

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

UNDER: the Resource Management Act 1991

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 – Section 14: Orari-Temuka-
Opihi-Pareora

**LEGAL SUBMISSIONS ON BEHALF OF
THE OPIHI FLOW AND ALLOCATION WORKING PARTY
(SUBMITTER NO. PC7-382)**

Dated: 29 October 2020

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MAY IT PLEASE THE COMMISSIONERS

INTRODUCTION

1. These legal submissions are presented on behalf of the Opihi Flow and Allocation Working Group (**FAWP**).
2. The FAWP's membership comprises representatives of the Timaru District Council, Central South Island Fish and Game Council and communities in the main tributaries of the Opihi catchment, the North Opuha, South Opuha, Upper Opihi and Te Ana Wai Rivers (**Tributaries**).¹ As such, the FAWP represents a collective view on Proposed Plan Change 7B (**PC7B**) from the perspective of municipal and community water supply, recreational angling, and agricultural interests.
3. To the extent that PC7B has codified recommendations that the FAWP made to the OTOZ Zone Committee during 2017/2018 following extensive hydrological and ecological analysis and stakeholder engagement, the FAWP supports PC7B. This includes PC7B's proposed:
 - 3.1 Environmental flow regime for the North Opuha River;² and
 - 3.2 "BN" (high flow) allocation blocks for each of the Tributaries.³
4. The FAWP supports the recommendations of the Section 42A Report to retain those provisions as notified. For that reason, and in the absence of any submissions or further submissions providing a contrary position, it is unnecessary to address those elements of PC7B in further detail.
5. The legal submissions that follow instead focus on the residual issues of concern to the FAWP with respect to PC7B as notified and/or arising from the recommendations proffered in the Section 42A Report, which relate to:
 - 5.1 Environmental flow regimes for the South Opuha, Upper Opihi and Te Ana Wai Rivers: Section 14.6.2, Tables 14(n) – 14(s);
 - 5.2 Allocation limits for each of the Tributaries: Section 14.6.2, Tables 14(m) – 14(s); and
 - 5.3 Pro-rata partial restrictions, specifically:

¹ Evidence in Chief of Mark Webb on behalf of the FAWP (**Mr Webb's Evidence**), dated 17 July 2020, at [3.2].

² Section 14.6.2, Table 14(m).

³ Section 14.6.2, Table 14(y).

- (a) Section 14.1A Definitions; and
- (b) Timing of pro-rata partial restrictions for the Te Ana Wai River: Table 14(s).
6. As will be addressed in further detail in these submissions, the position advanced by the FAWP on these issues has been informed by the outcome of the hydrology and ecology witness conferencing⁴ and otherwise supported by the evidence of the following witnesses filed on behalf of the FAWP on 17 July 2020:

Witness / Role	Description of evidence
<p>Mark Webb, Fish and Game Officer, Fish and Game New Zealand (Central South Island Region) and Fish and Games' representative on the FAWP.</p>	<p>Background to the FAWP's formation and workstreams during the development phase of the OTOZ ZIPA and key considerations that informed its recommendations to the OTOZ Zone Committee, response to matters arising from the Section 42A Report and outline of the changes sought by the FAWP'.</p>
<p>Gregory Anderson, North Opuha irrigator representative on the FAWP.</p>	<p>Overview of personal farming operations and the PC7 environmental flow and partial restriction regime for the North Opuha River, implications for irrigators and changes to PC7 requested by the FAWP.</p>
<p>Deinol Davies, South Opuha irrigator representative on the FAWP.</p>	<p>Overview of personal farming operations and those related to the Cascade Irrigation Scheme, overview of the current state and irrigation in the South Opuha River and the FAWP, the impacts of the PC7</p>

⁴ Joint Witness Statement in respect of Hydrology in the Orari-Temuka-Opihi-Pareora sub-region following conferencing on 7 August 2020 (**Hydrology Caucusing Statement**); and Joint Witness Statement in respect of Freshwater Quality/Ecology in the Orari-Temuka-Opihi-Pareora sub-region following conferencing on 18 August 2020 (**Ecology Caucusing Statement**).

	environmental flow regime for the South Opuha River on irrigators.
Murray Bell , Upper Opihi irrigator representative on the FAWP.	Overview of personal farming activities, the current state and irrigation in the Upper Opihi River, background to the FAWP's submission on the Upper Opihi River's environmental flow regime, the impacts of that regime on irrigators, changes to PC7 requested by the FAWP and comments on the Section 42A Report.
Mark Hawkins , Te Ana Wai irrigator representative on the FAWP.	Overview of personal farming activities and those of the TeNgawai Water Users Group (TWUG), current state and irrigation in the Te Ana Wai River, background to the FAWP's submission on the environmental flow and partial restriction regimes for the Te Ana Wai River, implications for those regimes for the TWUG and comments on the Section 42A Report.
Keri Johnston , Director of Irricon Resource Solutions Limited.	Expert witness, surface water hydrology.
Dr Gregory Ryder , Environmental Scientist, Ryder Environmental Ltd.	Expert witness, freshwater quality and ecology.
Gregory McAllister and Jonathan Sutherland , Directors of Vector Charlie Charlie.	Expert witnesses, drone footage.
Grant Porter , finance and agribusiness consultant	Expert witness, economics.

