

**BEFORE THE COMMISSIONERS APPOINTED ON BEHALF OF CENTRAL OTAGO
DISTRICT COUNCIL AND THE OTAGO REGIONAL COUNCIL**

UNDER	The Resource Management Act 1991
IN THE MATTER	of an application for resource consents to establish and operate an alluvial gold mining operation
BETWEEN	HAWKESWOOD MINING LIMITED Applicant
AND	CENTRAL OTAGO DISTRICT COUNCIL (RC230325) OTAGO REGIONAL COUNCIL (RM23.819) Consent Authorities
AND	TE RŪNANGA O NGĀI TAHU Submitter (the Iwi Authority)
AND	KĀTI HUIRAPA RŪNAKA KI PUKETERAKI TE RŪNANGA O ŌTĀKOU HOKONUI RŪNANGA Submitters (Collectively Kāi Tahu ki Otago)

**STATEMENT OF EVIDENCE OF TIM VIAL
ON BEHALF OF TE RŪNANGA O NGĀI TAHU AND KĀI TAHU KI OTAGO**

ABBREVIATIONS

CODC	Central Otago District Council
FMU	Freshwater Management Unit
HML	Hawkeswood Mining Limited
MFWC	Millers Flat Water Company
NPSFM	National Policy Statement for Freshwater Management 2020 (updated 2023)
NRMP	Kai Tahu ki Otago Natural Resource Management Plan
NTFWP	Te Rūnanga o Ngāi Tahu Freshwater Policy Statement
ORC	Otago Regional Council
RPS	Operative Otago Regional Policy Statement 2019
PORPS	Proposed Otago Regional Policy Statement 2021 (Decisions Version)
RMA	Resource Management Act 1991
RPS	Operative Otago Regional Policy Statement 2019
RPW	Regional Plan Water: Otago

INTRODUCTION

1. My name is Tim Vial. I hold the qualifications of Bachelor of Arts, Bachelor of Laws and Master of Regional and Resource Planning from the University of Otago. I have 22 years' experience in resource management planning and policy development, including experience in developing freshwater management policy and in assessing the effects of resource use on wai māori.
2. I am a Full Member of the New Zealand Planning Institute and an accredited hearings commissioner under the Making Good Decisions programme.
3. I am employed as a Senior Planner at Aukaha, a consultancy based in Otago and owned by Te Rūnanga o Waihao, Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga. My role at Aukaha is focused on freshwater planning and consenting.
4. My evidence addresses the submissions of Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga (collectively **Kāi Tahu ki Otago**) and Te Rūnanga o Ngāi Tahu on resource consent applications RM23.819 (ORC) and RC230325 (CODC) by Hawkeswood Mining Limited (**the Applicant**).
5. Although this is a Council hearing, I confirm that I have read and agree to comply with the Code of Conduct for Expert Witness contained in the Environment Court Practice Note 2023. This evidence is within my area of expertise except where I state that I am relying on what I have been told by another person. I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express.
6. The key documents that I have referred to in preparing my evidence include:
 - (a) Application for land use and regional consents to establish and operate a gold mining activity at 1346 - 1536 Teviot Road, Millers Flat, dated 25 October 2023 and 16 November 2023 (**the application**), including the associated technical reports and s92 responses;
 - (b) The evidence filed on behalf of the Applicant;
 - (c) The ORC s42A staff recommending report written by Ms Ter Huurne and the CODC s42A staff recommending report written by

Ms Stirling;

- (d) The statements of evidence of Tūmai Cassidy and Dr Lynda Murchison filed on behalf of Kāi Tahu ki Otago and Te Rūnanga o Ngāi Tahu;
- (e) The Otago Regional Plan: Water (**RPW**);
- (f) The Operative Otago Regional Policy Statement 2019 (**RPS**) and the Proposed Otago Regional Policy Statement 2021 (**PORPS**);
- (g) The National Policy Statement for Freshwater Management 2020, updated 2023 (**NPSFM**);
- (h) The following iwi planning documents lodged with ORC and CODC:
 - i. Te Rūnanga o Ngāi Tahu Freshwater Policy 1999 (**NTFP**);
 - ii. The Kāi Tahu Ki Otago Natural Resource Management Plan 2005 (**NRMP**).

