



AGENDA

Emergency Executive Committee Meeting Tuesday, 7 May 2024

Date: Tuesday, 7 May 2024

Time: 12.00 pm

Location: Microsoft Teams

(A link to the live stream will be available on the Central Otago District Council's website.)

Notice is hereby given that an Emergency Executive Committee meeting will be held in Microsoft Teams and live streamed via Microsoft Teams on Tuesday, 7 May 2024 at 12.00 pm. The link to the live stream will be available on the Central Otago District Council's website.

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Members His Worship the Mayor T Cadogan (Chairperson), Cr N Gillespie, Cr T Alley, Cr S Duncan, Cr S Feinerman

In Attendance D Scoones (Acting Chief Executive Officer), L van der Voort (Group Manager – Planning and Infrastructure), W McEnteer (Governance Manager)

1 APOLOGIES

2 DECLARATIONS OF INTEREST

24.1.1 DECLARATIONS OF INTEREST REGISTER

Doc ID: 1508997

Report Author:	Wayne McEnteer, Governance Manager
Reviewed and authorised by:	Saskia Righarts, Group Manager - Business Support

1. Purpose

Members are reminded of the need to be vigilant to stand aside from decision making when a conflict arises between their role as a member and any private or other external interest they might have.

2. Attachments

Appendix 1 - Declarations of Interest [↓](#)

Name	Member's Declared Interests	Spouse/Partner's Declared Interests	Council Appointments
Tamah Alley	Manuherikia Irrigation Co-operative (shareholder) Cliff Care Ltd (family connection) Aviation Cherries Ltd (Director) Tenaya New Zealand Ltd (Director and Shareholder) Southern Lakes Trails (Trustee)	Manuherikia Irrigation Co-operative Society Ltd (shareholder) Emergency Management Otago Group Controller (employee) Aviation Cherries Ltd (Director)	Alexandra Community House Trust Central Otago Wilding Conifer Control Group Destination Advisory Board
Tim Cadogan	Business South Central Otago Advisory Group (member) Alexandra Squash Club (member) LGNZ National Council (member) Clyde Volunteer Fire Brigade (member)	Two Paddocks (Employee)	Manuherikia Exemplar Group Eden Hore Steering Committee Major Projects Reference Group Airport Reference Group
Stuart Duncan	Penvose Farms - Wedderburn Cottages and Farm at Wedderburn (shareholder) Penvose Investments - Dairy Farm at Patearoa (shareholder) Fire and Emergency New Zealand (member) JD Pat Ltd (Shareholder and Director)	Penvose Farms - Wedderburn Cottages and Farm at Wedderburn (Shareholder) Penvose Investments - Dairy Farm at Patearoa (shareholder)	Otago Regional Transport Committee Maniototo Ice Rink Committee Maniototo Curling International Inc
Sally Feinerman	Feinerman's Ltd, 109 Scotland Street (Owner / Director) Roxburgh Pool Committee (Chair) Sally Feinerman Trust (Trustee) Feinerman Family Trust (Trustee) MPI Teviot Valley Community Hubs group	Breen Construction (Employee / Builder)	Ida MacDonald Charitable Trust Teviot Prospects Teviot Valley Walkways Committee
Neil Gillespie	Contact Energy (Senior Specialist - Hydro Sustainability) Clyde & Districts Emergency Rescue Trust (Secretary and Trustee) Cromwell Volunteer Fire Brigade (Chief Fire Officer) Cromwell Bowling Club (patron) Otago Local Advisory Committee - Fire Emergency New Zealand Returned Services Association (Member)		Tarras Hall Committee

3 REPORTS

24.1.2 HIGH COURT APPEAL ON DISCHARGE OF WASTEWATER TO LAND / WATER

Doc ID: 1508734

Report Author:	Louise van der Voort, Group Manager - Planning and Infrastructure
Reviewed and authorised by:	David Scoones, Acting Chief Executive Officer

1. Purpose

To discuss whether to join the appeal by Queenstown Lake District Council (QLDC) of the decision of the Otago Regional Council (ORC) on the discharge of land/water made as part of the Freshwater plan provisions.

Recommendations

That the Council

- A. Receives the report.
- B. Decides whether to join the Queenstown Lakes District Council in a High Court appeal on the decision of the Otago Regional Council on the discharge of wastewater to land / water subject to legal advice confirming Council can join proceedings.

