BEFORE HEARING COMISSIONERS OF THE CANTERBURY REGIONAL COUNCIL

In the matter Proposed Plan Change 7 to the Canterbury Natural Resources Regional Plan

And

In the matter of A submission by:

AS ONE INCORPORATED

Submitter

OPENING LEGAL SUBMISSIONS ON BEHALF OF THE SUBMITTER

16 NOVEMBER 2020

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INTRODUCTION

The Submitter

1 As One Incorporated (As One) was formed when Plan Change 7 to the Canterbury Land and Water Regional Plan (PC7) was published. They started with ten farmers realizing that PC7 would drastically change the way they farm and their future. Not being experts - but understanding that this plan was based on highly complex modelling, involving many assumptions and limited data they were deeply concerned that its basis could be fundamentally flawed.

2 As One has grown to include over 90 grass roots farmers. These farmers are from all farming types and sizes. It also includes business owners from around the Waimakariri area. These members joined following a brief explanation to them of the potential ramifications of PC7 and voluntarily donated funds to enable the retention of counsel and appropriate technical expertise.

3 The majority of the farmer members of As One have substantial mortgages on their businesses and are the ones that provide significant economic support for their communities. They are the ones that pay the bills. They are the individual farmers that work the land on a daily basis. As One may be only one submitter, but it represents a large portion of the people who make up the communities of the Waimakariri Sub-Zone. They have pooled their resources to ensure that the Panel gets one single submission with the appropriate technical backing to assist the Panel.

Key Concerns

4 As One’s submission sets out its position in detail, as well as the relief it seeks. Its members are in favour of ensuring the achievement of the high water quality objectives that are required to give effect to Part 2 of the Resource Management Act 1991 (RMA) as expressed through the high order policy documents. They are willing to incur additional cost to achieve this. They do not seek to avoid reasonable and justified restrictions on their

operations, nor do they oppose any and every measure that will reduce their profitability.

5 However, they consider that the measures implemented to achieve those objectives must be demonstrated to be the right ones, that will work, so that the opportunity to achieve real protection and improvements is not squandered. This is to be achieved by applying the prescribed statutory tests, to identify the measures that are necessary, effective and, critically, reflective of the correct cost-benefit balance specified by those tests[1]. That correct balance hinges on a correct and reliable assessment of:

5.1 The level of certainty or risk that the objectives will not be met in the absence of intervention through PC7;

5.2 The costs of the various means of intervening available to the Panel through the provisions as notified and the relief sought; and

5.3 The likelihood that those various means will be effective and to what extent they will provide a proven benefit in ensuring those risks will be addressed and/or those objectives will be met.

6 As One submits that the s32 and s42A reports are critically flawed and lacking in these key areas. As a result, they are incapable of demonstrating that measures they propose are the most appropriate means of giving effect to the statutory requirements and high order planning documents that apply.

7 The key focus of As One's Concerns is the requirement imposed on those within the Nutrient Priority Area (NPA) to make reductions in modelled losses by 2030 and then in ever increasing steps for decades to come, while leaving sources of nutrient loss outside that area largely untouched. It is an approach that As One considers is lacking in its conception, improperly prepared and more consistent with the desire to be seen to be doing

[1] In particular s32 RMA.

something than bringing actual effective improvements where it counts – in the freshwater itself. It is potentially so flawed that it risks missing the critical opportunity to make changes in areas where they will achieve real assurance of actual freshwater quality.

8 Most importantly, those reports totally exclude the combined effect of two critical changes to the regulatory environment applying to all those subject to PC7, which occurred after the s42A officers did their initial assessment of the risk of the necessary water quality standards not being met:

8.1 As of 1 July 2020 all farms have to meet a much higher more stringent Good Management Practice (GMP), designed to reduce their nutrient loss;

8.2 As of 3 September 2020 the National Environmental Standards for Freshwater 2020 (NESFM), which directly control their land uses through s9(1) and ss13-15 RMA and include synthetic N fertiliser loading limits to take effect in 2021.

9 These have been designed to reduce significantly the nutrient losses from farms within the PC7 area, both inside and outside the NPA. The requirement to comply with GMP was introduced by Plan Change 5 to the Canterbury Land and Water Regional Plan (**PC5**). As One considers it strange that these changes were not clearly contemplated by the s42A report, given that the rules introducing the requirement from 1 July 2020 has been operative since 1 February 2019.

10 In addition, Dr Freeman's evidence in particular[2] will show that the information on which the s32 and 42A reports are based is critically flawed. Those reports rely on incorrect assumptions, arising from critical errors and shortcomings in the matters to be assessed and the evidence on which they are based, the most significant of which are:

[2] As well as the evidence of Dr Alister Keith Metherell for Melbury Limited

10.1 Errors and/or inappropriate assumptions in the approach to fixing relevant maximum N loss rates;

10.2 Overreliance on computer modelling without sufficient ground-truthing through actual data;

10.3 Overestimation of some projected future nutrient concentration concentrations in ground and surface water;

10.4 Overestimation of the contribution of the NPA's nutrient losses, and underestimation of other sources' contribution, to current and projected future surface and groundwater nutrient concentrations;

10.5 Overestimation of the contribution that the controls on NPA can make to achieving the necessary ground and surface water quality objectives;

10.6 Modelling undertaken in the absence of the type of robust policy framework to specifying receiving water "standards" that would typically be required to drive important parts of the modelling;

10.7 A resultant focus on reducing modelled nutrient concentrations instead of a more adaptive management approach that would use actual measured concentrations in ground and surface water; and

10.8 Insufficient assessment and management of the full range of nutrient loss sources required in order to achieve the necessary water quality goals.

11 Furthermore, As One's evidence will show that the economic cost of implementing the s42A reports' approach will be very high and irreversible for many of its members, as it is likely to put them out of business permanently. While Table 8-9 only requires the first round of reductions by 2030, in its current form it means that the farms it affects are effectively labelled as unfarmable from 2030 onwards and if not by then, then at one of

the next reductions. That means that none of the long-term plans needed to make real improvements can be made and the loans necessary to fund them will be unavailable.

