BEFORE THE SOUTHLAND REGIONAL COUNCIL

IN THE MATTER OF	the Resource Management Act 1991
AND	
IN THE MATTER OF	Hearings on submissions concerning the Proposed Southland Water and Land Plan
AND	Southland Fish & Game Council (submitter)

LEGAL SUBMISSIONS ON BEHALF OF SOUTHLAND FISH & GAME COUNCIL

Dated: 24 September 2017

Southland Fish & Game Council
17 Eye Street, West Invercargill, Invercargill
PO Box 159, Invercargill 9840
Telephone (03) 215 9117
Facsimile (03) 215 9118

Contact: Jacob Smyth

May it please the Hearing Panel:

1. My name is Jacob James Smyth. I am employed by Southland Fish & Game Council ('Fish & Game') as a Resource Management Officer based in Invercargill. I have held this position since September 2008.

2. I hold a Bachelor of Arts with a major in history and a Bachelor of Law from the University of Otago (2001). I have been admitted as a Barrister and Solicitor by the High Court of New Zealand (May 2001).

3. My job entails assessing resource consent applications and planning documents for their effect on the game bird, trout and salmon fishery, and recreational hunting and angling values within the Southland region. In addition, I carry out field work associated with monitoring sports fish and game populations and the condition and trend of their habitats.

4. I have prepared these legal submissions on behalf of Fish & Game.

Introduction

5. Fish & Game submitted[1] and further submitted[2] on the Proposed Water and Land Plan for Southland ("the Proposed Plan") notified by the Southland Regional Council ('Environment Southland').

6. Fish & Game is largely supportive of the Proposed Plan. In particular, Fish & Game is strongly supportive in principle of the use of nine physiographic zones, including zone specific objectives, policies and rules, to manage water and land use in the Southland region to:

    a. Achieve the sustainable management purpose of the Resource Management Act 1991 ('the RMA'); and

    b. Give effects to the National Policy Statement for Freshwater Management ('the NPS-FWM'), as further amended with effect from 7 September 2017.

7. These legal submissions cover the following matters:

    a. The statutory function and role of Fish & Game in the Southland Region;

    b. A summary of Fish & Game's position on the Proposed Plan;

    c. The state of Southland's water;

    d. The value of Southland's sports fisheries and game birds;

    e. The legal framework for the Proposed Plan;

    f. Case law regarding improvement of degraded water bodies;

    g. Physiographic zones;

    h. Matters arising from submissions on the Proposed Plan;

[1] Submitter 752 by written submission dated 1 August 2016.
[2] Submitter 752 by written further submission dated 19 December 2016.

i. Matters arising from Fish & Game's submission on the Proposed Plan; and

j. Summary.

8. Fish & Game is calling evidence from two witness, namely:

a. Zane Moss, Manager with Southland Fish & Game Council, whose evidence discusses:

i. The background to Fish & Game Councils, including statutory considerations, and the national importance of salmonids;

ii. The ecological requirements of trout; and

iii. Specific areas of concern in relation to the Proposed Plan, principally with respect to land use and development activities that pose a risk to water quality.

Mr Moss has prepared written evidence-in-chief dated 19 May 2017.

b. Cohen Stewart, Field Officer with Southland Fish & Game Council, whose evidence discusses by way of a comparative case study:

i. The effects of deposited fine sediment on the ecosystem health of the Otapiri Stream, including changes in the invertebrate community over 50 years and the associated decline in both trout density and angler usage of the fishery; and

ii. The prevalence of winter forage crop grazing on hill slopes in the Otapiri catchment.

Mr Stewart has prepared written evidence-in-chief dated 19 May 2017.

Mr Moss and Mr Stewart will each present a power point summary of their evidence and accompanying exhibits at the hearing.

Statutory functions of Fish & Game

9. Southland Fish & Game Council is the statutory manager for sports fisheries and game birds in the Southland region under s 26Q of the Conservation Act 1987 ('the Conservation Act'), which has the following statutory functions:.

a. Manage, maintain and enhance the sports fish and game resource in the recreational interests of anglers and hunters;[3]

b. Assess and monitor the condition and trend of ecosystems as habitats for sports fish and game;[4]

c. In relation to planning to:

[3] Section 26Q(1) of the Conservation Act 1987.
[4] Section 26Q(1)(a)(iii) of the Conservation Act 1987.

i. Represent the interests and aspirations of anglers and hunters in the statutory planning process;[5] and

ii. Advocate the interests of the Council, including its interest in habitats.[6]

10. Fish and Game Councils are public entities under the Public Finance Act, funded almost entirely by the sale of fishing and hunting licences and governed by Councillors elected from adult whole season licence holders.

11. In relation to planning Fish & Game seeks to ensure the maintenance and enhancement of the spectrum of recreational angling and game bird hunting within the Southland region, which relies on adequate levels of sports fish and game bird habitat protection. Fish & Game has been involved in numerous planning processes in Southland to achieve appropriate management of freshwater resources, including:

a. Submissions on the full Proposed Plan, the Operative Regional Water Plan for Southland ("the Operative Plan") and the NPS-FWM;

b. Participation in Water and Land 2020 (WAL 2020); and

c. Involvement in numerous notified (publically and limited notified) and non-notified consent applications under Southland regional and district plans; and

d. Application for two water conservation order in the Southland region[7].

12. Fish & Game submits that by virtue of its statutory functions under the Conservation Act 1987 and associated legislation, including the Wildlife Act 1953, it has an interest greater than the general public in the Proposed Plan.

Summary of Fish & Game's position on the Proposed Southland Water and Land Plan

13. Available science shows that current actions by Environment Southland are not maintaining water quality as required by the RMA, NPS-FWM, SRPS and the PSRPS. As such, Environment Southland has notified the Proposed Plan, which is based on a strong scientific foundation for the management of land use and development activities that pose a risk to water quality.

14. Key to Fish & Game's submission is that water quality in Southland does not deteriorate further. As such, Fish & Game submits that:

a. The Proposed Plan must achieve water quality outcomes that safeguard its life-supporting capacity, ecosystem processes, and indigenous species.

b. Provisions should not be introduced or amended to the extent that it would result in further deterioration of water quality. This is particularly important if the intent is to maintain or improve water quality.

State of water in the Southland region

<u>Water quality</u>

[5] Section 26Q(1)(e)(i) of the Conservation Act 1987.
[6] Section 26Q(1)(e)(vii) of the Conservation Act 1987.
[7] Water Conservation (Mataura River) Order 1997 and Water Conservation (Oreti River) Order 2008.

15. Recent Environment Court decisions demonstrate that the Court is acutely aware of the cumulative causes of water quality deterioration. In *Infinity Investment Group Holdings Limited v Canterbury Regional Council* the Environment Court said:

> *". . . in our view it is now a notorious fact (in a legal sense) that excreta from farm animals on land are a cause of deterioration in downstream catchment water quality. (As are stormwater and sewerage systems in urban areas) It is equally notorious that increasing intensification of farming with irrigation from water abstraction may exacerbate that deterioration by increasing discharges of contaminants (often rather coyly called "nutrients" in regional planning instruments) and decreasing river flows (thus increasing concentrations of contaminants)."*[8]

16. The s 42A report, which summarises data and reports from Environment Southland SoE monitoring sites, provides that:

> *"**Key findings and water quality trends***
>
> *3.10 Data and reports from Environment Southland's SoE monitoring networks show several consistent themes:*
>
> - *elevated microbial contamination in lowland rivers and streams, resulting in a high risk to human health;*
> - *an increase in nitrate nitrite nitrogen levels in the main stem and some tributaries of the Waiau, Oreti, Mataura and Pourakino rivers, increasing at 15 of 34 and 4 of 6 sites with sufficient data for the time period 2000 - 2016, operated by Environment Southland and NIWA respectively, 2 of 34 and 1 of 6 showed decreases in concentration with the balance being unable to be determined with confidence;*
> - *nuisance growths of benthic periphyton in the lower Mataura, Aparima Rivers and several other lowland streams;*
> - *macroinvertebrate community health standards are not met at 20% of sites;*
> - *isolated pollution 'incidents' linked to toxic levels of nitrate, ammonia or depleted oxygen;*
> - *impacts of intensive land use on groundwater quality with approximately 20% of managed aquifers posing a potential risk to ecosystem health in hydraulically connected surface water bodies;*
> - *most groundwater supplies have nitrate concentrations which are suitable for human consumption, however 58 wells or ~9% have nitrate concentrations in excess of drinking water standards;*

[8] *Infinity Investment Group Holdings Limited v Canterbury Regional Council* [2017] NZEnvC 36 (17 March 2017) at [126].

- *increases in ground water nitrate nitrite nitrogen concentrations at 15 of 23 and 1 of 6 sites with sufficient data for the time period 2000 - 2016 operated by Environment Southland and GNS respectively, 3 of 23 and 1 of 6 showed decreases in concentration with the balance being unable to be determined with confidence."*[9]

17. The s 42A report identifies that:

    a. Non-point source agricultural inputs, such as leaching and run-off, are the main source of nutrient contaminants in Southland's rivers;[10]

    b. Degraded areas of the Waikawa, Fortrose (Mataura FMU), Jacobs River (Aparima FMU) and New River (Oreti FMU) are increasing in size from the cumulative 'stress' of elevated nutrients and sediment loading from upstream catchments;[11]

    c. None of the six popular river bathing sites (primary contact recreation) in the Operative Plan meet the standard for bathing waters or the NPS-FWM national bottom line for swimming. In addition, six of fifty-five SoE monitoring sites with sufficient data for state assessment do not meet the national bottom line, or the Operative Plan standard for *E.coli* for secondary contact recreation;[12]

18. In relation to ecosystem health the s 42A report identifies that:

    <u>Estuaries</u>

    a. Ecosystem health of the New River Estuary is in decline. Impacts of nutrient enrichment are the main driver of degradation;[13]

    b. Ecosystem health of Jacobs River Estuary is in decline. Impacts of nutrient enrichment and sedimentation are the main drivers of degradation. Ecological health of the estuary is severely compromised in parts, with no indication of improvement, and evidence of further deterioration;[14]

    c. Fortrose Estuary is in a moderate state of ecological health. The main stressor appears to be nutrient enrichment;[15]

    d. Waikawa Estuary appears in good overall health, however the upper estuary is only moderately healthy. Management of nutrient input is necessary to prevent a threshold change.[16]

    <u>Lakes</u>

[9] Section 3.10 at page 34 of the s 42A report.
[10] Section 3.11 at page 34 of the s 42A report.
[11] Section 3.13 at page 35 of the s 42A report.
[12] Section 3.17 – 3.18 at page 35 of the s 42A report.
[13] Section 3.30 at pages 37 – 38 of the s 42A report.
[14] Section 3.31 at page 38 of the s 42A report.
[15] Section 3.32 at page 38 of the s 42A report.
[16] Section 3.33 at page 38 of the s 42A report.

a. Shallow lakes – Mainland shallow lakes are significantly degraded compared to Stewart Island reference lakes. Ecological integrity is a mixed bag, lower rating can be attributed to degraded water quality or the presence of non-native species. Nitrogen and phosphorus concentrations in all shallow coastal lakes indicate high nutrient loads from anthropogenic inputs;[17]

b. Intermittently open and closed lakes and lagoons – Waituna Lagoon is exhibiting considerable nutrient stress when it is closed and remains at risk of changing to an algal dominated state if nutrient loads are not reduced;[18]

c. Deep lakes - The Ecological Health Assessment for Lake Manapouri is "excellent" and "good" for Lake Te Anau.[19]

Rivers

a. Macroinvertebrate health – MCI standards are not met at 20% of sites in Southland. 26% of sites monitored from 1996 – 2014 had strongly significant decreasing macroinvertebrate health trends. No sites showed improving trends;[20]

b. Periphyton – Breaches of the NoF bottom line are likely to occur in the lower reaches of the main stem of the Mataura River and tributaries of the Aparima, Oreti, Waimatuku and Makarewa Rivers. Eight sites are unlikely to meet the national bottom line for periphyton;[21]

c. Nitrate toxicity – Rivers in Southland currently meet the national bottom line for nitrate toxicity to fish at all surface water monitoring sites, however, increasing trends for nitrate in groundwater and surface water suggest there is a risk of not meeting the bottom line at some sites in the future.[22] The majority of total nitrogen trends between 2000 – 2016 are for deterioration;[23]

d. Ammonia toxicity to fish – Southland currently meets the national bottom line for ammonia toxicity to fish at all surface water monitoring sites.[24]