SCOPE OF EVIDENCE

- 7. My evidence will address the following matters:
 - (a) The submissions of Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga (referred to collectively as 'Kāi Tahu ki Otago) and Te Rūnanga o Ngāi Tahu;
 - (b) The relationship of mana whenua with wai māori;
 - (c) The mana whenua relationship with the Clutha River / Mata Au and the Tima Burn as discussed in the evidence of Mr Cassidy and Dr Murchison;
 - (d) The statutory direction in the RMA and higher order planning documents that are relevant to the current application, including the expression of Te Mana o Te Wai in the NPSFM 2020 and the implications of this for assessing the effects of the application; and
 - (e) The precautionary principle and the approach proposed to address uncertainties in the information provided in the application through conditions.
- 8. The section 42A reports discuss the statutory framework that is relevant to the proposed alluvial gold mining activity. I do not consider it is

necessary to repeat this discussion, but instead will highlight matters that are of relevance to the submissions of Kāi Tahu ki Otago and Te Rūnanga o Ngāi Tahu.

EXECUTIVE SUMMARY

9. The mana whenua submission on this application arises from concerns that the application does not appropriately protect the mauri of the Clutha River / Mata Au and the Tima Burn, nor does it give effect to Te Mana o te Wai. Mauri is a critical element of the spiritual relationship of Kāi Tahu with wai māori, and an important component of an intact mauri is maintaining the integrity of habitat for taoka species.
10. In my opinion, the effects of the proposed alluvial gold mining operation on the mauri of the Clutha River / Mata-au and Tima Burn are unknown. Further there is insufficient information to conclude that the proposed conditions will avoid a loss of extent or values in the Tima Burn.
11. The RMA, NPSFM, RPS, PORPS and Iwi Management Plans recognise and provide for the relationship of Kāi Tahu with wāhi tūpuna (ancestral landscapes) and require active engagement with mana whenua in managing the effects of an activity on wāhi tūpuna values.
12. A precautionary approach should be taken to this application for resource consent in order to give effect to Te Mana o te Wai, protect the mauri of the Mata-au and the Tima Burn, and to protect wāhi tūpuna values.
13. Overall, there is insufficient information submitted with the application to be satisfied that the activity achieves the purpose of the Act. Rather the applicant is relying on the use of consent conditions to 'fill the knowledge gap.'

THE APPLICATION

14. The alluvial gold mining proposal is described in the application and the s42A Reports. I adopt that description for this evidence.
15. I visited the site and the Tima Burn on the 11th of April 2024 and discussed the mining proposal and potential effects on the receiving environment with the Applicant, Mr Heller, and Mr MacDonell.

Surface Water and Ground Water

16. Mr Heller confirmed during the site visit that the two small ephemeral tributaries of the Clutha River referenced in the groundwater technical report, namely Oven Hill Creek to the south and an unnamed creek to the

north, are not impacted by the current proposal.

17. Ms Badenhop notes that *“the site hydrology is complex and difficult to assess due to the Clutha River boundary extending along the southern and western boundary of the site, the Tima Burn flowing along the eastern boundary, a closed landfill to the north of the site, and historic mining being completed along the southern boundary in the past.”*¹
18. The application is supported by assessment of the proposed groundwater take and discharge prepared by Environmental Associates Limited (EAL). Key information on the surface water and groundwater conditions noted in this report include:
 - There is very little information about the hydrogeology of the Clutha Outwash Gravel aquifer that exists within and surrounding the identified mine site extent at Millers Flat.
 - Available well logs and resource investigation datasets, including HML investigation well log information, were used by EAL to provide a general description of the stratigraphic profile and to determine typical hydrologic conditions at the site.
 - Aquifer testing adjacent to the HML mine site was originally performed to assess a proposed groundwater take for Mr A Parker (a landowner), for irrigation at the property.²
 - EAL concluded that *“... given the location of old mine tailings, the Parker test data would most likely not be reflective of the majority of the proposed mine dewatering area.”*³ (Emphasis added by EAL)
 - With the above finding, a trial pit dewatering test was undertaken by HML. EAL concludes that *“Whilst the trial dewatering activity was invaluable to understanding the “actual” resulting dewatering flow and how that compared to a predicted dewatering flow (using initial hydraulic parameters from the Parker aquifer test), the information gathered was essentially limited to that which had been provided by HML. It is understood that although the activity was a dewatering trial, it was not specifically an aquifer test.”*
 - The Tima Burn is an intermittent flowing water body in the lower reach

¹ Alexandra Badenhop, E3 Scientific, Technical Review of Hydrogeology and Water Quality, 2/04/2024, p.2.

