policy 10A.2.3 made for hydro-electricity generation.

Decision – should there be any policy to inform consideration of a non-complying activity application?

[247] The notified version of the plan change had a policy attempting to describe a non-complying activity this way:²⁹²

10A.2.3 for a duration of no more than six years, except where Rule 10A.3.2.1 applies and:

- (a) The activity will have no more than minor adverse effects (including no more than minor cumulative effects) on the ecology and the hydrology of the surface water body (and any connected water body) from which the abstraction is to occur; and
- (b) The resource consent granted will expire before 31 December 2035.

[248] The drafting of the policy proved discombobulating, and we were not surprised that planners found it taxing to conceive of activities that might justify an exception to the duration policies.

[249] It is unusual (in our experience) to have policies specifically pertaining to non-complying activities. The amendment of the policy to remove the description of potential qualifying non-complying activities is approved. We leave the ‘avoid’ or ‘not grant’ duration policies intentionally directive to limit the use of the non-complying pathway.

Rules

Controlled activity rule

[250] The controlled activity (10A.3.1.1) is the most straightforward consenting pathway, with the Regional Council required to grant consent with a six-year term and only able to look at a limited number of matters in processing the application.

²⁹² PC7, Policy 10A.2.3 (notified version).

The Regional Council proposed, and parties supported, the amendment to exclude controls conferring discretion upon the Council in respect of a range of environmental methods.²⁹³

[251] To qualify as a controlled activity the entry conditions set out in the rule must be met. An application for resource consent under this rule is to be processed without public or limited notification. To take advantage of this rule it is anticipated that most, if not all, applications for water permits currently lodged with the Regional Council, will need to be amended.

[252] Several entry conditions to the rule were robustly contested, namely:

- (i) the limitation on consent duration of no more than six years;
- (ii) the restriction on land area under irrigation and secondly, the date reference used to determine the area;
- (iii) the relevant period to determine the historical instantaneous take and volume;
- (iv) stranded assets; and
- (v) deemed permits.

The limitation of consent duration to no more than six years

[253] Many submitters sought to amend Rule 10A.3.1.1 to increase the duration of consent.²⁹⁴

[254] Related submissions include:

- (i) rejecting the plan change;
- (ii) amending the plan change to include a rule that the taking and use of water is a permitted activity;

²⁹³ De Pelsemaeker, supplementary evidence dated 14 March 2021.

²⁹⁴ A summary of submissions made is set out in De Pelsemaeker, EiC at [218]-[233].

- (iii) amending the plan change to include a policy pathway for consents exceeding six years.

[255] The court cannot simply amend a rule to provide for a longer duration. Section 67 RMA is clear: rules are to implement policies. The notified plan change does not contain supporting policies and it was for this reason that other parties proposed a policy pathway for consents exceeding six years (addressed elsewhere).

The restriction on land area under irrigation and secondly, the date reference used to determine the area

[256] The submissions on the restriction on area of irrigable land have been addressed under the relevant policy. The control on land area is to discourage further investment in irrigation expansion.

[257] We have not accepted the related submission that the consent authority instead rely on s 128 of the Act to bring consented activities in line with the new plan. As is their right, given the cost of irrigation infrastructure we anticipate many permit holders will oppose any review of consent conditions. That said, the state of water quality in the region,²⁹⁵ and uncertainty around availability of water quantity to meet demand, justify the retention of the control and discouragement of expansion.

The relevant period to determine the historical instantaneous rate of take and volume

[258] Submitters raised cogent reasons to amend the date period in the notified version of the plan change when determining the historical instantaneous take and volumes. The effect of this rule would be to reduce the rate of take and volume on re consenting and the implications of this are set out in the introductory paragraphs to the Primary Sector section of this decision.

²⁹⁵ Annexure 4: Water Quality.

[259] The date range of 1 July 2012 – 30 June 2017 is to be deleted and the provision amended to allow consideration of all water years²⁹⁶ for which water meter data is available up until 30 June 2020. For some but not all activities, this aligns the date range with the requirements to meter water takes pursuant to the Resource Management (Measurement and Reporting of Water Takes) Regulations 2010 (amended 2020).²⁹⁷ There is an exception for situations where metering is not required by conditions of a resource consent or the regulations, with the rate and volume sought to be within the terms of the existing consent. Schedule 10A.4 has also been amended to bring it into line with the controlled activity entry conditions by not allowing calculations to include dates for water years past 30 June 2020.

Stranded assets

[260] Provision for stranded assets within this rule is discussed elsewhere in the decision.

Deemed permits

[261] Provision to retain within this rule flow-sharing between former holders of deemed permits is discussed elsewhere in this decision.

Matters over which the Regional Council reserves control

[262] The court finds that carrying through existing consent conditions in the way proposed, achieves a straightforward controlled activity consent pathway that rolls over checks on an existing consent.

²⁹⁶ A water year is defined as the period 1 July to 30 June.

²⁹⁷ ORC, opening submissions at [133].

General comment on interpretation of rules

[263] The same entry conditions apply to Rules 10A.3.1.1 and 10A.3.1A.1. These are:

“Despite any other rule or rules in this Plan:

- (a) any activity that is currently authorised under a deemed permit; or
- (b) the take and use of surface water ... that is currently authorised by an existing water permit where that water permit expires prior to 31 December 2025”.

[264] The reservation of control/restriction of discretion in both rules talk about “existing water permit conditions”. For avoidance of doubt, the phrase “existing water permit conditions” is to be interpreted as applying to **both** deemed permits and existing water permits expiring prior to 31 December 2025.

[265] The rule that applies to hydro-electricity generation activities (Rule 10A.3.1B.1), only applies to deemed permits. We have proposed an amendment to the rule to standardise the language.

[266] The use of different terms also arises in relation to Schedule 10A.4. The activities to which the Schedule applies are listed in the entry conditions to the controlled activity rule, however the Schedule uses generic terms such as ‘consents’ and ‘permits’. To make the interpretation of the Schedule clear, an amendment has been proposed.

Decision – a new restricted discretionary activity rule (Rule 10A.3.1A.1)²⁹⁸

[267] A new restricted discretionary rule is proposed to be added to the plan change.

²⁹⁸ 12th JWS dated 12 July 2021.

[268] No party opposed a new restricted discretionary activity consent pathway for those activities that comply with the entry conditions for a controlled activity (except conditions (iv) rate of take based on water meter data and (vi) volume of water based on water meter data – with both calculated in accordance with the methodology in Schedule 10A.4).

[269] We accept reasons put forward by parties in support of the restricted discretionary activity rule.²⁹⁹

Stranded assets

[270] Provision for stranded assets within this rule is discussed elsewhere in this decision.

Deemed permits

[271] Provision to retain within this rule flow-sharing between former holders of deemed permits is discussed elsewhere in this decision.

Decision – should all consent applications proposing a duration exceeding six years be a non-complying activity?

[272] PC7, as notified, provides that applications for new water continue to be assessed in accordance with the provisions in Chapters 5, 6, 12 and 20 of the operative regional plan, except that the duration of any water permit will be determined in accordance with the policies in Chapter 10A. Fish and Game proposes³⁰⁰ a new rule to make all applications for resource consent to take or use new water for a duration of more than six years, a non-complying activity.

²⁹⁹ See 4th JWS dated 7-8 April 2021; 5th JWS dated 4-6 May 2021 and 12th JWS dated 12 July 2021.

³⁰⁰ Fish and Game (submission 70045); Farrell, supplementary evidence at [5c] and [19].

[273] The policy on duration for permits covered by Policy 10A.2.2 is very directive.³⁰¹ Accordingly, we do not find any need to add a rule as proposed by Fish and Game.

Decision – 10A.3.2 Non-complying activity: Resource consent required

[274] The non-complying activity is to have Rule 10A.3.1A.1 and Rule 10A.3.1B.1 added as a consequential amendment to the introduction of the new restricted discretionary activity rules with the effect that where the entry conditions for either controlled or restricted discretionary activities are not met, a non-complying activity application is required.

Decision – definitions

[275] The definitions of ‘valid permit’, ‘mainline irrigation pipes’ and ‘take cessation condition’ and the definitions that apply when replacing a deemed permit are accepted as adding clarity and certainty to the provisions of PC7.

Other drafting amendments

[276] We have also made other minor amendments to the PC7 provisions for clarity and consistency reasons, such as not using ‘and/or’. All changes from the text in the provisions in the 12th JWS are tracked.

³⁰¹ That is in stark contrast to Policy 6.4.19 that has an explanation that does not reflect the policy and that decision-makers have read into the policy in decision-making.

Hydro-electricity generation

[277] At issue is whether hydro-electricity generation activities are to be treated on the same footing as other activities that also take and use water.

National Policy Statement for Renewable Electricity Generation 2011

[278] The matters of national significance to which this NPS applies are:

- (a) the need to develop, operate, maintain and upgrade renewable electricity generation activities ('renewables') throughout New Zealand; and
- (b) the benefits of renewable electricity generation.

[279] The sole objective of the NPS-REG 2011 is to recognise the national significance of renewables by providing for development, operation, maintenance, and upgrading of new and existing renewable activities. This is with the outcome that the proportion of electricity generated from renewable energy sources increases to a level that meets or exceeds the New Zealand Government's national targets for generation.³⁰²

[280] Regional policy statements and regional and district plans are to include provisions for new and existing hydro-electricity generation activities.³⁰³ To the extent applicable to Otago,³⁰⁴ this entails decision-makers recognising and providing³⁰⁵ for the national significance of renewables, including the following benefits:

³⁰² NPS-REG 2011, Objective.

³⁰³ NPS-REG 2011, Policy E2 Hydro-electricity resources.

³⁰⁴ NPS-REG 2011, Policy E2 Hydro-electricity resources.

³⁰⁵ Ministry for the Environment *National Policy Statement for Renewable Electricity Generation 2011: Implementation Guide* (Ministry for the Environment, Wellington, 2011) at 8 states 'recognise and provide for' means actual provision must be made for the matter in the planning documents.

Policy A

- (a) maintaining or increasing electricity generation capacity while avoiding, reducing or displacing greenhouse gas emissions;
- (b) ...
- (c) using renewable natural resources rather than finite resources;
- (d) ...
- (e) avoiding reliance on imported fuels for the purposes of generating electricity.

[281] Decision-makers are to have particular regard³⁰⁶ to:

Policy B

- (a) maintenance of the generation output of existing renewable electricity generation activities can require protection of the assets, operational capacity and continued availability of the renewable energy resource; and
- (b) ...
- (c) ...

[282] The national significance of renewables and the benefits of renewable electricity generation are also acknowledged in the NPS-FM 2020 through its policy on climate change.