12 The s32 and 42A reports failed to identify these costs, much less weigh them in any meaningful way as s32 would require, or look at alternatives that indicate that these measures will only be implemented if water quality monitoring shows they are necessary.

13 Finally, the s32 and s42A reports are critically flawed in that apply the wrong legal tests, by preferring the views of the Zone Committee over the need for evidence concerning the various considerations prescribed by s32.

Key Relief

14 In view of the above, As One submits that the most appropriate approach is to:

14.1 Ensure full compliance with the GMP requirements introduced by PC5 and the NES nutrient application limits;

14.2 Measure water quality properly through increased monitoring;

14.3 Identify reliably all the material sources of nutrient loss that potentially put the appropriate freshwater goals at risk;

14.4 Commit to re-modelling all the relevant catchments with the fatal flaws in the previous model addressed, for example, including a robust peer review process; and

14.5 Only impose additional restrictions after 2027 if that monitoring shows that the risk of the applicable water quality standards not being met is real and/or increasing.

15 As One's position has therefore moved somewhat since its initial submission. As One will accept the 15% reductions contained in Table 8-9

for 2030 if, by 2027, appropriate water quality monitoring has shown that the measures identified in paragraph 8 above are unlikely to achieve the necessary water quality standards.

16 The result is that the s32 and s42A reports cannot, as a matter of law, satisfy the Panel that it can be established that:

16.1 Implementing As One's relief will cause or contribute to a failure or the real risk of a failure to achieve the relevant water quality standards;

16.2 Implementing the s42A reports' approach, will or is likely to make a significant and real contribution to avoiding that risk and/or failure; and

16.3 The benefits of that are sufficiently large and certain to justify the social, economic and cultural cost to the As One's members in particular and the other people and communities affected by the s42A reports' approach.

17 It is acknowledged that since As One made its submission, the National Policy Statement for Freshwater Management 2020 (NPSFM20) took effect, with higher water quality targets. However, this does not take away the need to establish the appropriateness of measures adopted through this Plan Change, against the prescribed statutory tests with proper evidence.

18 No evaluation has been made through s32 or 42A of the appropriateness of the s42A reports' measures or any of the relief sought in terms of giving effect to the NPSFM20. That matter will be addressed in more detail elsewhere in these submissions.

19 The principal focus of As One's evidence will be:

19.1 Water quality and modelling expert evidence, which will identify the errors made and the way they undermine the assumptions which

underpin the s32 and s42A assessments, as well as what is necessary to eliminate those errors to achieve a proper evaluation;

19.2 Factual evidence from As One members outlining the likely social, economic and cultural implications of the currently proposed measures on their particular operations; and

19.3 Farming consultancy expert evidence on the likely wider social, economic and cultural costs involved with the proposed measures, as compared with the relief sought by As One.

20 That evidence will show that the relief As One seeks will more appropriately achieve the necessary statutory and high order policy requirements than any other relief before this Panel.

STATUTORY CONSIDERATIONS

Legal Basis for Process

21 This hearing is part of a statutory process that must be followed in order to determine whether and if so, how, the provisions of the operative Canterbury Land and Water Regional Plan are to be changed. That process is prescribed by the RMA, as amended by Sections 61, 62(1), 63 to 68 (and sections 54 and 55) and Schedule 1 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (2010 Act)[3].

22 The two most significant ways in which those provisions amend the RMA statutory provisions are:

22.1 In addition to the other matters specified by the RMA, this Panel must have particular regard to the vision and principles of the

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[3] Environment Canterbury (Transitional Governance Arrangements) Act 2016, Schedule 1, Clause 7

Canterbury Water Management Strategy (CWMS), which are set out in Schedule 1 of the 2010 Act[4];

22.2 Appeals on the merits to the Environment Court are excluded; only appeals to the High Court on points of law are available[5].

23 The effect is therefore that the vision and principles of the CWMS are to be added to the other matters to be given particular regard, namely those in s7 RMA. Apart from the change in appeal rights, there are however no amendments to any other procedural or machinery provisions. In all other respects, this process has to follow the "normal" procedural requirements and apply the usual statutory tests prescribed by the RMA for plan changes.

24 Section 65(5) RMA applies, which requires that a regional plan must be changed in the manner prescribed by Schedule 1. Section 66(1)(d) and (e) require that a regional plan must be prepared and changed in accordance with the regional council's obligation to prepare an evaluation report in accordance with s32 and to have particular regard to that report. Section 32AA requires further evaluation against s32 for provisions that are different from those initially notified. Section 32A limits the ability to challenge the s32 analysis to challenge via a submission, but does not prevent a decision-maker from having regard to s32.

25 The centrality of the matters set out in s32 as a statutory test for evaluating the provisions of a proposed plan or plan change emerges from these provisions, and from case law[6]. The RMA as it applies to PC7, does not remove the centrality of s32 and the importance of its tests.

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[4] Sections 63 and 64 2010 Act

[5] Section 66 2010 Act.

[6]See for example *Port Otago Ltd v Otago Regional Council* [2018] NZEnvC 183, at paragraph [44], *Commercial Ltd v Christchurch City Council* [2016] NZHC 1218, *Gisborne DC v Eldamos Investments Ltd* 26/10/05, Harrison J, HC Gisborne CIV-2005-485-1241)

Application of Incorrect Evaluation Test

26 At Paragraphs 2.3-2.5 As One's submission raised explicitly the failure to comply with s32. At Paragraph 4 the submission indicated that s80A did not apply. That submission is related to this failure. The failure was not addressed, but exacerbated through the s42A reports, which rejected As One's relief on the basis that it was inconsistent with the Zone Committee's recommendations.

27 The key issue is that the only way in which placing a particular group's views ahead of the s32 focus could occur under the relevant statutory provisions was if the Collaborative Planning Process had applied, in which case Clause 51 of Schedule 1 would have enabled it. In the absence of that the focus had to remain s32.

28 This submission was the subject of questions from the Chair during the morning session of the 29 July 2020 hearing day, in which the impact of amendment of s80A arose. That issue is addressed here.