2. Discussion

The Otago Regional Council has released its decision on the Partially Operative Regional Policy Statement (PORPS).

The QLDC have appealed the ORC decision. The appeal is limited to points of law.

The decision has ramifications in terms of cost and ability to gain consent for future wastewater discharge facilities, both Council and private.

The order of the hierarchy of plans under the Resource Management Act is as follows – the National policy statement for Freshwater Management (NPSFM) is at the top, followed by the Regional Policy Statement then Regional Plans followed by District Plans.

In the decision, the policy framework for new wastewater discharges has shifted from the notified version. In the notified version the policy “preferred” that wastewater discharges be to land, rather than to water, subject to an exemption: if the effects of discharging to land were worse than discharging to water. The wording has changed to a policy “requiring” any new discharge to be to land, with no exemption.

The implications are that when ORC revises its Regional Plan, it must “give effect” to the PORPS and this may mean making discharges to water a prohibited activity. If an activity

has the status of a prohibited activity, it is not possible to apply for a resource consent for that activity.

The first priority of the NPSFM is the health and wellbeing of the water body, the second priority is peoples' health needs (such as drinking water) and the third priority is other users. The PORPS's policy about prioritisation narrows down the health needs of people and this may impact consenting waste water treatment plant discharges and water allocation decisions for council water supplies.

Legal advice is being sought as to whether Council can join the appeal.

3. Options

Option 1

Join the appeal

Advantages:

- Will add weight to arguments in Court.
- May enable parties to reach a negotiated settlement.
- If successful will enable Council to make application for resource consent to discharge to water in appropriate circumstances.
- If successful will enable consideration of people's health needs in decisions for waste water treatment plans and water allocation for council water supplies.

Disadvantages:

- There will be time and cost.
- If unsuccessful may have reputational damage.

Option 2

Do not join the appeal

Advantages:

- No time and cost

Disadvantages:

- Will prevent Council from making application for resource consent for discharge to water.
- May impact on consenting of waste water treatment plans and water allocation for water supplies.

4. Attachments

Appendix 1 - Notice of appeal to HC(22) [↓](#)

**In the High Court of New Zealand
Dunedin Registry**

**I Te Kōti Matua O Aotearoa
Ōtepoti Rohe**

CIV

Under of the Resource Management Act 1991
In the matter of an appeal under cl 56 of the First Schedule to the Resource Management Act 1991

Between
Queenstown Lakes District Council
Appellant

And
Otago Regional Council
Respondent

Notice of Appeal

MC.

Counsel acting:
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Notice of Appeal

To: The Registrar of the High Court at Dunedin

And to: The Respondent

This document notifies you that –

Queenstown Lakes District Council appeals to the High Court under cl 56 of the First Schedule to the Resource Management Act 1991 (**RMA**) against the decision of Otago Regional Council on the freshwater planning instrument parts of the Proposed Otago Regional Policy Statement 2021, delivered and issued on 28 March 2024, on the grounds that the decision is erroneous in law.

1 Parties

1.1 The Appellant is:

- (a) Queenstown Lakes District Council (**QLDC**), a territorial authority duly constituted under the Local Government Act 2002 (**LGA**), having its principal office at 10 Gorge Rd, Queenstown.

1.2 The Respondent is:

- (a) Otago Regional Council (**ORC**), a regional council duly constituted under the LGA, having its principal office at 70 Stafford Street, Dunedin.

2 Decision appealed against

2.1 The Appellant appeals against the decision of the Respondent to accept the recommendation of the freshwater hearings panel (**Panel**) in relation to the following policies of the Proposed Otago Regional Policy Statement 2021:

- (a) LF-FW-P16 - Discharges containing animal effluent, sewage, greywater and industrial and trade waste; and
- (b) LF-WAI-P1 – Prioritisation.

3 National Policy Statement for Freshwater Management 2020

3.1 The National Policy Statement for Freshwater Management 2020 (**NPSFM**) is a national policy statement, formulated in accordance with ss 45-55 of the RMA.