<p>Dr Caroline Saunders, Professor of Trade and the Environment and Director of the Agribusiness Economic Research Unit, Lincoln University.</p>	<p>Expert witness, economics.</p>
<p>Timothy Ensor, Principal Planner, Tonkin and Taylor Ltd.</p>	<p>Expert witness, planning.</p>

THE FAWP'S INTEREST IN PC7B

7. The FAWP's involvement in the OTOP sub-region plan change process began in 2017,⁵ during the early stages of the development the OTOP Zone Implementation Programme Addendum (**ZIPA**). The FAWP was formed after concerns were raised by community members that the OTOP Zone Committee had not been furnished with the necessary information to allow them to make fully informed recommendations about future environmental flow and allocation regimes for the Tributaries in particular, and an apparent lack of community engagement on the same.⁶
8. The Zone Committee supported the assistance that FAWP could provide in the development of the ZIPA, namely through gathering community feedback to inform the development of recommendations on flow and allocation for the Tributaries, and providing an avenue for robust community discussion by affected permit holders and key stakeholders.⁷ In addition to the interest groups represented by the FAWP, invitations to FAWP meetings and notes from those meetings were provided to Te Rūnanga o Arowhenua, the Department of Conservation and Canterbury Regional Councillors.⁸ Zone Committee members attended some of those FAWP meetings.⁹
9. Informed by independent expert advice on hydrological, ecology, agricultural economics, and resource management planning, the FAWP developed a series of recommendations during 2017/18 for consideration by the Zone Committee during its deliberations.¹⁰ The majority of the FAWP's

⁵ Mr Webb's Evidence, at [4.1].

⁶ Mr Webb's Evidence, at [4.2].

⁷ Mr Webb's Evidence, at [4.4].

⁸ Mr Webb's Evidence, at [4.4].

⁹ Mr Webb's Evidence, at [4.4].

¹⁰ Mr Webb's Evidence, [4.6] – [4.12].

recommendations were included (either in whole or part) in the December 2018 OTO ZIPA, and carried through into PC7B as notified.¹¹

10. The primary focus of FAWP's submissions, and the position advanced at this hearing, is to ensure those recommendations are fully enshrined in PC7B.

PRELIMINARY LEGAL ISSUES

11. A detailed overview of the legal and statutory framework for the Hearings Panel's consideration of PC7B and submissions is outlined in the Section 42A Report and supplemented by Council's legal submissions¹². For the most part, that overview comprises a fair and accurate summary, and therefore, for the sake of brevity, we do not propose to repeat it in these submissions.
12. However, it is appropriate to address you on key elements of that framework that are particularly relevant to your consideration of the matters raised in the FAWP's submissions and evidence and those of other submitters in relation to the aspects of PC7B referred to in [5] above. Specifically, the relevance of the National Policy for Freshwater Management 2020 (**NPSFM 2020**) to PC7B, which took effect on 3 September 2020 and the wider statutory framework for regional plan provisions, and related issues arising from the Section 42A Report.

Relevance of the NPSFM 2020 to PC7

13. On behalf of Council, Mr Maw has advanced the position that in terms of the requirement in section 67(3)(a) RMA:
 - 13.1 PC7 need not give full effect to the NPSFM immediately;¹³
 - 13.2 To the extent that submissions provide scope to do so, the Panel should strive to give effect to the NPSFM 2020;¹⁴ and
 - 13.3 It is for submitters to invoke the policies relevant to the changes that they seek, and to illustrate the extent to which their relief gives effect to the NPSFM 2020.¹⁵

¹¹ Mr Webb's Evidence, [4.13] – [4.15].

¹² Opening legal submission of counsel for the Canterbury Regional Council dated 22 September 2020 (**Council's Legal Submissions**).

¹³ Council's Legal Submission, at [18].

¹⁴ Council's Legal Submissions, at [25].

¹⁵ Council's Opening Submissions, at [40].