29 As of 1 July 2020 a new s80A took effect, along with a new Part 4 of Schedule 1, which replaced previous versions of those provisions by virtue of Resource Management Amendment Act 2020. Section 80A now provides that for a "freshwater planning instrument" the new process set out in (new) Part 4 of Schedule 1 is to be used.

30 However, because PC7 was notified prior these amendments taking place, the current process is to take place as if those provisions are unamended, so the pre-1 July 2020 versions of s80A and Part 4 Schedule 1 apply to PC7[7]. They provided for an optional collaborative planning process.

31 It is noted that Mr Maw, Counsel for the s42A officers, confirmed to the Panel during the morning session on 29 September 2020 that this process had not been engaged. As One agrees that the requirements of Clause 38 of

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[7] Clause 19 into Schedule 12 RMA

Part 4 have not been met, and as a result there is no dispute that the collaborative process provided for under the “old” s80A was not engaged.

32 That is of particular importance because those provisions were the only ones that allowed a different emphasis and focus for the Schedule 1 process[8] than that prescribed in s32. It was only under that collaborative process that the consensus position of a formally appointed[9] collaborative group could prevail. As a result, the focus remains the test in s32, modified only by particular regard having to be had to the CWMS purpose and principles along with s7 RMA.

33 The need to have particular regard to the vision and principles of the CWMS does not provide a statutory basis for changing the fundamental statutory test at the heart of the evaluation of the appropriateness of plan provisions either. Not only does it lack the type of procedural provisions that would be required and any express requirement to change the key statutory evaluation test, it does not alter the procedural or machinery provisions that apply.

34 It cannot require the type of shift in focus that is seen in the s42A reports, or the assignment of a role to the Zone Committee that is not provided for by the provisions of the RMA that apply. There is nothing in those provisions that requires or justifies such a shift. As indicated above, it simply requires the vision and principles of the CWMS to be given the same type of weighting as the matters in s7, to which “particular regard” is also to be had.

35 The Zone Committee is therefore, in legal terms, nothing more than a special (non-elected) committee of the Canterbury Regional Council (CRC), through which it has been conducting the consultation process for developing PC7. While conducting consultation in that manner was a legitimate choice for the CRC, the Committee cannot be regarded legally as a representative body for the people and communities affected by PC7. Its

[8] Set out in Clause 51, “old” Schedule 1
[9] In accordance with Clause 40 “old” Schedule 1

views cannot be seen as representative of their views. To do so would be an error of law.

36 Nor can its views be taken as evidence of the various matters that have to be weighed in the consideration of whether the proposed provisions are the most appropriate. They cannot supplant the need for this Panel to have and evaluate expert evidence as to the costs of those provisions or their benefits.

37 This is not merely a question of weighting; the s42A reports have largely substituted consistency with the views of Zone Committee for the tests that this Panel will have to apply in accordance with s32AA and s32 and the evidence that is required to be able to apply those tests correctly. It is an error of law that materially affects the outcome of their assessment, resulting in recommendations that if followed, would lead to decisions that are not only based on an error of law, but for which there also is no proper evidentiary basis. It would be a failure to consider a relevant matter, namely the proper evidentiary cost-benefit analysis against the purposes to be achieved.

38 The fact that appeals are only available to the High Court and then only on points of law underpins the importance of applying the correct legal tests, making only decisions that are supported by proper evidence, disregarding irrelevant matters and taking into account all relevant matters.

39 This Panel can therefore only adopt provisions if there is a proper evidentiary basis, at a scale and level that corresponds with the significance of the changes, for finding that they are the most appropriate means of giving effect to the purposes of the Act[10], as expressed through the applicable policy documents. That evidence must establish that the benefits outweigh the costs of those measures, against the background of a proper

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[10] With which the vision and principles of the CWMS must be considered, having particular regard to it, along with the matters in s7 RMA

risk evaluation. The risk evaluation is acknowledged as a key requirement of s32, which is addressed in more detail below at paragraph 80 and following.

Effect of NPSFM20 and NESFM

40 Both the NPSFM20 and NESFM took effect after submissions closed. They were part of the package of freshwater measures implemented in 2020 by the government, which also included amendments to the RMA by the 2020 Amendment Act. As a result, they were not part of the basis on which:

40.1 The section 32 evaluation was undertaken;

40.2 Members of the public decided whether or not to make submissions on PC7;

40.3 Submitters decided on the content and relief sought by their submissions;

40.4 The s42A reports were prepared.

41 For the purposes of the Regional Council's functions and specifically freshwater management, the NESFM, being a National Environmental Standard, has direct effect through ss9 and 12-15 in much the same way as a Regional Rule. Section 43B provides that it applies alongside regional rules and that where there is a conflict between the two, the more stringent applies. That means that activities that might be lawful under a regional rule that is less restrictive or more permissive than the NESFM20 (and thus contrary to the NESFM20), will be unlawful under the NESFM20.

42 Neither s67 nor s68 imposes any requirement for consistency between regional rules or plans and national environmental standards. This is because the latter, as explained above, have direct legal effect and do not rely on regional plans to give them effect.

43 In this sense they are very different from a National Policy Statement, which cannot of itself alter the activity status of a particular activity, or render it an

offence in the same way that a national environmental standard can. It is for this reason that s67(3) requires that a regional plan must give effect to an NPS and then s68(1) provides for the rules whereby this is achieved.

44 This is important in view of the effect of the "package" amending the RMA and introducing the NPSFM20 and NESFM in 2020. This package includes the transitional provisions in Clauses 18 and 19 of Schedule 12 RMA. When they are all read together, their impact is that Regional Councils have until 31 December 2024 to prepare plan changes to give effect to the NPSFM20[11], which will be subject to the new Freshwater Planning Process that was introduced under s80A. Importantly, in the interim, the NESFM is in place to provide the equivalent of rules to give effect to the NPSFM20 until regional plans are updated through the that process to include the rules and other provisions required to give effect to the NPSFM20.