3.2 Part 1.3 of the NPSFM describes its fundamental concept: Te Mana o te Wai. It is relevant to this appeal that paragraph (5) explains:

There is a hierarchy of obligations in Te Mana o te Wai that prioritises:

- (a) first, the health and well-being of water bodies and freshwater ecosystems

- (b) second, the health needs of people (such as drinking water)
- (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

3.3 Part 2.1 of the NPSFM states its single objective in the same terms:

The objective of this National Policy Statement is to ensure that natural and physical resources are managed in a way that prioritises:

- (a) first, the health and well-being of water bodies and freshwater ecosystems
- (b) second, the health needs of people (such as drinking water)
- (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

3.4 Part 3.2(2) of the NPSFM refers to the above as “the hierarchy of obligations” and directs regional councils to apply it when developing long-term visions, implementing the national objectives framework, and when developing objectives, policies, methods, and criteria for any of the purposes under subpart 3 of the NPSFM relating to natural inland wetlands, rivers, fish passage, primary contact sites, or water allocation.

3.5 The hierarchy of obligations must also be applied at each step of the national objectives framework process,¹ when that occurs.

4 Regional policy statements

4.1 The purpose of a regional policy statement is to achieve the purpose of the RMA by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of a region.²

4.2 National policy statements such as the NPSFM influence regional policy statements in a number of ways:

- (a) A regional council must prepare and change its regional policy statement in accordance with a national policy statement;³
- (b) A regional policy statement must give effect to a national policy statement;⁴ and
- (c) A regional council must amend its regional policy statement if a national policy statement directs so,⁵ and make all other amendments to its

¹ Part 3.7(1)(b).

² RMA, s 59.

³ RMA, s 61(1)(da).

⁴ RMA, s 62(3).

⁵ RMA, s 55(2)

regional policy statement that are required to give effect to any relevant provision in a national policy statement.⁶ These amendments must be undertaken as soon as possible as regards the NPSFM.⁷

5 Legal framework for freshwater planning processes

- 5.1 The freshwater planning process is provided for in s 80A and Part 4 of the First Schedule to the RMA. It is a special process for the purpose of formulating any freshwater planning instrument.⁸
- 5.2 A freshwater planning instrument is any part of a regional policy statement or a regional plan that relates to objectives that give effect to the NPSFM,⁹ and may include other provisions that relate to freshwater if the regional councils wishes.¹⁰
- 5.3 Regional councils are required to publicly notify a freshwater planning instrument they have prepared.¹¹ Where the instrument is a proposed policy statement, submissions on the instrument may be made within 40 working days of public notification.¹²
- 5.4 There is then the opportunity for certain persons to make further submissions. Further submissions are limited to matters in support of or in opposition to a submission made on the freshwater planning instrument.¹³
- 5.5 No later than 6 months after publicly notifying the freshwater planning instrument, the regional council must submit the freshwater planning instrument, along with any variations, the council's evaluation report, submissions and further submissions on the instrument, planning documents recognised by an iwi authority and any documents relevant to obligations under any relevant iwi participation legislation, and any other relevant information, to the Chief Freshwater Commissioner.¹⁴
- 5.6 The Chief Freshwater Commissioner must then convene a freshwater hearings panel as soon as practicable.¹⁵ The freshwater hearings panel is required to conduct a hearing of the submissions on the freshwater planning instrument and to make recommendations to the regional council after the hearing of submissions is concluded.¹⁶
- 5.7 The freshwater hearings panel must make recommendations on the freshwater planning instrument in one or more written reports.¹⁷ The freshwater hearings panel is not limited in making recommendations only within the scope of

⁶ RMA, s 55(2B).

⁷ RMA, s 55(2D) and NPSFM, part 4.1(1).

⁸ RMA, s 80A(1).

⁹ RMA, s 80A(2)(a).

¹⁰ RMA, s 80A(2)(b) and (c) and (6B)(b) and (c).

¹¹ RMA, s 80A(3) and (4)(a).

¹² RMA, s 80A(6)(a) and sch 1, cl 5(3).

¹³ RMA, 80A(6)(a) and sch 1, cl (8)(1) and (2).

¹⁴ RMA, sch 1, cl 37.

¹⁵ RMA, sch 1, cl 38.

¹⁶ RMA, sch 1, cl 39.

