

**BEFORE INDEPENDENT HEARING COMMISSIONERS
APPOINTED BY THE CANTERBURY REGIONAL COUNCIL**

UNDER the Resource Management Act 1991 (RMA)
AND the Environment Canterbury (Transitional Governance
Arrangements) Act 2016
IN THE MATTER of Proposed Plan Change 7 to the Canterbury Land and
Water Regional Plan and Proposed Plan Change 2 to the
Waimakariri River Regional Plan

**OPENING LEGAL SUBMISSIONS OF COUNSEL FOR THE CANTERBURY
REGIONAL COUNCIL
22 September 2020**

Canterbury Regional Council's Solicitor
PO Box 4341 CHRISTCHURCH 8140
DX WX11179
Tel +64 3 379 7622
Fax +64 379 2467

Solicitor: P A C Maw
(philip.maw@wynnwilliams.co.nz)

WYNNWILLIAMS

MAY IT PLEASE THE HEARING COMMISSIONERS

Introduction

- 1 These opening legal submissions are intended to provide context for proposed Plan Change 7 (**PC7**) to the Canterbury Land and Water Regional Plan (**LWRP**) and proposed Plan Change 2 (**PC2**) to the Waimakariri River Regional Plan (**WRRP**).
- 2 These submissions have been provided to the Hearing Commissioners five working days in advance of the scheduled hearings on PC7 and PC2.
- 3 We will address the following matters in these submissions:
 - (a) an introduction to both PC7 and PC2;
 - (b) the current status of the relevant regional planning framework;
 - (c) the implications of the National Policy Statement for Freshwater Management 2020 (**NPSFM 2020**), the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-Freshwater**), and the Resource Management (Stock Exclusion) Regulations 2020 (**Stock Exclusion Regulations**) for PC7 and PC2;
 - (d) the key documents that have been prepared and filed by Council Officers following notification of PC7 and PC2; and
 - (e) the Joint Witness Statements in respect of various topics filed with the Hearing Commissioners.

PC7

- 4 There are three components to PC7; Parts A, B and C.
- 5 Part A of PC7, also referred to as Omnibus, amends various provisions in the LWRP, including:
 - (a) Amendments to better align the outcomes and limits in the LWRP with the NPSFM 2017, particularly the numeric attribute states in the 2017 National Objectives Framework;
 - (b) Amendments to regulate plantation forestry activities following the introduction of the NES-PF;

- (c) The inclusion of new matters of discretion for certain restricted discretionary rules to allow consideration of effects on Ngāi Tahu values;
 - (d) Amendments to define, map, and protect the critical habitat of threatened indigenous freshwater species and to improve the management of activities resulting in adverse effects on aquatic habitats;
 - (e) Responding to the recommendations of the Hinds Drains Working Party;
 - (f) Amendments to provide for managed aquifer recharge;
 - (g) Amendments to manage commercial vegetable production;
 - (h) The addition of further bathing sites to Schedule 6 of the LWRP and the addition of further salmon spawning sites to Schedule 17 of the LWRP; and
 - (i) Various other amendments to address issues of interpretation, clarification and consistency in the LWRP.
- 6 Part B of PC7 primarily relates to the Orari-Temuka-Opihi-Pareora (**OTOP**) sub-region (being section 14 of the LWRP) and introduces or amends provisions to introduce catchment-specific freshwater outcomes, limits and provisions for the sub-region, and amends the region-wide provisions in the LWRP insofar as they relate to the OTOP sub-region.
- 7 Finally, Part C of PC7 primarily relates to the Waimakariri sub-region (being section 8 of the LWRP) and introduces or amends provisions to introduce catchment-specific freshwater outcomes, limits and provisions for the sub-region, and amends the region-wide provisions in the LWRP insofar as they relate to the Waimakariri sub-region.

PC2

- 8 PC2 proposes to reduce the area covered by the WRRP in response to changes being made to the Waimakariri sub-region of the LWRP through PC7.
- 9 This results in the WRRP only applying to the mainstem of the Waimakariri River, the upper catchment area and the tributaries to the south of the Waimakariri River.