Water quantity

19. The s 42A report identifies that allocation of groundwater is limited in many areas of Southland by allocation status and reliability of supply constraint associated with moderate – high hydraulic connectivity with surface water ways.[25] In terms of primary allocation of surface water:

a. The Waiau catchment is fully allocated; and

[17] Section 3.36 at page 38 of the s 42A report.
[18] Section 3.40 at page 39 of the s 42A report.
[19] Section 3.41 at page 39 of the s 42A report.
[20] Section 3.52 at page 41 of the s 42A report.
[21] Section 3.54 at page 41 of the s 42A report.
[22] Section 3.56 at page 41 of the s 42A report.
[23] Section 3.57 at pages 41 - 42 of the s 42A report.
[24] Section 3.59 at page 42 of the s 42A report.
[25] Section 3.79 at page 44 of the s 42A report.

b. Allocation of water in the Mataura catchment is theoretically possible, however reliability of supply for irrigation is not sufficient for run-of-river schemes.[26]

Wetlands

20. 90% of wetlands in Southland (excluding public conservation land associated with Fiordland and Stewart Island / Rakiura National Parks) have been lost between 1840 - 2010.[27] As such, Landcare Research recommended to Environment Southland in 2011 that:

". . . The large extent of the loss of wetlands (90%) in the Southland region study area indicates that virtually all remaining wetlands could be considered significant."[28]

21. Mapping of wetland extent in Southland clearly demonstrates the significance of ongoing encroachment and loss of wetlands located outside the conservation estate. Mapping results between 2007 – 2014/2015 showed:

a. The loss of 36 wetlands totalling 156 ha through conversion into pasture; and

b. 120 wetlands were reduced in spatial extent by a total of 1,079 ha, mainly by pasture conversion.

The total wetland area lost was 1,235 ha or approximately 10% of the area of wetland mapped in 2007, mostly in lowland areas.[29] In addition, the author of the report observed that:

> *"Although many wetlands that have been lost or reduced in extent appeared to be of poor or moderate quality, some good quality wetland areas that are highly likely to meet significance criteria are still being modified or lost, and even poor quality wetlands are likely to be providing some level of ecosystem service."*[30] (Emphasis added)

Sports fish and game values in the Southland region

22. The sports fish and game bird resources of the Southland region are highly valued. Fish & Game represents holders of 17,500 angling and hunting licences in the Southland region (2017 game – 5,702 licences and 2016 / 2017 fish – 11,932 licences).

Sports fish

23. The Southland sports fishery is particularly significant. The Southland region is one of the key regions in the South Island for sport fishing and includes a large number of sports fisheries which have locally, regionally and nationally significant values.

---

[26] Section 3.82 at page 45 of the s 42A report.
[27] Clarkson, B., *Current and historic wetlands of Southland Region: Stage 2*, Landcare Research report (LC312) for Environment Southland, June 2011, pp. vi and 16.
[28] Ibid, p. 16.
[29] Ewans, R., *Environment Southland Wetland Inventory Project: Monitoring wetland extent on non-public conservation land in the Southland region - Interim report for 2016*, Report by Eco-South for Environment Southland - July 2016, pages 11 – 15.
[30] Ibid, p. 16.

24. All river and still water fisheries in Southland are wild and self-sustaining through natural spawning, rearing and recruitment of juvenile trout into the adult population. It is the standing of adult trout that provide the recreational trout fishing amenity and fishery productivity is related to habitat quality and ecosystem health.

25. The value of the sports fish resource in the Southland region is encapsulated by the two operative Water Conservation Orders in the Region, Water Conservation (Mataura River) Order 1997 ('Mataura WCO) and Water Conservation (Oreti River) Order 2008 ('Oreti WCO'). These recognise nationally significant brown trout fisheries / habitat and angling amenity features associated with the Mataura and Oreti Rivers, which have national and international status.

26. Southland also has a selection of waterbodies that offer regionally significant fishing opportunities, for example: Lakes Manapouri and Te Anau, Waituna Lagoon and the Upper and Lower Waiau and Aparima Rivers. In addition, Southland has many locally significant fisheries, such as the Makarewa River, which provide close to home angler opportunity, and a comprehensive network of significant spawning rivers and streams, such as the Waikaka Stream and tributaries, which are essential to the health and sustainability of the regions fisheries.

27. Total effort for the Southland region in 2014 / 2015 angling season was 122,660 ± 6,010 angler days, distributed over 57 river fisheries and 14 lake fisheries in 14 catchments.[31]

28. The most distinctive long-term trend across the Southland region has been a steady decline in effort on lowland river fisheries. Research suggests that displacement of anglers from the lower reaches of Southland Rivers, such as the Mataura River, is due to a perceived and / or measurable decline in water quality.[32]

Gamebirds

29. The Southland Region provides for significant wildlife habitat and game bird hunting opportunities, with key wetlands such as the Waituna / Awarua complex, numerous other wetlands on private and public land and its extensive network of rivers and lakes.

30. The Southland region has the most consistent mallard hunting in New Zealand, with average season bags usually ranging from 25 – 35 birds.

Legal framework

Planning framework and policy instruments

31. The purpose of the Proposed Plan is to aid Environment Southland in fulfilling its obligations to meet the purpose and principles of the RMA. Specifically, the Proposed Plan seeks to:

    a. Maintain water quality;

[31] Unwin, M., *Angler usage of New Zealand lake and river fisheries - Results from the 2014/15 National Angling Survey*, NIWA (Client Report No: 2016021CH), July 2016, page 44 and Appendix A.
[32] McAuliffe, T. (2010). *Angling and Dairying: Local Anglers' Perceptions and Responses to Dairying in the Mataura River Catchment*. A dissertation submitted for the partial fulfilment of the Bachelor of Commerce with Honours in Tourism at the University of Otago, Dunedin.

b. Make improvements to water quality through the implementation of good management practices; and

c. Set up a framework to enable further improvements where water quality is degraded, through the FMU process.

32. A succinct working summary of the matters to be taken into account in assessing and approving Regional Plans is found in the Environment Court's decision regarding the proposed "One Plan" appeals in *Day v Manawatu-Wanganui Regional Council*:

"[1-13] Drawn from the Act, we set out a working summary of the matters to be taken into account in assessing and approving Regional Policy Statements and Regional Plans:

. . .

Regional Plans

1. *The purpose of a regional plan is to assist a regional council to carry out its functions in order to achieve the purpose of the Act (s63).*

2. *When preparing its regional plan the regional council must give effect to any national policy statement or New Zealand Coastal Policy Statement (s67(3)).*

3. *The regional plan must not be inconsistent with any other regional plan or a water conservation order or a determination of the Chief Executive of the Ministry of Fisheries about aquaculture permits (s67(4)).*

4. *When preparing its regional plan the regional council shall:*

   (a) *have regard to any proposed regional policy statement in the region (s66(2));*

   (b) *give effect to any operative regional policy statement (s67(3)(c));*

   (c) *have regard to the extent which the plan needs to be consistent with the regional policy statements and plans or proposed regional policy statements and plans of adjacent regional councils (s66(2)(d)).*

5. *A regional plan must also record how it has allocated a natural resource under s30(1)(fa) or (fb) and (4), if it has done so (s67(4)).*

6. *When preparing its regional plan the regional council shall also:*

   - *have regard to the Crown's interests in land of the Crown in the CMA (s66(2)(b));*

   - *have regard to any management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations (s66(2)(c));*

   - *take into account any relevant planning document recognised by an Iwi authority (s66(2A)(a)); and*

- *not have regard to trade competition (s66(3)).*

7. *A regional council must prepare a regional plan in accordance with its functions under s 30, the provisions of Part 2, any direction given by the Minister for the Environment, and its duty under s 32 and any regulations (s66).*

8. *A regional plan must also state its objectives, policies to implement the objectives and the rules (if any) (s67(1)) and may (s67(2)) state other matters.*

9. *The rules (if any) are for the purpose of carrying out its functions (other than those in s30(1)(a) and (b)) and achieving the objectives and implementing the policies of the plan (s67(1)(c) and s 68(1)).*

10. *In making a rule the regional council shall have regard to the actual or potential effect on the environment of activities (s68(3))*."[33]

33. Accordingly, the Proposed Plan must:

a. Be prepared in accordance with Regional Council's functions under s 30 of the RMA[34], which includes the following relevant paragraphs:

> *"**Functions of regional councils under this Act***
> *(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:*
>
> *(a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:*
>
> *. . .*
>
> *(c) <u>the control of the use of land for the purpose of</u>—*
> *(i) <u>soil conservation</u>:*
> *(ii) <u>the maintenance and enhancement of the quality of water in water bodies</u> and coastal water:* (emphasis added)
> *(iii) the maintenance of the quantity of water in water bodies and coastal water:*
> *(iiia) <u>the maintenance and enhancement of ecosystems in water bodies</u> and coastal water:* (Emphasis added)
> *(iv) the avoidance or mitigation of natural hazards:*
> *. . .*
>
> *(e) the control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—*

[33] *Day v Manawatu-Wanganui Regional Council* (Proposed One Plan Appeals) [2012] NZEnvC 182 (30 August 2012) at [1-13].
[34] Section 66(1)(a) of the RMA.

(i) the setting of any maximum or minimum levels or flows of water:
(ii) the control of the range, or rate of change, of levels or flows of water:
(iii) the control of the taking or use of geothermal energy:

. . .

(f) the control of discharges of contaminants into or onto land, air, or water and discharges of water into water: (emphasis added)

. . .

(ga) the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity:"

In *Ngati Kahungunu Iwi v Hawkes Bay Regional Council* the Environment Court observed that:

> *". . . it is a function of every regional council to control the use of land to maintain and enhance the quality of water in waterbodies – ie including water in aquifers, and to control the discharges of contaminants into water (again, including water in aquifers). This function is not optional – it is something a regional councils is required to do, whether it be difficult or easy."*[35] (emphasis added)

Judge Thompson further noted in the context of considering a water quality objective in a regional plan in *Ngati Kahungunu Iwi v Hawkes Bay Regional Council* that:

> *". . . an objective in a planning document sets out an end state of affairs to which drafters of the document aspire, and is the overarching purpose that the policies and rules of the document ought to serve. In this planning document, the objective must be governed by the function imposed on a regional council by s 30(1)(c)(ii):*
>
> > *The maintenance and enhancement of the quality of water in water bodies and coastal water."*[36] (emphasis added)

b. "Give effect' to the NPS-FWM.[37]

The Supreme Court considered in *Environmental Defence Society Inc v New Zealand King Salmon Co. Ltd* (*'King Salmon'*) what is meant by the phrase "give effect to" in s 67 in the context of the New Zealand Coastal Policy Statement and held that:

[35] *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50 (27 March 2015) at [29].
[36] Ibid at para [42].
[37] Section 67(3)(a) of the RMA.