45 This is not a submission that either the NESFM or NPSFM20 must or even can be ignored for the purposes of PC7. It is however one to the effect that the above considerations do strongly shape what is expected of this Panel when it comes to giving effect to the NPSFM20. They show an implicit recognition of the limitations on what this Panel can reasonably be expected to achieve through the current process. This limitation is made explicit by Clause 4.1(1) of the NPSFM20, which requires that every local authority must give effect to it "as soon as reasonably practicable".

46 Mr Maw for the s42A officers cited two decisions in support of his submissions on the effect of the NPSFM20[12]. It is accepted that those decisions confirm that this Panel cannot ignore the NPSFM20. However, it is also important to note that they applied to a different national policy

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[11] Section 80A(3)&(4).

[12] *Ngati Kahungunu Iwi Incorporated v Hawke's Bay Regional Council* [2015] NZEnvC 50, (2015) 18 ELRNZ 565, and *Hawke's Bay and Eastern Fish and Game Council v Hawke's Bay Regional Council* [2014] NZHC 3191, referred to at P6 of the "CRC" opening legal submissions.

statement in different circumstances. Specifically, the NPSFM20 forms part of a package with the following effects:

46.1 The risk of not immediately imposing more restrictive rules is fundamentally altered by the fact that there are now national environmental standards in place until after 2024, to give effect to the NPSFM20 until Regional Plans can be updated through the Freshwater Planning Process;

46.2 The existing environment, which as a matter of law includes the reasonably foreseeable future environment[13], now must include the entire catchment complying with the NESFM. While not a consequence of this "package", the same applies to the compliance with the Good Management Practice requirements in place since 1 July 2020;

46.3 The RMA recognises that freshwater outcomes in accordance with the NPSFM20 are best achieved through documents prepared and evaluated under a specific freshwater planning process, different from the current process[14];

46.4 There is a specific window provided for regional councils to develop documents that are purpose-built for giving effect to the NPSFM20, through the new s80A process[15].

47 At Paragraph 17 of his submissions, Mr Maw appropriately accepts that Clause 4.1 NPSFM20 explicitly qualifies the duty to give effect only to the extent "reasonably practicable". While it is accepted that the fact that the Panel is confined to the scope of what was notified and the relief sought

[13] *Queenstown-Lakes District Council v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299
[14] Section 80A RMA
[15] Which provides, on application, for cross-examination, as well as a merits-based appeal in certain circumstances.

through submissions, that is because it legally lacks the power to go beyond that scope. That would be the case irrespective of Clause 4.1.

48 The words “reasonably practicable” in Clause 4.1 are significant and must be given effect. They signal that over and above the legal constraints, there may be practical constraints that would render endeavouring to give full effect to the NPSFM20 in the usual sense either impracticable or unreasonable.

49 One such constraint would be the procedural unfairness of basing decisions to accept or reject relief on simply on whether that relief gives effect to the NPSFM20, given the matters raised in paragraph 40. Particularly important is the inability to ensure that there has been a proper s32 evaluation of the appropriateness of the PC7 provisions in giving effect to the NPSFM20. This inability must mean that this Panel cannot be satisfied of the appropriateness of the proposed measures sought by the s42A reports.

50 In view of this, it is submitted that this Panel should:

50.1 Be reticent to reject or provide relief purely on the basis that that decision is necessary to give effect to the NPSFM20;

50.2 Rather view PC7 as an opportunity to set up provisions that will provide the best platform for a further process under s80A to identify provisions purpose-built rather than retrofitted to give effect to the NPSFM20. It can do so in the assurance that the NESFM provides the “rules” required to give effect to the NPSFM20 interim.

51 In practice, the relief sought by As One is entirely in line with this, as it recommends the increase of real monitoring so that a real understanding of actual water quality and the effectiveness of measures already in place (such as the NESFM and GMP) can be evaluated to see whether further restrictions are required to give effect to the NPSFM20.

PLANNING PROVISIONS

Evidence and s42A Reports as Filed

52 It is acknowledged that all of the evidence and the s42A reports' analysis of the planning provisions was filed prior to the NPSFM20 taking effect. It does not address that document. These submissions therefore address that document separately below.

53 As One has not called stand-alone planning evidence. It does not dispute the s42A reports' analysis of which planning documents are applicable, but does dispute their application to the facts and their conclusions. That is because of the serious errors not only in the scientific evidence on which they are based, but also on their failure to evaluate properly and take into account the very high social, cultural and economic costs of their proposals.

54 The planning evidence of Ms Susan Ruston for Waimakariri Next Generation Farmers (NGF) contains a helpful analysis of what the policy framework requires. She demonstrates how the planning framework requires enabling people and communities to provide for their social, economic and cultural wellbeing[16].

55 However, her evidence was prepared without the benefit of As One's evidence as to the way in which the various staged reductions in nutrient losses that NGF supports will prevent, not enable people and communities from providing for their social, economic and cultural wellbeing.

56 With the greatest respect, the evidence of NGF that the various restrictions are economically achievable is not underpinned. There is no real data or analysis demonstrating how this will be possible. When the As One evidence of those in a similar situation, which is based on real data, is

[16] Statement of Primary Evidence of Susan Clare Ruston
For the Waimakariri Next Generation Farmers Trust
17 JULY 2020, at paragraphs 6.6, 6.7, 6.8, 6.10, 6.11, 6.12, 9.3-9.7.

reviewed, then it becomes difficult to see how the assurances by NGF can be sufficiently robust to allow the Panel to rely on them.

57 It is submitted that if Ms Ruston had made an assessment of what her view would be if As One's evidence on the social, economic and cultural wellbeing were to be preferred, she could no longer reach the conclusions she does as to the proposed reductions. On the contrary, the policy framework and her analysis thereof must suggest that the most appropriate approach is then that sought by As One.

58 Similarly, the economic evidence for Waimakariri Irrigation Limited (WIL) also raises the importance of the enabling provisions. However, none of it is actually based on the real practical cases and numbers raised by As One's evidence. Their policy analysis also strongly suggests that if the social, economic and cultural effects are as the As One evidence demonstrates, then taking As One's approach is to be preferred. It is then the only approach that most appropriately gives effect to the planning hierarchy as it stood prior to the NPSFM20, based on the correct statutory evaluation.