Current status of the regional planning framework

- 10 The LWRP was originally notified in 2012 and first made partially operative in September 2015. Throughout its implementation, a number of issues of interpretation, clarification and potential areas for improvement have been identified.
- 11 A number of changes have been promulgated in respect of the LWRP, both to address those issues and introduce sub-region specific provisions:
- (a) Plan Change 1 (Selwyn – Te Waihora) was made operative by the Council in February 2016;
 - (b) Plan Change 2 (Hinds/Hekeao) was made operative by the Council in June 2018;
 - (c) Plan Change 3 (South Coastal Canterbury) was made operative by the Council in September 2017;
 - (d) Plan Change 4 (Omnibus) was made operative by the Council in March 2017;
 - (e) Plan Change 6 (Wairewa Catchment) was made operative by the Council in February 2017;
 - (f) Plan Change 5 (Nutrient Management and Waitaki) was made operative by the Council as of 1 February 2019.
- 12 The WRRP was made operative in October 2004. Plan Change 1 to the WRRP was notified in August 2009, made operative in June 2011, and as such is incorporated into the WRRP.

Implications of the Action for Healthy Waterways Package

- 13 On 5 August 2020, the Government gazetted the following documents as part of its 'Action for healthy waterways package':
- (a) The National Policy Statement for Freshwater Management 2020 (**NPSFM 2020**);
 - (b) The Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-Freshwater**);
 - (c) The Resource Management (Stock Exclusion) Regulations 2020 (**Stock Exclusion Regulations**); and

(d) The Resource Management (Measurement and Reporting of Water Takes) Amendment Regulations 2020.

- 14 We address the implications of the NPSFM 2020, NES-Freshwater, and the Stock Exclusion Regulations below.

NPSFM 2020

- 15 The Council is required to prepare and change any regional plans in accordance with, amongst other matters, its obligation to have particular regard to an evaluation report prepared in accordance with section 32, and a national policy statement, in accordance with section 66(1)(e)-(ea) of the Resource Management Act 1991 (**RMA or Act**). A regional plan must give effect to, relevantly, a national policy statement.¹ In the hierarchy of planning documents, the NPSFM 2020 is a higher order planning document than the Canterbury Regional Policy Statement, the LWRP and the WRRP.
- 16 PC7 and PC2 were prepared, evaluated pursuant to section 32 of the Act, and notified in order to give effect to the National Policy Statement for Freshwater Management 2014 (as amended in 2017) (**NPSFM 2017**).
- 17 The NPSFM 2020 came into force on 3 September 2020² and replaces the NPSFM 2017. Clause 4.1 of the NPSFM 2020 provides that “[e]very local authority must give effect to this National Policy Statement as soon as reasonably practicable”. In accordance with section 80A of the Act, the Council must notify a freshwater planning instrument, where that instrument has the purpose of giving effect to the NPSFM 2020, by 31 December 2024.
- 18 As indicated in the Memorandum of Counsel on behalf of the Canterbury Regional Council dated 31 August 2020, the extent to which it is reasonably practicable for the provisions of PC7 and PC2 to give effect to the NPSFM 2020 is confined by the scope within submissions to make changes to PC7 and PC2. PC7 and PC2 do not need to immediately give full effect to the NPSFM 2020. Rather, the Council

¹ RMA, s 67(3)(a).

² NPSFM 2020, cl 1.2(1).

must give effect to the NPSFM 2020 as soon as is reasonably practicable.

- 19 The situation before this Panel with respect to the introduction of the NPSFM 2020 ‘mid-process’ so to speak, is not new, and has occurred before with previous iterations of the National Policy Statement for Freshwater Management.
- 20 In *Ngati Kahungunu Iwi Incorporated v Hawke’s Bay Regional Council* the Environment Court held that the applicable national policy statement in that case was the National Policy Statement for Freshwater Management 2014 (which came into force following the Council’s decision on proposed change 5 to the Hawke’s Bay Regional Resource Management Plan, but prior to the Environment Court hearing the appeal on 3 and 4 December 2014):³