National Policy Statement for Freshwater Management 2020

[283] Te Mana o te Wai, which is relevant to all freshwater management,³⁰⁷ imposes a hierarchy of obligations which prioritises first, the health and well-being of water bodies and freshwater ecosystems.³⁰⁸ The other priorities are second, the health needs of people, and third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

³⁰⁶ Ministry for the Environment *National Policy Statement for Renewable Electricity Generation 2011: Implementation Guide* (Ministry for the Environment, Wellington, 2011) at 8 states the duty to 'have particular regard' is one of inquiry. The decision-maker must give the identified matter(s) genuine attention and thought and weigh them carefully in coming to a conclusion.

³⁰⁷ NPS-FM 2020, cl 1.3(2).

³⁰⁸ NPS-FM 2020, cl 1.3(5).

[284] These priorities are carried forward into the national policy statement's objective and policies;³⁰⁹ policies implementing the objective include managing freshwater as part of New Zealand's integrated response to climate change.³¹⁰

[285] We return briefly to the preamble of the NPS-REG 2011 to note the statement that the national policy statement does not apply to the allocation and prioritisation of freshwater. While the Environment Court was not dealing with a national policy statement for fresh water, we respectfully agree with the court's observations in *Carter Holt Harvey Ltd v Waikato Regional Council*³¹¹ as to the practical effect of the statement in the preamble:

... the National Policy Statement [for Renewable Electricity Generation] should not be used to justify always giving hydro-electricity generation activities priority when making freshwater allocation decisions. It envisages that there may be circumstances where this will not be appropriate and should not occur.

The current relevance of this statement is reinforced by the objectives and policies of the NPS-FM 2020.

Regional Policy Statement (RPS)

[286] PC7 is also to give effect to the partly operative regional policy statement; the latter instrument regrettably doing little by way of fleshing out the national policy statements.

[287] For energy resources and supplies to be secure, reliable and sustainable,³¹² the generation output of existing regionally significant renewables is to be protected by, *inter alia*, recognising their functional needs, including resource

³⁰⁹ NPS-FM 2020, cl 2.1 and 2.2 Policy 1.

³¹⁰ NPS-FM 2020, cl 2.2 Policy 4. While the Clutha Scheme is located in Otago, no submission on PC7 was made by the scheme operators and we have not had regard to the policy that applies to large HEG schemes (NPS-FM 2020, cl 3.31).

³¹¹ *Carter Holt Harvey Ltd v Waikato Regional Council* [2011] NZEnvC 380 at [58]-[59].

³¹² RPS, Objective 4.4.

needs.^{313,314} This is not to suggest that the environment will always give way to hydro-electricity generation on consenting. That would be inconsistent with the direction in the NPS-FM 2020 and also the regional policy objective that infrastructure is managed and developed in a sustainable way.³¹⁵ That aside, the policy statement provisions on climate change are that communities are prepared for and able to adapt to the effects of climate change and, in the context of PC7, the encouragement of system resilience is relevant.³¹⁶

Proposed Otago Regional Policy Statement (ORPS)

[288] Finally, we have had regard to the proposed policy statement.

[289] With one exception noted, ‘renewable electricity generation’, including hydro-electricity generation, is identified as being ‘regionally significant infrastructure’.³¹⁷

[290] Many of the significant resource management issues identified are applicable to renewable electricity generation, including hydro-electricity generation. While we do not set out all the issues here, the fact that climate change is likely to impact Otago’s economy and environment is recognised as a significant resource management issue for the region going forward: ‘Otago’s climate is changing, and these changes will continue for the foreseeable future’.³¹⁸

³¹³ RPS, Policy 4.4.3.

³¹⁴ For completeness, we record Policy 4.4.1 is concerned with the subject matter of renewable electricity generation, although this is to paraphrase the NPS-REG 2011 without further elaboration.

³¹⁵ RPS, Objective 4.3.

³¹⁶ RPS, Objective 4.2 and Policy 4.2.2.

³¹⁷ ‘Renewable electricity generation’ has the same meaning as in the Interpretation section of the National Policy Statement for Renewable Electricity Generation 2011 and is electricity from solar, wind, hydro-electricity, geothermal, biomass, tidal, wave, or ocean current energy sources. ‘Regionally significant infrastructure’ means renewable electricity generation facilities that connect with the local distribution network but not including renewable electricity generation facilities designed and operated principally for supplying a single premise or facility.

³¹⁸ ORPS, SRMR–12.

[291] While all provisions in the IM-Integrated Management section are relevant, there are detailed provisions about climate change.

[292] The proposed policy statement's objectives include that Otago's communities and economy are supported by renewable energy generation that is safe, secure, and resilient.³¹⁹ Noting its contribution to meeting New Zealand's national target for renewable electricity generation, an outcome of the proposed policy statement is that generation capacity is to be maintained and, if practicable, maximised within environmental limits.³²⁰

[293] Of undoubted importance to a future regional plan, are policies that require decisions on the allocation and use of fresh water and development of land to first, recognise the national, regional and local benefits of renewables and second, take account of the need to maintain renewable electricity generation capacity.³²¹

[294] That said, renewables are not given a free pass on their effects on the environment; the effects associated with the operation and maintenance of existing renewables are to be minimised.³²²

Should there be a special regime for the renewal of specific deemed permits authorising hydro-electricity generation activities?

[295] Submitters who either hold or may hold relevant permits for hydro-electricity generation activities are the following:

- (a) Pioneer Energy Ltd;
- (b) Mount Earnslaw Station; and
- (c) Trustpower Ltd.

³¹⁹ ORPS, EIT-EN-O1 – Energy and social and economic well-being.

³²⁰ ORPS, EIT-EN-O2 – Renewable electricity generation.

³²¹ ORPS, EIT-EN-P2 – Recognising renewable electricity generation activities in decision-making.

³²² ORPS, EIT-EN-P1 – Operation and maintenance. See also, EIT-INF-O4 – Provision of infrastructure and EIT-INF-P10 – Recognising resource requirements.

Pioneer Energy Ltd

[296] Submissions on the topic of renewable activities were received from Pioneer Energy Ltd seeking by way of relief to either reject PC7 or alternatively, exclude deemed permits for damming activities and associated infrastructure from its provisions. Pioneer Energy generates electricity from water stored at Frasers Dam and elsewhere.³²³ While not entirely clear, other than for the Upper Roaring Meg Dam,³²⁴ it does not appear that Pioneer Energy holds permits for damming activities, but rather is potentially affected by decisions in respect of applications to consent the same. Therefore, while Pioneer Energy is a generator, its submission has been considered in the Dams section of this decision.

Mount Earnslaw Station

[297] Mount Earnslaw Station is generating electricity from stored water. No water is used for irrigation and all water is returned to the catchment. The permit holder wishes their activity to be considered separately from permits associated with the take and use of water for irrigation.³²⁵ This relief differs from the original submission on the plan change which was to reject PC7. That said, the consultancy representing Mount Earnslaw did not propose wording for the alternative relief for a separate consenting pathway.³²⁶ The court directed the Regional Council's policy planner to give further consideration to Mount Earnslaw's circumstances³²⁷ and this was done in the 11th JWS, although again – no provisions were

³²³ While Pioneer Energy submission does not identify other locations in which the generator is operating, we were told by other witnesses that it was also generating electricity in association with the Falls Dam, Manuherekiā River.

³²⁴ Curran, supplementary evidence dated 14 May 2021, Table at p 3.

³²⁵ Transcript Cromwell WKS 4/5 (Perkins) at 123-124. We note that the relief supported by Ms Perkins differs from the original submission where Mount Earnslaw sought the plan change be rejected.

³²⁶ Transcript Cromwell WKS 4/5 (Perkins) at 122-124.

³²⁷ Transcript Dunedin WKS 9/10 (De Pelsemaecker) at 348.

recommended.³²⁸ The Regional Council's lawyer also turned his mind to the issue, but he found he had insufficient information to proceed further.³²⁹

[298] We have taken this matter as far as we can and in the absence of any proposed provisions, the plan change is to apply to any application lodged by Mount Earnslaw Station to re-consent permits pertaining to its hydro-electricity generation activity.

Trustpower Ltd

The Waipori and Deep Stream Schemes

[299] Trustpower's Waipori hydro-electricity generation Scheme was commissioned in 1907 to provide power to Dunedin with the Deep Stream Scheme being added in 2008.

[300] Currently there are around 100 deemed permits for the Waipori Scheme. Replacement consent applications have been filed with the Regional Council by Trustpower for seven of these deemed permits, all associated with the four water races. Trustpower advised that it would not be seeking replacement consents for the remainder of its deemed permits (totalling around 90 permits) all of which expire in October 2021. Trustpower advises that none of its deemed permits are subject to rights of priority.³³⁰

Background to Trustpower's position and updated relief being sought

[301] Trustpower submitted on the plan seeking to limit the application of Policy 10A.2.2 to irrigation activities and secondly, to enable the re-consenting of water permits for hydro-electricity generation activities. The rationale for seeking this relief is that Trustpower needs certainty that it can continue to operate its schemes

³²⁸ 11th JWS dated 5 July 2021.

³²⁹ Transcript Dunedin WKS 9/10 (Maw) at 743.

³³⁰ Joint memorandum dated 8 October 2021 at [2].

after six years and secondly, the provisions on short duration impact investment decisions around new development and maintenance/enhancement of existing schemes.³³¹ We have found elsewhere, the court does not have jurisdiction to grant aspects of Trustpower's amended relief.³³²

[302] In its submission on the plan, Trustpower sought to enable hydro-electricity generation activities in general; in amended relief Trustpower confined its relief to specified schemes.³³³ Trustpower proposed amended relief on four occasions; on three occasions through their planning witness Ms S Styles,³³⁴ and the fourth through counsel's closing submissions which, because it was advanced in a closing submission, was not subject to any testing through examination nor assessment under s 32AA.³³⁵

[303] Counsel for Trustpower and the Regional Council subsequently conferred on the plan change provisions and counsel for Regional Council sought to advance a fifth amended relief.³³⁶ We will refer to this draft as the '7 July hand-up'.

7 July Hand-up

[304] The 7 July Hand-up proposed substantive amendments to the objective, policies and rules that are of relevance to TAs, Trustpower and to those parties interested in the topic of stranded assets. Drafted by counsel, the relief had not been properly evaluated by the Regional Council's policy planner, Mr De

³³¹ Foran, EiC dated 5 February 2021 at [6.11]-[6.16]; Styles, EiC dated 5 February 2021 at [6.6], [6.8].

³³² Trustpower, closing submissions, original Annexure (B) Policy 10A.2.2. See Annexure 2: Scope Challenge.

³³³ Namely, Waipori and Deep Stream Hydro-electric Schemes.

³³⁴ Styles, EiC dated 5 February 2021; supplementary evidence dated 23 March 2021 and summary of evidence dated 17 May 2021.