² EAL, Groundwater Take and Discharge Technical Report, p.13

³ EAL, Groundwater Take and Discharge Technical Report, p.19.

adjacent to the Clutha River. A Tima Burn aquatic ecology assessment prepared by Water Ways Consulting was submitted with the application.

- There are no flow monitoring records or statistics for the Tima Burn, nor is there an assessment of the effects of groundwater drawdown on flows, natural character, and instream values.

19. Information provided in the application appears incomplete, namely:

- **Updated Site Plans:** The location of the sediment retention and infiltration ponds is shown on the 'Site Plan – Start' and are not shown on the plans for the subsequent stages. The dimensions of the sediment and infiltration ponds required for each stage of the mining operation are not specified.
- **Hydrology and augmentation of the Tima Burn:** Attachment D of Mr Heller's evidence, which provides further information on the monitoring of the water table in the vicinity of the Tima Burn and the proposed augmentation, is illustrative and lacks detail.

Landscape

20. The effects of the mining operation on landscape values are assessed by Mr Moore for HML. The evidence of Mr Moore is supported by a graphic supplement showing key viewpoints. The evidence of Mr Moore refers to progressive rehabilitation and restoration of the site. Further detail on the restoration of the site is provided in a Draft Mine Site Rehabilitation Plan prepared by Enviroscope Ltd.

21. The draft rehabilitation plan provides for "... the establishment of clusters of indigenous vegetation communities adjacent to the Clutha Gold Cycle Trail. The objective of these clusters is to provide functional ecologies and habitats to improve the biodiversity of flora and fauna along this section of the cycle trail adjacent to the rehabilitated goldmine."⁴ However, the ecological value of four isolated 'biodiversity clusters' on the mine perimeter is not assessed by Enviroscope Limited.

22. The draft rehabilitation plan does not propose riparian planting along the margins of the Tima Burn, and the composition of the 'biodiversity clusters' on the mine perimeter is not specified.

⁴ Enviroscope Limited, Draft Mine Site Rehabilitation Plan, Section 3.1, p.17.

Archaeology

23. An archaeological assessment was undertaken by Heritage Properties Limited for HML. This assessment concludes that “... *there is potential to encounter archaeological remains associated with manawhenua activity. Previous early manawhenua sites have been recorded along the Clutha/Mata-Au, with the closest site G43/12 within 250m of the project area, to the south of the Tima Burn. There is potential for midden/oven sites to be encountered through the project area, but especially near the Tima Burn, where imported shell was identified during the archaeological survey and there is a lower terrace (shown in Figure 6-5) similar to that on which site G43/12 sits on the other side of the waterway.*”⁵
24. The evidence of Ms Ross recommends that no mining should take place “... *in the vicinity of the Tima Burn until it is determined that there is no potential for intact archaeological material relating to pre-1900 Māori activity.*”⁶

Cultural Impact Assessment

25. Ms Ter Huurne notes that a cultural impact assessment has not been forthcoming. In principle, mana whenua do not support the preparation of a cultural impact assessment after the fact when there is no meaningful opportunity to shape the design of the proposal. Further, mana whenua require sufficient information to assess the potential impacts of a proposal on cultural values.
26. Aukaha wrote to the Applicant on the 16th of June 2023 on behalf of Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga and identified areas of concern with the proposal, including:
- potential discharge of contaminants to land and water
 - sedimentation and migration of soils via overland flow paths
 - width of the buffer areas in relation to waterways
 - actual and potential impacts of flooding
 - the impact on mahika kai with respect to the Mata-au and Tima Burn
 - impacts on ecology and biodiversity (including aquatic life)

⁵ Heritage Properties Limited, 1346-1536 Teviot Road, Roxburgh, An Archaeological Assessment Report prepared for Hawkeswood Mining Limited, Section 7, p.99.

⁶ Evidence of Victoria Ross for Hawkeswood Mining Limited, paragraph 25.

- impact on groundwater and surface water from the drawing down of groundwater
 - potential destruction and modification of wāhi tūpuna, including archaeological sites.
27. Further information on mana whenua cultural values was provided in the submissions lodged on behalf of Kāi Tahu ki Otago and Te Rūnanga o Ngāi Tahu.