[16] Since the Supreme Court judgement in *EDS v NZ King Salmon Co Ltd* [2014] NZRMA 195 there has been an increased awareness of the need to consider the hierarchy of planning documents, and the degree of control those documents have over the required or permissible contents of the documents ranking below them. Plainly, the senior document is the RMA, and immediately below that are the National Policy Statements (NPS). **In this case, this is the NPSFM which came into force on 1 August 2014 and, with some transitional provisions, revoked the 2011 version from that date. ...**

(Emphasis added)

- 21 Similarly, in *Hawke’s Bay and Eastern Fish and Game Council v Hawke’s Bay Regional Council* the High Court considered the question of which freshwater policy statement ought to be given effect to, following an appeal and the referral of a provision back to the decision-maker for reconsideration (in this case a Board of Inquiry).⁴ The Court acknowledged that the effect of its direction for reconsideration meant that the Board of Inquiry would have given effect to the NPSFM 2011 in

³ *Ngati Kahungunu Iwi Incorporated v Hawke’s Bay Regional Council* [2015] NZEnvC 50, (2015) 18 ELRNZ 565.

⁴ *Hawke’s Bay and Eastern Fish and Game Council v Hawke’s Bay Regional Council* [2014] NZHC 3191 involving Plan Change 6 to the Hawke’s Bay Regional Management Plan.

relation to most of the Plan Change, and to the NPSFM 2014 in relation to the specific issue referred back to it:

[183] As the Freshwater Policy Statement 2014 will be the operative Freshwater Policy Statement when the Board reconsiders Rule TT1(j), the Board should give effect to that policy. This approach:

- (1) recognises that the Executive wants the Freshwater Policy Statement 2014 to be implemented as promptly as possible; and
- (2) **best reflects the requirements of s 67(3)(a) of the RMA** which requires the Board to give effect to any national policy statement.

[184] Accordingly, the Board should, as part of its reconsideration of Rule TT1(j) invite the parties to make submissions on the meaning and effect of the Freshwater Policy Statement 2014. **I appreciate that this direction will mean the Board will have given effect to the Freshwater Policy Statement 2011 in relation to those parts of its report that have not been challenged and give effect to Freshwater Policy Statement 2014 when re-writing Rule TT1(j).** This unfortunate but unavoidable consequence arises from the fact the appeal I have had to consider focuses primarily on Rule TT1(j).

(Emphasis added).

- 22 By contrast, in *Horticulture New Zealand v Manawatu-Wanganui Regional Council*, the High Court held that on appeal, the Environment Court was not obliged to give effect to the National Policy Statement for Freshwater Management 2011:⁵

[98] It is convenient to start with Horticulture NZ's submission. Section 55 requires a local authority to make amendments to plans required to give effect to any provision in the NPSFM that affects a plan. Those amendments must be made either as soon as practicable, or within the time specified

⁵ *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492 involving the Horizons One Plan.

within the NPSFM (if applicable), or before the occurrence of any event specified in the statement. That provision is responsive to the NPSFM, as is s 65(3)(g) which provides that a regional council is to consider the desirability of preparing a regional plan when the implementation of a NPSFM arises, or is likely to arise.

[99] It is also important to bear in mind that **the Environment Court's jurisdiction is functionally limited**. It is confined by the scope of appeals, and in turn further limited by the scope of submissions and further submissions. I agree with Mr Maassen's submission that **the Environment Court does not sit in an executive plan-making and plan-changing role**. That is the local authority's role.

[100] In this case the NPSFM was gazetted only after appeals and s 274 notices had been filed. I consider that the Council (and the Court) was not obliged then to attempt to give effect to the NPSFM in the course of the appellate process. The NPSFM contains its own implementation timetable, including a series of default steps where it is impracticable to complete implementation of the policy fully by the end of 2014. I accept this is such a case. As the implementation guide associated with the NPSFM notes, "implementing the NPSFM will take time, will involve new approaches, and will not necessarily be achieved in one step".

[101] Policy E1 of the NPSFM anticipates decisions being made by regional councils. Implementation must be undertaken using the process in Sch 1.37 Notification and consultation is a key part of that process. There is no justification for that to be short-circuited through a hurried implementation exercise in the course of a party-confined, and jurisdictionally confined, appellate process that commenced before the NPSFM was gazetted.