³³⁵ In Annexure 2: Scope Challenges we decided there is no scope for the court to consider the amendment to Policy 10A.2.2, wherein Trustpower in closing proposed there be no consideration of environmental effects for the first six years of a new activity. There is, however, scope to consider a general exemption of Trustpower's activities from Policy 10A.2.2 and Policy 10A.2.3.

³³⁶ Transcript Dunedin WKS 9/10 (Maw) at 604.

Pelsemaeker, or sighted by its regulatory and consents witness, Ms King.³³⁷ And again, its provisions were not assessed under s 32AA.

[305] We do not recall whether counsel for the Territorial Authorities was involved in its drafting, but plainly other counsel in the courtroom that day were not and reservations were raised about potential prejudice.³³⁸ We will treat the 7 July hand-up as the Regional Council's statement of position on these important topics.³³⁹

Regional Council's planning evidence

[306] Mr De Pelsemaeker did not support amending the plan change to make specific provision for renewables, although he remained open to evidence persuading him to a contrary view.³⁴⁰ The last comprehensive opinion given by Mr De Pelsemaeker on the topic of renewables is in his evidence-in-reply where he confirms his earlier view emphasising the failure by the regional planning documentation to give effect to either the NPS-FM or NPS-REG means reliance on the operative policy statement and regional plan to make long-term decisions on consenting renewables is fraught with difficulty.³⁴¹

[307] While Mr De Pelsemaeker remained of the view that all hydro-electricity generation activities should be of limited duration (i.e. six years),³⁴² in relation to Trustpower's activities he said:³⁴³

³³⁷ Transcript Dunedin WKS 9/10 (Maw) at 584-585.

³³⁸ Transcript Dunedin WKS 9/10 (Winchester) at 614.

³³⁹ See transcript Dunedin WKS 9/10 (Maw) at 583 where he says the provisions would, in the ordinary course, have been attached to his submissions but on this occasion, he had tabled them in advance.

³⁴⁰ De Pelsemaeker, EiC dated 7 December 2020 at [349]-[356].

³⁴¹ De Pelsemaeker, reply (June) at [47].

³⁴² De Pelsemaeker, reply (June) at [49] & [56].

³⁴³ De Pelsemaeker, reply (June) at [51]-[53]. In Appendix 5 to his reply, he identifies and evaluates four options that emerged in evidence during the hearing.

[51]

(a) ...

(b) The efficacy of PC7 to bring the management of the Waipori and Deep Stream HEG Schemes in line with the management regime in this new regional planning framework is conceivably constrained. This is because the activities that are currently authorised by the deemed permits that Trustpower is seeking to replace are functionally connected to other aspects of these schemes authorised by a wider suite of consents that will not expire until 2038.

[52] For a variety of reasons the Environment Court may be minded to adopt a different position with regard to the management of (some) HEG schemes from the one stated [that was not to provide for any specific relief for hydro-electricity generation activities]. If that is the case, an alternative option would be to amend PC7 to include a new DA rule for takes and/or uses of water authorised by deemed permits associated with the operation of the Waipori and Deep Stream HEG Schemes only for a term that (better) aligns with the expiry dates of other consents authorising the operation of these schemes.

[53] This alternative option could, depending on the exact consent duration provided for, incentivise accelerating the timing of applying for resource consents to replace existing permits currently authorising other aspects of the Waipori and Deep Stream HEG Schemes. For example, allowing the replacement consents to be granted for a period up to 31 December 2035 could act as an incentive for Trustpower to apply for a full suite of new resource consents for the operation of the Waipori and Deep Stream HEG Schemes within the lifespan of the new regional planning framework.

[308] Mr De Pelsemaeker helpfully proposed provisions which could apply were the court minded to exclude Trustpower from the policies on duration. He was not cross-examined in respect of his proposed wording.

Position of the Regional Council

[309] In closing, counsel for the Regional Council indicated his client would support a restricted discretionary activity pathway on the basis that new and replacement consent applications limit the consent duration to 31 December 2035 rather than 31 May 2038. Applications for new activities would continue to be assessed under the provisions of Chapters 6, 12 and 20 of the regional plan.³⁴⁴ The Regional Council takes this position to ensure that Trustpower's permits align with the 10-year term of the new regional plan and that the volume and rate of take is in accordance with historical use, and finally that the effects on the environment are taken into account.³⁴⁵

[310] As noted above, the Regional Council's position differs from its policy planner, Mr De Pelsemaecker, insofar as he does not support any consents exceeding a six-year duration.

Position of other parties

[311] The Minister for the Environment supported,³⁴⁶ and Forest and Bird did not oppose, the latest relief proposed by Trustpower.³⁴⁷

[312] Ngā Rūnanga's position was that there should be no exceptions made to the six-year duration for new or replacement consents.³⁴⁸ Terms extending well into and beyond the lifetime of the new regional plan would undermine the significant effort and engagement that is currently occurring between Ngā Rūnanga and ORC, undermine Treaty principles and also undermine the ability of Kāi Tahu to exercise rākatirataka and kaitiakitaka.³⁴⁹ We will not comment on the

³⁴⁴ ORC, closing submissions at [155].

³⁴⁵ ORC, closing submissions at [154]; transcript Dunedin WKS 9/10 (Maw) at 743-744.

³⁴⁶ MfE, closing submissions dated 5 July 2021 at [30]-[35].

³⁴⁷ Forest and Bird, closing submissions dated 2 July 2021 at [20].

³⁴⁸ Ngā Rūnanga made further submissions in response to Trustpower's submission on the plan change.

³⁴⁹ Ngā Rūnanga, closing submissions dated 5 July 2021 at [28(d)].

relationship between the Regional Council and Ngā Rūnanga. But, for the reasons that we have given, we accept that the regional plan does not enable the proper consideration of Ngā Rūnanga's interests and values in the consenting process.

[313] Fish and Game's position is that until there is more detailed national direction beyond the NPS-REG 2011 as to how renewable energy is to be weighted, there was no justification for treating hydro-electricity generation activities any differently in PC7. That is, the six-year term in PC7 should also apply to the take and use of water for renewable activities.³⁵⁰

Consideration

[314] The national significance of renewable electricity generation activities and the benefits of generation are not in dispute; nor is the contribution of hydro-electricity to generation capacity in the attainment of NPS-REG's objective.

[315] Many of the issues raised by Trustpower in its submission on the plan change are resolved through amendments to be made to Policy 10A.2.1, Rule 10A.3.1.1 (for controlled activities) and Schedule 10A.4.³⁵¹ However, Trustpower would have the plan change go further.

[316] Broadly speaking, the options being pursued by the various parties interested in this topic are as follows:

Option 1: approve PC7 policies without amendment. The consent authority will only grant consent for all renewable activities for a duration of six years;

Option 2: exclude all hydro-electricity generation activities from PC7's policies on duration and consider the duration of these activities under Policy 6.4.19 of the regional plan. Include a discretionary activity rule for

³⁵⁰ Fish and Game, closing submissions dated 5 July 2021 at [18]-[22].

³⁵¹ De Pelsemaeker, reply at [39] and Styles, summary of evidence at [5].

replacement activities.³⁵²

Option 3: amend Policies 10A.2.2. and 10A.2.3 to create an exception for Trustpower’s hydro-electricity generation activities enabling a grant of consent for a duration up to 2035 or 2038 and amend PC7 to include a restricted discretionary activity rule.^{353, 354}

[317] We do not have copies of Trustpower’s deemed permits in evidence but our experience with other such permits would indicate that it is unlikely these permits will be subject to conditions managing the effect of the taking and use of water. As planning evidence led on behalf of Trustpower does not address the operative regional plan, we do not know whether there are provisions in that plan for renewable activities. Our perusal of the plan would suggest not. The salience of this being that Chapter 6 of the operative regional plan provides weak direction on the outcomes for water quality and quantity, with little or no regard being paid to associated land uses.

[318] As directed by the NPS-FM 2020, the regional plan has now been amended³⁵⁵ to insert:

- (a) the objective in NPS-FM cl 3.26(1) (fish passage) as new Objective 8.3.5;
- (b) the policy in NPS-FM cl 3.22(1) (natural inland wetlands) as new Policy 5.4.2A; and
- (c) the policy in NPS-FM cl 3.24(1) (rivers) as new Policy 10.4.8.

[319] While these are important provisions, no party advances the proposition that they cover the field in terms of actual and potential effects of hydro-electricity generation activities. These provisions do not implement the concept of Te Mana

³⁵² Styles, summary statement dated 17 May 2021.

³⁵³ Trustpower, closing submissions, Annexure B.

³⁵⁴ The ‘7 July Hand-up’.

³⁵⁵ ORC, closing submissions at [24].

o te Wai specifically nor NPS-FM 2020 generally; this is to be done through the proposed policy statement and a new regional plan.

[320] Recalling the significant resource management issues that PC7 is to address, two issues stand out for hydro-electricity generation activities:

- (i) the original authorisation to take and use water will not have prioritised first the health and well-being of water bodies and freshwater ecosystems; and
- (ii) the current planning framework does not give effect to the objectives and policies of the NPS-FM 2020.

[321] Earlier we accepted Ms McIntyre's criticism of the regional plan's provisions, and in this context we add:

- (a) the regional plan does not give effect to the NPS-FM 2020 or its predecessors;
- (b) to the extent that it can be said that the regional plan has a planning paradigm, it is opposed to Te Mana o te Wai as expressed in cl 1.3 of NPS-FM 2020 (concept and framework);
- (c) Te Mana o te Wai is not an integral part of freshwater management in Otago;
- (d) the regional plan's weakly drawn objectives provide no direction on outcomes for the environment (people and communities included) and do not prioritise the health and well-being of water. There is, we find, a weighting towards abstractive uses through its policies and rules;
- (e) an issue for Ngā Rūnanga is that their cultural values are recognised by giving effect to Te Mana o te Wai in the regional planning documents. Put another way: Te Mana o te Wai is both a value in itself and a concept under the NPS-FM. This is in contra-distinction

with Trustpower's case which promotes the outmoded³⁵⁶ line of inquiry as to the effect on cultural values from the taking and use of water in a consenting process;

- (f) under Te Mana o te Wai the choice between the health and well-being of water bodies and freshwater ecosystems on the one hand and the health needs of people or their social, economic and cultural well-being on the other, is a false dichotomy.