". . . "Give effect to" simply means "implement". On the face of it, it is a strong directive, creating a firm obligation of the part of those subject to it . . ."[38]

The above obligation means that subject to the three exceptions of invalidity, incompleteness or uncertainty, a decision maker on a Plan is not required to have recourse to Part 2 of the RMA, or undertake a *"balancing"* interpretation when considering the higher order instrument(s) at issue.[39]

Since inception, the NPS-FWM has begun to be rigorously tested and upheld by the Environment Court. The Environment Court's decision in *Ngati Kahungunu Iwi v Hawkes Bay Regional Council* provided important consideration for interpreting the objectives of the NPS-FWM; ultimately upholding its higher order objectives as being 'unequivocal' (without recourse to a Part 2 interpretation of those provisions).[40]

Whilst the decision in *Ngati Kahungunu Iwi v Hawkes Bay Regional Council* largely focused on overall water quality[41] the reasoning is equally applicable to the provisions on overall water quantity, including provisions on allocation and flows.

c. "Give effect" to the Southland Regional Policy Statement.[42]

All appeals on the Proposed Southland Regional Policy Statement (2012) ('PSRPS') have now been resolved through consent orders issued by the Environment Court and Council is currently preparing the PSRPS so that it can be made operative as soon as possible.[43]

Technically, the PSRPS is not yet operative despite the resolution of all Environment Court appeals. As such, it is arguable that Council is only required to "have regard" to it as a proposed regional policy statement under s 66(2)(a) of the RMA. Fish & Game, however, submits that:

i. The PSRPS is virtually at the point where Council must "give effect" to it under s 67(3)(c) of the RMA; and

ii. Substantial weight must be attached to the PSRPS, including preferring it where there is inconsistency with the operative Southland Regional Policy Statement, in circumstances where all outstanding Environment Court appeals against the PSRPS have been resolved and Council is preparing to make it operative. Case law provides that the closer the proposed plan comes to its final content, the more regard is had to it.[44]

---

[38] *Environmental Defence Society Inc v New Zealand King Salmon Co. Ltd.* [2014] NZSC 38; [2014] 1 NZLR 593; [2014] NZRMA 195; (2014) 17 ELRNZ 442 at [77].
[39] *King Salmon* at [90].
[40] *Ngati Kahungunu Iwi v Hawkes Bay Regional Council* at [59] referring to Objective A1 in particular.
[41] Referring to Objectives A1 and A2 of the NPS-FWM 2014.
[42] Section 67(3)(c) of the RMA.
[43] http://www.es.govt.nz/document-library/plans-policies-and-strategies/regional-policy-statement/Pages/Proposed-RPS.aspx - Accessed 20 September 2017.
[44] *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 815 (19 April 2013) at [9].

d. "Not be inconsistent with" a Water Conservation Order.[45]

A Water Conservation Order ('WCO') is New Zealand's highest level of recognition that can be afforded to a body of freshwater. The measure of "outstanding" is assessed on a rigorous national comparative basis.[46] The Mataura and Oreti WCO's are applicable.

"Give effect" to the NPS-FWM (2014)

34. The NPS-FWM 2014 sets out the objectives and policies for freshwater management under the RMA. As the Hearing Panel will be aware, the NPS-FWM was amended as of 7 September 2017.[47] This raises the question as to which version is applicable and should be considered by the Hearing Panel.

35. The amended version of the NPS-FWM does not contain any transitional provisions. As such, Fish & Game submits that Environment Southland must *"give effect"* to the NPS-FWM as amended on 7 September 2017.

36. Key changes to the NPS-FWM include:

a. Amendments to the text of the Preamble, a new section 'National significance of fresh water and Te Mana o te Wai', amendments to some definitions and insertion of new definitions;

b. New section AA – 'Te Mana o te Wai' and new Objective AA1 and Policy AA1;

c. Amendment of Objective A2;

d. New Objective A3 (improvement of water quality so it is suitable for contact recreation);

e. New Objective A4 (enabling communities to provide for economic well-being in sustainably managing freshwater quality);

f. New Policies A5, A6 and A7 (dealing with water quality improvement matters);

g. New Objective B5 (enable communities to provide for their economic well-being in sustainably managing freshwater quantity within limits;

h. New Policy B8 (Regional Councils considering how to enable communities to provide for economic well-being while managing within limits);

i. Amendment to Policy C1 (recognising interactions between freshwater, land, associated ecosystems and the coastal environment and managing fresh water, land use and development in catchments in an integrated and sustainable way to avoid, remedy or mitigate adverse effects, including cumulative effects;

[45] Section 67(4)(a) of the RMA.
[46] *Rangitata South Irrigation Limited v New Zealand and Central South Island Fish and Game Council* C109/2004 [2004] NZEnvC 270 (5 August 2004) at [17].
[47] https://www.gazette.govt.nz/notice/id/2017-go4171 - Accessed 23 September 2017.

j. Amendments to Policies CA2 and CA3 (National Objectives Framework);

k. Amendments to Policy CB1 and new Policies CB2, CB3 and CB4 (Monitoring Plans);

l. Amendments to Policy E1 (timeframes and information requirements for progressive implementation; and

m. Amendments to Appendix 1 - National values and uses for fresh water, Appendix 2 – Attribute tables; and

n. New Appendix 5 – Surveillance monitoring of *E.coli* at primary contact sites and Appendix 6 – National target for water quality improvement.

37. Fish & Game submits that there is a very strong statutory imperative for, and directive towards giving effect to the amended NPS-FWM in the Proposed Plan. In *King Salmon* the Supreme Court held that the "requirement to give effect to the NZCPS is intended to constrain decision-makers"[48] and that the NZCPS was ". . . a carefully expressed document whose contents are the results of rigorous process of formulation and evaluation. It is a document which reflects particular choices".[49]

38. The Preamble of the NPS-FWM highlights that:

a. Freshwater is essential to New Zealand's economic, environmental, cultural and social well-being, but the quality, health, availability and economic value of it is under threat;[50]

b. Given the vital importance of freshwater and to achieve the purpose of the RMA there is a need for clear Central Government policy to set a national direction, which includes managing land use and development activities that affect fresh water so that growth is achieved with a lower environmental footprint;[51]

c. The NPS-FWM sets out objectives and policies that direct local Government to manage water in an integrated and sustainable way, whilst providing for economic growth within set water quantity and quality limits. The NPS-FWM is a first step to improve freshwater management at a national level;[52]

d. New Zealanders generally aspire to high standards for our waterways and outcomes that are better than those achieved under the status quo;[53]

e. National bottom lines in the NPS-FWM are not standards to aim for. Where changes are required in the way communities use freshwater, the pace of change should take into account impacts on economic well-being;[54]

f. The NPS-FWM requires freshwater quality within a freshwater management unit to be maintained at its current level (where community values are

[48] *King Salmon* at [91].
[49] *King Salmon* at [91].
[50] NPS-FWM – Preamble at page 2.
[51] Ibid.
[52] Ibid.
[53] Ibid – Preamble at page 3.
[54] Ibid

currently supported) or improved (where community values are not currently supported);[55]

g. Setting enforceable quality and quantity limits is a key purpose of the NPS-FWM;[56] and

h. Where water resources are over-allocated (in terms of quality and quantity) to the point national and local values are not met, over allocation must be reduced over agreed timeframes.[57]

39. Fish & Game submits that the following provisions of the amended NPS-FWM are of particular relevance to the Proposed Plan:

Water Quality

a. Objective A1

Objective A1 of the NPS-FWM is to safeguard:

i. The life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of freshwater; and

ii. The health of people and communities affected by contact with fresh water.

in sustainably managing the use and development of land, and of discharges of contaminants.

Fish & Game further submits that:

i. Safeguarding the above environmental attributes is given priority in Objective A1, i.e. they operate as an "environmental bottom line", in relation to land use and development, and of discharges of contaminants.

ii. The above interpretation is consistent with the purpose and principles in Part 2 of the RMA for the following reasons:

- Environmental protection is a core element of the purpose of "sustainable management" in s 5 of the RMA.[58]

- Section 5(2)(b) specifically refers to "safeguarding the life-supporting capacity of air, water, soil and ecosystems".

  The Supreme Court noted in the *King Salmon* case that it is consistent with the definition of "sustainable management" in s 5(2) of the RMA for an NPS to direct decision makers to give primacy to environmental protection in particular circumstances.[59]

[55] Ibid.
[56] Ibid – Preamble at page 4.
[57] Ibid.
[58] See for example, *King Salmon* at [24](d), [28], [47], [146], [148], [149] and [152].
[59] *King Salmon* at [149] and [152].

iii. Objective A1 is consistent with Regional Council land control and discharge functions under s 30(1)(c) and (f) for the purposes of giving effect to the RMA.

b. Objective A2

Objective A2 of the NPS-FWM requires that the overall quality of freshwater is "maintained or improved" whilst meeting the following environmental bottom lines of protection:

i. Protecting the significant values of outstanding freshwater bodies;

ii. Protecting the significant values of wetlands; and

iii. Improving the quality of fresh water in waterbodies that have been degraded by human activities to the point of being over-allocated.

Fish & Game further submits that Objective A2 is fully consistent with the purpose and principles in Part 2 of the RMA. The Supreme Court in the *King Salmon* case emphasised repeatedly that environmental protection is a core element of sustainable management under the RMA.[60]

In addition, Objective A2 refers to "protecting the significant values of wetlands". This is consistent with case law providing there is a need to recognise and provide for the protection of the natural values of <u>all</u> wetlands and not just for the protection of wetlands with significant ecological values.[61]

c. Objective A4

Objective A4 refers to enabling communities to provide for their economic well-being, including productive economic opportunities, in sustainably managing freshwater quality, within limits.

Fish & Game submits that:

i. Objective A4 retains the priority given to the protection of freshwater quality, which is confirmed by the caveat that economic well-being, including productive economic opportunities, must be provided for "<u>within</u> limits" (emphasis added).

"Limit" is the maximum amount of resource use available, which allows a freshwater objective to be met.[62]

ii. The above caveat is important when considering water quality and is fully consistent with the concept of sustainable management – use, development and protection within the bounds of the environment's capacity – that underpins the RMA.

<u>Water Quantity</u>

[60] See for example, *King Salmon* at [24](d), [28], [47], [146], [148], [149] and [152].
[61] *Friends of Shearer Swamp Inc v West Coast Regional Council* [2012] NZEnvC 6 (18 January 2012) at [114] – [124].
[62] NPS-FWM – Interpretation section at page 8.

a. Objective B1

Objective B1 of the NPS-FWM is to "safeguard the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of freshwater" when making decisions about the taking, using, damming or diverting of freshwater."

Fish & Game submits that:

i. Safeguarding the above environmental attributes is given priority in Objective B1, i.e. they operate as an "environmental bottom line", particularly in relation to the impact of activities on the natural flow of rivers and other water bodies.

ii. The above interpretation is fully consistent with the purpose and principles in Part 2 of the RMA for the following reasons:

- Environmental protection is a core element of the purpose of "sustainable management" in s 5 of the RMA.[63]

- Section 5(2)(b) specifically refers to "safeguarding the life-supporting capacity of air, water, soil and ecosystems".

  The Supreme Court noted in the *King Salmon* case that it is consistent with the definition of "sustainable management" in s 5(2) of the RMA for an NPS to direct decision makers to give primacy to environmental protection in particular circumstances.[64]

iii. Objective B1 is consistent with Regional Council water control functions under s 30(1)(e) for the purposes of giving effect to the RMA, including controlling the taking, use, damming, and diversion of water, and the quantity, level, and flow of water in water bodies.

b. Objective B4

Objective B4 is "to protect significant values of wetlands and of outstanding freshwater bodies."

Fish & Game further submits that Objective B4 is fully consistent with the purpose and principles in Part 2 of the RMA, including recognising and providing for the protection of the natural values of <u>all</u> wetlands

c. Objective 5

Objective B5 of the NPS-FWM retains the priority given to the protection of freshwater quantity. This is confirmed by the caveat that economic well-being, including productive economic opportunities, must be provided for "<u>within</u> limits" (emphasis added).

Fish & Game submits that:

[63] See for example, *King Salmon* at [24](d), [28], [47], [146], [148], [149] and [152].
[64] *King Salmon* at [149] and [152].

i. The above caveat is important and is fully consistent with the concept of sustainable management – use, development and protection within the bounds of the environment's capacity – that underpins the RMA;

ii. Objectives A4 and B5 of the NPS-FWM are mutually consistent insofar as each separately confirms the caveat that economic well-being, including productive economic opportunities, must be provided for "within limits" with respect to both water quality (Objective A4) and water quantity (Objective B5); and

iii. Recognising and working within environmental limits when making decisions on the *quantity* of water is a critical first step in managing and improving the *quality* of freshwater in the Southland Region.

Improvement of degraded water bodies

40. The cases cited below provide assistance, and show that the Courts are finding in favour of the obligation and function of Regional Councils to maintain and restore degraded waterbodies.