NPSFM20

59 As indicated above, the NPSFM20 is now a National Policy Statement (NPS) to which PC7 must give effect, albeit subject to a number of significant and unique constraints arising from the manner and timing of its introduction.

60 In accordance with *Sustain Our Sounds v The New Zealand King Salmon Company*[17] the NPS must be taken as an indication of how the purposes set out in Part 2 are to be achieved. It is therefore important in that sense as well. The legal implications of the NPSFM20 are addressed below.

Te Mana o te Wai – Health and Well-Being of Water Bodies and Freshwater Ecosystems

61 The most significant issue that has arisen is that of *Te Mana o te Wai*¸ as set out in Clause 1.3 of the NPSFM and implemented through objective 2.1 and

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17 [2014] NZSC 40

Policy 1. In particular Clause 1.3(5) and Objective 2.1 place the health and wellbeing of freshwater bodies and ecosystems (Freshwater Wellbeing) above the ability of people and communities to provide for their social, economic, and cultural wellbeing, now and in the future (Social, Economic and Cultural Wellbeing). There are a number of observations that are however to be made regarding this.

62 The NPSFM20 is subordinate legislation and therefore cannot amend the RMA. It does not amend Part 2 or the tests set out in s32. It must be interpreted in light of those. It therefore cannot mean that the Social, Economic and Cultural Wellbeing is now subordinate to the Freshwater Wellbeing. Rather, it is a recognition that it plays such an important role in enabling the communities to provide for their wellbeing, that it is to be prioritised in also achieving that outcome.

63 The Social, Economic and Cultural Wellbeing cannot come at the expense of the Freshwater Wellbeing, but it remains a key consideration. That is confirmed by the wording of Policy 15. The priority of the Freshwater Wellbeing therefore only comes into play where a choice must be made between an outcome that will or is likely to come at the expense of that wellbeing and one that does not. If both types of wellbeings can be achieved by an outcome, then Te Mana o te Wai requires the option that achieves that to be preferred. It certainly does not require the removal of the ability to provide for people's social, economic and cultural wellbeing where that removal is not shown to be something that will or is necessary to enable Freshwater Wellbeing. That highlights again the importance of the evidentiary issues that Dr Freeman's evidence reveals.

Best Information

64 Clause 1.6 requiring best information is of particular importance and relevance, specially in view of Dr Freeman's evidence. Its wording shows that it is not optional. Sub-clause (1) uses the word "requirement" twice, one of which is "a requirement to use, if practicable, complete and scientifically robust data". Dr Freeman's evidence shows that this has not occurred. Sub-clause (2) uses the word "must" for the requirements in that

clause. Again, Dr Freeman's evidence shows that this has not been complied with. It is submitted that As One's relief requiring monitoring to form the basis of assessments of the health and wellbeing of water bodies and freshwater ecosystems is far more consistent with this than that of the s42A reports.

65 Importantly, Clause 1.6(3) must not be misinterpreted so as to require this Panel to rely on information that does not meet the requirements of sub-clauses (1) and (2). It is neither a requirement to nor a justification for relying on critically flawed and unreliable data. It is not a licence to proceed without doing the essential groundwork implicit in the requirements of sub-clauses (1) and (2).

66 The requirement in sub-clause (3)(b) does not require the information to be interpreted as if the flaws are not there. It is limited to situations where it is established that the information, which has been obtained in compliance with the requirements of sub-clauses (1) and (2), is genuinely open to different interpretations. In that case it is to be interpreted in a way that best gives effect to the entire policy statement.

67 What As One seeks is not the delay of a decision, but the making of a decision that facilitates compliance with sub-clauses (1) and (2).

Te Mana o te Wai - Consultation

68 A further very relevant consideration is that which comes out of Clause 3.2 and in particularly sub-clause (1). From that it is patently evident that this Panel cannot implement te Mana o te Wai without first undertaking the consultation with Tangata Whenua and communities as to how it applies. That has not yet occurred. At this stage then, if this Panel were to adopt an approach that imposed its own view as to how it is to apply, it has not complied with that clause, because it has precluded this process from occurring.

69 There is a real danger that the Panel may end up locking in a course that is contrary to or precludes the ability to implement how Tangata Whenua and

communities consider it should apply. To give effect to this clause the Panel is required to prefer an approach that leaves room to undertake the consultation and then give it shape through applicable provisions. As One's relief best provides for that.

Te Mana o te Wai – Health Needs of People (Such as Drinking Water)

70 The provisions implementing te Mana or te Wai also require the health needs of people such as drinking water to be prioritised over social, economic and cultural wellbeing enabling. For exactly the same reasons as set out above for Freshwater Wellbeing, this does not alter the statutory tests or provisions. It simply means that enabling social, economic and cultural wellbeing must not come at the expense of the health needs of people, again because they are so interdependent. It does not remove the importance of the Social, Economic and Cultural Wellbeing.

71 In the same way therefore this priority is only engaged if there is evidence that there is an adverse effect on those health needs which can only be avoided by reducing the ability of people and communities to provide for their social, economic or cultural wellbeing. That assessment is not to be undertaken in a vacuum.

72 Particularly important is the role of the Ministry of Health and its setting of drinking water standards under s69O of the Public Health Act 1956. That Act's short title states that it is "*An Act to consolidate and amend the law relating to public health*", which in turn is defined by incorporation of the definition in s6(1) of the New Zealand Public Health and Disability Act 2000:

> ***"public health** means the health of all of—*
> ***(a)** the people of New Zealand; or*
> ***(b)** a community or section of such people"*

73 Section 3A states the following regarding the function of the Ministry of Health under that Act: *"Without limiting any other enactment or rule of law, and without limiting any other functions of the Ministry or of any other person or body, the Ministry shall have the function of improving, promoting, and protecting public health."*

74 Section 69O is part of Part2A, a Part inserted into the Public Health Act by s7 of the Health (Drinking Water) Amendment Act 2007, which inserted ss69A-69ZZZE. Section 69A(1) identifies that the purpose of that Part is to "*protect the health and safety of people and communities by promoting adequate supplies of safe and wholesome drinking water from all drinking-water supplies*". Part 2A also includes specific procedures for fixing drinking water standards.