MANA WHENUA SUBMISSIONS

28. Submissions were lodged on the ORC and CODC applications by Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga and by Te Rūnanga o Ngāi Tahu.
29. The submissions discuss:
- (a) The Ngāi Tahu Claims Settlement Act 1998 and cultural redress mechanisms, including the statutory acknowledgement of the association of Ngāi Tahu with the Mata-Au / Clutha River;
 - (b) The whakapapa relationship of mana whenua with te taiao and wai māori (freshwater) and the Clutha/ Mata-au catchment;
 - (c) Mauri as a critical element of the spiritual relationship of mana whenua with te taiao and wai māori;
 - (d) Rakatirataka and kaitiakitaka and the intergenerational right and responsibility to care and look after the natural environment;
 - (e) Wāhi tūpuna, the ancestral places, landscapes and taoka that reflect the history and traditions associated with the long settlement of Kāi Tahu whānui in Otago; and
 - (f) The cultural, spiritual, historic, and traditional relationship of Kāi Tahu ki Otago with the Clutha /Mata-au Catchment including the Tima Burn.
30. The submission highlights the concern of Kāi Tahu ki Otago that the applicant has provided insufficient information to assess whether the proposed alluvial gold mining activity provides for the mauri of the Mata-au and the Tima Burn and gives effect to Te Mana o te Wai. Further, there is insufficient information to assess whether the proposal preserves the natural character and instream values of the Tima Burn.

31. The effects of the proposal on wāhi tūpuna and archaeological values are unknown and the excavation of the current mine pit without an archaeological permit is of concern to Kāi Tahu ki Otago.

MANA WHENUA RELATIONSHIP WITH WAI MĀORI AND WITH THE CLUTHA/ MATA-AU CATCHMENT

32. The evidence of Dr Murchison describes the recognition of the mana whenua connection with the Mata-au Catchment in the Ngai Tahu Claims Settlement Act 1998, and the evidence of Mr Cassidy explains the cultural connection of mana whenua with the catchment.
33. In summary, mana whenua, water and land are inextricably connected through whakapapa, and this relationship is fundamental to the identity of mana whenua. This whakapapa connection carries rakatirataka rights and imposes a kaitiakitaka obligation to protect te taiao and wai māori, and all the life it supports, in accordance with customs and knowledge developed over many generations.
34. As Mr Cassidy explains, wai māori is the lifeblood of te taiao and significant for mana whenua, both for its practical applications and for the spiritual meaning it embodies. Rivers and streams whether continually or intermittently flowing are a source of spiritual meaning and connection for kā rūnaka.
35. Connection to wai māori is supported and sustained through the availability and use of mahika kai, and the retention and transfer of associated knowledge (mātauraka) across the generations. This requires that whānau are able to access mahika kai and carry out customary practices. For mahika kai use to be sustained, populations of species must be present across all life stages and must be plentiful enough for long term sustainable harvest.
36. Indigenous species are valued as taoka by Kāi Tahu, as are the habitats through which taoka species survive and thrive. When the health of a waterway is degraded, the impacts are far-reaching, for the waterway, for the ecosystems, habitats, and species it supports, and for mana whenua.
37. Mr Cassidy and Dr Murchison discuss the relationship of mana whenua with the Mata-au. The Mata-au was historically an ara tawhito that provided access from the coast to the upper lakes of Wānaka, Hāwea, and Whakatipu-wai-māori. The awa is of status and significance for Kāi Tahu and is of contemporary significance for mana whenua.

38. The entire Mata-au system acted as a significant wāhi mahika kai. Weka, kōura, and tuna were key food sources collected along its length, and there were bountiful stands of tī kōuka from which to source kāuru.
39. The landscape of the Mata-au catchment is the cradle of mana whenua creation stories - the imagery reflects the majesty of the creation traditions, and speaks of the footsteps of the tūpuna, where they lived, camped, and gathered mahika kai.
40. The Archaeological Assessment concludes that there is potential for subsurface midden and oven remains relating to early manawhenua activity to be encountered on this site, as is seen in the recorded sites in the surrounding area along the Clutha/Mata-Au and in the nearby hills.⁷