¹⁷ RMA, sch 1, cl 49(3).

submissions made on the freshwater planning instrument.¹⁸ However, the report must identify any recommendations that are out of scope of the submissions made on the provisions of the freshwater planning instrument covered by the report.¹⁹

- 5.8 The regional council must decide whether to accept or reject each recommendation of the freshwater hearings panel and must publicly notify its decisions no later than 40 days after receiving the report from the freshwater hearings panel.²⁰ The regional council may accept recommendations that are beyond the scope of the submissions made on the freshwater planning instrument.²¹ In publicly notifying the decision, the regional council must set out each recommendation that it accepts.²²
- 5.9 If the regional council rejects a recommendation of the freshwater hearings panel, appeal rights are available to the Environment Court.²³ If the regional council accepts a recommendation of the freshwater hearings panel, appeal to the High Court is available for persons who made submissions on the freshwater planning instrument.²⁴ If the accepted recommendation was within scope of the submissions, a person can only appeal the recommendation to the High Court if the person addressed the provision or matter in their submission.²⁵ However, where a regional council decides to accept a recommendation of the freshwater hearings panel that is outside the scope of submissions, any person who made a submission on the instrument may appeal to the High Court in respect of that decision.²⁶ Appeals to the High Court in relation to accepted recommendations may be on questions of law only.²⁷
- 6 Freshwater planning instrument parts of the Proposed Otago Regional Policy Statement**
- 6.1 In June 2021, ORC publicly notified the Proposed Otago Regional Policy Statement 2021 (**PORPS**), many parts of which related to freshwater management. Under s 80A of the RMA all freshwater planning instruments prepared by a regional council must undergo the freshwater planning process set out in Part 4 of the First Schedule to the RMA.
- 6.2 ORC initially advanced the PORPS on the basis that the entire regional policy statement was a freshwater planning instrument. However, on 22 July 2022 the High Court ruled that ORC had erred in that regard, and must reconsider which parts of the PORPS should be subject to the freshwater planning process and re-start the freshwater planning process in relation to those parts.²⁸

¹⁸ RMA, sch 1, cl 49(2)(a).

¹⁹ RMA, sch 1, cl 49(4)(a).

²⁰ RMA, sch 1, cl 52.

²¹ RMA, sch 1, cl 52(4).

²² RMA, sch 1, cl 52(5)(a).

²³ RMA, sch 1, cl 55.

²⁴ RMA, sch 1, cl 56.

²⁵ RMA, sch 1, cl 56(1).

²⁶ RMA, sch 1, cl 56(2).

²⁷ RMA, sch 1, cl 56(3).

²⁸ *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Incorporated* [2022] NZHC 1777.

- 6.3 Later in 2022 ORC notified the freshwater parts of the PORPS in accordance with s 80A of the RMA. The publicly notified version of the policy referred to as LF-WAI-P1²⁹ read as follows (with the key words for the purposes of this appeal italicised in this and following quotations):

LF-WAI-P1 – Prioritisation

In all management of fresh water in Otago, prioritise:

- (1) first, the health and well-being of water bodies and freshwater ecosystems, *te hauora o te wai and te hauora o te taiao*, and the exercise of mana whenua to uphold these,
- (2) second, *the health and well-being needs of people*, *te hauora o te tangata*; *interacting with water through ingestion (such as drinking water and consuming harvested resources) and immersive activities (such as harvesting resources and bathing)*, and
- (3) third, the ability of people and communities to provide for their social, economic, and cultural wellbeing, now and in the future.

- 6.4 QLDC did not make a submission on this policy itself but did make further submissions on the submissions on this policy by Dunedin City Council and Kāi Tahu ki Otago.³⁰

- 6.5 The publicly notified version of the policy referred to as LF-FW-P15³¹ stated:

LF-FW-P15 – Stormwater and wastewater discharges

Minimise the adverse effects of direct and indirect discharges of stormwater and wastewater to fresh water by:

- (1) except as required by LF-VM-O2 and LF-VM-O4, *preferring discharges of wastewater to land over discharges to water, unless adverse effects associated with a discharge to land are greater than a discharge to water*, and
- (2) requiring:
 - (a) all sewage, industrial or trade waste to be discharged into a reticulated wastewater system, where one is available,
 - (b) all stormwater to be discharged into a reticulated system, where one is available,
 - (c) implementation of methods to progressively reduce the frequency and volume of wet weather overflows and minimise the likelihood of dry weather overflows occurring for reticulated stormwater and wastewater systems,
 - (d) on-site wastewater systems to be designed and operated in accordance with best practice standards,

²⁹ Land and Freshwater chapter-Te Mana o te Wai topic-Policy 1.

³⁰ In full: Kāi Tahu ki Otago (Te Runanga o Moeraki, Kati Huirapa Runaka ki Puketeraki, Te Runanga o Otakou and Hokonui Runanga).