14. We concur with Mr Maw's submissions in that regard. In our submission, it is simply not practical or necessary to give full effect to the NPSFM 2020, an exercise that can only be completed by Council and following the various implementation steps prescribed by Part 3 of the NPSFM 2020. That position is supported by the case law referred to in Mr Maw's submission, particularly *Hawke's Bay and Eastern Fish and Game Council v Hawke's Bay Regional Council* [2014] NZHC 3191.
15. However, Mr Maw's submissions stop short of providing guidance on how the Hearings Panel should approach the NPSFM 2020 within the context of the wider statutory framework for regional plans, other than to suggest that sections 5 and 32 could not be invoked to avoid giving effect to the NPSFM 2020.¹⁶
16. While the NPSFM 2020's status as a higher order statutory document is irrefutable, in our submission the Hearings Panel must approach its consideration of the mandatory directives of the NPSFM 2020 within the context of the wider statutory framework for consideration of PC7B and submissions. It is submitted that wider context requires the Hearings Panel to:
 - 16.1 First identify all reasonably practicable options for addressing issues raised by submissions, guided by the decisions sought in submissions;
 - 16.2 Then determine how each of the options identified fares against the NPSFM 2020.
17. From there, any options that the Panel determines will give effect to the NPSFM 2020, must then be tested against the other statutory requirements for regional plan provisions, including those prescribed by sections 32 and 67.
18. The inquiry into whether an option gives effect to the NPSFM 2020 needs to be approached objectively with reference to the fundamental concept of the NPSFM 2020, Te Mana o te Wai. By Policy 1, freshwater must be *managed in a way that gives effect to Te Mana o te Wai*, as defined by clause 3.1 and articulated through the following hierarchy of priorities set out in Objective 2.1:
 - (a) first, the health and well-being of water bodies and freshwater ecosystems
 - (b) second, the health needs of people (such as drinking water)

¹⁶ Council's Opening Submissions, at [46].

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

19. In simple terms, the effect of the hierarchy of obligations espoused by the Objective is to require that freshwater is managed in such a way to ensure that the health and well-being of the water is protected and human health needs are provided for before enabling other uses of water (e.g. irrigation). Policy 15 further directs that such uses can only be enabled (i.e. to provide for communities' social, economic, and cultural well-being) in a way that is consistent with the NPSFM 2020.
20. This is an important point to note with respect to PC7B's proposed environmental flow regimes in particular, as PC7B may fall short of achieving compliance with section 67(3)(a) in the event that, on the evidence, the Hearings Panel finds a competing option would provide suitable (not superior) ecological and human health outcomes for the freshwater resource, and at the same time, provides for the social, economic and cultural well-being, for people and communities. That is the position advanced by the FAWP with respect to the environmental flow regimes for the South Opuha, Upper Opihi and Te Ana Wai Rivers, as discussed later in these submissions.
21. Relevant also to the Hearings Panel's consideration of those options is, in our submission, Policy 3 of the NPSFM, which requires that *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*. That directive is carried through to the implementation framework of the NPSFM 2020, which contemplates integrated management of both freshwater and land use and development as a means through which adverse effects on the health and wellbeing of water bodies, freshwater ecosystems and receiving environments will be avoided, remedied or mitigated.¹⁷
22. Dr Ryder's evidence is particularly relevant in this regard where, in relation to the Tributaries, he notes:
 - [3.3] Sections of these rivers which exhibit nutrient enrichment and occasional nuisance periphyton growths are unlikely to be assisted by further increases in minimum flows. This is because nutrient levels are not flow related and nuisance periphyton growths are controlled

¹⁷ NPSFM 2020, clause 3.5(1)(c).

largely by the frequency of freshes. The size of allocations for these rivers do not significantly affect the size or frequency of flood events. Increases in downstream temperature are not significantly influenced by the size of the minimum flow (at issue here), but rather climate.

23. In our submission, approaching the Te Mana o te Wai inquiry with reference to PC7's environmental flow regimes alone, in isolation of PC7's land use management (nutrient reduction) rules, would be entirely contrary to the principle of ki uta ki tai, which the NPSFM 2020 identifies as an essential requirement of Te Mana o te Wai.¹⁸

Local application of Te Mana o te Wai

24. It is also appropriate to acknowledge that the role of tangata whenua in freshwater management is strengthened under the NPSFM 2020, though the revised concept and framework for Te Mana o te Wai (clause 1.3) and Policy 2. In light of Ms Davidson's evidence on behalf of Te Rūnanga o Arowhenua (**Arowhenua**) and Te Rūnanga o Ngāi Tahu (collectively **Ngā Rūnanga**), it is submitted that the Hearings Panel can rely on Ngā Rūnanga's submission and the evidence of its witnesses as articulating Arowhenua's desired outcomes for the hauora of the Opihi catchment within the context of Te Mana o te Wai, but only to the extent that the matters addressed are within legal scope (an issue we return to later in these submissions).