41. In considering the One Plan, i.e. a regional plan in the Horizons-Manawatu region, in *Day v Manawatu-Wanganui Regional Council* the Environment Court noted:

> *[5-8] We should immediately say that also that we have little sympathy for the line of argument that we should defer taking decisive action in the field of improving water quality (or, at the very least halting its further decline because . . . the science is not sufficiently understood . . . or that . . . further analysis could give a more comprehensive process . . . or similarly phrased excuses for maintaining more or less the status quo. We will never know all there is to know. But what we undoubtedly do know is that in many parts of the region the quality of the natural water is degraded to the point of being not potable for humans or stock, unsafe for contact recreation, and its aquatic ecosystems range between sub-optimal and imperilled. We also know what is causing that decline, and we know how to stop it, and reverse it. To fail to take available and appropriate steps within the terms of the legislation just cited would be inexcusable."*[65] (Emphasis added)

42. The Environment Court decision in *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council*[66] is useful because it determined the applicability of the NPS-FWM in light of a Regional Council's obligations under s 30 of the RMA. The Court concluded that:

a. There was an "unqualified function" imposed on Regional Councils in s 30(1)(c)(ii) of the RMA, to control the use of land for the purposes of "the maintenance and enhancement of the quality of water in water bodies";[67] and

b. There was a clear requirement in s 69 of the RMA that Regional Councils "shall not set standards in a plan which result, or may result, in a reduction of the quality of the water in any waters . . . unless it is consistent with the purpose of the Act to do so."[68]

[65] *Day v Manawatu-Wanganui Regional Council* at [5-5] – [5-6].
[66] *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50 (27 March 2015).
[67] Ibid at [56].
[68] Ibid at [57].

The Court considered that Objective A1 of the NPS-FWM (being to safeguard the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems, of freshwater), was unequivocal. The following excerpts from the case at paragraphs 29 and 69 – 78 are also helpful:

> *"[29] . . . it is a function of every regional council to control the use of land to maintain and enhance the quality of water in water bodies - ie including water in aquifers, and to control the discharges of contaminants into ·water (again, including water in aquifers). This function is not optional - it is something a regional council is required to do, whether it be difficult or easy."*
>
> . . .
>
> *[69] This lack of precise knowledge is not a reason to refrain from taking any step to try to maintain, and indeed improve, the quality of the water in any aquifer. We can start with the definition of existing water quality in the NPSFM - the quality of the fresh water at the time the regional council commences the process of setting or viewing freshwater objectives and limits in accordance with Policy A1, Policy B1, and Policies CA1 - CA4. The Objective therefore should be to, at the least, maintain that level of quality. While maintaining water quality may be something of a moving target, the requirement is to strive for management practices that will prevent degradation, and to strive to ensure that quality is, at a minimum, maintained. That is the plain requirement of s30: - see particularly s30(1)(c)(ii) and s30(1)(f) . . .*
>
> *[70] If historical causes of water quality lead to decline later, and are causes which cannot be foreseen or controlled, then that will have to be dealt with at the time the quality decline is identified and its extent becomes known . . .*
>
> *[71] The frequent use in the hierarchy of planning documents of terms such as enhancement- see eg s7 RMA, or improve - see eg Objective A2 of the NPSFM, inherently recognise that there will be situations where, from whatever cause, water or other aspects of the environment . . . may be degraded to some degree from their pristine states.*
>
> *. . .*
>
> *[73] What we can predict, and can, and should, be planning for, by way of objectives and policies, is the effects of current anthropogenic activities affecting waterbodies.*
>
> *[74] If the load to come argument has any superficial appeal, it cannot succeed against the truth that we know what makes the quality of groundwater worse – ie putting pollutants into it. So, if we appropriately manage potential pollutants entering it now, its quality at least will not get worse (ie it will be maintained) and, as the inherited pollutants slowly work their way out of it, it will get better (ie it will be improved). Having a sub-optimal present is not an excuse for failing to strive for an optimal (or, at least, closer to optimal) future.*
>
> *. . .*
>
> *[77] . . . not being able to remedy the poor practices of the past . . . is not a good reason to allow the same errors to be made in the future. We must be*

able to say that, even if what has been done in the past is irreversible, it would be irresponsible to use that as an excuse not try to apply better standards from this point on . . . Whatever intensification leads to higher potential pollutants, technology and best practice needs to be developed to maintain and, where degraded, enhance the environment to ensure that the sustainability principles of RMA are fulfilled.

[78] . . . the possibility of an objective of maintenance or enhancement being partly unfulfilled is not an excuse for not trying at all. The objective, even if unachieved because of the load to come, will still have value as a demonstration that the aspiration, from now on, is to at least maintain quality and that, from now on, the planning documents will be designed to give effect to that aspiration." (Emphasis added)

In short, the decision of *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* is authority that the Proposed Plan should at least aspire and attempt to *maintain* water quality.

43. The same findings were also made by the Environment Court in *Sustainable Matata v Bay of Plenty Regional Council*[69] as follows:

"[277] Once we consider the primary objective to safeguard the life supporting capacity and sheet this home to Part 2 and the Regional Council's functions, we conclude that maintenance at least must be assumed. Adding to an existing background level albeit degraded, will not achieve maintenance.

. . .

[373] We conclude that the ORC [Old Rangitaiki Channel] is over-allocated because the regional documents provide a clear direction towards reduction of contaminants and enhancement. Further, the ORC, through its interaction with the Tarawem River, is contributing to the reduction of health and mauri of that river. These compulsory values would seem to put the ORC clearly in the frame of the directives of the Freshwater Policy Statement for maintenance and enhancement. It would not meet Objective AI(a) of the Freshwater Policy Statement. As a contributor to the Tarawera it must fall under A2, which signals maintained or improved.

. . .

[375] . . . Further, there are the Regional Council's functions as set out in s30 RMA, the most relevant parts for current purposes, we set out here:

30 Functions of regional councils under this Act
(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:
(a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:
(b) the preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance:
(c) the control of the use of land for the purpose of:

[69] *Sustainable Matata v Bay of Plenty Regional Council* [2015] NZEnvC 90 (12 May 2015) at [277], [373], [375], [377], [378] and [381].

(i) *soil conservation:*
(ii) *the maintenance and enhancement of the quality of water in water bodies and coastal water:*
(iii) *the maintenance of the quantity of water in water bodies and coastal water:*
(iiia) *the maintenance and enhancement of ecosystems in water bodies and coastal water:*
(iv) *the avoidance or mitigation of natural hazards:*
(v) *the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances: ..... .*

(f) *the control of discharges of contaminants into or onto land, air, or water and discharges of water into water: .....*

[emphasis added]

This section indicates towards maintenance or improvement of all water bodies.

[377] . . . This raises the issue of cumulative effects and long term effects. Once we consider the primary objective to safeguard the life supporting capacity and sheet this home to Part 2 and the Regional Council's functions, we conclude that maintenance at least must be assumed. Adding to an existing background level albeit degraded, will not achieve maintenance.

[378] By increasing the level of contamination of the ORC, there is the potential for the overall input from this source to the Tarawera River to increase and therefore to have a negative impact on the river . . .
. . .

[381] If the suggestion is that the Freshwater Policy Statement provides some permit to drive to the bottom line, or a licence to pollute, then that concept is entirely rejected by the Court . . ."

44. The Final Report and Decision of the Board of Inquiry into the Tukituki Catchment Proposal[70] mirrors the position of the Courts as follows:

"[328] . . . where the quality of freshwater has been degraded by human activities to such an extent that OBJ TT1 is not being achieved, water quality should not be allowed to degrade further. Rather, water quality should be improved progressively over time so that OBJ TT1 is achievable by 2030 (the year by which the NPSFM is to be implemented).
. . .

[808] The NPSFM requires overall water quality to be maintained or improved within a region. It also requires councils to safeguard the life-supporting capacity, ecosystem processes and indigenous species (including their associated ecosystems) of fresh water. Councils are also required to manage fresh water efficiently within set limits and to address over-allocation."

45. Maintaining and enhancing amenity values and the quality of the environment generally feeds into the requirement under s 5 of the RMA that people's cultural, social and economic well-being be enabled. The recreation, leisure and even

[70] Tukituki Board of Inquiry final report and decision – Volume 1 of 3 – 18 June 2014 at [328] and [808].

business of people recreating are reliant on the maintenance and enhancement of healthy water bodies.

46. The fact that enhancement of an environment degraded by historical actions is consistent with the purpose of the Act was made by the Environment Court in *J F Investments Ltd v Queenstown Lakes District Council*[71] as follows:

> *'[28] . . . The RMA does not regard the present Environment – being the sum of all environments – as the best of all possible New Zealands. Section 7(f)'s reference to enhancement of the quality of the environment requires that improvements may be made in appropriate circumstances. That is consistent with the purpose of the Act which requires remedying of the adverse effect of activities, including past effects (of past activities). For example air and water quality were the past regarded as public goods, people could pollute water nearly (subject to the common law of nuisance) as much as they wished. It is clearly contemplated by section 7(f) together with sections 5(2)(a) to (c) of the RMA that improvements to air and water quality may be very desirable ends of resource management . . ."* (Emphasis added)

Physiographic zones

47. Fish & Game is strongly supportive in principle of the use of nine physiographic zones, including zone specific objectives, policies and rules, to manage water and land use in the Southland region to:

    a. Achieve the sustainable management purpose of the Resource Management Act 1991 ('the RMA'); and

    b. Give effects to the National Policy Statement for Freshwater Management ('the NPS-FWM'), as further amended with effect from 7 September 2017.

48. Fish & Game submits that the use of physiographic zones in the Proposed Plan is a very useful tool to manage diffuse discharge of contaminants, and enables targeted, rather than 'blanket' solutions. However, it is not clear how:

    a. The recommendation in the s 42A report to move from physiographic zones to Freshwater Management Units (FMU's) for the purpose of Rule 20 provides any more certainty to farmers; and

    b. The recommendation in the s 42A report to increase permitted area of land in Old Mataura and Peat Wetlands physiographic zones that can be intensively winter grazed from 20ha - 50ha is justified with reference to water quality risks. No scientific analysis of the likely impact of the increase in area from 20ha – 50ha is provided despite both physiographic zones being highly susceptible to nutrient loss and water quality degradation from dairy farming and intensive winter grazing.[72]

Matters arising from submissions on the Proposed Plan

Economic well-being

[71] *J F Investments Ltd v Queenstown Lakes District Council* C048/2006 NZEnvC 127 (27 April 2006) at [28].
[72] Memorandum: Physiographic Zones – Susceptibility of Particular Parts of Southland to Dairy Grazing and Winter Grazing Practices, Environment Southland 2016.

49. Mr Maw observes in opening legal submissions for Environment Southland that *"Many submitters appear to be solely concerned with the economic consequences of the proposed plan"*[73] and identifies key themes emerging from those types of submissions, such as delaying the introduction of regulatory requirements[74] and reducing the numbers of rules and activities being regulated.[75]

50. It is acknowledged that the phrase "economic well-being" is used in s 5(2) of the RMA and in the NPS-FWM[76], however is not defined in either. As such, it is useful to consider the term, particularly in light of the number of submitters that have outlined concerns about the Proposed Plan that are economic in nature.

51. "Economic well-being" is usually interpreted to mean economic development and associated economic opportunities – such as employment, operational spend or tourism revenue.[77] In the freshwater context economic opportunities are likely to be interpreted to include agriculture, irrigation, industrial use, renewable electricity generation, recreation and tourism in the Southland region. However, case law provides that consideration of "economic well-being" in the context of Part 2 of the RMA is the broad aspect of economics rather than the narrower consideration of financial viability, including consideration of profitability.