[322] There are, however, two national policy statements and, as we have noted, the national significance of renewable activities and the benefits of renewable electricity generation are acknowledged in the NPS-FM 2020 through its policy on climate change. The NPS-FM 2020 objective is implemented by 15 policies, one of which is that freshwater is managed as part of New Zealand's integrated response to climate change (Policy 4). While we do not discuss his evidence in detail, we have borne in mind Dr M Salinger's evidence (Wise Response) on climate change and the likelihood of New Zealand's domestic policy settings changing following COP26, UN Climate Change Conference.³⁵⁷

[323] We find a case has been made out under the higher order planning documents for exempting the reconsenting of Trustpower's deemed permits from the policy on duration (Policy 10A.2.3). The maintenance of renewable electricity generation activities is a matter of national significance. NPS-REG 2011 policies and the policies in the operative and proposed policy statements recognise the maintenance of generation capacity.³⁵⁸

³⁵⁶ Outmoded in relation to the NPS-FM 2020 and its predecessors as it puts abstractive uses to the forefront of discussion and decision-making and not the health and well-being of water bodies and freshwater ecosystems.

³⁵⁷ COP 26, UN Climate Change Conference hosted by the UK in partnership with Italy, from 31 October 2021.

³⁵⁸ ORPS, EIT-EN-O2 – Renewable electricity generation and EIT-EN-P2 – Recognising renewable electricity generation activities in decision-making. RPS, Objective 4.4, Policy 4.4.3 and 4.4.1.

[324] The environment is already impacted by Trustpower's activities; in order to be reconsented Trustpower will need to satisfy the consent authority that it will take practicable steps to remedy and mitigate those effects. The Regional Council may review those consents under s 128 of the Act if a new regional plan sets maximum or minimum levels of flows, rate of take or minimum standards of water quality. We will not approve the directions sought by Trustpower in relation to ss 95A and 95B concerning notification of an application for consent as we were not satisfied that the evidence led demonstrated this is appropriate.

[325] The duration of consents replacing Trustpower's deemed permits are not to extend beyond 31 December 2035. Trustpower proposed a longer duration³⁵⁹ to coincide with the expiry date for other permits for the scheme. Trustpower is not proposing the longer duration for mere convenience as there is sense in bundling the activities and considering them in the round. We accept, however, the Regional Council's submission that Trustpower's renewable activities should be reconsidered under the future regional plan rather than being put off.

Other amendments proposed

[326] We find against Option 2 which is to determine the duration in accordance with Policy 6.4.19 of the Regional Plan.³⁶⁰ The policy and the explanation to the policy are not consistent, a fact that the consent authority may have overlooked when applying this policy.

[327] With the above findings in mind, we turn to the drafting of the provisions.

³⁵⁹ 31 May 2038.

³⁶⁰ Trustpower, closing submissions, Annexure B.

Amendments to the provisions

Objective 10A.1.1 and Policy 10A.2.2

[328] No changes are made to Objective 10A.1.1 or Policy 10A.2.2.

[329] Given the paucity of policy in the regional plan we will not amend Policy 10A.2.2 to allow Trustpower to seek longer-term consents for activities that have not been previously authorised. This means, Policy 10A.2.2 applies without amendment to its 'Black Rock Race' application for resource consent.³⁶¹

Policy 10A.2.3 and rule

[330] Having considered the options put forward in evidence, the court proposed a draft amendment to Policy 10A.2.3 and a new restricted discretionary activity rule and sought the parties' comment.³⁶² As no issues were raised in relation to the same, we approve of the exception to Policy 10A.2.3 for hydro-electricity activities listed in Schedule 10A.5.1 and approve a restricted discretionary activity rule (Rule 10A.3.1B.1). The wording is set out in Annexure 8: Plan Change 7 Provisions.

[331] Policy 10A.2.3 is to be amended by providing for the following exception:

- (xx) where the take and use of water replaces a Deemed Permit associated with hydro-electricity generation infrastructure listed in Schedule 10A.5.1 and the applicant takes practicable steps to remedy or mitigate any adverse effects on the environment arising from the activity.

³⁶¹ The intake coordinates for Black Rock Race are set out in the Joint Memorandum 'Regarding Trustpower Intake Coordinates' dated 9 July 2021.

³⁶² Minute 'Trustpower' dated 1 October 2021 and Joint memorandum 'Trustpower' dated 8 October 2021.

[332] The exception to Policy 10A.2.3 is to apply to the four races listed in Schedule 10A.5.1 and the matters of discretion are to inform decision-making on duration.

Territorial Authorities

Introduction

[333] We have examined the different outcomes supported by the Territorial Authorities, paying close attention to the wording of the relevant provisions in the national policy statements on which they rely.

[334] The Territorial Authorities submit PC7 is inconsistent with:

- (a) the NPS-FM, Objective 2.1(b) – the health needs of people;
- (b) the NPS-UD 2020; and
- (c) the partly operative RPS.³⁶³

[335] They say they will be *inhibited* from fulfilling their statutory obligations unless they are granted long-term water permits for community water supplies.³⁶⁴ They submit long-term consents are essential for continuity of water supply to the community, to support forward planning and in order for Territorial Authorities to have the confidence to make significant financial investment in infrastructure.³⁶⁵ By way of relief, the Territorial Authorities seek community water supplies be either excluded from PC7 and left to be comprehensively addressed under a future regional plan³⁶⁶ or alternatively, PC7 is amended to include an opportunity to gain long-term permits for new and replacement consents.³⁶⁷

³⁶³ Territorial Authorities, opening submissions at [54]. At [7] of the opening submissions the Territorial Authorities submit PC7 *prevents* them from satisfying their obligations under these planning instruments.

³⁶⁴ Territorial Authorities, opening submissions at [8], transcript Cromwell WKS 4/5 (Twose) at 338-339, 368.

³⁶⁵ Territorial Authorities, opening submissions at [5], [91]; transcript Cromwell WKS 4/5 (Twose) at 338-339, 368; DCC, original submission on PC7 at [15]-[18].

³⁶⁶ 3rd JWS, Community Water Supplies, Schedule 10A dated 31 March 2021 at [30]. Twose, EiC dated 5 February 2021 at [7].

³⁶⁷ Territorial Authorities, legal submissions ‘setting out options for position on evolved relief for community water supplies’ dated 5 July 2021.

[336] Elaborating, Ms J Muir³⁶⁸ and Ms J McGirr³⁶⁹ gave evidence addressing water permits granted to authorise the take and use of water for community water supplies. These water permits together with their conditions are regarded as input parameters for a supply scheme design, with design of water supply infrastructure commencing before the application for a water permit is lodged,³⁷⁰ and continuing after the grant is issued.³⁷¹ The Territorial Authorities are concerned that in six years' time, if the permits are not reconsented on the same conditions or if the permits are reviewed by the Regional Council under a future regional plan, they may need to redesign (if not yet constructed) or retrofit the take and distribution infrastructure. Worse still, some schemes may simply become 'stranded'.³⁷²

[337] At the hearing's conclusion, the Regional Council had amended its position and supported an exception from the policies on duration for replacement consents.³⁷³ It was the Territorial Authorities' case, however, that if approved PC7 may cause District Councils to defer necessary upgrades rather than risk incurring additional costs³⁷⁴ and they pursued an exception for both new and replacement consents.

What is a community water supply?

[338] The term *community water supply* is not defined in the regional plan or this plan change.

[339] The Territorial Authorities distribute water that has been treated to potable

³⁶⁸ Central Otago District Council, Infrastructure Manager.

³⁶⁹ Queenstown Lakes District Council, Environmental Manager – Infrastructure.

³⁷⁰ Transcript Cromwell WKS 7/8 (Muir) at 527 – water supply schemes do not require discharge permits or land use consents.

³⁷¹ Transcript Cromwell WKS 7/8 (Muir) at 529. Ms McGirr, EiC dated 4 February 2021 at [32]-[34].

³⁷² Muir, EiC dated 8 April 2021 adopting the evidence of P R Greenwood dated 4 February 2021 at [31]. McGirr, EiC at [32]-[34].

³⁷³ Transcript Dunedin WKS 9/10 (Maw) at 720ff esp. 724.

³⁷⁴ Muir, EiC dated 8 April 2021 adopting the evidence of P R Greenwood dated 4 February 2021 at [31]. McGirr, EiC at [32].

standard for use in the community via its infrastructure.³⁷⁵ Potable water is supplied to all sectors within the community³⁷⁶ as well as for human consumption.³⁷⁷

[340] Central Otago District Council's water metering records provide a good illustration of the different types of uses for which water is supplied. This is the only district metering water supply with data to draw upon. The District Council supplies water to Alexandra and Clyde. Of the water taken for supply, 30- 38% is lost from the scheme.³⁷⁸ The balance is supplied for a wide range of uses, 42.9% of which is residential. Urban growth is predicted to increase residential use to 54.6% of water distributed by 2034/2035. This increase could be met from the consented volumes.³⁷⁹ While supplying water for a wide range of uses, these do not include dairying, forestry, mining or pastoral uses.

[341] By way of contrast, 80% of the water distributed through the Bruce Water Supply by the Clutha District Council is to the primary sector, being stock water and water for dairy shed wash down. The balance is supplied to residential properties.³⁸⁰

[342] The final example comes from Dunedin City Council. Dunedin's water network supplies around 48,000 residences and 3,800 commercial properties. This network operates under 31 resource consents to take and use water which in combination (in 2016)³⁸¹ supplied adequate volumes of water to meet current

³⁷⁵ Territorial Authorities, opening submissions at [26].

³⁷⁶ Sectors meaning primary, secondary and tertiary sectors.

³⁷⁷ Twose, EIC at [21], [49].

³⁷⁸ Transcript Cromwell WKS 7/8 (Muir) at 513.

³⁷⁹ Muir, supplementary evidence dated 12 May 2021, Appendix 4. Transcript Dunedin WKS 7/8 (Muir) at pp 512-514.

³⁸⁰ Transcript Cromwell WKS 4/5 (Heller) at 283. The Bruce Water Supply is operated by the Clutha District Council. It is not clear whether this example is an outlier.

³⁸¹ Twose, supplementary evidence dated 29 March 2021 at Appendix 2: *Dunedin City Council Water Conservation and Management Plan 2017-2027*.

demands under normal operating conditions³⁸².

[343] The metropolitan scheme services 89% of Dunedin’s residential water customers. Residential water use in 2016 accounted for about 57% of the total water taken, commercial and industrial use about 24%³⁸³ with the balance of 19% being “unaccounted water”.³⁸⁴ At least 25% of total domestic usage is consumed by garden watering.

[344] Dunedin City Council has relatively low confidence in this data as only commercial/industrial sites and a small number of high occupancy residential properties have water meters with the majority of urban residential properties being exempt from having to meter. The City Council has not identified any proposals for new or replacement water take permits in its draft DCC LTP2021-2031 with all existing permits due to expire during the period 2036-2041.³⁸⁵

[345] This is context for the Territorial Authorities’ submission that all water distributed through community water supply schemes is intended for human consumption.

What is drinking water?

[346] ‘Drinking water’ is defined in the Drinking Water Standards for New Zealand 2005, Resource Management (National Environmental Standard for Sources of Human Drinking Water) Regulations 2007 and the National Planning Standards. The definitions do not differ in any material respect and each have an element that drinking water means water intended to be used for human consumption.