³¹ Land and Freshwater chapter-Freshwater topic-Policy 15.

- (e) stormwater and wastewater discharges to meet any applicable water quality standards set for FMUs and/or rohe, and
 - f) the use of water sensitive urban design techniques to avoid or mitigate the potential adverse effects of contaminants on receiving water bodies from the subdivision, use or development of land, wherever practicable, and
 - (3) promoting the reticulation of stormwater and wastewater in urban areas
- 6.6 Paragraph (1) expresses a policy preference for wastewater discharges to be to land rather than water, but includes an exemption to that general preference in circumstances where the adverse effects associated with a discharge to land are greater than a discharge to water (**Exemption**).
- 6.7 QLDC made a submission on this policy and made further submissions regarding submissions on this policy by the Director-General of Conservation, Dunedin City Council, NZSki Ltd and Realnz.
- 6.8 Kāi Tahu ki Otago made a submission³² on this policy in which it requested that the policy be replaced with two policies: one for wastewater discharges and one for stormwater discharges. The wastewater discharge policy requested was as follows (with the key words for the purposes of this appeal *italicised*):

LF-FW-P15 – Discharges containing animal effluent, sewage and other human wastes, and industrial and trade waste

Avoid the adverse effects of direct and indirect discharges containing animal effluent, sewage and other human wastes (including cremated ashes), and industrial and trade waste to fresh water by:

- (1) *requiring new discharges containing sewage or other human wastes, or industrial and trade waste to be to land, unless adverse effects associated with a discharge to land are demonstrably greater than a discharge to fresh water,*
- (2) phasing out existing direct discharges of sewage or industrial and trade wastes, whether treated or untreated, to fresh water, and
- (3) requiring discharges containing animal effluent to be to land,
- (4) requiring:
 - (a) that all discharges containing sewage or industrial and trade waste are discharged into a reticulated wastewater system, unless alternative treatment and disposal methods will result in improved environmental outcomes,
 - (b) implementation of methods to progressively reduce the frequency and volume of wet weather overflows and minimise the likelihood of dry weather overflows occurring into reticulated wastewater systems,

³² Referenced in ORC's summary of decisions requested as FPI032.025.

- (c) on-site wastewater systems and animal effluent systems to be designed and operated in accordance with best practice standards,
 - (d) that any discharges do not prevent water bodies from meeting any applicable water quality standards set for FMUs and/or rohe, and
 - (5) promoting source control as a method for reducing contaminants in discharges containing industrial and trade waste.
- 6.9 It is relevant to this appeal that paragraph (1) of Kāi Tahu ki Otago's proposed wastewater policy involves narrowing, but not removing, the Exemption in paragraph (1) of LF-FW-P15 as notified. Further, there were there no submissions by any party that sought removal of the Exemption.
- 6.10 On 2 June 2023 ORC published its s report making recommendations to the Panel. This report, authored by planner Ms Boyd, provided a summary and evaluation of the submissions and further submissions, including recommending possible amendments to the freshwater planning instrument parts of the PORPS.³³
- 6.11 In relation to LF-WAI-P1, ORC's s 42A report recommended that the Panel consider the following minor changes (additions shown underlined, changes shown struck through):

LF-WAI-P1 – Prioritisation

In all ~~decision-making affecting management of~~ fresh water in Otago, prioritise:

- (1) first, the health and well-being of water bodies and freshwater ecosystems, (te hauora o te wai) and the contribution of this to the health and well-being of the environment (te hauora o te taiao), and together with the exercise of mana whenua to uphold these,
 - (2) second, ~~the health and well-being needs of people;~~ (te hauora o te tangata); interacting with water through ingestion (such as drinking water and consuming harvested resources harvested from the water body) and immersive activities (such as harvesting resources and bathing primary contact), and
 - (3) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.
- 6.12 In relation to LF-FW-P15, ORC's s 42A report recommended splitting it into two policies: a new LF-FW-P15 dealing with stormwater discharges and a new LF-FW-P16 with wastewater discharges. The new LF-FW-P16 retained the Exemption in a narrowed form:

LF-FW-P16 – Discharges containing animal effluent, sewage, and industrial and trade waste

Minimise the adverse effects of direct and indirect discharges containing animal effluent, sewage, and industrial and trade waste to fresh water by:

³³ RMA, s 42A and Sch 1, cls 40(1)(j) and 42(5).