"Most appropriate"

25. As PC7B does not itself contain objectives, the examination required as to which option is the most appropriate is directed to achieving the purpose of the plan change¹⁹, and to relevant and continuing objectives of the Canterbury Land and Water Regional Plan.²⁰ As Mr Ensor explains, the Hearings Panel's assessment does not stop short at the NPSFM 2020 (as implied by the Section 42A Report), but all reasonably practicable options that align with the hierarchy of obligations need to be evaluated in the context of s32(1)(b) of the RMA so as to examine which option is the most appropriate way to achieve the objectives of the plan change. This point is illustrated by Mr Ensor, where he notes:²¹

¹⁸ NPSFM 2020, clause 3.5(1).

¹⁹ RMA, section 32(6).

²⁰ RMA, section 32(3).

²¹ Evidence Update of Mr Ensor, dated 27 October 2020.

[2.16] The minimum flows proposed through PC7 in the Upper Opihi, Te Ana Wai and South Opuha Rivers, provide an example where achieving the first priority (through PC7 at least) may mean that the third priority is unable to be achieved due to the impact on the viability of the farming systems that rely on the abstracted water.²² In this case my view is that in order to give effect to the NPSFW 2020 objective, priority needs to be given to the health and well-being of the Upper Opihi, Te Ana Wai and South Opuha Rivers. However, the flow and allocation regime needs to deliver this priority in the least restrictive manner possible so the regime can also provide for the health needs of people, and the ability of communities to provide for their well-being; in the case of the latter, through taking and using water for irrigation.

26. As to the Hearings Panel’s consideration of what option is “most appropriate”, the following key case law principles are, in our submission, directly relevant:
- 26.1 There is no presumption that PC7B as notified is the most appropriate or correct²³.
- 26.2 “Most appropriate” means suitable, not superior.²⁴
- 26.3 Where the purpose of the RMA and the objectives of the plan change can be met by a less restrictive regime then that regime should be adopted²⁵, such an approach reflecting the requirement in section 32(1)(b)(ii) to examine efficiency of the provision by identifying, assessing and, if practicable, quantifying all of the benefits and costs associated with implementation.

Section 42A Report

27. At this juncture, it is appropriate to make reference to the changes to PC7B’s environmental flows and partial restriction regimes for the Tributaries recommended in the Section 42A Report and Supplementary Report. Those changes, which would bring forward the time-staged steps for implementation of PC7B’s proposed increases in environmental flows and/or pro-rata partial

²² Primary evidence of Grant Porter for the Opihi Flow and Allocation Working Party, paragraph 6.2 and Table 12.

²³ *Moturoa Island Ltd & Ors v Northland Regional Council* [2013] NZEnvC 227.

²⁴ *Rational Transport Society v New Zealand Transport Agency* [2012] NZRMA 298, at [45].

²⁵ *Royal Forest and Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] EnvC 051, at [59].

restrictions for the Tributaries, are purportedly offered on the basis that they “...*may be more aligned with Te Mana o te Wai...should the Hearings Panel conclude that further weight needs to be given to it*”²⁶. The submissions of Ngā Rūnanga, Royal Forest and Bird Protection Society Incorporated, J Richardson and P Driver are relied on to provide scope for the changes.

28. Regrettably, however, no supporting reasons (including evidence) is provided for the views expressed (i.e. how the changes achieve the stated outcome), or analysis against the wider statutory context for regional plan provisions. It is therefore submitted that the Hearings Panel should approach the recommendations with caution.
29. We note that, unlike the former versions, the NPSFM 2020 does not specify implementation timeframes. However, the recent RMA amendments provide the necessary direction for *freshwater planning instruments* for the purpose of implementing the NPSFM 2020 to be publicly notified no later than 31 December 2024,²⁷ such instruments being one element of the Government’s “Essential Freshwater work programme” whose objectives include bringing *...freshwater resources, waterways and ecosystems to a healthy state within a generation*.²⁸
30. It is therefore highly doubtful whether the element of immediacy implied by the Reporting Officer’s recommendations is an inherent requirement of Policy 1’s directive with respect to Te Mana o Te Wai. Certainly, such a requirement does not feature in the NPSFM’s Policy 11, which for catchments in much more vulnerable state than the Tributaries²⁹, contemplates *phasing out* of over-allocation.
31. In our submission, any perceived ‘risk’ of not acting immediately (or within a shorter timeframe) is answered by Dr Ryder’s evidence with respect to the current health of water quality across the Tributaries. Against that evidence, we submit that providing a transition period (as proposed by the FAWP) may assist in giving effect to the NPSFM’s objective, but enabling all three priorities to be achieved.

²⁶ Section 42A Report, at [2.16], page 29.

²⁷ RMA, section 80A(4)(b).

²⁸ Essential Freshwater: Healthy Water, Fairly Allocated, New Zealand Government, October 2019, Objective 2 (page 3).

²⁹ Documents supporting PC7 variously record the position that the freshwater resources of the Opihi FMU are fully allocated but not over-allocated.