STATUS OF THE APPLICATION

41. The status of the application is discussed in the s42A Reports. I concur with Ms Stirling for CODC that a bundling approach is appropriate, and that the overall status of the application is discretionary.⁸
42. I do not agree however with Ms Stirling's reasoning that part of the proposed activity, including the storage of diesel, is a temporary activity as defined in the Central Otago District Plan. Ms Stirling comes to this conclusion because the definition includes activities allowed by a mineral exploration permit.⁹
43. The definition of exploration under s2 of the Crown Minerals Act 1991 is:
"...means any activity undertaken for the purpose of identifying mineral deposits or occurrences and evaluating the feasibility of mining particular deposits or occurrences of 1 or more minerals; and includes any drilling, dredging, or excavations (whether surface or subsurface) that are reasonably necessary to determine the nature and size of a mineral deposit or occurrence; and to explore has a corresponding meaning."
44. The definition of mining under the Crown Minerals Act 1991 is:
"mining—

⁷ New Zealand Heritage Properties Limited, An Archaeological Assessment, 1346-1536 Teviot Road, Roxburgh, Executive Summary, p.ii.

⁸ ORC s42A report, Section 5; QLDC and CODC s42A report, paragraphs 66–67.

⁹ CODC, s42A report, paragraph 39.

- (a) *means to take, win, or extract, by whatever means,—*
 - (i) *a mineral existing in its natural state in land; or*
 - (ii) *a chemical substance from a mineral existing in its natural state in land; and*
- (b) *includes—*
 - (i) *the injection of petroleum into an underground gas storage facility; and*
 - (ii) *the extraction of petroleum from an underground gas storage facility; but*
- (b) *does not include prospecting or exploration for a mineral or chemical substance referred to in paragraph (a).”*

45. In my view, the application is for a mining activity, not mineral exploration, and my understanding is that the applicant holds a mining permit for this site as well as a mineral exploration permit. If I am correct, and the activity is being carried out in accordance with a mining permit, then it is not a temporary activity as defined in the Central Otago District Plan.

RELEVANT STATUTORY DIRECTION

Recognition and provision for Kāi Tahu interests and values in Part 2 RMA

- 46. The concerns underlying the mana whenua submissions relate directly to Part 2 of the RMA, particularly to sections 6(e), 7(a), and 8, and to the implementation of these provisions through the NPSFM 2020 and the concept of Te Mana o te Wai. As Dr Murchison notes in her evidence, consent authorities are required to recognise and provide for that relationship when considering resource consent applications.
- 47. The evidence of Mr Cassidy and Dr Murchison describe the depth and breadth of the relationship of mana whenua with te taiao and wai māori, and the Mata-au catchment (which relates to s6(e) of the RMA).
- 48. Section 7(a) requires the consent authorities to have particular regard to kaitiakitaka. Implicit in kaitiakitaka is maintaining a balance between the right to access and use natural resources, and the responsibility to care for te taiao, with a focus on providing a sustainable base for future generations. This is the underpinning meaning of the Kāi Tahu whakataukī, Mō tātou, ā, mō kā uri a muri ake nei (for us and our children after us).
- 49. Section 8 of the RMA requires the consent authorities to take into account the principles of the Treaty of Waitangi when exercising their functions and powers under the RMA. It has been held that taking into account the

principles of the Treaty of Waitangi requires the following:¹⁰

- (a) The active participation by tangata whenua in resource management decision-making;
- (b) Engagement with tangata whenua in good faith;
- (c) Seeking of reciprocity and mutual benefit;
- (d) Protection of resources of importance to tangata whenua from adverse effects; and
- (e) Positive action to protect tangata whenua interests.

50. In my view, it is evident that giving effect to sections 6(e), 7(a), and (8) of the RMA requires active protection of the relationship of Kāi Tahu with the Mata-au and the Tima Burn, including protection of the wāhi tūpuna values that are embedded in this landscape.

National Policy Statement for Freshwater Management 2020 (Updated 2024)

51. The provisions of the NPSFM that are relevant to the submissions of Kāi Tahu ki Otago are set out in Appendix 1.

Te Mana o te Wai

52. Te Mana o te Wai is a fundamental concept in the NPSFM 2020 and refers to *“...the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.”*¹¹

53. Policy 1 of the NPSFM requires that Te Mana o te Wai is given effect to in freshwater management. Policy 2 requires that tangata whenua are actively involved in freshwater management and Māori freshwater values are identified and provided for.

54. In *Aratiatia Livestock Limited and Ors v Southland Regional Council [2019]* the Environment Court emphasised that the concept of Te Mana o te Wai represents a significant paradigm shift in freshwater management. The Court notes: *“the usual RMA focus on the scale and significance of effects of resource use [is redirected] onto the mauri or lifeforce of water and the enquiry becomes how do users of resources protect the water's mauri and*

¹⁰ *Aratiatia Livestock Limited and Ors v Southland Regional Council [2019]* NZEnvC 191 at [6].