[102] I do not, therefore, find that the Environment Court erred in failing to consider the extent to which the POP gave effect to the NPSFM in the paragraphs complained of. Implementation of the NPSFM will need to be addressed in accordance with its own terms, and under Sch 1, separately.

Should the Council fail to give effect to the NPSFM, then the appellants may seek declaratory relief from the Environment Court under Pt 12 of the Act, or seek judicial review in the High Court.

(Emphasis added)

- 23 The Environment Court's rationale for not considering the evidence it had before it on the relevance of the new national policy statement (which was upheld by the High Court on appeal) was that the new national policy statement "only came into force long after the POP [being the Proposed One Plan] was well advanced".⁶ Further, Kós J emphasised the limited jurisdiction of the Environment Court and the fact that it does not sit in an executive plan-making and plan-changing role.
- 24 In our submission, the approach taken by the High Court in *Hawke's Bay and Eastern Fish and Game Council v Hawke's Bay Regional Council* is preferable and ought to be followed here. The High Court's approach best reflects the requirements of s 67(3)(a) of the RMA, but is also more consistent with the purpose of the Act, being to promote the sustainable management of natural and physical resources. Further:
- (a) The PC7 and PC2 processes are far less advanced than those in the *Horticulture New Zealand* case, having only progressed through the notification and submissions stages to date; and
 - (b) This Panel is not jurisdictionally confined (as the Environment Court was in the *Horticulture New Zealand* case) and is charged with making recommendations to the Council, which does sit in an executive plan-making and plan-changing role.
- 25 Accordingly, to the extent that there is scope to do so, this Panel should strive to give effect to the NPSFM 2020. In saying that, it is important to acknowledge that the NPSFM 2020 is in many respects a significant departure from previous iterations of the national policy statement, particularly in respect of the manner by which the document is implemented. Unless and until certain implementation steps have been followed, the NPSFM 2020 can not be fully given effect to.

⁶ *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182 at [5-189].

- 26 The actions required of regional councils to implement the NPSFM 2020 are set out in several clauses of Part 3, rather than through specific policy direction. There is one objective in the document, supported by 15 policies.
- 27 One of the key changes in the NPSFM 2020 is the further elevation and articulation of the concept of Te Mana o te Wai. Te Mana o te Wai has the meaning set out in clause 1.3 and is described as a fundamental concept, encompassing six principles:
- (a) Mana whakaere;
 - (b) Kaitiakitanga;
 - (c) Manaakitanga;
 - (d) Governance;
 - (e) Stewardship; and
 - (f) Care and respect:
- along with a hierarchy of obligations that prioritises:
- (a) First, the health and well-being of water bodies and freshwater ecosystems
 - (b) Second, the health needs of people (such as drinking water)
 - (c) Third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.
- 28 This hierarchy of obligations is enshrined in the only objective in the NPSFM 2020, which provides:
- (1) The objective of this National Policy Statement is to ensure that natural and physical resources are managed in a way that prioritises:
 - (a) first, the health and well-being of water bodies and freshwater ecosystems
 - (b) second, the health needs of people (such as drinking water)

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

29 In addition to the articulation of Te Mana o te Wai in clause 1.3 and the objective, the Council must engage with communities and tangata whenua to determine how Te Mana o te Wai applies to water bodies and freshwater ecosystems in the region.⁷ Accordingly, while it is possible to initiate action intended to give effect to the NPSFM 2020, it is submitted that it is not possible to fully give effect to the true intent of the document until such time as the local approach to giving effect to Te Mana o te Wai (as required in clause 3.4) has been determined. This necessarily has a bearing on the extent to which PC7 and PC2 can give effect to the NPSFM 2020, acknowledging also the scope constraints for these processes.

30 Further, in giving effect to Te Mana o te Wai, the Council must actively involve tangata whenua in freshwater management (including decision-making processes); engage with communities and tangata whenua to identify long-term visions, environmental outcomes, and other elements of the National Objectives Framework (**NOF**); apply the hierarchy of obligations when:

- (a) Developing long-term visions;
- (b) Implementing the NOF;
- (c) Developing objectives, policies, methods, and criteria relating to natural inland wetlands, rivers, fish passage, primary contact sites, and water allocation;

enable the application of a diversity of systems of values and knowledge to the management of freshwater (such as mātauranga Māori); and adopt an integrated approach to the management of freshwater (ki uta ki tai).