32. In our submission, the changes recommended in the Section 42A Report are simply not necessary to ensure the relevant national and regional policy directives, or the “objectives” in terms of section 32, are achieved or to ensure the Government vision for freshwater is not compromised. We therefore submit that the Reporting Officer’s recommended changes should be disregarded.

Legal scope

33. The matter of legal scope created by submissions which provides the Hearings Panel with jurisdiction to amend PC7B to give effect to the NPSFM 2020 is also, in our submission, particularly important. What becomes apparent when one reads Council’s summary of decisions is the absence of detail in the primary submissions seeking alternative flow regimes or specific amendments to PC7B, which might assist the Hearing Panel (and also other submitters, such as the FAWP) better understand what outcomes from the statutory planning process are sought. The submissions of greatest relevance to the environmental flow and allocation regimes for the Tributaries, summarily:

33.1 Support PC7B’s proposal to introduce environmental flow increases in two time-staged steps;³⁰

33.2 Support PC7B’s first “step” in environmental flow increases (2025) in the Tributaries, but oppose the second “step” (2030)³¹; or

33.3 Seek further improvements to those flows, but without specificity.³²

34. Given the range of decisions sought, it is submitted that the Hearings Panel’s inquiry should focus primarily on whether the NPSFM 2020 would be given effect to more fully, and the section 32 test for appropriateness would be achieved, if:

³⁰ Royal Forest and Bird Protection Society Incorporated’s submission on PC7 (PC7-472), dated 13 September 2020, at para 44:

Relief sought: Retain 2025 targets for minimum flows. Establish meaningful and equitable pollution reductions to restore water quality and quantity in both ground and surface water, with higher minimum flows for rivers underpinned by the needs of the waterway, to be implemented within the life of this plan. This would give effect to Te Mana o Te Wai.

³¹ For example, as requested in the FAWP’s submission on PC7.

³² For example, Ngā Rūnanga’s submission on PC7, dated 13 September 2020 (PC7-424), at [8]:

Arowhenua oppose the environmental flow and allocation limits, and the timeframe within which reductions will take place for the Te Umu Kaha / Temuka River, Ōpūaha / Opuha River and Te Anaa-Wai / Te Ana Wai River. The Plan change means that these water bodies of significance to Arowhenua will remain in a poor state for future generations. Arowhenua do not consider the flows proposed are sufficient to maintain natural processes; water levels; prevent nutrient enrichment at the hāpua; or protect indigenous biodiversity at key life stages e.g. the migration of large tuna (eels).

- 34.1 The proposed second step in environmental flow increases for the South Opuha and Upper Opihi River, to take effect from 1 January 2030, were retained in PC7B;
- 34.2 The proposed environmental flow increases for the Te Ana Wai River, to take effect from 1 January 2025, were retained in PC7B; and
- 34.3 Pro-rata partial restrictions were implemented in the Te Ana Wai River in 2035, rather than 2030 as proposed by PC7B as notified.
35. The legal submissions that follow address those residual issues, before addressing matters relating to allocation and pro-rata partial restrictions. In each case, the issue of legal scope for change beyond PC7's flow and allocation regimes is also addressed.

ENVIRONMENTAL FLOWS

South Opuha

36. We submit that the need for further increases in environmental flows in the South Opuha beyond those proposed by PC7B to take effect from 1 January 2025 (Table 14(n)) are questionable in light of the Ecology Caucusing Statement and Dr Ryder's evidence.
37. While the ecologists acknowledge there is an apparent decline in invertebrate community health, they agree that the South Opuha has good ecological health and water quality.³³ To give some context to that position, Dr Ryder's evidence confirms that under the South Opuha's current flow regime, attribute levels for ecological and human health indicators are already well-above national bottom lines.³⁴ Similar comments appear in the documentation supporting PC7B.³⁵
38. With reference to the priorities prescribed by the NPSFM 2020, that evidence indicates that the current flow regime already gives effect to Te Mana o te Wai. It is therefore arguable whether any change to that regime is in fact required in order for PC7B to comply with section 67(3)(a) RMA. Certainly, in our submission, the evidence at least supports a finding by the Hearings Panel

³³ Joint Witness Statement – Freshwater Quality/Ecology, at [45].

³⁴ Evidence in Chief of Dr Gregory Ryder on behalf of the FAWP dated 17 October 2020 (**Dr Ryder's Evidence**), at [4.31] – 4.35].

³⁵ Environment Canterbury Memo 6, section 7.1, attached to Environment Canterbury Report: *Surface Water Quality and Aquatic Ecology Technical Report to Support the Orari-Temuka-Opihi-Pareora limit-setting process*, Report No. R19/80, dated June 2019.

that the second step increase in environmental flows proposed by Table 14(o) as notified is not required in that regard.