¹¹ National Policy Statement for Freshwater Management 2020, s.1.3.

health?”¹²

55. The Environment Court confirmed that interpretation of Te Mana o te Wai in the Interim Decision on Proposed Plan Change 7: Water for Otago:¹³

“The court’s observations in Aratiatia Livestock Ltd remain relevant and bear repeating here:

*(a) Te Mana o te Wai is not a Māori centric but a water centric approach.*¹⁴

(b) While expressed in te reo Māori, Te Mana o te Wai benefits all New Zealanders.

(c) Te Mana o te Wai is a concept that requires natural and physical resources be managed in a way that recognises that by protecting the health of freshwater, the health and well-being of the wider environment is also protected. This concept entails a fundamental shift in societal perspectives on sustainable management of fresh water.”

56. There is no information provided in the application on the interaction between groundwater and surface water in the Tima Burn, and the effects on flows in the Tima Burn from the mining activity is not assessed. In my opinion, the application does not give effect to Te Mana o te Wai, nor does it provide for the health and well-being of the Mata-au and the Tima Burn.

Loss of river extent and values

57. Policy 7 of the NPSFM requires that the loss of river extent and values is avoided to the extent practicable (*my emphasis*). Policy LF–FW–P13 of the PORPS and Policy 5.4.2A of the RPW give effect to Policy 7 of the NPSFM.

58. The recent Supreme Court decision *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency / Waka Kotahi* provides guidance on the priority and weight that should be afforded to ‘avoid’ policies:

“ ...directive policies, such as policies requiring particular environmental impacts to be avoided, have greater potency than other non- or less directive policies. This Court’s decision in Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd (King Salmon) explains why,

¹² Ibid at [7].

¹³ [2021] NZEnvC 164, paragraph [31].

¹⁴ Waitangi Tribunal (2019) *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims* (Report No. Wai 2358) at 355.

so it is appropriate to refer to it at this juncture.¹⁵

....

King Salmon is relevant in two ways. The first is that, generally speaking, directive policies will take priority over other policies wherever they appear in the hierarchy. ... The second aspect is that the specific language of directive policies is important. It will provide the best guidance on how policies that are in tension may be reconciled."¹⁶

- 59.** This directive NPSFM policy and the corresponding policies in the PORPS and the RPW require the applicant to avoid a loss of extent and values within the Mata-au and the Tima Burn, to the extent practicable. A loss of value means the river is less able to provide for the following existing or potential values:
- (i) ecosystem health
 - (ii) indigenous biodiversity
 - (iii) hydrological functioning
 - (iv) Māori freshwater values
 - (v) amenity values.¹⁷
- 60.** The proposal needs to show that:
- (a) there is a functional need for the activity to be located on that site; and
 - b) the applicant has carried out an appropriate analysis in terms of the effects management hierarchy and shown that effects, including residual effects, are being appropriately managed in accordance with this hierarchy.
- 61.** In my opinion, consent can only be granted if the Applicant can demonstrate the application meets these tests in the NPSFM and corresponding documents. In my opinion, the application for the regional consents and associated AEE do not do this.
- 62.** The groundwater technical report and the evidence of Mr Heller suggest that augmentation of the Tima Burn is required to avoid a loss of extent and

¹⁵ *Royal Forest and Bird Protection Society of New Zealand Incorporated v New Zealand Transport Agency / Waka Kotahi* [2024] NZSC 26, Why avoid policies are so important, paragraphs [72] – [78].

¹⁶ *Ibid*, at paragraph [77].

¹⁷ National Policy Statement for Freshwater Management (2020), Clause 3.2.1.

values within this waterbody.

- 63.** The recommended conditions for the groundwater permit require the applicant to provide to the satisfaction of the Consent Authority, an assessment of natural flow (losses) within the lower reaches of the Tima Burn prior to the exercise of the consent.¹⁸
- 64.** The proposed augmentation conditions are contrary to the clear direction of the NPSFM and the corresponding policies in the PORPS and RPW. An assessment of natural flow losses in the Tima Burn, and the impact of groundwater drawdown on those losses, is a prerequisite for the granting of consent. Without this assessment, the threshold for augmentation and the flow that is required to avoid a loss of river extent and values within the Tima Burn cannot be meaningfully established through conditions.
- 65.** In my opinion, there is insufficient information to conclude that the proposal is consistent with Policy 7 of the NPSFM.