³⁸² There is a requirement in some of these consents for a Water Conservation and Management Plan to be developed and implemented.

³⁸³ Includes industry, farming, restaurants, hospitals, the university and schools (at [2.2]).

³⁸⁴ Includes public and private leaks, fire-fighting, unauthorised connections, theft, un-metered commercial usage and network operations (at [2.2].)

³⁸⁵ Twose, supplementary evidence 12 May 2021 at Appendix 3.

[347] All water distributed by the Territorial Authorities is treated to a potable drinking water standard. Therefore, they argue, the water is drinking water intended for human consumption.

[348] We find the Territorial Authorities' submission is a non-sequitur; it does not follow logically³⁸⁶ and is unsupported by the Territorial Authorities' evidence on the uses of treated water. The problem lies (we think) with the Territorial Authorities' equation of the supply of treated water with the *purpose* for which water is supplied.³⁸⁷ We find that while treated water supplied by the Territorial Authorities may be consumed by humans – the distributed water is after all potable – it does not necessarily follow that the Territorial Authorities supplied water that was intended solely for this purpose.

[349] We understand this submission is made to support the Territorial Authorities' case for a higher priority to be given fresh water relative to the needs for water by people and the community in general. This is a significant matter which may go to a view held by Territorial Authorities on different (competing) usage priorities. If this is the Territorial Authorities' thinking, then it is best understood in terms of Territorial Authorities seeking to manage risk around access to water at a time of uncertainty and likely change to Otago's planning environment. That being said, no evidence was led that the Regional Council would not prioritise the health needs of people, including their need for drinking water, as required by the NPS-FM 2020's sole objective – indeed the contrary is true.

[350] The importance to people and the community of the supply of water for a wide range of users is not in dispute and nor are the Territorial Authorities' statutory functions. We were referred to the Health Act 1956, Local Government

³⁸⁶ Territorial Authorities, submissions dated 23 April 2021 [Territorial Authorities, supplementary submissions (April)] at [14]-[52].

³⁸⁷ Territorial Authorities, opening submissions at [24]-[28]; Territorial Authorities, supplementary submissions (April) – entire submission.

Act 2002 and Civil Defence Emergency Management Act 2002 but having considered these we could not find support for the submission that all the water supplied is drinking water intended for human consumption.³⁸⁸

Resource Management Act 1991

[351] Notwithstanding their functions under other statutes, the RMA applies to Territorial Authorities with the effect that they are required to obtain water permits to authorise the taking and use of water.

National Policy Statement – Freshwater Management 2020

[352] The NPS-FM 2020's sole objective is directive – it is to “ensure” natural and physical resources are managed in a way that prioritises:

- (a) first, the health and well-being of water bodies and freshwater ecosystems;
- (b) second, the health needs of people (such as drinking water); and
- (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

[353] The objective is implemented through policies, Policy 1 being that “freshwater is managed in a way that gives effect to Te Mana o te Wai”. Te Mana o te Wai “... recognises that protecting the health of freshwater protects the health and well-being of the wider environment ...”.³⁸⁹ Te Mana o te Wai is relevant to all freshwater management³⁹⁰ and must inform the interpretation of the NPS-FM 2020.³⁹¹

[354] We observe that under Te Mana o te Wai the choice between the use of

³⁸⁸ See Annexure 3: Legislation Relevant to Territorial Authorities.

³⁸⁹ NPS-FM 2020, cl 1.3.

³⁹⁰ NPS-FM 2020, cl 1.3.

³⁹¹ NPS-FM 2020, cl 3.2(4).

drinking water to provide for the health needs of people and protecting the health of fresh water is again a false dichotomy.

[355] The objective of the NPS is implemented by an integrated management approach,³⁹² of particular note is the direction that local authorities must:³⁹³

Clause 3.5 (1)(d) encourage the co-ordination and sequencing of regional or urban growth.

Clause 3.5 (4) Every territorial authority must include objectives, policies, and methods in its district plan to promote positive effects, and avoid, remedy, or mitigate adverse effects (including cumulative effects), of urban development on the health and well-being of water bodies, freshwater ecosystems, and receiving environments.

[356] The adoption of integrated management is also strong theme in the NPS-UD 2020.

National Policy Statement – Urban Development 2020

[357] The NPS-UD 2020 applies to all local authorities that have all or part of an urban environment within their district or region, and to local authority planning decisions.³⁹⁴ The NPS-UD 2020, therefore, applies to the Otago Regional Council and the Territorial Authorities.

[358] While the NPS objectives and most policies are relevant, because the Territorial Authorities are concerned that PC7 *inhibits* them from fulfilling their statutory obligations, our focus is on pt 3: Implementation. The Territorial Authorities highlight that local authorities must provide sufficient development capacity to meet expected demand for housing and business land in the short,

³⁹² Including NPS-FM 2020, Policies 3 and 4.

³⁹³ NPS-FM 2020, cl 3.5.

³⁹⁴ NPS-UD 2020, cl 1.3.

medium and long term.³⁹⁵ Development capacity is ‘sufficient’ when, amongst the matters, it is plan-enabled and infrastructure-ready.³⁹⁶

[359] Development capacity is plan-enabled for housing and business land in the short or medium term if, respectively, (a) it is on land zoned for these uses in an operative District Plan or (b) it is on land zoned for these uses under both the operative and proposed District Plans. Long-term, development capacity is plan-enabled when land for future urban use or intensification is identified in a Future Development Strategy.³⁹⁷

[360] Development capacity is infrastructure-ready if in the short term, (a) there is adequate existing development infrastructure³⁹⁸ to support development of the land and (b) over the medium term either the existing development infrastructure is adequate or there is funding for infrastructure to support development of the land. Long term, development capacity is infrastructure ready when it is identified in the local authority’s long-term plan.³⁹⁹

Short, medium and long term

[361] Short-term means within the next 3 years; medium-term means between 3 and 10 years and long-term means between 10 and 30 years.⁴⁰⁰

[362] Territorial Authorities and the Regional Council disagree on whether PC7 is a ‘planning decision’ for the purpose of NPS-UD 2020 and secondly, the relevance of the NPS provisions to our decision on PC7 or to an application for a water permit.⁴⁰¹ The Territorial Authorities argue the decision on consent duration

³⁹⁵ Territorial Authorities, supplementary submissions (April) at [98], NPS-UD 2020, cl 3.1-3.3.

³⁹⁶ NPS-UD 2020, cl 3.2 and cl 3.3.

³⁹⁷ NPS-UD 2020, cl 3.4 (1). If not an FDS, then other relevant plan or strategy.

³⁹⁸ NPS-UD 2020, cl 1.4, ‘development infrastructure’ includes network infrastructure for water supply, wastewater, or stormwater.

³⁹⁹ NPS-UD 2020, cl 3.4 (2).

⁴⁰⁰ NPS-UD 2020, cl 1.4 Interpretation.

⁴⁰¹ Territorial Authorities, supplementary submissions (April) at [104].

should be made at the time applications are considered and not pre-determined under the policies of PC7.⁴⁰² This way the merits of the application can be assessed in light of their obligations under the NPS-UD 2020.⁴⁰³

[363] The Territorial Authorities make this submission notwithstanding the opinion of their planning witness, Mr M Twose, that the operative regional plan is not fit-for-purpose for new and replacement community water supply permits either in respect of:

- (a) water quantity; or
- (b) the effects on water quality consequential upon the taking and use (including land uses).⁴⁰⁴

[364] Mr Twose did not contradict the Regional Council's case – that the operative policy statement and regional plan do not give effect to the NPS-FM 2020, NPS-UD 2020 or their predecessors.

Consideration

[365] We do not need to decide whether PC7 is or is not a 'planning decision'. National policy statements are to be given effect to through lower order planning instruments of regional and district councils.

[366] The direction that the Territorial Authorities 'must' provide for sufficient development capacity is an ongoing obligation. Development capacity is achieved through the provisions of the district plans in the short to medium term, with long-term intentions set out in the local authorities' Long-Term Plans. Except for Clutha District Council (whose situation is not known),⁴⁰⁵ the Territorial

⁴⁰² Territorial Authorities, closing submissions at [60]-[61]; [81].

⁴⁰³ Territorial Authorities, supplementary submissions (April) at [102]-[103].

⁴⁰⁴ Twose, supplementary evidence dated 12 May 2021 ('Twose supplementary evidence (May)') at [19]-[21].

⁴⁰⁵ The Clutha District Council did not provide evidence, as directed, on this matter.

Authorities:⁴⁰⁶

- (a) confirm development capacity is infrastructure-ready;
- (b) have not notified the Minister for the Environment of insufficient development capacity;⁴⁰⁷
- (c) have yet to formally identify their urban environments;⁴⁰⁸
- (d) where required, completion of their Future Development Strategy will be in time to inform 2024 Long Term Plan; and
- (e) where required, the Housing and Business Development Capacity Assessment Strategy will be in time to inform 2024 Long Term Plan.

[367] Future Development Strategies (FDS) are to spatially identify broad locations in which development capacity will be provided over the long-term and in relation to which development infrastructure and additional infrastructures are required to support or service the same. The purpose of the FDS is, amongst other matters, to assist the integration of planning decisions under the RMA with infrastructure planning and funding decisions⁴⁰⁹ and its strategies to be made available every six years, and in time to inform the long-term plan.

[368] The NPS-UD 2020 directs that the FDS **must** be informed by any relevant national policy statement (our emphasis) and by the Housing and Business Development Capacity Assessment.⁴¹⁰ The importance of this direction is spelled out in Ministry for the Environment and Ministry of Housing and Urban

⁴⁰⁶ Twose, supplementary evidence (May) at Appendix 3.

⁴⁰⁷ NPS-UD 2020 cl 3.7.

⁴⁰⁸ Twose, supplementary evidence (May) at [30] says none of the Territorial Authorities have identified their urban environment, but at Appendix 3 says Queenstown Lakes District Council has. The difference is immaterial to this decision.

⁴⁰⁹ NPS-FM 2020, cl 3.12-3.13.

⁴¹⁰ NPS-FM 2020, cl 3.14.

Development 2020, Recommendations and decisions report on the National Policy Statement *on Urban Development*.⁴¹¹ The FDS:

... provide a mechanism for local authorities to identify areas with environmental constraints, such as freshwater environments, where development may not be appropriate.

[369] The NPS-FM 2020 and NPS-UD 2020 are to be read together and reconciled under the regional policy statement and the district plans. As Mr Twose accepted, growth in development capacity does not outweigh (trump) Te Mana o te Wai. Te Mana o te Wai is the fundamental concept of freshwater management: any thinking to the converse would not give effect to either national policy statement.⁴¹²

[370] Even so, the Territorial Authorities say they “cannot wait for all the statutory ducks to be lined up – the reality is that perfect alignment is likely to continue to be illusive”.⁴¹³ The Territorial Authorities cannot possibly know that in advance. We find that with their focus firmly on NPS-UD 2020, the Territorial Authorities have pursued policy goals through this plan change with insufficient regard being paid to the NPS-FM 2020.