39. The ecologists' agreement that the increases in flows proposed by Table 14(o) provide incremental increases in habitat retention³⁶, and Ms Hayward's view that *the proposed summertime flows in Table 14(o) give more assurance that ecological values can be supported through different climatic conditions*³⁷, indicate that Table 14(o) may result in a superior outcome for ecological habitat. However, as noted earlier in these submissions, all that the RMA requires is that the outcome be suitable, not superior. Relevant in that regard is the ecologists' agreement that neither Table 14(n) or 14(o) would result in a measurable improvement in water quality attributes.³⁸
40. From the perspective of efficiency and effectiveness, it is Mr Ensor's evidence that Table 14(o) is not required to achieve the relevant objectives, particularly when considered against the economic evidence of Mr Porter and Ms Saunders.³⁹ We therefore submit that the FAWP's request for the deletion of Table 14(o) is the most appropriate and its submission should be allowed.

Upper Opihi

41. Whilst not entirely clear from wording of the Joint Witness Statement – Freshwater Quality/Ecology, it is understood that the ecologists agree with Dr Ryder assessment in respect to habitat retention under the environmental flow regimes proposed by Table (p) and (q) that:⁴⁰

5.25 In broad terms, the monthly minimum flows proposed by the FAWP and encapsulate in Table 14(p) of PC7 provide good to excellent habitat retention (relative to habitat at MALF) for most species, and moderate increases in potential habitat over the warmer months of the year for large eels and food producing water, relative to the existing flow regime (Table 4). Habitat for small native fish (with the exception of torrent fish) is high and provided for all months of the year.

5.26 A further increase to 1,000 L/sec over summer months from 1 January 2030, as proposed in Table 14(q), but opposed by the FAWP, provides some gains in habitat for adult longfin and shortfin eels,

³⁶ Joint Witness Statement – Freshwater Quality/Ecology, at [47].

³⁷ Joint Witness Statement – Freshwater Quality/Ecology, at [48].

³⁸ Joint Witness Statement – Freshwater Quality/Ecology, at [48].

³⁹ Evidence in Chief of Timothy Ensor on behalf of the FAWP, dated 17 July 2020, at [6.9] – [6.10].

⁴⁰ Dr Ryder's Evidence.

torrentfish, adult brown trout and food producing water, and losses in habitat for juvenile longfin and shortfin eels, common and upland bully, Canterbury galaxia and juvenile brown trout (Figure 19). Habitat is reduced for long filamentous algae, but increased for Phormidium (Figure 20).

42. However, Dr Ryder's concerns with respect to Phormidium cover and impacts on benthic invertebrate communities in the Upper Opihi River⁴¹ are echoed in the Ecological Caucusing Statement, which identifies *elevated nitrate concentrations and cyanobacteria blooms* as key issues of concern.⁴²
43. We submit that the Panel's assessment of Table 14(p) and 14(q) against the NPSFM 2020 must be undertaken with due cognisance to the integrated management directive in Policy 3. In our submission, this requires consideration of the relative influences of differing management approaches (environmental flows vs land use management) on relevant ecological and human health attributes, in order to achieve the stated priorities of the NSPFM. In this regard, we note our earlier reference (at [22]) to Dr Ryder's evidence, and further his commentary on the Upper Opihi, as follows:

[5.28] Further increases in monthly minimum flows proposed under Table 14(q) produces a mixture of habitat gains and habitat losses depending on species. Increases in minimum flow are unlikely to be reflected in water quality or the proliferation of periphyton nuisance growths, the later will be controlled largely by the accrual period between flood events.

44. We submit that on the basis of Dr Ryder's evidence, Table 14(p) is the most appropriate regime for the Upper Opihi as further increases beyond those proposed in Table 14(p) are not required to achieve the relevant objectives. In our submission, when considered in the wider statutory context and the economic evidence of Mr Porter and Ms Saunders, Table 14(p) is the least restrictive regime and consequently the FAWP's submission should be allowed.

Te Ana Wai

⁴¹ Dr Ryder's Evidence, at [4.49] and [5.28].

⁴² Joint Witness Statement – Freshwater Quality/Ecology, at [49].

45. The primary issue for concern in the Te Ana Wai is the timeframe for implementation of pro-rata restrictions; the FAWP requests that restrictions take effect in 2035, not 2030 as proposed by PC7B.
46. In our submission, it is important to understand the underlying basis for the FAWP's request. As Mr Hawkins has explained, the additional 5 years is required to enable abstractors to prepare for the financial implications of the consequential impacts on water availability and on-farm operational changes.⁴³ Without this small window to enable such adjustment, Mr Porter's evidence indicates the viability of farms in the Te Ana Wai catchment will be impacted significantly.⁴⁴
47. The implementation of appropriate pro-rata partial restrictions is a key element of the FAWP's original package to the OTOP Zone Committee, which was accepted at the time as a necessary step towards improving the freshwater resources of the Te Ana Wai River, consistent with the directives of national and regional policy. That outcome is not undermined by the FAWP's request, but will ensure it is achieved without significant economic and social cost. In our submission, the FAWP's requested change is therefore the most appropriate option, and on that basis, its submission should be allowed.