75 Given the very specific purpose and requirements of Part 2A of the Health Act as to drinking water and the very special health focus and expertise of the Ministry, this Panel can and ought to be reassured that achieving the drinking water standards set under 69O will ensure that the health needs of people will be met. The Drinking Water Standards for New Zealand 2005 (which were revised in 2018), are such standards.

76 While there may well be research suggesting links between certain contaminants in drinking water and certain serious health conditions, evaluating that research and its applicability to New Zealand and Canterbury conditions is something that requires the type of specialist expertise held by the Ministry of Health specific to its statutory role. The Panel can and ought therefore to have confidence that drinking water standards will be adjusted if that is established to be necessary for the health needs of people.

77 It is, with respect, not appropriate for this Panel to question the appropriateness of those drinking water standards. That is not what the priority of health needs of people entails. Rather, for the purposes of drinking water, it is engaged where it is evident that enabling in particular economic wellbeing will or is likely to come at the expense of the ability of a drinking water source to meet the drinking water standards fixed under s69O Health Act.

78 Counsel is not aware of evidence that demonstrates that with the requirements of GMP and the NESFM being met, making the restrictions to be imposed for the NPA via Table 8-9 contingent on monitoring evidence by

2027 that they are needed, will or is likely to lead to drinking water sources becoming unable to meet the drinking water standards.

Importance of Section 32

79 Finally, the focus of the statutory tests in section 32 RMA remains critical. It requires this Panel to ask whether there are alternatives that will also achieve the Freshwater Wellbeing and health needs priorities without the very significant adverse effects on the ability of people and communities to provide for their social, economic and cultural wellbeing identified by As One's evidence. It is submitted that on the evidence before the Panel, the relief As One seeks is such an alternative, which is, also on the basis of the NPSFM20, to be preferred.

OTHER LEGAL MATTERS

Role of Risk Evaluation and Precautionary Principle

80 A key requirement of s32, set out in s32(2)(c) is the need to "assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions".

81 As One is aware that the Panel has received evidence around the risks associated with increased nitrogen, particularly in drinking water. To the extent that this issue arises from the NPSFM20, it has been discussed above. It will be evident from that discussion that As One does not consider the conclusions as to the increased nitrogen risks are particularly useful to your decision making. The errors identified by Dr Freeman's evidence reinforce that point. Based on that evidence, As One submits that those errors result in an overstatement of the risk and current groundwater trends.

82 However, if the Panel is nevertheless inclined to give weight to the evidence around the health risk arising from nutrients in drinking water, it may be assisted by submissions on the precautionary principle, and the relevance of that principle in resource management decision making, and proposed plans in particular.

Basis of Precautionary Principle

83 The basic premise of the precautionary principle is that a precautionary approach should be applied to the management of natural and physical resources where there is scientific uncertainty and a threat of serious or irreversible adverse effects on the resource and the built environment.

84 The Supreme Court has accepted that the "precautionary principle" is implicit in section 5, as well as in section 32, of the RMA.[18] It has previously been recognised as part of the definition of effect in the RMA, which includes a potential effect.[19]

85 Case law under the RMA relating to the precautionary principle has predominantly been in relation to applications for resource consents. *Wratten v Tasman District Council*[20] offers the most case law guidance as to when the precautionary principle might be relevant to the context of plan formulation. The case does not go so far as to lay down a clear, formal threshold as to when the principle should apply. There was debate as to the manner in which the precautionary principle would be incorporated into the creation or amendment of planning instruments.

86 Submissions were heard in that case that the precautionary principle could be applicable in a planning context once it is demonstrated that a potential adverse effect exists when the consent authority is considering whether or not a proposed provision is expedient or desirable. Further submissions were made that the wide precautionary principle should be applied during the plan formulation stage given that many activities will be encompassed by the plan, rather than one specific activity which is focused on with a resource consent application.

87 By contrast, submissions were also made in *Wratten* that to rely on the precautionary principle would be to introduce a further factor that could confuse the decision making process. The argument was that a cautious

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18 *King Salmon* at 598.

19 *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (EnvC).

20 (1998) 4 ELRNZ 148

approach could still be adopted, without relying on the precautionary principle.

88 The Court declined to apply the precautionary principle in *Wratten*. Its reasoning was that the principle should not apply where the risk is insignificant or issues are evenly balanced. In that case, controls were in place to protect an aquifer and so it was submitted that any potential effects were not serious or irreversible. However, the Court did hold that the principle may apply in a plan formulation context if there is a need to prevent serious or irreversible harm to the environment in situations of scientific uncertainty. There was no outright rejection of the possibility of the precautionary principle applying to a plan formulation context. It remains a possibility, dependent on the individual circumstances of each particular case.

89 On that basis, the Panel to is arguably not prevented from applying the precautionary principle at this stage in the plan preparation process. The question then is whether it **should** and if so, what level of caution is then required.

90 PC7 proposes successive and cumulative reductions in nitrogen loss every decade, in some cases until 2080. As outlined in the evidence for As One, this imposes both an immediate cashflow cost (in order to make the first stage of reductions) and considerable uncertainty for future finance and backing. The economic impacts are considerable.

91 In *Rotokawa Joint Venture Ltd v Waikato Regional Council*[21] the Environment Court held that due to the level of scientific uncertainty about the environmental context of the activity (abstraction of geothermal water), it was unable to determine positively the best discharge strategy. In the circumstances it declined to require the most conservative and costly option for minimising adverse effects, as potentially a more moderate option would be appropriate. The Court held it would not be appropriate to impose conditions that could prove to be of poor cost effectiveness if the adverse

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21 EnvC A041/07

effects were to prove to be not be so serious as to justify high cost measures.