Regional Policy Statements

Operative Regional Policy Statement

[371] We have had regard to the operative policy statement, notwithstanding its inadequacies in terms of the senior planning documents. The planning witnesses were clear that this policy statement does not allocate water to specific activities or

⁴¹¹ Ministry for the Environment and Ministry of Housing and Urban Development. *Recommendations and decisions report on the National Policy Statement on Urban Development*. (Ministry for the Environment and the Ministry of Housing and Urban Development, Wellington, 2020) at 87-88.

⁴¹² Transcript Cromwell WKS 4/5 (Twose) at 408.

⁴¹³ Territorial Authorities, supplementary submissions (July) at [21].

uses.⁴¹⁴

Proposed Otago Regional Policy Statement 2021

[372] We have also had regard to the proposed policy statement 2021. The proposed policy statement records ‘poorly managed urban and residential growth affects productive land, treasured natural assets, infrastructure and community well-being’.⁴¹⁵ For context, the proposed policy records:

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

[373] It is of particular relevance to the Territorial Authorities’ case that this new plan is to include:⁴¹⁶

- environmental flow and level regimes for water bodies that give effect to Te Mana o te Wai and
 - provide for community drinking water supplies (LF-FW-M6 Regional plans); and
- limits on resource use that:
 - differentiate between types of uses, including drinking water, and social, cultural and economic uses, in order to provide long-term certainty in relation to those uses of available water.

[374] In line with the NPS-UD 2020, the proposed policy statement requires

⁴¹⁴ De Pelsemaeker, EiR to the supplementary evidence of the Territorial Authorities at [26], concurring with assessment of M Twose in supplementary evidence at [26].

⁴¹⁵ ORPS, at SRMR–I4, significant resource management issue.

⁴¹⁶ ORPS, LF–FW–M6 – Regional plans.

strategic planning to be undertaken in advance of significant development, expansion or redevelopment (UFD–O3 Strategic planning).

[375] Development of nationally and regionally significant infrastructure together with land use change, is to occur in a co-ordinated manner to minimise adverse effects on the environment and increase efficiency in the delivery, operation and use of the infrastructure (EIT–INF–O5 Integration) and in this context, urban growth and infrastructure is provided for (EIT–INF–P17).⁴¹⁷ Decision-making on allocation or use of natural and physical resources must take into account the needs of nationally and regionally significant infrastructure (EIT-INF-P10 Infrastructure) with the management of effects also being prioritised (EIT-INF-P11 to P14). The need for a strategic approach to infrastructure development is also a method in the same chapter (EIT-INF-M5(1) District Plans).

Operative Regional Plan

[376] The relevant provisions are set out in Chapters 5, 6 and 12 of the operative regional plan. Our commentary elsewhere on the regional plan provisions applies here.

[377] In addition, we note ‘human use values’ supported by Otago’s water bodies, are to be maintained/enhanced (Objective 5.3.1). ‘Human use values’ is not defined, but Policy 5.4.1 makes tolerably clear these include ‘water supply values’. ‘Water supply values’ relate to takes for human consumption. Recorded in Schedules 1B and 3B, avoiding adverse effects on these values is to be given priority (Policy 5.4.2).

[378] Second, a key objective is to provide for the water needs of community domestic water supplies (Objective 6.3.2). The term ‘community domestic water

⁴¹⁷ Policy EIT-INF-P17 Urban growth and infrastructure, is to provide for development infrastructure and additional infrastructure required to service existing, planned and expected urban growth demands in the short, medium and long term.

supplies’ is not defined and nor is ‘community water supplies’, although the latter term was frequently used in this hearing.

[379] Thirdly, in many instances minimum flows will not apply to community water supply takes identified in Schedule 1B or 3B (Policy 6.4.8). Scheduled community drinking water supplies are exempt from the policies controlling primary allocation to allow for population growth.

[380] Finally, subject to the standards in the rule, the taking and use of water for community water supply is a controlled activity under Rule 12.1.3.1. With few exceptions, the matters of control focus on the abstractive use with no recognition of the cumulative effects of the proposed take.

Should the duration policies apply to community water supplies?

[381] The importance of the supply of drinking water for human consumption has never been in doubt.⁴¹⁸ The critical importance of infrastructure to the region’s communities and the need for the continued operation and the development of upgraded or new infrastructure, is recognised in the proposed policy statement.⁴¹⁹ The operative regional plan also recognises the value of water supply for human consumption.⁴²⁰

[382] As with hydro-electricity generation, the relief being pursued by Territorial Authorities has been amended on several occasions. We deal with their relief by examining whether there should be an exclusion of water permits from the policies on duration as that was the starting point for their planning witness, Mr Twose.⁴²¹

⁴¹⁸ See RMA, s 14(3), NPS-FM 2020’s Objective and RWP, Objective 5.3.1 and Policy 5.4.2, “water supply values”.

⁴¹⁹ See INF-Infrastructure, EIT-INF-E2 Explanation.

⁴²⁰ RWP, Objective 5.3.1, Policies 5.4.1(e) and 5.4.2; definition “water supply values”.

⁴²¹ Twose, EiC dated 5 February 2021.

Decision – exception from Policy 10A.2.2 for new community water supply activities

[383] We have found that the proposed restricted discretionary activity rule, Rule 10A.3.1A.2 (the ‘May 2021’ relief), is beyond scope and we give it no further consideration.⁴²²

[384] Our findings in relation to the operative regional plan and its unresponsiveness to freshwater management at paragraphs [317]-[320]⁴²³ and elsewhere in this decision, apply here.

[385] The District and Regional Councils are working together on spatial planning on development capacity. This work is ongoing and will be realised through the (now) proposed policy statement and district plans.⁴²⁴ We find that the exception pursued by the District Council for new activities weakens the processes and outcomes mandated by the NPS-UD 2020 and NPS-FM 2020.

[386] We agree with the Territorial Authorities that the proposed policy statement lends support for their position;⁴²⁵ however this is not unqualified support. The Territorial Authorities do not address the implication of the proposed policy to exclude from ‘regionally significant infrastructure’ – delivery systems or irrigation or infrastructure primarily deployed for the delivery of water for irrigation of land or rural agricultural drinking-water supplies. These are services currently provided by Territorial Authorities and which they wish to

⁴²² For the ‘May 2021’ relief see Twose, supplementary evidence dated 12 May 2021. See also Annexure 2: Scope Challenges.

⁴²³ Hydro-Electricity Generation section.

⁴²⁴ Transcript Dunedin WKS 7/8 (Muir) at 524-525.

⁴²⁵ Territorial Authorities, supplementary submissions dated 28 July 2021 at [16].

continue under PC7.⁴²⁶

[387] The NPS-FM 2020 directs regional councils to include rules in a regional plan that set environmental flows and levels and take limits. The uncontested evidence before this court is that attribute states in several water bodies in Central Otago and Queenstown Lakes and in other districts, fall below the national bottom lines.⁴²⁷

[388] If water permits are the input parameters for the Territorial Authorities' scheme design, these parameters may change following a s 128 review. It is a matter for the Territorial Authorities whether they would assume the risk of their consent changing on review and seek resource consent (now) for new schemes replacing existing infrastructure. However, their stance on risk should not be to the potential detriment of the environment, nor other resource users who will look to a future regional plan to provide long-term certainty of available water.^{428, 429} Given the above, we find the exception from this policy on duration is not made out.

Exception from Policy 10A 2.3 for community water supply activities

[389] After the conclusion of the hearing the court circulated an amendment to Policy 10A.2.3 and a draft restricted discretionary activity rule for the parties' consideration.⁴³⁰ We considered a case can be made under the national policy statements for re-permitting existing community water schemes. As these schemes are already affecting the environment, the policy focus was on measures to

⁴²⁶ Under the proposed policy statement 'drinking water' has the same meaning as in the National Planning Standards 2019. Community drinking water infrastructure is 'regionally significant infrastructure', however the definition of 'regionally significant infrastructure' expressly excludes delivery systems or irrigation or infrastructure primarily deployed for the delivery of water for irrigation of land or rural agricultural drinking-water supplies. See also method LF-FW-M6.

⁴²⁷ Annexure 4: Water Quality.

⁴²⁸ ORPS, LF-FW-M6 – Regional plans.

⁴²⁹ ORC, closing submissions at [194]. The Regional Council is concerned that a s 128 statutory review could not change allocation between users in line with regional plan priorities.

⁴³⁰ Minutes 'Community Water Supplies' dated 23 July and 4 October 2021.

minimise demand.

[390] The new rule addressed replacement permits (i.e. take and use permits expiring prior to 31 December 2025).⁴³¹ There were several iterations of the rule in evidence and presented by counsel in their submissions, but the drafting of the rule had yet to be landed securely.

[391] Parties responded proposing amendments but did not complete the Schedule attached to the court's rule identifying the community water schemes that the rule would apply too.⁴³² The Registry followed this up and a completed Schedule identifying both existing and proposed community water schemes in Queenstown Lakes and Central Otago districts was filed.⁴³³ The Schedule did not respect the court's direction to consider replacement permits (only) and ignored the entry conditions on the draft rule limiting its application to replacement permits.

[392] The court queried the Schedule⁴³⁴ and the Territorial Authorities and Regional Council jointly responded by removing activities that are not replacement permits from the Schedule and proposing substantive amendments to the proposed rule.⁴³⁵ We refer to this as the 'October 2021 draft rule'.

[393] Policy 10A.2.3 (as proposed to be amended by the court) would continue to apply to replacement permits. However, the entry conditions to the new rule were amended to include both replacement permits (i.e. permits expiring before 31 December 2025) and secondly, permits expiring after 31 December 2025. From the evidence, we could only find two permits listed in the schedule that expire

⁴³¹ Minute 23 July 2021 at [6].

⁴³² Joint memorandum of ORC and Territorial Authorities dated 9 August 2021.

⁴³³ ORC email sent 30 September 2021.

⁴³⁴ Minute 'Community Water Supplies' dated 4 October 2021.

⁴³⁵ Joint memorandum 'Community Water Supplies' dated 11 October 2021.

before 31 December 2025.⁴³⁶

[394] The effect of the amendments would be to enable Territorial Authorities to apply for resource consents for proposed new consolidated supply schemes – these schemes could source water from different sites and/or in different water bodies from the sites of the existing consents. As examples, for Clyde/Alexandra, the site of the take for the consolidated scheme would be “in the vicinity” of the existing consented bore at Clyde⁴³⁷ and for the Cromwell/Pisa consolidated scheme, a lake take “in the vicinity” of the existing consented bore site at Cromwell.⁴³⁸

Scope and s 32AA assessment of the new restricted discretionary activity rule

[395] The rule as proposed to be amended by the Territorial Authorities and the Regional Council, does not respect the architecture of the plan change.