52. In *New Zealand Rail v Marlborough District Council* the High Court held that:

> *". . . That economic considerations are involved is clear enough. They arise directly out of the purpose of promotion of sustainable management. Economic well-being is a factor in the definition of sustainable management in s 5(2). Economic considerations are also involved in the consideration of the efficient use and development of natural resources in s 7(b). They would also be likely considerations in regard to actual and potential effects of allowing an activity under s 104(1). But in any of these considerations it is the broad aspects of economics rather than the narrower consideration of financial viability which involves the consideration of the profitability or otherwise of a venture and the means by which it is to be accomplished. Those are matters for the applicant developer and, as the Tribunal appropriately said, for the boardroom . . ."*[78] (Emphasis added)

53. Similarly, in *Maniototo Environmental Society Incorporated v Central Otago District Council* the Environment Court similarly held that under Part 2 of the RMA it was not to be concerned about the viability or profitability of the proposed project (a wind farm) to the applicant (Meridian) or its financial well-being.[79] The Court emphasised that:

---

[73] Opening legal submission for Environment Southland (dated 17 May 2017) at para 50.
[74] Ibid – para 50(b).
[75] Ibid – para 50(d).
[76] See for example, the preamble at page 3, Objective A4, Policy A7, Objective B5, Policy B8 and Policy A2(f)(iab).
[77] See for example, *Kawarau Jet service Holdings Ltd v Queenstown Lakes District Council* [2015] NZRMA 185 at [161] - Contributions to the economic well-being of the Queenstown community associated with the consent application were identified as being *"through attracting visitors, operational spend and providing employment opportunities."*
[78] *New Zealand Rail v Marlborough District Council* [1994] NZRMA 70 at page 88.
[79] *Maniototo Environmental Society Incorporated v Central Otago District Council* [2009] NZEnvC 293 (28 October 2009) at [227].

> *". . . We are directed in section 5 of the RMA to provide for the "economic well-being" of "people and communities", through the sustainable management of "natural and physical resources" while giving appropriate regard to the issues covered in sections 6 – 8. We are not required to be concerned for the financial wellbeing of corporate entities or with their use of their financial resources. As such, we are not concerned with how much the project might cost Meridian, what the long run marginal cost to Meridian of electricity generated by the wind farm might be, or with the wisdom or otherwise of Meridian's investment decisions. As discussed in Chapter 3.0 these are matters for Meridian's Board of Directors and, in Meridian's case, ultimately the Shareholding Minister."*[80] (Emphasis added)

54. In *Day v Manawatu-Wanganui Regional Council* the Environment Court considered surface water quality and non-point source discharges, the central issue being the amounts and types of run-off and leachates arising from farming activities that found their way into waterbodies, primarily lakes and rivers:

> "There can no doubt of course that enabling *… people and communities to provide for their … economic … wellbeing …* includes so enabling the farmers and communities of the region. But that part of the purpose is not absolute, or necessarily even predominant. It must be able to coexist with the purposes in subparagraphs a), b) and c). For the reasons already traversed, unless effective and through steps are taken to manage N leaching from the region's farms, none of the three purposes will be met."[81] (Emphasis added)

55. Judge Thompson's reasoning in *Day v Manawatu-Wanganui Regional Council* aligns with that of the Supreme Court in the *King Salmon* case. Specifically, the Supreme Court emphasised that the definition of "sustainable management" in s 5(2) of the RMA does not consist of two distinct parts, i.e. "essentially development interests" and "essentially intergenerational and environmental interests", of which one is to be balanced against the other.[82] Rather, it should be read as an integrated whole:

> *". . . As we see it, the use of the word "while" before sub-paras (a), (b) and (c) means that those paragraphs must be observed in the course of the management referred to in the opening part of the definition. That is, "while" means "at the same time as"."*[83]

Consistent with this interpretation, the Supreme Court repeatedly stressed that environmental protection is a core element of sustainable management, so that "sustainable management of natural and physical resources involves protection of the environment as well as its use and development".[84] Environmental protection does not in itself have primacy.[85] But, Part 2 when read as a whole does contemplate the adoption of "environmental bottom lines".[86]

56. Fish & Game submits that:

---

[80] Ibid at [587].
[81] *Day v Manawatu-Wanganui Regional Council* at [5-215].
[82] *King Salmon* at [24](c).
[83] *King Salmon* at [24](c).
[84] *King Salmon* at [24](d) – See also similar statements at: [28], [47], [146], [48], [149] and [152].
[85] *King Salmon* at [148] - [149].
[86] *King Salmon* at [47].

a. "Economic well-being" is only one aspect of sustainable management, which does not necessitate consideration of profitability, nor does it have primacy in either the RMA or the NPS-FWM;

b. Using references to "economic well-being, including productive economic opportunities" to undermine the level of environmental protection in the RMA and NPS-FWM, particularly with respect to water quality and water quantity, would be inconsistent with the recognition given to environmental protection by the Supreme Court in the *King Salmon*; and

c. It is not clear that the economic apprehensions of submitters in relation to the Proposed Plan will be realised.

57. The decisions of the Hearing Panel on the Proposed Plan are no doubt difficult. However, as recognised by the Environment Court in *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council*:

> *". . . economic consequences for private individuals are an inevitable corollary of regulation in the public interest. That is not a reason to manipulate or pervert plan implementation. In fact, it emphasises the importance of consistent and transparent plan implementation to ensure those consequences are evenly and fairly distributed."*[87]

Effects on land values

58. A number of submitters assert that the Proposed Plan and changes in the planning framework, particularly with respect to the use of physiographic zones, will have adverse effects on their property and / or land value.[88] Alternatively, a number of submitters seek compensation for any reduction in land values associated with the Proposed Plan, including the use of physiographic zones.[89]

59. In a similar vein the s 32 report prepared for Environment Southland outlines likely adverse and positive effects on the market value of land associated with the notified provisions, particularly with respect to the classification of land using physiographic zones and the subsequent rules for each zone).[90] However, no evidence is provided and / or referenced by the author to support arguments with respect to effects on land values nor does the author establish his / her expertise to express professional opinion with respect to the assessment of changing planning frameworks on property values.

---

[87] *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* [2017] NZEnvC 37 (21 March 2017) at [182].

[88] See, for example: Belgard Family Trust (GA & JM Rauber) Sub ID and Sub point 64.1 – 64.9 – *" . . . The new zone system will unfairly affect property values, which may not be truly reflected in their potential use."*; McKee, Scott Sub ID and Sub point 543.2 – *"Amend so Rule doesn't affect land values";* and Southern Farms NZ Ltd (Brendon Phillips) Sub ID and Sub point 743.3 – *"No definition of winter grazing given in relation to stock class/stocking rate not being able to expand the dairy farm will reduce my property value."*

[89] See, for example: Stewart Rory Sub ID and Sub point 772.1 and 773.1 – *"Have the ability to contest physiographic zones. Allow new dairying to be permitted and pay compensation to landholders and owners for the depreciation in land values and farming business."*; and Morris G. G. & R. M. Family Trust Sub ID and Sub point 580.1 – *"Compensation should be payable to those whose farm values are adversely affected by the implementation of new 'zones' on our land."*

[90] Section 32 Report for the Proposed Southland Water and Land Plan (Section 6.3.5, page 108)

60. As has been identified by the Hearing Panel, such submissions raise the question as to whether an effect on land values is an "effect" within the meaning and context of the RMA. "Effect" is defined in s 3 of the RMA as follows:

> *"In this Act, unless the context otherwise requires, the term **effect** includes—*
> *(a) any positive or adverse effect; and*
> *(b) any temporary or permanent effect; and*
> *(c) any past, present, or future effect; and*
> *(d) any cumulative effect which arises over time or in combination with other effects— regardless of the scale, intensity, duration, or frequency of the effect, and also includes—*
> *(e) any potential effect of high probability; and*
> *(f) any potential effect of low probability which has a high potential impact."*

61. The question of adverse effects on property values has been addressed by the Environment Court on several occasions in the context of appeals regarding consent. In *Re Application by Meridian Energy Limited* Judge Harland articulated the argument for and against as follows:

> *"If property values are reduced as a result of activities on another property, the argument is that the loss of value is the result of the effect of that activity on the environment, not an effect itself. The objection is to the prospect of effects being double-counted."*[91]

Further, Judge Harland noted that there are inherent difficulties in trying to assess whether or not a proposed activity under the RMA is likely to result in a drop in property values.[92]

62. In *Land Air Water Association & Ors v Waikato Regional Council* Judge Whiting considered that the definitions of "effect" and "environment" in sections 2 and 3 of the RMA and concluded that the operative word was "economic".[93] As such, an effect on property values was *". . . an economic condition which affects "people and their communities" and "natural and physical resources"."*[94] However, Judge Whiting cautioned that the weight that should be given to such evidence is dependent upon the facts and circumstances of each case.[95]

63. In practice, the Environment Court has preferred to rely on evidence about environmental effects themselves as opposed to a valuers appraisal of the way those effects might impact on market value.[96] Further, the Environment Court has cautioned in a number of cases that evidence of valuation effects is often speculative and unhelpful and physical effects on the environment are usually of more importance to the case.[97] For example:

---

[91] *Re Application by Meridian Energy Limited* [2013] NZEnvC 59 (15 April 2013) at [483].
[92] Ibid at [485].
[93] *Land Air Water Association & Ors v Waikato Regional Council* A110/01 [2001] NZEnvC 366 (23 October 2001) at [368] – [369].
[94] Ibid at [370].
[95] Ibid at [370].
[96] See, for example: *Giles v Christchurch City Council* A92/00 [2000] NZEnvC 261 (27 July 2000) at [59]; and *ELC (2008) Limited v Selwyn District Council* C53/2009 [2009] NZEnvC 179 (4 August 2009) at [57].
[97] See, for example: *North Canterbury Gas Ltd v Waimakariri District Council* A217/2002 [2002] NZEnvC 458 (6 November 2002) at [86]; *Rototuna Lands Ltd and Others v Hamilton City Council,* A46/2002 [2002] NZEnvC 81 (26 February 2002) at [71]; *Bunnik v Waikato District Council* A42/96 [1996] NZPT 133 (24 May 1996) at page 6; *Chen v Christchurch City Council* C102/97 [1997].

a. In *Bunnik v Waikato District Council* Judge Sheppard held that it is preferable to consider environmental effects directly, rather than to consider the market's response to them because *". . . a market can be an imperfect measure of environmental effects"*;[98]

b. In *Hudson v New Plymouth District Council* Judge Treadwell noted that a potential purchaser takes the situation as it exists at the time of purchase and may not be influenced by matters that may be of great moment to a present owner and occupier;[99] and

c. In *Chen v Christchurch City Council* Judge Jackson held that valuation evidence needs to be carefully used because it can lead to *"double-weighting"* and that a valuation is simply another expert opinion of the adverse effect (loss) being assessed by the Council or the Court.[100]

64. Fish & Game submits that:

a. As recognised by the Environment Court, there are inherent difficulties in trying to assess whether or not the change in planning framework associated with the Proposed Plan is likely to result in an increase and / or decrease in land values;

b. It is preferable for the Hearing Panel to consider environmental effects directly as opposed to considering the speculative response of the market to the change in planning framework associated with the Proposed Plan. In this case, neither the s 32 author nor submitters cite any evidence to support their assertions with respect to effects on land values; and

c. The Hearing Panel should guard against "double weighting", i.e. considering both the adverse effect giving rise to the reduction in value and the reduction in value.

Matters arising from the s 32 and s 42A reports

Undermining of public acceptance

65. The s 32 and s 42A reports both refer on occasion to undermining of public acceptance as justification to support a less restrictive planning framework in relation to activities that are having an effect on water quality, notwithstanding scientific evidence about risks of such activities to water quality.[101]

66. For example, the Winter Grazing and Dairy Farming Report[102] accompanying the s 32 report identifies that the Old Mataura, Peat Wetlands, Oxidising, Central Plains and Riverine zones are highly susceptible to nutrient loss and water quality

NZEnvC 299 (26 September 1997) at pages 18 - 19; and *Land Air Water Association & Ors v Waikato Regional Council* A110/01 [2001] NZEnvC 366 (23 October 2001) at [365].

[98] *Bunnik v Waikato District Council* A42/96 [1996] NZPT 133 (24 May 1996) at page 6.

[99] *Hudson v New Plymouth District Council* W138/95, [1995] NZPT 311 (9 November 1995) at page 6.

[100] *Chen v Christchurch City Council* C102/97 [1997] NZEnvC 299 (26 September 1997) at page 18.