92 It is submitted that the Panel is faced with a similar issue to the Court in *Rotokawa.* The option proposed by S42A reports and others is overly cautious and imposes unjustifiable expense on farmers within the NPA. The is problematic for two reasons:

92.1 Firstly, as outlined previously in these submissions, the S42A reports approach has not taken into account the changes to nitrogen loss which will occur as a result of GMP and the loading limit implemented by the NESFM. For that reason, the position in PC7 is overly cautious and exceedingly costly.

92.2 Secondly, the evidence of Dr Freeman questions whether the reductions within the NPA can even meet the purported outcomes of PC7. If that is correct, the costs on those within the NPA would be even less justifiable, as the outcomes sought to justify the costs will not be achieved.

Adaptive Management

93 Often arising out of the use of the precautionary principle is the concept of adaptive management. This is particularly relevant as As One is seeking relief consistent with an adaptive management approach, whereby significant measurement would be completed throughout the Waimakariri district, and any decision about reductions would be reliant on the assessment of those measured results. For the reasons outlined in the submission and Dr Freeman's evidence, a measured approach is considered significantly more appropriate than a modelled one.

94 The Supreme Court offered useful guidance in *Sustain Our Sounds v The New Zealand King Salmon Company*[22] (***King Salmon***) where it discussed whether an adaptive management approach was available in that case, and is particularly relevant as the NZCPS **requires** a precautionary approach.

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22 [2014] NZSC 40

Therefore, the test set out by the Court can be similarly applied to this PC7 scenario, if a precautionary approach is deemed appropriate by the Panel.

95 At paragraph [129] of *King Salmon*, the Court considered the overall question of whether an adaptive management regime can be considered consistent with a precautionary approach. The Court set out four factors to be assessed in combination:

95.1 The extent of the environmental risk (including the gravity of the consequence if the risk is realised);

95.2 The importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment);

95.3 The degree of uncertainty; and

95.4 The extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty.

96 Each of the above factors is considered below, in a PC7 context:

96.1 The risk to be protected against is the decline of water quality. The Panel has received evidence related to the risk of declining water quality on drinking water, which may inform its decision on the consequence if the risk is realised.

96.2 The activity here relates primarily to farming activities, as they are proposed to be curtailed dramatically by the PC7 proposal. Unlike King Salmon, which was seeking to establish a new activity, these rules are proposing to reduce an existing, lawfully established activity. That difference must be given weight. Farming in the Waimakariri is critical to the social, economic and cultural well-being of people and communities, as has been presented to you by evidence for As One and other primary industry groups. On that basis, it is submitted that the activity is incredibly important to the individuals, and also locally and regionally.

96.3 The degree of uncertainty is high. The information provided by Environment Canterbury with PC7 has been questioned by several experts, including Dr Freeman. For the reasons set out in his evidence, it is submitted that the uncertainty relates to the level of risk – and the S42A reports approach is overstating that risk. The Court in *King Salmon* quoted a witness[23] who stated, "all models and wrong, but some models are useful". Dr Freeman raises concerns with the usefulness of the model relied upon by S42A reports when preparing PC7.

96.4 The Court considered that the "vital part" of the test is that at 95.4 above[24]. The Court accepted the Board of Inquiry's factors which assisted in determining the ability of an adaptive management regime to deal with risk and uncertainty. Those factors were:

96.4.1 There will be good baseline information about the receiving environment;

96.4.2 The conditions provide for effective monitoring of adverse effects using appropriate indicators;

96.4.3 Thresholds are set to trigger remedial action before the effects become overly damaging; and

96.4.4 Effects that might arise can be remedied before they become irreversible.

97 Firstly, it is important to understand the difference between a traditional adaptive management, and what is proposed by As One. As outlined previously, farming and nutrient loss is an **existing activity**. Unlike most resource consent applications where adaptive management is applied, which is introducing a new impact, PC7 seeks to address existing effects.

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[23] *Ibid* at [132]
[24] *Ibid* at [133]

98 When assessing the ability of the adaptive management regime to deal with the risk and uncertainty within PC7, the matters identified by the Board of Inquiry and accepted by the Supreme Court can be considered below:

98.1.1 There is existing monitoring information. The As One approach seeks that this is improved and increased, and we understand that WIL has provided significant evidence and information around a proposed regime.

98.1.2 As One accepts that a reduction **may** be necessary below Baseline GMP. However, it proposes that the reduction requirement be triggered by monitoring outcomes, rather than automatically applying on PC7 becoming operative.

98.1.3 Linked to the above is the fact that the As One relief also provides for the 15% reduction by 2030 **if it is shown to be necessary**. A trigger date (for example 2027) could be introduced which would give time for monitoring and improved assessment over the next seven years, whilst also giving farmers time to plan for how to achieve the 15% reduction by 2030, if that is necessary.

99 The monitoring requirement which is critical to the As One approach means that effects and trends can be captured early, preventing the drinking water standards from being exceeded. Any effects will be reversible by further nitrogen loss reductions, if required.

Precautionary Principle – Social, Economic and Cultural Wellbeing

100 From the above analysis it is evident that the Precautionary Principle is engaged where there is evidence of a real (as opposed to insignificant) risk of significant and irreversible adverse effects on the environment.

101 It is widely accepted that people and communities form part of the environment and that adverse effects on their ability to provide for their social, economic and cultural health and wellbeing are very much adverse

effects on the environment[25]. This is not altered by the NPSFM20. That effect is a primary focus of the purposes of the Act, which, as explained above, is not altered by the NPSFM20, which still recognises its importance, albeit in a more nuanced way.

102 As One's evidence will demonstrate that there is much more than a real risk that the measures supported by the s42A reports will have an adverse effect on the ability of people and communities to provide for their social, economic and cultural health and wellbeing. That effect can be properly categorised as serious and irreversible. Once the businesses affected have been wound up as a result of insolvency or the loss of the ability to remain viable, they cannot be resurrected. The way in which they provide for the social, economic and cultural wellbeing of the people and communities in the Waimakariri Sub-Zone is lost forever.