- (1) phasing out existing discharges containing sewage or industrial and trade waste directly to water to the greatest extent possible,
- (2) requiring:
 - (a) new discharges containing sewage or industrial and trade waste to be to land, unless adverse effects associated with a discharge to land are demonstrably greater than a discharge to fresh water,
 - (b) discharges containing animal effluent to be to land,
 - (c) that all discharges containing sewage or industrial and trade waste are discharged into a reticulated wastewater system, where one is made available by its owner, unless alternative treatment and disposal methods will result in improved outcomes for fresh water,
 - (d) implementation of methods to progressively reduce the frequency and volume of wet weather overflows and minimise the likelihood of dry weather overflows occurring into reticulated wastewater systems,
 - (e) on-site wastewater systems and animal effluent systems to be designed and operated in accordance with best practice standards,
 - (f) that any discharges do not prevent water bodies from meeting any applicable water quality standards set for FMUs and/or rohe,
- (3) to the greatest extent practicable, requiring the reticulation of wastewater in urban areas, and
- (4) promoting source control as a method for reducing contaminants in discharges.

- 6.13 At the hearing before the Panel on 30 August 2023 QLDC presented legal submissions in which it addressed LF-WAI-P1 and the new LF-FW-P16, supported by evidence from QLDC's Infrastructure Operations Manager, Mr Mason.³⁴
- 6.14 In relation to LF-WAI-P1, QLDC submitted that paragraph (2) wrongly narrowed consideration of how freshwater affects the "health needs of people" to interaction through ingestion and immersive activities. QLDC submitted that this narrow approach was inconsistent with Parts 1.3, 2.1 and 3.2(2)(c) of the NPSFM. QLDC supported evidence presented on behalf of Dunedin City Council³⁵ about the range of ways in which municipal water supplies are critical to the health needs of people. QLDC particularly emphasised that water supply for sanitation is indispensable in maintaining people's health.³⁶
- 6.15 In relation to LF-FW-P16, QLDC submitted that paragraph (2)(a) should retain some latitude for the merits of disposal to water to be evaluated relative to

³⁴ Statement of evidence of Simon Alexander Mason, 3 July 2023.

³⁵ Statement of evidence of James Taylor, 28 June 2023, paragraph 16.

³⁶ QLDC legal submissions, 30 August 2023, paragraphs 6.1-6.7.

other types of disposal (i.e. some form of the Exemption), rather than stipulating an absolute policy directive.³⁷

- 6.16 On 15 September 2023 Ms Boyd provided ORC's "reply report" to the Panel. In it, Ms Boyd recommended no changes to LF-WAI-P1, but did recommend changes to LF-FW-P16. One of those changes was to reword paragraph (2)(a) so that all new wastewater discharges would be required to be to land, deleting any form of the Exemption. While Ms Boyd accepted that the cost of phasing out all existing discharges of wastewater to water might be too high, with respect to new discharges she stated:

My view is different when it comes to new discharges. In these situations, there are more opportunities for systems to be designed to avoid discharging directly to water and, in my opinion, requiring new discharges to be to land gives effect to Te Mana o te Wai by prioritising, first, the health and well-being of the water bodies and freshwater ecosystems.

Some submitters have identified a lack of clarity in the direction in LF-FW-P16. In light of my recommendations above, I recommend minor changes to this policy for consistency with LF-FW-O1A and to address these points.

- 6.17 The Panel subsequently heard closing submissions from ORC and closed the hearing.
- 6.18 In March 2024 the Panel made its recommendation to ORC regarding the freshwater planning instrument parts of the PORPS. ORC accepted the Panel's recommendations on all accounts and gave notice of its decision to QLDC on 28 March 2024.
- 6.19 The Panel's recommendation to ORC was to amend LF-WAI-P1 in accordance with ORC's s 42A report, limiting the scope of prioritisation when making freshwater-related decisions about the "health needs of people" to just ingestion and immersion activities. The Panel's reasoning was:³⁸

... the most compelling reasons for adopting the narrower approach include additional considerations.

The first of those is once again the overall regime in the NPSFM of the NOF process for setting attribute states and targets and the concomitant setting of limits through rules. For that to be able to function effectively the balancing required by Te Mana o te Wai requires that quantity and quality limits are able to be provided for at closely confined levels in priorities one and two, so that the broader priority conflicts can be resolved through the NOF process. That can only realistically occur if there is a high level of certainty as to what falls within priority two so that the broader aspects of priority three of 'social, economic, and cultural well-being' of people and communities can be resolved through the NOF process. Any major broadening of the interpretation of 'health needs of people' would mean that the very types of conflicting arguments we have heard advanced, which much more closely fall within descriptions of 'social, economic and cultural well-being', could absorb all available water at priority two, leaving the other important priority three needs with no or minimal provision, or an inability to share in allocation.