[101] See, for example: section 7.445 of the s 42A report; and section 6.3.6 of the s 32 report in relation to Rule 22 - New or expanded dairy farming of cows.

[102] *Memorandum: Physiographic Zones – Susceptibility of particular parts of Southland to dairy grazing and winter grazing practices* (Pages 38 – 54 of Section 32 supporting documents).

degradation resulting from dairy farming. Rule 22 requires consent for all new or expanded dairy farms, with the activity status dependent on the physiographic zone within which is it located and a FEMP/IASM membership. It is proposed that:

a. New dairy farming in the Riverine, Gleyed, Bedrock / High Country, Oxidising, Central Plains and Lignite-Marine Terrace physiographic zones is a discretionary activity provided a FEMP is prepared; and

b. New dairy farming in the Old Mataura and Peat Wetlands physiographic zones is a non-complying activity.[103]

Whilst the author of the s 42A report doesn't make any recommendation on the issue they do note that:

a. A non-complying activity status is more likely to contribute to at least maintaining water quality[104]. This contrasts to a discretionary activity, which has a lesser test under the RMA[105]; and

b. There is scientific rationale for new and expanded dairy farming in the Riverine, Central Plains and Oxidising physiographic zones to be treated the same as in the Old Mataura and Peat Wetland zones.[106]

In short, proposed Rule 22 takes a less stringent planning approach to regulating the new dairy farming of cows in the Oxidising, Central Plains and Riverine zones. Reasoning for this approach includes, among other things: public perception of a perceived moratorium of dairy farming, unacceptability to the agricultural community and the current downturn in milk prices.[107]

If it is the case, as suggested by the author of the s 42A report, that a discretionary activity status as opposed to a non-complying activity status for new dairy farming of cows in the Oxidising, Central Plains and Riverine zones is more likely to result in a degradation, rather than maintenance of water quality then Environment Southland cannot be satisfied that adopting the regime will give effect to the NPS-FWM.

67. Fish & Game submits that:

a. The test is whether the proposed restriction on the use or development of land serves the statutory purpose of promoting sustainable management, and not whether it is unreasonable to the land owners, such as farmers.[108]

b. The Proposed Plan must give, among other things, give effect to the NPS-FWM[109], including Water Quality Objectives A1 – A4.

The Supreme Court emphasised in the *King Salmon* case that "give effect to" is a strong directive, creating a firm obligation on regional and district councils

[103] Section 7.652 of the s 42A report.
[104] Objective A2 of the National Policy Statement for Freshwater Management (2014) requires that the overall quality of freshwater is "maintained or improved" while meeting certain "environmental bottom lines" of protection.
[105] Section 42A report – Para 7.438, p. 247.
[106] Section 42A report – Para 7.441, p. 247.
[107] Section 6.3.6 of the s 32 report.
[108] *Hastings v Auckland City Council* A068/01 [2001] NZEnvC 254 (6 August 2001) at [96] – [100].
[109] Section 67(3)(a) of the RMA.

to implement the NPS through their planning documents.[110] Subject to the three exceptions of invalidity, incompleteness or uncertainty, the Hearing Panel is not required to have recourse to Part 2 of the RMA, or undertake a "balancing" interpretation when considering the NPS-FWM.[111]

c. Public acceptance is not a relevant consideration in terms of the requirement to "give effect", i.e. implement, the NPS-FWM, including Water Quality Objectives A1 – A4, through the Proposed Plan.

In relation to introducing a land use and development rules in the One-Plan to address surface water quality and the consequences for farming the Environment Court in observed in *Day v Manawatu-Wanganui Regional Council* that:

> *". . . there is nothing that gives farmers a privileged place in the scheme of things."*[112]

d. The author(s) of the s 32 and s 42A reports do not identify who the "public" are whose acceptance will be undermined by the Proposed Plan focusing on land use activities which scientific research show poses a risk to water quality in Southland. In contrast, survey based research shows that freshwater quality and related issues are perceived as the single most important environmental issue for New Zealand.[113]

Benefits and costs

68. Benefits and costs under the RMA includes *"benefits and costs of any kind, whether monetary or non-monetary."* Fish & Game submits that there are non-monetary benefits from maintaining and enhancing water quality as required by the NPS-FWM. These are non-monetary benefits from maintaining and enhancing, and safeguarding the life supporting capacity of the water bodies in the Southland Region, including:

a. Benefits to the ecosystems themselves;

b. Benefits to recreations users of streams, rivers, lakes and estuaries, including anglers, hunters and tourists; and

c. Potential benefits to farmers, in particular, of analysing their farm systems so as to reduce their losses of sediment, nutrient and microbial contaminants and, thereby, having a sense of achievement that they are doing their bit for sustainable management.

69. Non-monetary benefits of improved water quality does however present difficulties that they have to be considered in the analysis under s 32, but there is no real market mechanism by which they can be quantified.

Matters raised by Fish & Game's submission

Permitted activity status

---

[110] *King Salmon* at [77].
[111] *King Salmon* at [90].
[112] At para [5-176].
[113] Hughey, K. F. D., Kerr, G. N. and Cullen, R. (2013). *Public Perceptions of New Zealand's Environment: 2013*. EOS Ecology, Christchurch, pages 35 – 37.

70. Fish & Game submitted against several permitted activity Rules in the Proposed Plan on the basis that:

a. They are invalid due to inherent vagueness; and / or

b. They did not include permitted activity standards that comprehensively control the actual and potential adverse effects of on water (surface water and groundwater) that could arise from the activities permitted to ensure the discharge is not contrary to s 107(1)(c) – (g);

71. In *Carter Holt Harvey Limited v Waikato Regional Council* the Environment Court held:

> *"For a permitted activity no resource consent is required if the activity complies with any standards, terms or conditions specified in a Plan. Therefore it is necessary for any such standards, terms or conditions to be included in the Proposed Plan and to be stated with sufficient certainty such that compliance is able to be determined readily without reference to discretionary assessments."*[114] (Emphasis added)

72. Fish & Game submits that permitted activity rules in the Proposed Plan must:

a. Be comprehensible to a reasonably informed, but not necessarily expert, person. If not, then its validity is in question;[115]

b. Not reserve to Environment Southland the discretion to decide by subjective formulation whether a proposed activity is permitted or not;[116] and

c. Be sufficiently certain to be capable of objective assessment.[117]

73. The above legal principles are further referred to in these submissions with respect to specific permitted activities in the Proposed Plan.

Deposited sediment limit

74. The Proposed Plan contains no numerical standards for either suspended or deposited sediment, such as percentage change in visual clarity, a turbidity standard or deposited sediment standard. As such, Fish & Game sought the inclusion of a deposited sediment standard in the Proposed Plan for the following reasons:

a. To transparently monitor the state of the environment and the effectiveness of the Propose Plan in preventing excessive sedimentation in waterways; and

b. A deposited sediment standard in is scientifically robust and an appropriate way of measuring the extent of sedimentation in waterways in the Southland region, which is directly relevant to ecosystem health.

---

[114] *Carter Holt Harvey Limited v Waikato Regional Council* A123/2008 [2008] NZEnvC 326 (6 November 2008) at [116].
[115] *Lower Hutt City Council* W046/2007 [2007] NZEnvC 161 (31 May 2007) at [10].
[116] *Twisted World Limited v Wellington City Council* W024/2002 [2002] NZEnvC 250 (8 July 2002) at [63].
[117] Ibid at [64].

75. Fish & Game submits that:

a. Including a deposited sediment limit for monitoring purposes is a transparent and appropriate way of Environment Southland demonstrating that there is a measure of the effectiveness of the Proposed Plans provisions in addressing the adverse effects of sedimentation on waterways;

b. The Hearing Panel has before it evidence from Mr Moss as to the adverse effects of excess deposited sediment on waterways and an appropriate deposited sediment standard; and

c. The Hearing Panel has before it evidence from Mr Stewart as to:

i. The significance of winter forage crop grazing on hillslopes in the Otapiri Stream catchment; and

ii. The adverse effects of deposited sediment on declining Otapiri Stream health, including invertebrate communities, trout populations and angler.

Mr Stewart's evidence demonstrates the change in the invertebrate community in the Otapiri Stream has resulted in reduced trout food availability and quality. In turn, trout density has declined by 89% since the 1960's and angler usage of the fishery has declined by 76% in the last 20 years. These results highlight how declining water quality due to excessive sedimentation have reduced the life supporting capacity and recreational amenity of the Otapiri fishery.

Wetlands

76. Fish & Game submits that:

a. Environment Court case law provides that there is a need to recognise and provide for the protection of the natural values of all wetlands in the Southland region.[118]

b. Environment Southland's own research demonstrates that wetlands are still being rapidly lost from the Southland region despite being a national priority for protection on private land since 2007.[119] The 2007 Statement of National Priorities for Protecting Rare and Threatened Biodiversity on Private Land by the Ministry for the Environment has a national priority to:

". . . protect indigenous vegetation associated with sand dunes and wetlands; ecosystems types that have become uncommon due to human activity."[120]

[118] *Friends of Shearer Swamp Inc v West Coast Regional Council* [2012] NZEnvC 6 (18 January 2012) at [114] – [124].

[119] Clarkson, B., *Current and historic wetlands of Southland Region: Stage 2*, Landcare Research report (LC312) for Environment Southland, June 2011, pp. vi and 16; and Ewans, R., *Environment Southland Wetland Inventory Project: Monitoring wetland extent on non-public conservation land in the Southland region - Interim report for 2016*, Report by Eco-South for Environment Southland - July 2016, pages 11 – 15.

[120] Ministry for the Environment, *Protecting our Places - Information about the Statement of National Priorities for Protecting Rare and Threatened Biodiversity on Private Land*, April 2015, p. 15.

c. Monitoring shows that current identification and protection of wetlands in Southland is inadequate. As such, Fish & Game supports strengthening of wetland provisions in the Proposed Plan, however this must be complimented by ongoing wetland monitoring and strengthened compliance activities by Environment Southland.

Rule 13(a) - Sub-surface drainage discharges

77. Fish & Game opposed Rule 13(a) of the Proposed Plan on the basis that it is contrary to s 70 of the RMA. Fish & Game submits that this is the case for the following reasons:

a. Rule 13(a) creates a permitted activity for discharges from subsurface drainage systems. In doing so, Rule 13(a) repeats the narrative requirements of s 70(1)(d)[121], (f)[122] and (g)[123] of the RMA in relation to discharges. Rule 13(a) does not, however, repeat the requirements of s 70(1)(c), which refers to the production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials, such as sediment.[124]

b. Rule 13(a) does not include any clear, measurable, and enforceable standards to ensure compliance with the narrative requirements of s 70(1)(d), (f) and (g) of the RMA, notwithstanding the issues in relation to subsurface drainage discharges and transport of contaminants to surface water set out in Mr Moss' evidence at paragraph 100. It is not clear:

i. How compliance with the requirements of Rule 13(a)(i), (ii) and (vi) is be able to be objectively and reliably determined for the purposes of measuring compliance with the discharge to surface water, which is point source in nature;[125] or

ii. Why point source discharges from subsurface drainage systems to surface water are being treated differently in the Proposed Plan compared to other point source discharges to surface water[126], which require consents for the activity and apply a higher activity status in circumstances where discharges do not comply with freshwater quality standards set out in Appendix E of the Proposed Plan.

c. Rule 13(a) does not require a landholder to comply with any of the applicable freshwater quality standards set out in Appendix E of the Proposed Plan, which are applicable to point source discharges and intended to maintain

[121] Rule 13(a)(i).
[122] Rule 13(a)(ii).
[123] Rule 13(a)(vi).
[124] Fine sediment is the collective term for inorganic particles smaller than 2mm, such as clay, silt and sand that are deposited on the beds of rivers and streams.
[125] This is reflected in the fact that Rule 13(a)(i) creates a 20m zone of reasonable mixing for the purposes of measuring any conspicuous change to the colour and / or clarity of the receiving waters from the point of discharge.
[126] See for example, Rule 5 – Discharges to surface waterbodies that meet water quality standards (discretionary activity status), Rule 6 – Discharges to surface waterbodies that do not meet surface water quality standards (non-complying activity status), Rule 7 – Other discharges to water (discretionary activity status), Rule 8 – Discharges of surface water (controlled activity status) and Rule 15 – Discharge of storm water (discretionary or non-complying activity status).