31 Tangata whenua involvement is promoted and required by the NPSFM 2020, with clause 3.4 requiring the Council to actively involve tangata whenua when identifying the local approach to giving effect to Te Mana o te Wai, when making or changing a regional policy statement or

⁷ NPSFM 2020, cl 3.2.

regional plan relating to freshwater, when implementing the NOF, and when developing and implementing mātauranga Māori and other monitoring. In respect of the NOF, the NPSFM 2020 promotes the identification of Māori freshwater values⁸ (in addition to mahinga kai) that apply to any Freshwater Management Unit (**FMU**) or part of an FMU.⁹

- 32 The NOF process articulated in the NPSFM 2020 requires the Council to:
- (a) Identify FMUs in the region;
 - (b) Identify values for each FMU;
 - (c) Set environmental outcomes¹⁰ for each value and include them as objectives in regional plans;
 - (d) Identify attributes¹¹ for each value and set baseline states¹² for those attributes;
 - (e) Set target states, environmental flows and levels, and other criteria to support the achievement of environmental outcomes; and
 - (f) Set limits¹³ as rules and prepare action plans (as appropriate) to achieve environmental outcomes.
- 33 In respect of identifying values for each FMU, two additional values have been added to the compulsory values (previously Appendix 1 of the

⁸ **Māori freshwater values** means the compulsory value of mahinga kai and any other value (whether or not identified in Appendix 1A or 1B) identified for a particular FMU or part of an FMU through collaboration between tangata whenua and the relevant regional council.

⁹ **Freshwater management unit, or FMU**, means all or any part of a water body or water bodies, and their related catchments, that a regional council determines under clause 3.8 is an appropriate unit for freshwater management and accounting purposes; and **part of an FMU** means any part of an FMU including, but not limited to, a specific site, river reach, water body, or part of a water body.

¹⁰ **Environmental outcome** means, in relation to a value that applies to an FMU or part of an FMU, a desired outcome that a regional council identifies and then includes as an objective in its regional plan(s) (see clause 3.9).

¹¹ **Attribute** means a measurable characteristic (numeric, narrative, or both) that can be used to assess the extent to which a particular value is provided for.

¹² **Baseline state**, in relation to an attribute, means the best state out of the following: (a) the state on the date it is first identified by a regional council (b) the state on the date on which a regional council set a freshwater objective for the attribute under the National Policy Statement for Freshwater Management 2014 (as amended in 2017) (c) the state on 7 September 2017.

¹³ **Limit** means either a limit on resource use or a take limit. **Limit on resource use** means the maximum amount of a resource use that is permissible while still achieving a relevant target attribute state (see clauses 3.12 and 3.14). **Take limit** means a limit on the amount of water that can be taken from an FMU or part of an FMU, as set under clause 3.17.

NPSFM 2017, now Appendix 1A of the NPSFM 2020). In addition to identifying the values of 'ecosystem health' and 'human health for recreation' (renamed 'human contact' in the NPSFM 2020), the NPSFM 2020 includes 'threatened species' and 'mahinga kai' as compulsory values.

- 34 For the purposes of limit setting, the NPSFM 2020 makes changes to the following national bottom lines:
- (a) Nitrate (toxicity) in rivers to an annual median of 2.4 milligrams of nitrate-nitrogen per litre and an annual 95th percentile of 3.5 milligrams of nitrate-nitrogen per litre (meaning that the 2017 C and D bands are now below the national bottom line); and
 - (b) Ammonia (toxicity) in rivers and lakes is now an annual median of 0.24 milligrams of ammoniacal-nitrogen per litre and an annual maximum of 0.40 milligrams of ammoniacal-nitrogen per litre (meaning that the 2017 C and D bands are now below the national bottom line).
- 35 The NPSFM 2020 also introduces standards for suspended fine sediment in Appendix 2A.
- 36 Appendix 2B contains various attributes for which action plans are required (pursuant to clause 3.15 of the NPSFM 2020), including submerged native plants and submerged invasive plant species, fish, macroinvertebrates, deposited fine sediment, dissolved oxygen, lake-bottom dissolved oxygen, mid-hypolimnetic dissolved oxygen, dissolved reactive phosphorus, ecosystem metabolism, and *Escherichia coli*.
- 37 New Appendix 2C contains various sediment classification tables, and Appendix 3 (in place of the previous Appendix 6 of the NPSFM 2017) contains the national target for primary rivers (which remains unchanged).
- 38 For completeness, the NPSFM 2020 also contains implementation provisions requiring the identification and mapping of certain natural inland wetlands,¹⁴ monitoring requirements for primary contact sites, provisions in respect of large hydro-electric generation schemes, and provisions in respect of specified vegetable growing areas.