Ngā Rūnanga position

48. Mr Henry's evidence on behalf of Ngā Rūnanga seeks two key outcomes for the Te Ana Wai:
- 48.1 *Flows suitable to provide habitat for large eels*⁴⁵; and
- 48.2 *Variation...to protect the Opihi River now that the Opuha Dam has limited the variability that came from that sub-catchment*⁴⁶.
49. The FAWP understands Mr Henry's reference to "suitable flows" is to the 1.2 m³/s recommended by the COMAR Report.⁴⁷
50. We have some considerable difficulty with Mr Henry's evidence in this regard. As noted elsewhere in these legal submissions, Ngā Rūnanga's primary

⁴³ Evidence in Chief of Mark Hawkins on behalf of the FAWP, dated 17 July 2020, at [8.3].

⁴⁴ Evidence in Chief of Grant Porter on behalf of the FAWP, dated 17 July 2020, at [3.7] and [3.8].

⁴⁵ Statement of Evidence of John Arthur Henry on behalf of Te Rūnanga o Arowhenua, dated 22 July 2020 (**Evidence of Mr Henry**), at [82].

⁴⁶ Evidence of Mr Henry at [83].

⁴⁷ Evidence of Mr Henry, at [81].

submission addressed its concerns with respect to the Te Ana Wai in the following generic terms, without specificity as regards the changes sought:⁴⁸

Arowhenua oppose the environmental flow and allocation limits, and the timeframe within which reductions will take place for the Te Umu Kaha / Temuka River, Ōpūaha / Opuha River and Te Ana-a-Wai / Te Ana Wai River. The Plan change means that these water bodies of significance to Arowhenua will remain in a poor state for future generations. Arowhenua do not consider the flows proposed are sufficient to maintain natural processes; water levels; prevent nutrient enrichment at the hāpua; or protect indigenous biodiversity at key life stages e.g. the migration of large tuna (eels).

51. Certainly, we do not consider that on any reasonable interpretation that submission could provide scope to amend the environmental flows proposed in Table 14(r) and (s) to reflect the COMAR flow recommendation (outside of May to July), as is implied by Mr Henry.
52. Putting aside the issue of legal scope, the Joint Witness Statement – Freshwater Quality/Ecology records the ecologists agreement that:
 - 52.1 The Te Ana Wai already has moderate diversity of native fish species and taonga species:⁴⁹
 - 52.2 PC7's proposed minimum flows provide incremental gains in habitat availability over summer time flows for mahinga kai species, but that food producing habitat is limiting up to naturalised MALF;⁵⁰ and
 - 52.3 The proposed summertime minimum flow of 450 L/s along with the introduction of partial restrictions will provide flow connectivity throughout the lower Te Ana Wai River.⁵¹
53. On the basis of that evidence, we submit that even if the scope issue can be overcome, the flows referred to by Mr Henry are not required to achieve the NPSFM or relevant objectives.

⁴⁸ Submission No 424, at [8].

⁴⁹ Joint Witness Statement – Freshwater Quality/Ecology, at [53].

⁵⁰ Joint Witness Statement – Freshwater Quality/Ecology, at [55].

⁵¹ Joint Witness Statement – Freshwater Quality/Ecology, at [54].

54. Accordingly, we submit that subject to the adjustment of the timeframe for implementation of pro-rata partial restrictions, Table 14(r) and (s) (or an amalgam of them) should be confirmed.

ALLOCATION LIMITS

55. Council's approach to setting allocation limits for the Tributaries under PC7B mirrors the approach contemplated by the OTOIP ZIPA of capping surface water allocation at levels corresponding to total consented allocation. Ms Johnston, the FAWP's hydrologist, raised concerns in her primary evidence about various anomalies as between PC7B's proposed allocation limits and consent allocations summarised in Council's Resource Consent Inventory, a supporting document for PC7B. The crux of the issue appears to largely be that the allocation limits proposed in PC7B for each of the Tributaries were not updated after the release of the OTOIP ZIPA in December 2018.⁵²
56. The Hydrology Caucusing Statement satisfactorily resolves the issues raised in Ms Johnston's evidence, providing an agreed set of allocations for the Tributaries (and others), which takes into account shareholding agreements between consent holders and Opuha Water Limited (**OWL**), share leases and water sharing arrangements as at 7 August 2020. To assist the Panel, Ms Johnston has outlined in her evidence update the various changes required to PC7B to reflect that agreement. For the assistance of the Hearings Panel, these allocations are summarised in the following table:

Tributary	Allocation Limit (AA, AN and/or BA) (L/s)
North Opuha (Table 14(m))	255
Upper Opihi (Table 14(p))	520
Te Ana Wai (Table 14(r) and (s))	261

57. In addition, the following two further adjustments are recommended by Ms Johnston to reflect agreement reached at caucusing:

57.1 Deletion of Deep Creek from Table 14(m);⁵³ and

⁵² Evidence in Chief of Keri Johnston on behalf of the FAWP, dated 17 July 2020 (**Ms Johnston's Evidence**), at [4.4].