[396] The amendments were not supported by a s 32AA assessment and neither counsel have turned their mind to whether the court has jurisdiction to consider these amendments.

[397] The jurisdictional challenge that the Regional Council made to the ‘May 2021’ relief proposed by the Territorial Authorities’ planning witness, Mr Twose, applies here insofar as the rule as proposed to be amended by the parties, would apply to both new and existing supply schemes.⁴³⁹ The concerns around natural justice raised by the Regional Council in respect of the ‘May 2021’ relief also arise here. The intent of the amendment is for new activities to be consented for up to 15 years without any assessment of effects. We cannot exclude the possibility that the Territorial Authorities’ activities may adversely affect the

⁴³⁶ Central Otago District Council, Alexandra/Clyde Consent No RM 18.267.01 dated 14 August 2023 and Cromwell/Pisa Consent No 98586.V1 dated 1 February 2023.

⁴³⁷ Muir, supplementary evidence at [18].

⁴³⁸ Muir, supplementary evidence at [29].

⁴³⁹ ORC, closing submissions at [136]-[145] and see Annexure 2: Scope Challenges.

rights and interests of others, including other water users.

Position of other parties

[398] In the Hydro-Electricity Generation section we set out in full the views of Ngā Rūnanga⁴⁴⁰ and Fish and Game⁴⁴¹ in respect of the making of exceptions to the policies on duration. They oppose exceptions being made from the policies on duration.

Decision – exception from Policy 10A.2.3 for new community water supply activities

[399] The ‘October 2021 draft rule’, gives rise to fundamental issues of fairness as members of the public, who may be affected by what is proposed, have not had an opportunity to have a say in response. Furthermore, the Territorial Authorities do not propose to address the potential environmental effects caused by proposed *consolidated* supply schemes that would replace existing permitted schemes.

[400] Given the above, we decline to amend PC7 by including an exception to Policy 10A.2.3 for community water supplies and the associated restricted discretionary activity rule.

Other matters

[401] Substantial amendments have been made to the plan change in response to the submissions made by the Territorial Authorities. This includes amending the entry conditions to the controlled activity rule and the associated Schedule 10A.4 to improve the effectiveness of methodologies for calculating historical use to better account for usage by supply schemes. Policy 10A.2.1(d) provides an exception for community water supplies allowing for an increase in the historical

⁴⁴⁰ Ngā Rūnanga, closing submissions at [59].

⁴⁴¹ Fish and Game, closing submissions at [1]-[4].

rate of take and volumes up to the existing consent limits. The restricted discretionary activity rule (Rule 10A.3.1A.1(a)(ii)(aa)) has as a matter of discretion for community water supplies, within existing deemed permit and water permit volume and rate limits, the extent to which there is a need to provide for population growth within the term of the consent.⁴⁴²

⁴⁴² See De Pelsemaeker, reply (June) at [59] for summary of relevant changes. We adopt his s 32AA assessment in Appendix 6 concerning the population growth options.

Evaluation and Outcome

[402] Submissions on the plan change were lodged by 290 persons, of which 78 were parties to this proceeding.

[403] The approach we have adopted in this decision is to identify and decide broad issues raised in submissions. Many of the issues are interlinked, and the resolution of any one issue does not determine the outcome of this proceeding. If this is not clear from the body of the decision (including the annexures), we make it clear now that this has been our approach.

[404] In response to submissions, this plan change has been largely rewritten. The final plan change is the culmination of a considerable body of work achieved largely through court facilitated conferencing of expert witnesses and secondly, by court led drafting of provisions on topics that proved hard to render into policies and rules.

[405] What follows next, is a summary of the key findings relevant to ss 32 and 32AA of the Act, provisions which we have borne in mind throughout this decision.

Objective 10A.1

[406] The Objective is to provide for the lodgement and determination of applications for resource consent over the interregnum – that is, the period between the operative freshwater planning framework and a new integrated planning framework.

[407] The objective is broad enough to allow for different policy approaches to be taken to the primary sector, territorial authorities and hydro-electricity generation activities.⁴⁴³ The amendment proposed by the court to the objective

⁴⁴³ Hydro-electricity generation activities is, however, limited to Trustpower.

and the related amendment in Policy 10A.2.2 and in the explanatory material are to address what we regard as the inadvertent narrowing of the plan change to apply to most – but not all – applications to take and use fresh water. Our decision to approve of the plan change does not depend on these amendments being made, so serious are the deficiencies in the operative regional plan. Directions will be made allowing parties an opportunity to respond.

[408] We do not approve of additional objectives proposed by planning witnesses in the 9th JWS.⁴⁴⁴ Unsupported by an assessment under s 32 and s 32AA of the Act, the jurisdiction (scope) for the court to amend the plan change this way was not established. Unusually (in our experience) the intended outcome is for the additional objectives to provide support for non-complying activities. We find the proposed objectives would unlikely be effective in limiting the number and scope of applications for non-complying activities that may be consented for a duration exceeding six years.

The take and use of freshwater

[409] Under Objective 10A.1, consent applications for freshwater activities will continue to be filed and processed by the consent authority.

[410] For applications not involving the replacement of deemed permits or permits expiring by 31 December 2025, the provisions of the operative regional plan apply. However, the regional plan does not give effect to the NPS-FM 2020, NPS-UD 2020 or NPS-REG 2011 (or predecessors) and, taken together with the weak direction and unranked outcomes under the regional plan's objectives, warrants a policy limiting the duration of consents to a period not exceeding six years.

⁴⁴⁴ 9th JWS dated 4 and 21 June 2021.

Replacement consents

[411] Under Objective 10A.1, consent applications to replace deemed permits and replace water permits for existing takes and uses expiring before 31 December 2025, will not be determined under the general provisions of the operative regional plan⁴⁴⁵ but instead will be determined under the provisions of PC7's Chapter 10A.

[412] The NPS-FM 2020 and NPS-REG 2011 justify a different approach on duration being taken in relation to hydro-electricity generation where an application is made to replace an expiring permit under Policy 10A.2.3. An exception to this policy has been made for Trustpower's hydro-electricity generation schemes. However, this is not a preferred outcome for Territorial Authorities who intend *consolidating* existing supply schemes rather than seeking to replace consents for an existing activity.

Environmental effects

[413] Save to the limited extent proffered by Trustpower for replacement permits (Policy 10A.2.3), the plan change is not directly working on the adverse effects of activities on the environment, leaving this for the future regional plan. This outcome may seem counterintuitive to many within the primary sector, who wish to improve the current state of the environment and set out proposals to do so in their applications for resource consent.

[414] While we do not doubt that the intent of applicants is to change the existing management of freshwater, applications for resource consent do not themselves give effect to the national policy statements. This is 'planning by consent' – we do not use that phrase as a pejorative as we recognise primary sector applicants have felt compelled to this because of the operative freshwater planning framework.

[415] In spite of the operative regional plan – or perhaps because of it – people

⁴⁴⁵ Mainly set out in Chapters 5, 6, 12 and 20.

and communities within the primary sector are working to improve the environment.⁴⁴⁶ In addition to the on-farm environmental enhancements spoken about in evidence, there are scale-up projects, such as Tiaki Maniototo, which depend on the wide network of relationships within the farming community and the full potential of which will only be realised by some landowners changing their farm systems. People participate in these projects not to gain a grant of resource consent, but to benefit the region.⁴⁴⁷

[416] That said, when compared to an applicant-driven process, PC7's objective to facilitate the efficient and effective transition to a new planning framework is still the most appropriate way to achieve the purpose of the Act. This way the three national policy statements which together expand on the purpose and principles of the Act, will be given effect.

Mana whenua

[417] In coming to our decision to approve the plan change, we have given the Ngā Rūnanga submission significant weight.

[418] We said Te Mana o te Wai is both a concept and a value:

- (a) the NPS-FM 2020 calls Te Mana o te Wai the 'fundamental concept', its framework encompassing six principles in the management of freshwater which inform the NPS and its implementation;⁴⁴⁸ and
- (b) Te Mana o te Wai is also a value: "Te Mana o te Wai is inseparable from the mana of the people".⁴⁴⁹

⁴⁴⁶ See for example, Currie, EiC dated 4 February 2021 and supplementary evidence dated 12 May 2021. Also, Manson, EiC dated 5 February 2021, supplementary evidence filed 11 May 2021; for G Herlihy's experience re consenting in the Sowburn catchment see transcript Cromwell WK 6 at 1429. Matakanui Station's wetland protection work at transcript Cromwell WK 6 (Paterson) at 1479.

⁴⁴⁷ Transcript Cromwell WK 6 (E Crutchley) at 1176-1177.

⁴⁴⁸ NPS-FM 2020, cl 1.3.

⁴⁴⁹ Ellison, EiC at [119].

[419] Kāi Tahu ki Otago's⁴⁵⁰ perspective on Te Mana o te Wai records: "[t]he whakapapa of mana whenua and water are also integrally connected. [The] kinship relationship, and mana whenua and the wai cannot be separated."⁴⁵¹ Whakapapa describes the bonds, relationships and connections that bind mana whenua to the land and water. Mr E Ellison's evidence is that it is unnatural for mana whenua to separate themselves from the land and the water; all are one.⁴⁵² Water has life force, and if diminished in the sense that water does not retain its life, energy and vitality – so the people will too be diminished.⁴⁵³ The condition of water is seen as a reflection of the condition of the people: when the wai is healthy, so are the people.⁴⁵⁴

[420] When Ngā Rūnanga talk about mahinga kai, they are not *just* talking about the availability of a food resource. They are talking about the spiritual essence, the lifeforce (mauri) and health (hauora) of water bodies and of the spiritual and cultural practices that healthy water bodies sustain.⁴⁵⁵ They are concerned that mātauranga (knowledge) associated with customary mahinga kai activity will be lost if water is degraded;⁴⁵⁶ a loss that was likened to the loss of a language.⁴⁵⁷

[421] This is the context for Mr Ellison's statement that Kāi Tahu values and interests have been *disabled* under the operative regional plan.⁴⁵⁸ His opinion is borne out by the planning evidence of Ms M Bartlett (for Ngāi Tahu ki Murihiku) and Ms McIntyre (for Kāi Tahu ki Otago).

⁴⁵⁰ McIntyre, amended EiC at [64]-[67]. Ms McIntyre notes Kāi Tahu ki Otago definition of Te Mana o te Wai is informed by the Murihiku perspective.

⁴⁵¹ McIntyre, amended EiC Appendix 2: Kāi Tahu ki Otago Te Mana o te Wai definition, objectives and policies; Ellison, EiC at [114]-[117].