³⁷ QLDC legal submissions, 30 August 2023, paragraph 5.6(b).

³⁸ Report and recommendations of the Non-Freshwater and Freshwater Hearings Panels to the Otago Regional Council, March 2024, paragraphs 73-75.

The final consideration is that the example actually given in the NPSFM for priority two is that of drinking water. That makes it plain in our view that a very direct relationship with freshwater is what was intended. Had it been intended to include national interest considerations or less direct uses, the drafting example could have been expected to be broader, such as 'nationally significant hydro-electricity needs for the health of people', or 'irrigation for food supply'. The lack of any such broader example on its face supports the proposition that the interpretation was intended to be narrow, and related to more restricted direct human health needs.

6.20 The Panel later elaborated:³⁹

Our Legal Issues section [quoted above] also discussed the vexed issue of prioritisation under tier 2 and tier 3 of Te Mana o te Wai in the NPSFM. This was a common theme in submissions for a number of provisions in the LF chapter and is the essence of LF-WAI-P1. As we discussed, a number of submitters sought amendments to reference particular activities or industries as priority 2. We concluded that the approach taken by the ORC for the PORPS is correct, 'that the intent of priority two is only to capture that limited amount of water involved in contact usages which can directly affect human health needs, i.e. the taking of freshwater solely for drinking water purposes or other direct engagement activities.' We considered 'that should leave reasonable quantities available in most situations, short of drought conditions, for use by priority three users.'

We consider that the detailed methods of how to allocate water amongst uses will be informed and determined during the NOF process.

- 6.21 Despite QLDC's submissions that it is both important and consistent with the NPSFM that the PORPS's policy framework affords priority to providing sufficient water for sanitation to fulfil people's basic health needs (for example sewage conveyance or hygiene), the Panel's recommendation contains no indication whether the Panel turned its mind to the particular question of water for sanitation.

- 6.22 As regards wastewater discharges, the Panel's recommendation was to amend paragraph (2)(a) LF-FW-P16:

LF-FW-P16 – Discharges containing animal effluent, sewage, greywater and industrial and trade waste

Minimise the adverse effects of direct and indirect discharges containing animal effluent, sewage, greywater and industrial and trade waste to fresh water by:

(1) phasing out existing discharges containing sewage or industrial and trade waste directly to water to the extent practicable,

(2) requiring:

(a) new discharges containing sewage or industrial and trade waste to be to land,

(b) discharges of animal effluent from land-based primary production to be to land,

³⁹ Report and recommendations of the Non-Freshwater and Freshwater Hearings Panels to the Otago Regional Council, March 2024, paragraphs 247-248.

- (c) that all discharges containing sewage or industrial and trade waste are discharged into a reticulated wastewater system, where one is made available¹²⁵⁵ by its owner, unless alternative treatment and disposal methods will result in improved outcomes for fresh water,
 - (d) implementation of methods to progressively reduce the frequency and volume of wet weather overflows and minimise the likelihood of dry weather overflows occurring from reticulated wastewater systems,
 - (e) on-site wastewater systems and animal effluent systems to be designed and operated in accordance with best practice standards,
 - (f) that any discharges do not prevent water bodies from meeting any applicable water quality standards set for FMUs and/or rohe,
 - (3) to the greatest extent practicable, requiring the reticulation of wastewater in urban areas, and
 - (4) promoting source control as a method for reducing contaminants in discharges.
- 6.23 Consistent with Ms Boyd’s reply report, this recommendation deleted any form of the Exemption from paragraph (2)(a), removing any policy footing for future discharges of certain classes of wastewater to be to water, rather than to land, no matter the relative effects.
- 6.24 The Panel’s recommendation provides no reason for deleting any form of the Exemption from paragraph (2)(a) of LF-FW-P16.⁴⁰ The Panel’s recommendation includes a sweeping adoption of Ms Boyd’s reasoning where it has not provided its own,⁴¹ but Ms Boyd did not provide a reason for removing the Exemption altogether.
- 6.25 An important feature of the Panel’s recommendations is that every change from the notified version of the PORPS is footnoted to the original submission(s) on the PORPS that provide the Panel with the necessary scope to make the change. Where there is no submission providing scope, the footnotes state that the Panel is making an out-of-scope recommendation. Doing so fulfils the requirement in cl 49(4)(a) of the First Schedule to the RMA that the Panel “identify any recommendations that are out of scope of the submissions made in respect of those provisions”.
- 6.26 The Panel’s recommendation includes a footnote to paragraph (2)(a) of LF-FW-P16. The footnote refers to FPI032.025, which is Kāi Tahu ki Otago’s submission, set out above. That submission by Kāi Tahu ki Otago seeks to narrow but not remove the Exemption altogether. There is no other submission on the PORPS that the Panel could have relied on for scope.