¹⁴

Natural inland wetland means a natural wetland that is not in the coastal marine area.

39 Turning now to the 15 policies in the NPSFM 2020:

- (a) Policy 1: Freshwater is managed in a way that gives effect to Te Mana o te Wai (noting that Te Mana o te Wai has the meaning set out in clause 1.3 of the NPSFM 2020).
- (b) Policy 2: Tangata whenua are actively involved in freshwater management (including decision-making processes), and Māori freshwater values are identified and provided for.
- (c) Policy 3: Freshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments.
- (d) Policy 4: Freshwater is managed as part of New Zealand's integrated response to climate change.
- (e) Policy 5: Freshwater is managed through a National Objectives Framework to ensure that the health and well-being of degraded water bodies and freshwater ecosystems is improved, and the health and well-being of all other water bodies and freshwater ecosystems is maintained and (if communities choose) improved.
- (f) Policy 6: There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.
- (g) Policy 7: The loss of river extent and values is avoided to the extent practicable.
- (h) Policy 8: The significant values of outstanding water bodies are protected.
- (i) Policy 9: The habitats of indigenous freshwater species are protected.
- (j) Policy 10: The habitat of trout and salmon is protected, insofar as this is consistent with Policy 9.
- (k) Policy 11: Freshwater is allocated and used efficiently, all existing over-allocation is phased out, and future over-allocation is avoided.
- (l) Policy 12: The national target (as set out in Appendix 3) for water quality improvement is achieved.

- (m) Policy 13: The condition of water bodies and freshwater ecosystems is systematically monitored over time, and action is taken where freshwater is degraded, and to reverse deteriorating trends.
- (n) Policy 14: Information (including monitoring data) about the state of water bodies and freshwater ecosystems, and the challenges to their health and well-being, is regularly reported on and published.
- (o) Policy 15: Communities are enabled to provide for their social, economic, and cultural well-being in a way that is consistent with this National Policy Statement.

40 As submitted above, this Panel should strive to give effect to the NPSFM 2020 to the extent that there is scope within submissions to do so. It is for submitters to invoke the policies of the NPSFM 2020 relevant to the changes that they seek to PC7 and PC2, and to illustrate the extent to which their relief gives effect to the NPSFM 2020.

41 The degree to which these policies will be relevant to the PC7 and PC2 processes will vary, in part due to the directiveness of the policy direction therein. However, certain policies in the NPSFM 2020 are expressed in directive terms making it difficult for a decision-maker to ignore them.

42 By way of example, even in the absence of determining the local approach to giving effect to Te Mana o te Wai, Policy 1 clearly requires freshwater to be managed in a way that gives effect to Te Mana o te Wai (as that term is expressed in clause 1.3 of the NPSFM 2020). This necessarily involves consideration of the hierarchy of obligations which, at the forefront, requires the health and wellbeing of the waterbody and freshwater ecosystem to be put first, before any use is contemplated.

43 The ability to balance 'competing' policy considerations is not provided for in the policy direction of the NPSFM 2020. For example, Policy 1 is directive and clear in its terms that freshwater is to be managed in a way that gives effect to Te Mana o Te Wai. However, Policy 11 clearly contemplates the allocation and further use of the freshwater resource, albeit efficiently. Similarly, Policy 15 provides that communities are enabled to provide for their social, economic, and cultural well-being, in a way that is *consistent with* the NPSFM 2020. It may not be consistent with the NPSFM 2020 to provide for allocation and further use of the

freshwater resource if doing so would not prioritise first, the health and well-being of the particular water body and freshwater ecosystem.