⁴⁵² Transcript Dunedin WKS 1-3 (Ellison) at 510.

⁴⁵³ Transcript Dunedin WKS 1-3 (Bull) at 489.

⁴⁵⁴ McIntyre, amended EiC Appendix 2: Kāi Tahu ki Otago Te Mana o te Wai definition, objectives and policies; Ellison, EiC at [114]-[117].

⁴⁵⁵ Transcript Dunedin WKS 1-3 (Thompson) at 491-492.

⁴⁵⁶ Transcript Dunedin WKS 1-3 (Bull) at 492; (Ellison) at 503 and Ellison, EiC at [98].

⁴⁵⁷ Transcript Dunedin WKS 1-3 (Ellison) at 503.

⁴⁵⁸ Transcript Dunedin WKS 1-3 (Ellison) at 502.

[422] This plan change is supported by mana whenua as its objective is to give effect to Te Mana o te Wai through the framework of the regional planning documents and they regard this as being more consistent with the principles of the Treaty of Waitangi than the other options presented at this hearing.⁴⁵⁹ We accept their submission.

Policies, rules and methods

[423] The Objective is implemented by four policies:

Policy 10A.2.1 – a policy constraining the scale of activities that applies to application to replace specified water permits;

Policy 10A.2.2 – a policy on duration applying to consents granted for activities other than those replacing the specified water permits;

Policy 10A.2.3 – a policy on duration applying to consents granted to replace specified water permits; and

Policy 10A.2.4 – a policy that applies to consents granted to replace deemed permits.

Policy 10A.2.1

[424] Policy 10A.2.1 applies to all applications to replace specified water permits. Many of these will be deemed permits which had little by way of conditions to manage environmental effects. Applications for resource consent for these permits will be assessed and determined in accordance with Chapter 10A (alone).

[425] To the extent that it can, the purpose of this policy is to constrain the scale of the effects of these activities on the environment. The policy has changed

⁴⁵⁹ Ngā Rūnanga, opening submissions at [21].

substantially from the notified version and now has a clear focus on (a) the area of irrigation, and (b) the historical rate of abstraction and historical volume of water.

[426] An exemption from the policy has been made for orchards and viticulture activities where mainline irrigation pipes servicing an additional area to be irrigated were installed before 18 March 2020. We made this decision because (a) the application of the policy has the advantage of certainty – the investment having been made, and (b) we were satisfied that the land use effects of orchard and viticulture activities can be managed.

Policies 10A.2.2 and 10A.2.3

[427] The Territorial Authorities and Trustpower share a common concern that the policy on duration will impact investment decisions on new development and maintenance/enhancement of existing infrastructure. The importance of community water schemes and hydro-electricity generation is not in dispute; it is recognised in the national policy statements and through the proposed policy statement.

[428] We have found one exception from Policy 10A.2.3 is justified, and this exception is set out in Annexure 8: Plan Change 7 Provisions. The exception made from Policy 10A.2.3 is for the replacement of a deemed permit where the take and use of water in relation to hydro-electricity generation schemes listed in Schedule 10A.5.1. is for a duration of up to 31 December 2035.

[429] We have rejected the submission from the Territorial Authorities and Trustpower seeking general relief from the application of Policy 10A.2.2. Consent applications other than those to replace specified permits,⁴⁶⁰ will continue to be assessed and determined under the operative regional plan. However, the duration of the grant will not exceed six years.

⁴⁶⁰ Deemed permits and water permits expiring before 31 December 2025.

Policy 10A.2.4

[430] We have explained the need for a policy to support continued flow sharing between former holders of deemed permits (Policy 10A.2.4).

Other reasonably practicable options

[431] We considered whether the options identified by parties/submitters were reasonably practicable options for achieving the Objective. All options identified were tested through the joint witness conferencing and in examination of witnesses. Where the court has been concerned over the resolution of complex issues through the plan change provisions, we have provided feedback in court and in Minutes we have suggested ways to address intractable drafting problems, inviting response.

[432] Subject to our reservation over Objective 10A.1.1(a) we conclude that the provisions in Annexure 8 are the most appropriate way to achieve the Objective.

Efficiency and effectiveness

[433] We have assessed the efficiency and effectiveness of the amended policies and methods and are satisfied that their (now) narrow focus will achieve the plan change objective.

[434] That said, the notified version of the plan change was poorly conceived and not adequately informed by the primary sector. Consequently, primary sector applicants have not felt encouraged to apply to replace their permits using the controlled activity pathway as was intended, and any now wishing to take advantage of the amended controlled activity rule will likely need to amend their applications.

[435] We received extensive evidence on the negative impact PC7 will have on economic growth and employment (both expert and lay opinion). We find that

the policies on duration will likely reduce economic growth and potentially also growth in employment in the region. The social effects of these policies go well beyond their economic impact. As we have acknowledged, the primary sector (in particular) is having to deal with a lot right now and granting of consents for a short duration adds to their uncertainty.

[436] That said, the six-year duration is intended to discourage further investment in irrigation infrastructure and expansion of irrigable areas, and the policies will likely have this general effect. For many, this will seem perverse as investment in infrastructure is often accompanied by an increase in irrigation efficiency – which ordinarily is a *good* outcome. However, the six-year duration responds to imminent change in policy settings under the proposed policy statement and (to be notified) regional plan which is expected for land and freshwater management.

[437] The relief sought by many to either reject the plan change or to include provisions in the plan change to allow for the granting of resource consents for long duration (15 – 20 – 35 years) has its own risks. This risk of economic hardship to individuals investing in infrastructure during the intervening period is probable.

Outcome

[438] Pursuant to s 149U of the Resource Management Act 1991, upon finalising the drafting of provisions the court will approve the insertion of Chapter 10A into the Regional Plan: Water for Otago.

[439] Save in one respect, the decision of the court is final. The matter which is not final concerns an amendment to Objective 10A.1.1 set out in the 12th JWS. The parties may have inadvertently narrowed the scope of the plan change through an amendment proposed to Objective 10A.1.1(a). Any party taking a different view from the court is to file a memorandum giving reasons and identifying the submission(s) on the plan change that they rely on to support the amendment in

the 12th JWS.⁴⁶¹ Any party agreeing with the court, but wishing to suggest alternative wording, may do so.

[440] The court has made minor changes to the provisions of an editorial nature which are track changed in Annexure 8. Most of these are self-explanatory and where they are not, an explanation is contained in the decision. Leave is reserved for any party to seek clarification from the court on the amendments.

[441] Parties do **not** need to take any steps if they agree with the court's alternative wording and the reasons for suggesting the amendments.

Directions

[442] I direct:

- (a) by **Wednesday 27 October 2021** any party may file a memorandum seeking clarification as to an amendment proposed in Annexure 8: Plan Change 7 Provisions;
- (b) by **Friday 12 November 2021** any party:
 - (i) taking a view that Objective 10A.1.1(a) in the 12th JWS does **not** inadvertently narrow the plan change and **is** within scope of the plan change is to file a memorandum giving reasons;
 - (ii) may propose alternative wording to address any inadvertent narrowing of the Objective, including consequential amendments to other provisions; and

⁴⁶¹ The notified version of PC7 reads “new water permits “ and is proposed to be amended in the 12th JWS to “the take and use of freshwater not previously authorised by a water permit”.

- (iii) may suggest amendments to Annexure 8: Plan Change 7 Provisions that are of an editorial nature (only).

For the court

A handwritten signature in blue ink, appearing to read "J E Borthwick", is positioned above a horizontal line.

J E Borthwick
Environment Judge



Appearances:

P A C Maw & M A Mehlhopt for Otago Regional Council

D van Mierlo for Aotearoa New Zealand Fine Wine Estates Limited Partnership

R Armstrong & M MacGregor for Balquhidder Farming Limited

L Phillips for Beef + Lamb New Zealand Limited and NZ Deer Industry Association Limited

R Hore & V Hore for Blackstone Hill Limited

R Lane for Blackstone Irrigation Company Limited

P Smith for Cairnhill Limited

E Parcell for Carrick Irrigation Company Limited, P Horn & D Abrams

R Giles for Central Otago Environmental Society

B Irving for Clutha District Council, Waitaki District Council, Queenstown Lakes District Council, Dunedin City Council and Central Otago District Council

T and C Davis for Coburn Partnership Limited

C & R Tamblyn & M Dhillon for Coal Creek Water Users Group

G Crutchley for himself

P Williams for the Director-General of Conservation

P Page for Falls Dam Company Limited

K Reilly for Federated Farmers of New Zealand Inc

M Kelly for Galloway Irrigation Society Inc

D & D Sangster for Glenayr Limited

M Hore for Glenshee Station Limited

B Groundwater for A P & B J Groundwater, M Groundwater, Beggs Creek Station Limited, B & K McEwan, Lilybank Co Limited

R & S Weir for Hamilton Runs

K Gillespie for Hawdun Idaburn Irrigation Company

H Atkins & L Ford for Horticulture New Zealand Limited

M Hely for Heaney Road Partnership

N Armstrong for Ida Valley Irrigation Company Limited

C R Perkins for Landpro Limited, Hortinvest Limited, R Naylor, Knapdale Farms

Limited, Lindis Peaks Farming Limited, Terraces Irrigation Limited, Mount Earnslaw Station, E & B Attfield, Waikerikeri Water Users Group

K Heckler for Lauder Water Users Group, Lauder Creek Limited and D R & S A Hill

J Herlihy for Maniototo Irrigation Company Limited

E Crutchley for Maniototo West Side Irrigation Company Limited

G Martin for himself

A Paterson for Matakanui Station Limited

K Reid for McArthur Ridge Vineyard Limited, Mount Dunstan Estates Limited, Strath Clyde Water Limited,

A McAuley for A and L McAuley, Packspur Vineyard, Heaney Road Partnership

R Dixon for Minister for the Environment

C P Mulholland for C P & D E Mulholland

M Baker-Galloway for Otago Fish and Game Council and Central South Island Fish Game Council

P Page and B Irving for Otago Water Resources User Group

W McMillan for Pisa Irrigation Company Limited

P Murray for Phil Murray Resource Management Limited

P Anderson and R Zwaan for Royal Forest & Bird Protection Society of New Zealand Inc

J Thomson for Shag Valley Irrigators Group

S A Enright for Southern Lakes Holdings Limited

C Tamblyn for herself

J Winchester and S Lennon for Te Rūnanga o Moeraki, Kāti Huirapa Runaka ki Puketeraki, Te Rūnanga o Ōtākou, Hokonui Rūnanga and Waihōpai Runaka, Te Rūnanga Ōraka o Aparima, Te Rūnanga o Awarua and Te Rūnanga o Ngāi Tahu

J Welsh for Trustpower Limited

H Rennie for Wise Response Society Inc

D Young for himself