103 While it is accepted that te Mana o Te Wai, as imposed through the NPSFM20 means that if this is the only way of enabling Freshwater Wellbeing or meeting the health needs of people, then those latter outcomes take precedence. However, where it has not been demonstrated that that is the case, and there is or may well be an alternative that achieves all of those outcomes, that alternative must be preferred.

104 On that basis it is submitted that the Precautionary Principle must be applied by the Panel to the irreversible adverse effects to people and communities' ability to provide for their social, economic and cultural wellbeing. Specifically, that principle requires that in this case it should exercise caution before imposing measures that would have such effects, given their magnitude and irreversibility.

105 Particularly the evidence of Dr Freeman will demonstrate that the Panel's evidentiary basis for such measures is critically flawed and thus lacking. The evidence before the Panel cannot provide the basis required to find that there is no alternative way of enabling the Freshwater Wellbeing and

[25] *Waihi Gold Co v Waikato RC* A146/98 at 47

providing for people's health than to incur those irreversible serious adverse effects on social, economic and cultural wellbeing.

106 On that basis, the Precautionary Principle would require that the measures with those risks only be implemented when and if the proper evidentiary basis for their necessity and effectiveness has been provided. That is far better achieved through the approach in As One's relief than that in the s42A Reports.

NPA Boundaries Arbitrary – Relief and Jurisdiction

107 Dr Freeman's evidence is critical of the approach of imposing the NPA and effectively concludes that the NPA area is inappropriately constrained. Importantly, As One's relief does not include an expansion of the restrictions that apply within the NPA to the entire zone. As One therefore cannot and does not seek this.

108 Counsel is unaware of relief sought by other parties that would give the Panel scope to implement an expansion of the NPA. In the absence of such relief it does not have scope to do so. Importantly, Dr Freeman, while having been engaged by As One, is an independent expert, whose first duty is to the Panel and not to As One's relief. His views on the NPA area are his independent professional opinion and not something that As One seeks.

109 However, it is submitted that his evidence on that point does very strongly support the relief that As One seeks. It is As One's position that in view of the scope issues, and even if there were scope provided by another submitter, issues of fairness, it would be inappropriate for the Panel to expand the measures that apply within the NPA, to outside it.

110 On that basis, the choice for the Panel due to those constraints is between removing the distinction between the NPA and other areas by removing the additional restrictions that apply within it, and leaving them in place. Dr Freeman's evidence is very important to evaluating which of those is the appropriate choice. It shows that, given their limited and somewhat arbitrary application, it is questionable at best whether there are any real

benefits for the health of water bodies and freshwater ecosystems, or the health needs of people and communities, of retaining those specific additional restrictions.

CONCLUSION

111 There is no doubt that ensuring proper and effective management of freshwater quality is now a nationally important priority. Given the freshwater quality focus of PC7, that places significant pressure on this Panel, whose task is made all the more complex by the very unusual and unique circumstances that apply, including:

111.1 This being the last plan process conducted under the now repealed ECan Act, which excludes the ability to test evidence through Environment Court merits appeals, as well as the new s80A procedure that will apply for freshwater planning instruments such as PC7;

111.2 The amendments to the RMA concerning freshwater management, the NPSFM20 and the NESFM all taking effect well after notification, submissions closing, 42A report preparation and filing of evidence in chief;

111.3 The absence of the assessment of these critical issues and the modification of the receiving environment by GMP and the NESFM in the s32 and s42A reports;

111.4 The serious technical flaws in the information on which the s32 and 42A reports relied, as identified by Dr Freeman amongst others;

111.5 The resulting inability of this Panel to be assured that imposing particular restrictions will represent the most appropriate means of ensuring proper and effective freshwater quality management against the requisite statutory tests; and

111.6 The very real risk that imposing restriction in reliance on the information before it now will frustrate or harm the ability to ensure proper and effective freshwater quality management.

112 Nevertheless, this is significantly alleviated by the fact that Central Government, through the freshwater management package it implemented in mid-2020, recognised and provided a means of coping with these difficulties through:

112.1 Recognising that there may not only be legal constraints that would not only limit the extent to which this Panel give effect to the required freshwater management approach, but also practical constraints and the requirements of reasonableness that would further constrain this[26];

112.2 Providing a specific process and timeframes for the implementation of the requisite freshwater quality management approach[27]. Given the scope constraints accepted by Mr Maw, it is inevitable that the CRC will have to go through another plan process for freshwater by 2024, which will be subject to s84A; and

112.3 To enable this to occur and to plug the gap that would otherwise be left by the absence of more stringent rules pending the completion of that process, the NESFM provide interim protection.

113 For the reasons set out in these submissions, this must fundamentally alter this Panel's approach to its evaluation and the options open to it. It means that it should not feel under pressure to implement measures through this process that:

113.1 Have not been properly tested against the right statutory tests;

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[26] Clause 4.1 NPSFM20
[27] "New" s80A RMA

113.2 Are based on information that does not meet the requirements necessary to achieve proper and effective freshwater quality management;

113.3 Are highly likely to cause serious irreparable harm to people's and communities' ability to provide for their social, economic and cultural wellbeing, thereby prejudicing the implementation of measures that can be proven to be fully effective; and

113.4 May well frustrate, rather than enable the achievement of the approach to freshwater quality management now required[28].

114 This Panel has the unique opportunity to use all the information and analysis, and the lessons learned through this process, to put in place a framework that improves the prospects of the CRC notifying a freshwater planning instrument by 31 December 2024 that meets the requirements of the NPSFM20. Those requirements include the need to consult Tangata Whenua and communities as to how to implement te Mana o te Wai[29], and the best information requirements[30].

115 It is submitted that the relief sought by As One most appropriately achieves this, when evaluated against the appropriate statutory tests. It does so by giving effect directly to the need for best information through improved monitoring, and signalling that restrictions will be imposed, if demonstrated necessary through this information, while not imposing serious and irreversible social, economic and cultural harm without demonstrated necessity for this.

J M van der Wal/Jamie Robinson

Counsel for As One Incorporated/Solicitor for As One Incorporated

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[28] Particularly through the NPSFM20
[29] Clause 3.2
[30] Clause 1.6