- 44 That said, the purpose of a national policy statement is to state objectives and policies for matters of national significance that are relevant to the purpose of the Act. The Legislature, in approving the NPSFM 2020, was satisfied that the NPSFM 2020 achieved that purpose.
- 45 The purpose of the Act is to promote ‘sustainable management’ of natural and physical resources, the meaning of which is explained in section 5 of the Act:
- ...managing the use, development and protection of natural resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –
- (a) Sustaining the potential of natural and physical resources ... to meet the reasonably foreseeable needs of future generations; and
 - (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
 - (c) Avoiding, remedying or mitigating any adverse effects of activities on the environment.
- 46 Accordingly, it would not be appropriate for a decision-maker to invoke the definition of ‘sustainable management’ to seek more of a balance between the requirement to first prioritise the health and well-being of the waterbody and freshwater ecosystem, with the ability of people and communities to provide for their social, economic, and cultural well-being, if doing so would not provide for the freshwater resource being managed in a way that gives effect to Te Mana o te Wai. Nor would it be appropriate to rely on the requirement to have particular regard to the section 32 report to avoid giving effect to the NPSFM 2020.
- 47 Ultimately, a decision-maker is required to give effect to the NPSFM 2020 and where there is scope within submissions to make the necessary changes to the regional planning framework through the PC7 and PC2 process, a decision-maker must reconcile any conflict in policy direction with the LWRP and WRRP in favour of the NPSFM 2020. This

approach recognises that the NPSFM 2020 is the most recent articulation of the matters of national significance that are relevant to achieving the purpose of the Act in the freshwater management space.¹⁵ Any remaining (out of scope) conflict between the in the NPSFM and the objective and policy framework in the LWRP and WRRP will then need to be resolved on a consent by consent basis.

NES-Freshwater

- 48 As signalled in the Memorandum of Counsel on behalf of the Council dated 16 September 2020, the Council is required to amend its planning framework in situations where its plan (and proposed plan) rules conflict with the NES-Freshwater regulations:
- (a) A plan rule which is more stringent than a National Environmental Standard (**NES**) (in that it prohibits or restricts what the NES provision permits or authorises) conflicts with a provision of an NES if the NES does not expressly say that the rule may be more stringent than it (sections 43B(1) and 44A RMA);
 - (b) A plan rule which is more lenient than an NES provision (in the sense that it permits or authorises an activity that the NES prohibits or restricts) conflicts with a provision of an NES if the NES does not expressly say that a rule may be more lenient than it (sections 43B(3), (4), and 44A RMA).
- 49 In these circumstances, the Council must amend its planning framework as soon as practicable and without using a Schedule 1 RMA process.¹⁶
- 50 Regulation 6 of the NES-Freshwater provides:
- (1) A district rule, regional rule, or resource consent may be more stringent than these regulations.
 - (2) A district rule, regional rule, or resource consent may be more lenient than any of regulations 70 to 74 (culverts, weirs, and passive flap gates) if the rule is made, or the resource consent is granted, for the purpose of preventing the passage of fish in order to protect particular fish species, their life stages, or their habitats.

¹⁵ RMA, s 45(1).

¹⁶ RMA, s 44A.