⁴⁰ Report and recommendations of the Non-Freshwater and Freshwater Hearings Panels to the Otago Regional Council, March 2024, paragraphs 504-522.

⁴¹ Report and recommendations of the Non-Freshwater and Freshwater Hearings Panels to the Otago Regional Council, March 2024, paragraphs 523.

7 First point of appeal***Error of law***

- 7.1 The Panel erred in law by failing to give reasons for paragraph (2)(a) of LF-FW-P16 requiring all new discharges containing sewage or industrial and trade waste to be to land, irrespective of the relative effects of discharging to land or to water in any particular case

Question of law to be resolved

- 7.2 Was the Panel obliged to provide reasons for amending paragraph (2)(a) of LF-FW-P16 by requiring all new discharges containing sewage or industrial and trade waste to be to land, irrespective of the relative effects of discharging to land or to water in any particular case? If so, did it provide adequate reasons?

8 Second point of appeal***Error of law***

- 8.1 The Panel erred in law by failing to identify that it was making a recommendation out of the scope of submissions made on LF-FW-P15 when it recommended that paragraph (2)(a) of LF-FW-P16 require all new discharges containing sewage or industrial and trade waste to be to land, irrespective of the relative effects of discharging to land or to water in any particular case.

Question of law to be resolved

- 8.2 Was the Panel's recommendation in respect of paragraph (2)(a) of LF-FW-P16 out of the scope of submissions made on LF-FW-P15? If so, did the Panel fail to identify its recommendation as being out of the scope of submissions, in breach of cl 49(4)(a) of the First Schedule to the RMA?

9 Third point of appeal***Error of law***

- 9.1 By recommending that consideration of the "health needs of people" be limited to ingestion and immersive activities when making decisions affecting freshwater under paragraph (2) of LF-WAI-P1, the Panel erred in law by failing to prepare the PORPS in accordance with the NPSFM, or by failing to give effect to the NPSFM, specifically Part 1.3 (paragraph 5), Part 2.1 and Part 3.2(2)(c).

Question of law to be resolved

- 9.2 Did the Panel's recommendation in respect of paragraph (2) of LF-WAI-P1 fail to prepare the PORPS in accordance with the NPSFM, or fail to give effect to the NPSFM, by excluding water for basic sanitation from "the health needs of people"?

10 Fourth point of appeal***Error of law***

- 10.1 The Panel erred in law by failing to give reasons for excluding consideration of water for basic sanitation when considering the “health needs of people” under paragraph (2) of LF-WAI-P1.

Question of law to be resolved

- 10.2 Was the Panel obliged to provide reasons for excluding consideration of water for basic sanitation when considering the “health needs of people” under paragraph (2) of LF-WAI-P1? If so, did it provide adequate reasons?

11 Relief

- 11.1 The Appellant seeks:
- (a) that its appeal be allowed;
 - (b) that the decision of ORC is quashed to the extent that it pertains to LF-FW-P16 and LF-WAI-P1; and
 - (c) Costs.

Date: 22 April 2024



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J C Campbell / B A Watts
Counsel for the Appellant

This document is filed by Brandon Andrew Watts of Meredith Connell, solicitor for the Appellant. The address for service on the Appellant is Level 7, MC Centre, 8 Hardinge St, Auckland, New Zealand.

Documents for service on the Appellant may be left at that address for service or may be:

- (a) posted to the solicitor at PO Box 90750, Victoria Street West, Auckland 1142, New Zealand;
- (b) left for the solicitor at a document exchange for direction to DX CP24063;
- (c) emailed to janette@campbell.legal, with a copy sent to brandon.watts@mc.co.nz.