⁵³ Ms Johnston's evidence update, dated 27 October 2020, at [2.5].

57.2 A new table addressing the environmental flow and allocation regimes for the Lake Opuha minor tributaries.⁵⁴

58. Ms Johnston's primary evidence notes that while allocation limits were not expressly addressed in the FAWP's submissions, the changes to allocation limits are of minor effect and are required to correct errors in PC7B as notified.⁵⁵ On that basis, it is submitted that the changes can be made pursuant to clause 16(2) of Schedule 1, RMA.

Ngā Rūnanga position

59. Before moving from this topic, it is appropriate to draw your attention to the evidence of Mr Henry on behalf of Arowhenua, which urges the Panel *to reduce the level of abstraction from the Opihi system*,⁵⁶ and notes support for the changes in this regard that are discussed in the evidence of Ms Davidson.⁵⁷ Regrettably, Ms Davidson's evidence is bereft of any detail of the changes referenced.

60. Whilst these comments are noted within Mr Henry's section on the Te Ana Wai, the wording used indicates a general concern about the allocation limits across the Opihi catchment. However, as Mr Ensor has noted in his primary evidence, Ngā Rūnanga's ability to raise concerns about allocation limits is limited by the scope of its:

60.1 Primarily submissions, which address that issue expressly in the context of the Opuha, Temuka and Te Ana Wai Rivers only⁵⁸; and

60.2 Further submissions, which are limited to opposition of the primary submission of OWL seeking a minor adjustment to the allocation limit for the Upper Opihi River to more accurately reflect current consented allocations and OWL shareholding agreements.⁵⁹

61. In our submission, nothing in the submissions or evidence of Ngā Rūnanga's witnesses supports any departure from the approach adopted by PC7, which (guided by the recommendations of the OTOP Zone Committee) caps allocation at existing (consented) levels within the Tributaries.

⁵⁴ Ms Johnston's evidence update, dated 27 October 2020, at [2.3]

⁵⁵ Ms Johnston's Evidence, at [4.43] – [4.44].

⁵⁶ Mr Henry's Evidence, at [85].

⁵⁷ Mr Henry's Evidence, at [85].

⁵⁸ As outlined above at [50].

⁵⁹ Further Submission FPC7-424.131 in relation to Primary Submission by Opuha Water Limited PC7-381.102.

PRO-RATA PARTIAL RESTRICTIONS

62. The final issue for the FAWP concerns the management approach for AA/BA and AN water permits to pro-rata partial restrictions in the Tributaries.
63. In Ms Johnston's opinion, AN water permits should be stacked on top of AA/BA permits in a similar way to the banding approach utilised elsewhere in Canterbury in the management of different allocation blocks.⁶⁰ This approach is preferred by the FAWP as it gives priority to AA/BA permits, recognising the wider benefits of those permits and their holders' affiliation to OWL to the Opihi FMU. Accordingly, the FAWP's submission seeks an amendment to the definition of "Pro-rata Partial Restrictions" as it applies to the Tributaries to provide for that management approach.
64. As Ms Johnston's evidence confirms, the only difference between the definition of "pro-rata partial restrictions" under PC7 as notified and as proposed to be amended by the FAWP's submission is the starting point for partial restrictions for each permit category.⁶¹ In this regard, we note that the risk of minimum flow breach claimed in the Section 42A Report is completely unfounded, and appears to reflect a misunderstanding on the part of the Reporting Officers in terms of the change requested by the FAWP.
65. In our submission, the FAWP's submission point should be allowed if the Hearings Panel accepts the position advanced by the FAWP regarding the relative benefit of affiliation of tributary permits (compared with non-affiliated tributary permits). Again, the FAWP's submission offers a solution that will not compromise PC7's ability to give effect to the NPSFM nor result in any environmental cost, and in light of the social and economic costs of the alternative (PC7) option described in the evidence of Mr Porter, would improve the efficiency of the pro-rata partial restriction definition by achieving the objectives of the plan change.⁶²

Dated: 29 October 2020



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Counsel for the Opihi Flow and Allocation Working Party

⁶⁰ Confirmed in Ms Johnston's Evidence Update.

⁶¹ Ms Johnston's Evidence, discussed at [7.10] – [7.21].

⁶² Evidence in Chief of Timothy Ensor, dated 17 July 2020, at [5.13].