- 51 The Council has now reviewed the provisions of PC7 and PC2 to determine whether any such conflict exists, the result being that there are some plan provisions which partially conflict with the provisions of the NES-Freshwater. This means that, in some circumstances (but not all circumstances contemplated by the relevant regional rule), there is a conflict between the regional rule and the regulation.
- 52 For example, Rule 8.5.24 (introduced by PC7 as part of the Waimakariri provisions) and Rule 14.5.17 (introduced by PC7 as part of the Orari-Temuka-Opihi-Pareora sub-region), regulate the use of land for a farming activity on properties greater than 5 or 10 hectares respectively, as permitted activities, provided the listed conditions are met. Both rules include a condition regarding winter grazing, as a subset of the overall activity, being the use of land for a farming activity. The NES-Freshwater separately regulates intensive winter grazing on farms that are generally over 20 hectares in size (see Regulation 8), in Subpart 3 of the NES-Freshwater. Both PC7 Rules contain area conditions that are more stringent than the area condition in Regulation 26 (therefore not creating conflict), but the PC7 Rules do not contain slope condition requirements, or restrictions on pugging (as that term is defined in the NES-Freshwater). Accordingly, there may be certain circumstances where Rules 8.5.24 and 14.5.17 are more lenient than the NES-Freshwater regulation. There is no simple fix to remove the potential conflict in the Rules, given the broader application of the Rules compared to the Regulations, and without importing various definitions from the Regulations into the LWRP.
- 53 Accordingly, it is not possible to 'remove' the conflict (by removing the relevant terms and conditions that may be in conflict) without creating unintended consequences for the variety of other activities that the Rules regulate.
- 54 For this reason, the Council is considering its options to alert plan users to the need to consult both the relevant regional rules but also the NES-Freshwater. This may mean that in some circumstances, plan users need to consult the operative LWRP, the provisions of PC7, *and* the NES-Freshwater. While this results in certain inefficiencies for plan users, any alternative action may also adversely impact on the integrity and construction of the LWRP (given the need to import various definitions and provisions of the NES-Freshwater).

- 55 As stated previously, where such conflict is identified, the Council is required to amend its planning framework to remove the conflict without using the Schedule 1 process as soon as practicable after the date on which the NES-Freshwater comes into force, in accordance with section 44A of the Act.
- 56 The ability to amend a plan or proposed plan to remove a conflict with an NES without using the process in Schedule 1 has not been delegated, and therefore sits with the Council.

Stock Exclusion Regulations

- 57 The Stock Exclusion Regulations were made by way of Order in Council in accordance with section 360(1)(hn) of the RMA, and came into force on 3 September 2020 (however, some of the regulations do not apply until a later date).¹⁷
- 58 Regulation 19 provides that despite section 68(2) of the Act,¹⁸ a more stringent rule in a regional plan prevails over a provision in these regulations that relates to the same matter. Retaining rules that are more stringent than the Stock Exclusion Regulations may be appropriate in order to appropriately manage the freshwater resource.

Key documents filed following notification

- 59 The following documents have been prepared and filed by the Council Officers following notification of PC7 and PC2:
- (a) Section 42A Report on PC7 to the LWRP and PC2 to the WRRP dated March 2020;
 - (b) Section 42A Report Errata Table dated 29 April 2020;
 - (c) Council Officer responses to questions from the Hearing Commissioners on the Section 42A Report dated 28 May 2020 and 16 June 2020;

¹⁷ Resource Management (Stock Exclusion) Regulations 2020, cl 3.

¹⁸ Which provides that every such rule [in a regional plan] shall have the force and effect of a regulation in force under this Act but, to the extent that any such rule is inconsistent with any such regulation, the regulation shall prevail.

- (d) A further update to Appendix E Part 1 of the Section 42A Report and a Supplementary Report to the Section 42A Report, both dated 26 June 2020; and
- (e) A consolidated version of the Officer Recommendations (including recommendations from the Section 42A Report, Errata, and Update #2) dated 10 July 2020.

Joint Witness Statements

60 Following requests for expert witness caucusing by several submitters, expert witness caucusing took place throughout August on various topics. The following Joint Witness Statements were produced and filed with the Panel following the expert witness caucusing:

- (a) Joint Witness Statement in respect of Hydrology in the Orari-Temuka-Opihi-Pareora sub-region following conferencing on 7 August 2020;
- (b) Joint Witness Statement in respect of Freshwater Quality / Ecology in the Orari-Temuka-Opihi-Pareora sub-region following conferencing on 18 August 2020;
- (c) Joint Witness Statement of Shelley McMurtrie and Jarred Arthur in respect of Salmon Spawning Habitat dated 20 August 2020; and
- (d) Joint Witness Statement in respect of Groundwater Science in the Waimakariri sub-region following conferencing on 19 and 31 August 2020.

Council's Presentation

61 Council Officers and Counsel for the Council will be available to answer questions on the content of the section 42A report, Joint Witness Statements, and these legal submissions, in opening.

Dated this 22nd day of September 2020



.....

P A C Maw / I F Edwards

Counsel for the Canterbury Regional Council