Conclusion

- 66.** Overall, I conclude that the application is inconsistent with the NPSFM.

Operative Regional Policy Statement 2019 (RPS)

- 67.** Otago's current Regional Policy Statement (RPS) became fully operative on 4 March 2024. The provisions of the RPS that are relevant to the submissions of Kāi Tahu ki Otago are set out in Appendix 1.
- 68.** The provisions of the RPS recognise and provide for:
- (a) The integrated management of natural and physical resources.¹⁹
 - (b) The promotion of healthy ecosystems and ecosystem services.²⁰
 - (c) The relationship of Kāi Tahu with their ancestral lands, water, sites, wāhi tapu, and other taoka.²¹
 - (d) Kāi Tahu values, interests, and customary resources.²²
 - (e) Management of the natural environment to support Kāi Tahu wellbeing by recognising and providing for customary uses and cultural values and by safeguarding the life-supporting capacity of natural

¹⁸ Appendix 1B – recommended water permit conditions, proposed Conditions 5 and 7.

¹⁹ Otago Regional Policy Statement 2019, Objective 1.2, and Policy 1.2.1.

²⁰ Otago Regional Policy Statement 2019, Objective 1.2, and Policy 1.2.1(g).

²¹ Otago Regional Policy Statement 2019, Objective 2.1, and Policy 2.1.2.

²² Otago Regional Policy Statement 2019, Objective 2.2.

resources.²³

69. The RPS requires the application of a precautionary approach to activities where adverse effects are uncertain and potentially significant or irreversible.²⁴
70. In my opinion, there is insufficient information to conclude that the application is consistent with the provisions of the RPS. The application does not recognise and provide for Kāi Tahu values, interests, and customary resources, nor does it recognise and provide for healthy ecosystems and ecosystem services in the Tima Burn.

Proposed Otago Regional Policy Statement 2021

71. ORC adopted the recommendations of the Hearings Panel on the non-freshwater provisions and the freshwater planning instrument provisions of the PORPS on 27 March 2024.
72. From 30 March 2024, the non-freshwater provisions, and the freshwater planning instrument provisions of the PORPS were amended in accordance with the decisions of the Hearings Panel.
73. The provisions of the PORPS that are relevant to the submissions of Kāi Tahu ki Otago are set out in Appendix 1. Relevant appeals on the freshwater planning instrument provisions are also highlighted in Appendix 1. The appeal period for the non-freshwater provisions closes on 16 May 2024.

Mana Whenua

74. The objective and policies of the Mana Whenua chapter of the PORPS require the management of the natural environment to support Kāi Tahu well-being by:
- (a) Protecting Kāi Tahu customary uses, values and relationships to resources and areas of significance.
 - (b) Safeguarding the mauri and life-supporting capacity of natural resources; and
 - (c) Working with Kāi Tahu to incorporate mātauraka in resource management and recognising the whakapapa connections of Kāi Tahu with taoka resources and the connection to practices such as

²³ Otago Regional Policy Statement 2019, Policy 2.2.1.

²⁴ Otago Regional Policy Statement 2019, Objective 5.4, and Policy 5.4.3.

mahika kai.²⁵

- 75.** In my opinion, the proposal does not protect Kāi Tahu customary uses, values and relationships, as described by Mr Cassidy and Dr Murchison, nor does it safeguard the mauri and life-supporting capacity of the Tima Burn.

Integrated Management

- 76.** The integrated management objectives require the management of natural and physical resources in a way that:
- (a) achieves a healthy and resilient natural environment, including the ecosystem services it provides;
 - (b) supports the well-being of present and future generations; and
 - (c) embraces ki uta ki tai, recognising that the environment is an interconnected system which depends on its connections to flourish and must be managed as an interdependent whole.²⁶
- 77.** Integrated management policy IM-P3 of the PORPS recognises and provides for Kāi Tahu's relationship with natural resources by:
- (a) enabling mana whenua to exercise rakatirataka and kaitiakitaka;
 - (b) facilitating active participation of mana whenua in resource management processes and decision making;
 - (c) incorporating mātauraka Māori in processes and decision making; and
 - (d) ensuring resource management provides for wāhi tūpuna, wai māori (including awa / rivers) and mahika kai and habitats of taoka species.
- 78.** In resource management decision-making, the PORPS requires the management of uncertainties by using the best information available at the time, including scientific data and mātauraka Māori, and:
- (a) taking all practicable steps to reduce uncertainty, and
 - (b) adopting a precautionary approach, including through use of adaptive management, towards activities whose effects are uncertain, unknown, or a little understood, but potentially significantly adverse.²⁷

²⁵ Proposed Otago Regional Policy Statement 2021, MW-01 and MW-P3.