water quality prior to more specific FMU limit setting.[127] Fish & Game submits that this dismantles the effectiveness of freshwater quality standards set out in Appendix E of the Proposed Plan, some of which are quite degraded.[128]

78. Further, Fish & Game submits that Rule 13(a)(i) is invalid for inherent vagueness in circumstances where neither the rule nor the Proposed Plan objectively define what constitutes a "conspicuous change to the colour and / or clarity of the receiving waters" downstream of the proposed 20m zone of reasonable mixing.[129]

79. In *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council* the Environment Court noted the difficulties with measuring objectively and reliably whether a discharge was "conspicuous" under s 107(1)(d) of the RMA in the absence of definition as follows:

> *[54] The word conspicuous is not defined in the Act. In considering its meaning, we have had regard to dictionary definitions in:*
> - *The concise Oxford English Dictionary – "clearly visible, attracting notice or attention";*
> - *The New Zealand Oxford Dictionary – "clearly visible; striking to the eye";*
> - *Collins Concise Dictionary – "1. Clearly visible. 2. Attracting attention because of a striking feature."*
>
> *[55] We consider that it is clear from the above definitions that conspicuous does not mean simply visible but rather implies some degree of visibility. For the discharge to be conspicuous we consider that it would need (in layman's term) to catch the eye. Application of such a test is problematic. There are obvious elements of subjectivity involved as what may be seen as conspicuous by one person might not be seen as such by another. The position from which the discharge is seen may determine its conspicuousness. Again we note that it seemed to be common ground that whatever test was applied, the present discharge is conspicuous."*[130]
> (Emphasis added)

80. Mr Moss' evidence is that a 20 – 30% change in visual clarity, depending upon the geology of the receiving river, i.e. hard bed or soft bed, is the numerical equivalent to the narrative within sections 70 and 107 in the RMA: "*no conspicuous change in colour or visual clarity*" and an appropriate standard for inclusion in the Proposed Plan.[131]

81. In summary, Environment Southland cannot be confident that compliance with the requirements of proposed Rule 13(a) will adequately manage the expected water quality effects from subsurface drainage discharges to surface water. As such, Environment Southland should:

    a. Amend Rule 13(a) to require that drainage systems comply with standards set for the relevant receiving surface waterbody 20m downstream of the point of discharge; and

---

[127] Section 42A hearing report – Para 7.344, p. 229: *"At this time, prior to the more specific FMU limit setting process, Appendix E provides water quality standards that are intended to maintain water quality."*
[128] Evidence-in-Chief of Zane Moss at paragraphs 56 and 73.
[129] Rule 13(a)(i) of the Proposed Plan.
[130] *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council* [2016] NZEnvC 232 (25 November 2016) at [54] – [55].
[131] Evidence-in-Chief of Zane Moss at paragraphs 58 - 60.

b. Insert Fish & Game's definition of "conspicuous" in the Proposed Plan, which is clear, measurable, and enforceable.

Rule 23(b) – Intensive Winter Grazing and Rule 24(a) - Incidental discharges from farming

82. Fish & Game submitted in opposition to:

a. Rule 23(b), which created a permitted activity in relation to intensive winter grazing; and

b. Rule 24(a), which authorises as a permitted activity the diffuse discharges of nitrogen, phosphorus, sediment and / or microbial contaminants associated with farming activities that are addressed by the land use Rules 20 – 23 for farming activities.

In short, Rule 24 is a discharge rule intended to ensure that the discharge of contaminants from farming activities authorised by Rules 20 - 23 do not require a separate discharge consent.

83. Fish & Game submits that proposed Rules 23(b) and 24(a) are contrary to s 70(1) of the RMA for the following reasons:

a. Rule 24(a) does not include any receiving water quality standards to ensure the permitted discharge discharges of nitrogen, phosphorus, sediment and / or microbial contaminants associated with farming activities is not contrary to s 107(1)(c) – (g). In relation to discharges from intensive winter grazing Rule 24(a) relies upon compliance with Rule 23(b).

b. Rule 23 relates to intensive winter grazing of forage crops, which research shows contribute a disproportionately large part of annual farm nutrient, microbial and sediment losses to water as a result of intensive stock grazing on soils with high moisture content.[132] Mr Stewart and Mr Moss both detail the significant and well documented effects that increased levels of fine sediment have on instream aquatic habitat and ecosystems.[133]

Rule 23(b) creates a permitted activity in relation to intensive winter grazing of livestock, however it does not:

i. Sufficiently address methodologies to avoid, remedy or mitigate losses of contaminants from critical source areas, which research shows contribute disproportionately to adverse effects on surface water quality from intensive winter grazing. The Environment Court has said on a number of occassions that under the RMA adverse effects should be internalised as far as possible unless it is shown on a case-by-case basis that they cannont reasonably do so.[134]

---

[132] See for example, Penny, V., *The effects of winter forage crop grazing of hillslopes on soil erosion in South Otago*. Diss. Lincoln University, 2016.

[133] Evidence-in-Chief of Cohen Stewart at paragraph 4; and Evidence-in-Chief of Zane Moss at 43 – 60.

[134] *Aggregates v Matamata-Piako District Council* W055/2004 [2004] NZEnvC 210 (18 June 2004) at [7]; *Wilson v Selwyn District Council* C023/2004 [2004] NZEnvC 74 (16 March 2004) at [100]; and *Waikato Environmental Protection Society Inc v Waikato Regional Council* W060/2007 [2007] NZEnvC 219; [2008] NZRMA 431 (23 July 2007) at [185] – [186].

ii. Include any receiving water quality standards that comprehensively control the actual and potential adverse effects of on water (surface water and groundwater) that could arise from the activities permitted to ensure the discharge is not contrary to s 107(1)(c) – (g); nor

iii. Provide for compliance with the water quality standards set out for relevant waterbody in Appendix E "Water Quality Standards", which are intended to maintain water quality in anticipation of the more specific FMU process.

The only receiving water quality standard in proposed Rule 23(b) is found in paragraph (ix) which provides:

"(b) From 1 30 May 2018, the use of land for intensive winter grazing is a permitted activity, provided the following conditions are met:

. . .

(ix) Overland flow of run-off water does not cause a conspicuous discolouration or sedimentation of any adjacent waterbody."

Fish & Game submits that proposed Rule 23(b)(ix) is invalid due to inherent vagueness for the following reasons:

a. The Proposed Plan does not include a deposited sediment standard for surface water bodies, including "rivers", to maintain ecosystem health; and

b. Neither the RMA nor the Proposed Plan define "sedimentation" or "conspicuous discolouration" nor how to measure either term objectively and reliably for the purposes of measuring compliance with Rule 23(b)(xi) or similar provisions in the Proposed Plan. As such:

i. The Environment Courts comments in *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council* about the word "conspicuous" in absence of definition are applicable; and

ii. There is no way to objectively and reliably measure whether Rule 23(b)(xi) gives effect to s 107(1)(c), (d) or (g).

84. In summary, Environment Southland cannot be confident that compliance with the requirements of proposed Rule 23(b)(xi) will adequately manage the expected water quality effects from overland flow of water containing contaminants (nitrogen, phosphorus, sediment and / or microbial contaminants) from intensive winter grazing to surface water. Irrespective of this Rule 24(a) acts as a conduit to sanction such discharges to surface water contrary to s 107(1)(c), (d) or (g) of the RMA.

<u>Rule 49 - Fish screening</u>

85. Fish & Game submitted that specific fish screening standards and guidelines should be incorporated into the Proposed Plan by way of a Schedule[135], which is linked to Rule 49 – Abstraction, diversion and use of surface water, for the following reasons:

a. Fish screens need to be appropriately designed to enable migrating and resident fish, including juvenile and adult sports fish, safe passage by preventing loss through entrainment and impingement; and

b. Specifying fish screening requirements in the Proposed Plan would provide clarity and assist the drafting of clear, certain and enforceable consent conditions with respect to fish screening conditions in relation to dam or diversion structures.

86. The s 42A report concludes at section 8.241 that:

> *" . . . it is my view that the adoption of an appendix to set out appropriate standards and requirements for fish screening will assist in making the requirements clearer and the consenting process easier. However, I note that the appendix sought by the submitters is specific to the Canterbury region and it is unclear from the submission whether or not the fish screening standards suggested by the submitters is appropriate for Southland. I suggest the submitter may wish to address this in evidence."*

In response, Mr Moss' evidence-in-chief for Fish & Game outlines at paragraph 121 that the fish screening requirements proposed by Fish & Game are:

a. Based upon work in the Canterbury region, which was funded by the Sustainable Farming Fund, through Irrigation New Zealand, and involving Environment Canterbury, Fish & Game (Central South Island and North Canterbury Regions), Irrigation New Zealand and the Department of Conservation; and

b. Appropriate with reference to indigenous and sports fish species found in the Southland region.

87. Fish & Game submits that inclusion of its proposed fish screening criteria in the Proposed Plan is appropriate for the following reasons:

a. It provides clarity and certainty with respect to fish screening requirements under the Proposed Plan;

b. It is suitable for indigenous and sports fish species found in the Southland region; and

c. It has regard to Part 6 of the Freshwater Fisheries Regulations 1983, which relates to requirements for "fish facilities" in relation to dams and diversion structures, including fish screens and bypass structures to facilitate fish passage.

Environment Court case law in *Re Auckland Regional Council* provides that:

[135] See proposed appendix at page 157 of the Fish & Game submission on the Proposed Plan – dated 1 August 2016.

i. Fish passage is one of a broad spectrum of activities or matters that must be weighed or considered by consent authorities when considering resource consents under ss 104 and 105 of the RMA;[136]

ii. The purpose of the Freshwater Fisheries Regulations is the preservation and protection of freshwater fish and their habitats. By contrast the purpose of the RMA is the sustainable management of all natural physical resource, which includes fish and their habitats, hence the focus of the RMA is far more wide ranging;[137] and

iii. Consideration of the issue of fish passage under the RMA incorporates the consideration of matters set out in the Freshwater Fisheries Regulations and the Conservation Act (under which the Freshwater Fisheries Regulations were brought) and extends beyond those considerations, to include whether the application for an activity in a stream bed or lake bed properly promotes the sustainable management of natural and physical resources. There is no conflict between the Freshwater Fisheries Regulations and the RMA.[138]

d. It is appropriate for the Hearing Panel to have regard to the Freshwater Fisheries Regulations under s 66(2)(c)(ii) of the RMA. Section 66(2)(c) of the RMA provides that Council when preparing a regional plan shall have regard, in addition to the requirements of s 67(3) and (4) of the RMA, to:

> *"(iii) regulations relating to ensuring sustainability, or the conservation, management, or sustainability of fisheries resources (including regulations or bylaws relating to taiapure, mahinga mataitai, or other non-commercial Maori customary fishing); and*
>
> *. . .*
>
> *to the extent that their content has a bearing on resource management issues of the region."*[139]

88. In summary, Fish & Game submits that the proposed fish screening conditions should be included in the Proposed Plan by way of an Appendix.

<u>Rule 60 - Damming</u>

89. Fish & Game's submission opposed Rule 60(d) as drafted on the basis of inconsistency with the Mataura WCO. The recommended drafting of Rule 60(d) in the s 42A report provides as follows

> *"(d) The placement or erection of dams or weirs in the Mataura or Waikaia River, including the tributaries and in the Oreti River main stem at Rocky Point at NZMS 260 E44373946 upstream at the forks at E42345 450 is a prohibited activity."*[140]

---

[136] *Re Auckland Regional Council* [2002] NZRMA 214 at [48].
[137] Ibid at [46] and [50] – [51].
[138] Ibid at [50] – [54].
[139] Section 66(2)(c)(ii) of the RMA.
[140] Section 10.154 of the s 42A report.

90. Clause 6(1) of the Mataura WCO provides that a permit "must not" be granted under the RMA to dam the following waters:

a. Mataura River from its source to the sea; and

b. The Waikaia River from its source to its confluence with the Mataura River.

Conversely, Clause 6(2) provides that a permit "must not" be granted under the RMA to dam the any tributary of Waikaia or Mataura River classified as protected waters if the dam would harm salmonid fish-spawning or prevent the passage of salmonid fish, i.e. trout. "Protected waters" in the context of Clause 6(2) includes:

a. All tributaries of the Waikaia River;

b. The Otamita Stream;

c. All tributaries of the Mataura River upstream of its confluence of the Otamita Stream; and

d. The Mimihau Stream and the Mokoreta River and their tributaries. [141]

Thus a permit may be granted to dam the above "rivers" (a – d) provided that the dam does not harm trout spawning or the passage of trout.

91. The Environment Southland staff answers to questions pre-circulated by the Hearing Panel recommends creating a discretionary activity rule for dams and weirs on tributaries of the Mataura or Waikaia River.[142] In response, the effect of this proposal is that any new dam, irrespective of size, i.e. including "small" dams, would require consent from Environment Southland as a discretionary activity under the Proposed Plan.

As set out in Mr Moss' evidence-in-chief at paragraphs 134 – 135, which includes an example of a dam on a tributary of the Waimea Stream and subsequently the Mataura River, it is not clear why a "small" dam on a tributary of the Mataura or Waikaia River could not be permitted under Rule 60(a) provided that it does not harm spawning or prevent passage of trout. For the sake of comparison, a "small" dam can be currently constructed as a permitted activity on tributaries of the Mataura or Waikaia River under Rule 29(a) of the Operative Plan provided that, among other things, it *". . . shall not harm spawning or prevent passage of salmonid fish."*[143]

92. Fish & Game submits that the following amendments to Rule 60 of the Proposed Plan are appropriate and consistent with Clauses 2 and 6(2) of the Mataura WCO:

a. Insert the following new sub-paragraph into Rule 60(a)

"(a)(xxiv) Dams or weirs in tributaries of the Mataura or Waikaia Rivers shall not harm spawning or prevent passage of salmonid fish (trout)."

b. Amend Rule 60(d) to provide:

[141] Clause 2(b) and (c) of the Mataura WCO.
[142] ES Opening – Answers to pre-circulated questions - section 10.147 and 10.154 at page 66.
[143] Rule 29(a)(x) of the Regional Water Plan for Southland.

"(d) The placement or erection of dams or weirs in the following is prohibited in the following waterbodies:

i. The Mataura or Waikaia River main stem;

ii. The Oreti River main stem at Rocky Point at NZMS 260 E44 373 946 upstream to the forks at E42 345 450; and

iii. Tributaries of the Mataura or Wakaia River where the dam or weir would harm spawning or prevent passage of salmonid fish (trout)."

Rule 78 – Weed and sediment

93. Fish & Game submitted against Rule 78(a) on the basis that it does not sustainably manage the direct effects from instream gravel removal associated with drainage maintenance, which is a key component of trout spawning habitat, life supporting capacity and ecosystem health.

94. For the avoidance of doubt, Fish & Game does not take issue with the removal of aquatic weeds and fine sediment from the beds of rivers and streams to maintain drainage outfall. As described in Mr Moss' evidence-in-chief fine sediment is the collective term for inorganic particles smaller than 2mm, such as clay, silt and sand that are deposited on the beds of rivers and streams.[144]

95. Simply put, Fish & Game's main issue with Rule 78(a) relates to the fact that it provides for the unquantified removal of small and mediums sized gravels, which provided trout spawning habitat, as permitted activity. As discussed in Mr Moss' evidence-in-chief:[145]

a. All sports fisheries managed by Fish & Game in Southland are wild stocks; that is, they rely on the natural spawning of fish which undertake their entire life in the wild. Thus it is crucial that habitat requirements are provided at all times and places necessary to sustain these stocks;

b. Spawning streams can be quite small, and trout run up into them during freshes and minor floods in late autumn;

c. The location of spawning may vary considerably from year to year depending upon rainfall at the time of spawning. Maintaining the habitat of suitable spawning areas is crucial to the on-going survival of these wild stocks of salmonids; and

d. Most drainage maintenance is undertaken in lowland areas in Southland. It is very unusual for modified lowland watercourses in Southland to have actively eroding headwaters with a sustainable source of gravel to replenish any that is removed, incidental or otherwise

[144] Evidence-in-Chief of Zane Moss (dated 19 May 2017) at paragraph 43.
[145] Evidence-in-Chief of Zane Moss (dated 19 May 2017) at paragraphs 15, 30, 31, 61, 62, 64, 151 and 154.

96. The Conservation Act establishes two offences with respect to the disturbance of spawning habitat of freshwater fish, including salmonids. Specifically, it is an offence under s 26ZJ of the Conservation Act to:

a. Disturb or damage the spawning ground of any freshwater fish;[146] or

b. Disturb or injure the eggs or larvae of any freshwater fish.[147]

The above offences are punishable by up to 2 years imprisonment and / or a fine up to $100,000 in respect of an individual or a fine up to $200,000 in respect of a body corporate.[148] The maximum penalty was doubled in 2013 by s 6 of the Conservation (Natural Heritage Protection) Act 2013. During the second reading of the Bill, the Hon Phil Heatley, a member of the subcommittee which reported back on the Bill, made the following remarks:

> *". . . This Bill sends a very, very strong message that we take the protection of New Zealand's wildlife and natural areas very, very seriously."*[149]

97. In *Tawha v Fish & Game New Zealand* the High Court considered an appeal against sentence under s 26ZJ of the Conservation Act relating to charges of disturbing the spawning ground of rainbow trout and taking rainbow trout congregated for spawning. In considering the matter Justice Moore characterised offending against s 26ZJ as "serious, non-commercial, offending".[150]

98. Fish & Game submits that:

a. The Conservation Act does not constrain activities in water bodies generally so it is important that the habitat provisions of the Proposed Plan under the RMA integrate to ensure that spawning habitats are identified and activities detrimental to these, such as gravel removal under Rule 78(a) of the Proposed Plan are avoided, remedied or mitigated as required by Part 2 of the RMA;

b. Proposed Rule 78(a) treats instream gravel as a constituent of sediment for the purposes of maintaining drainage outfall. As such, the Hearing Panel cannot be confident that compliance with permitted activity standards in Rule 78(a) will sustainably manage the direct effects from instream gravel removal, which is a key component of trout spawning habitat, life supporting capacity and ecosystem health; and

c. The Hearing Panel should adopt the changes recommended by Mr Moss to Rule 78(a), which include:

i. A definition of what constitutes "gravel";[151] and

ii. A limitation on the amount of gravel which can be removed.[152]

Appendix L - Table Y.2: Classification and management of stream depletion effects

[146] Section 26ZJ(1) of the Conservation Act.
[147] Section 26ZJ(2) of the Conservation Act.
[148] Section 43(3)(a) and (b) of the Conservation Act.
[149] (4 September 2013) 693 NZPD 13284-13285 .
[150] *Tawha v Fish & Game New Zealand* [2015] NZHC 1119 at [44] – [45].
[151] Evidence-in-chief of Zane Moss at paragraphs 154(a) and 156.
[152] Ibid at paragraphs 154(b) and 156.

99. Fish & Game's submission opposed Appendix L – Table Y.2 on the basis that:

a. It provides that for a moderate degree of hydraulic connection "no specific minimum flow will be imposed on the groundwater take"; and

b. "Moderate" groundwater takes can have an adverse cumulative effect on flows in spring-fed streams, which derive their flow from groundwater and can have high aquatic habitat values, including providing habitat for trout.

100. The above scenario is illustrated by the Environment Court decision in *South Otago Holdings Ltd v Southland Regional Council,*[153] which concerned an appeal declining consent to take 5,620m3/day and 547,950m3/year of groundwater from the Riversdale Groundwater Zone to irrigate 140.5ha of pasture on the Appellant's dairy farm in the mid Mataura catchment.

101. The Meadow Burn is the largest of several spring-fed streams originating from the Riversdale aquifer. The Environment Court had evidence before it that:

a. The Meadow Burn provided aquatic habitat for upland bully, Gollum galaxias, longfin eel and brown trout;[154]

b. There had been a significant reduction in the seven day mean annual low flow at Round Hill since 1996, which was ascribed to the commencement of irrigation and rainfall patters.[155] Expert witnesses for the applicant and Environment Southland concluded that flows had reduced from 631l/s in 1996, i.e. prior to irrigation, to between 300-412l/s in early 2010[156] despite the aquifer not being fully allocated and 55% of seasonal allocation being actually used;[157] and

c. The applicant's proposal if fully utilised would result in a 0.7% increase in allocation from the Riversdale aquifer[158] and a 2.5-3.3l/s reduction in flow in the Meadow Burn, which on its own was a minor effect;[159] and

d. The Meadow Burn was a sensitive and stressed receiving environment. Any further allocation from the Riversdale aquifer in combination with other factors would have a significant adverse effect on the Meadow Burn, including indigenous fish habitat.[160]

102. Weighing all matters and having regard to Part 2 of the RMA, the Court concluded that sustainable management required that the appeal be declined.

103. Fish & Game submits that:

---

[153] *South Otago Holdings Ltd v Southland Regional Council* [2011] NZEnvC 120 (6 May 2011).
[154] Ibid at [82].
[155] Ibid at [116].
[156] Ibid at [112].
[157] Ibid at [58].
[158] Ibid at [60]
[159] Ibid at [77] and [96]
[160] Ibid at [96] – [98].

a. The Riversdale aquifer is an example of a groundwater aquifer that is not fully allocated in terms of the primary allocation threshold (33.6% allocated).[161] However, the combined effects of groundwater extraction from the Meadow Burn, including takes with moderate and low hydraulic connection, are resulting in flow in the spring fed Meadow Burning falling below minimum flow requirements.[162] To date, no minimum flows have been set on the Meadow Burn by Environment Southland to maintain instream aquatic habitat.

b. The *South Otago Holdings Ltd v Southland Regional Council* decision demonstrates the need to set minimum flows to protect instream aquatic values and avoid significant adverse effects from surface water takes and hydraulically connected ground water takes from riparian and terrace aquifers. This is particularly relevant in circumstances where the s 42A report provides that:

> *"The majority of Southland rivers and streams derive between 40 to 60% of their flow from groundwater. This percentage increases during low flow conditions, when streams and rivers are almost entirely derived from groundwater. In particular, riparian aquifers have a high degree of connectivity between surface and groundwater, and terrace aquifers commonly discharge to surface water bodies via springs."*[163]

c. The proposal to increase groundwater allocation from the Riversdale aquifer in Table L5 of the Proposed Plan from 5,020,000m3/year to 6,530,000m3/year fails to give effect to the NPS-FWM with respect to water quantity insofar as it:

i. Fails to safeguard the life-supporting capacity, ecosystem processes and indigenous species, including their associated ecosystems of freshwater – Objective B1;

ii. Fails to avoid any further over-allocation and phase out existing over-allocation – Objective B2; and

iii. Fails to protect outstanding freshwater bodies – Objective B4, including the Meadow Burn which is protected waters under the Mataura WCO.[164]

Summary

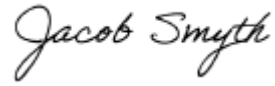
104. The Proposed Plan must be framed to achieve better water quality outcomes than is being achieved under the status quo. This is because available science show that current actions by Environment Southland are not maintaining water quality as required by the RMA, NPS-FWM, SRPS and PSRPS. As such:

a. The Proposed Plan must achieve water quality outcomes that safeguard its life-supporting capacity, ecosystem processes, and indigenous species; and

b. Provisions should not be introduced or amended to the extent that it would result in further deterioration of water quality. This is particularly important if

[161] Hughes, B., September 2014. *Summary of current groundwater and surface water allocation*. Liquid Earth, Report for Environment Southland ES22.
[162] *South Otago Holdings Ltd v Southland Regional Council* at [98].
[163] Section 3.44 of the s 42A report.
[164] Clause 2(b) defining "Protected waters" of the Mataura WCO.

the intent is to maintain or improve water quality in anticipation of the more specific FMU processes for catchments in Southland.



Jacob Smyth

Date: 24 September 2017