²⁶ Proposed Otago Regional Policy Statement 2021, IM-01 – IM-03.

²⁷ Proposed Otago Regional Policy Statement 2021, IM-P6.

- 79.** In my opinion, there is insufficient information provided in the application on the interconnections between surface water and groundwater, and the proposal does not provide for wāhi tūpuna values, wai māori, mahika kai and habitats of taoka species.
- 80.** There appears to be significant uncertainty on the effects of the proposed groundwater take, including the effects of the groundwater take on flows in the Tima Burn, and the steps taken to reduce that uncertainty do not appear proportionate to the scale of the proposed mining activity.
- 81.** Overall, I consider that that a precautionary approach should be adopted.

LF – WAI-Te Mana o te Wai

- 82.** The Te Mana o te Wai objective of the PORPS requires the protection of the health and well-being of Otago’s water bodies so that the mauri of those water bodies is protected, and the management of land and water recognises and reflects that:
- (a) water is the foundation and source of all life – na te wai ko te hauora o ngā mea katoa,
 - (b) there is an integral kinship relationship between water and Kāi Tahu whānui, and this relationship endures through time, connecting past, present and future,
 - (c) each water body has a unique whakapapa and characteristics,
 - (d) fresh water and land have a connectedness that supports and perpetuates life,
 - (e) protecting the health and well-being of water protects the wider environment,
 - (f) Kāi Tahu exercise rakatirataka, manaakitaka and their kaitiakitaka duty of care and attention over wai and all the life it supports, and
 - (g) all people and communities have a responsibility to exercise stewardship, care, and respect in the management of fresh water.²⁸
- 83.** Policies LF-WAI-P1 to LF-WAI P3 embed the Te Mana o te Wai hierarchy, recognise and give practical effect to Kāi Tahu rakatirataka in respect of fresh water, and require the management of fresh water and land using an integrated approach that is consistent with tikaka and kawa.

²⁸ Proposed Otago Regional Policy Statement 2021, LF-WAI-01.

- 84.** I have discussed these matters above, and for the reasons discussed, I consider the application is inconsistent with Policies LF-WAI-P1 to LF-WAI-P3.
- 85.** LF-WAI-P4 states that,
- “All persons exercising functions and powers under this RPS and all persons who use, develop or protect resources to which this RPS applies, must recognise that LF-WAI-O1, LF-WAI-P1, LF-WAI-P2 and LF-WAI-P3 are fundamental to upholding Te Mana o te Wai and must be given effect to when making decisions affecting fresh water, including when interpreting and applying the provisions of the LF chapter.”²⁹*

LF-FW-Fresh water

- 86.** LF-FW-O1A sets out visions for each FMU and rohe in Otago, including:
- (a) healthy freshwater ecosystems support healthy populations of indigenous species (including non-diadromous galaxiids) and mahika kai that are safe for consumption;
 - (b) the interconnection of land and freshwater (including groundwater, ephemeral water bodies, and rivers) is recognised;
 - (c) the form, function and character of water bodies reflects their natural characteristics and natural behaviours to the extent reasonably practicable;
 - (d) the ongoing relationship of Kāi Tahu with wāhi tūpuna, including access to and use of water bodies, is sustained, and
 - (d) the health of the water supports the health of people and their connections with water bodies.
- 87.** The proposal does not address the interconnection of land and freshwater, including the effects of the groundwater take on flows in the Tima Burn. Nor does the proposal ensure that the form, function, and character of the Tima Burn reflects its natural characteristics and behaviour.
- 88.** LF-VM-O2 sets out the vision for the Clutha River / Mata-au, including recognition that the Clutha Mata-au is a single connected system ki uta ki tai, and the source of the wai is pure, coming directly from Tāwhirimātea to the top of the mauka and into the awa.

²⁹ Proposed Otago Regional Policy Statement, LF-WAI-P4, p.132.

- 89.** This vision for the Clutha River/Mata-au recognises and is consistent with the cultural values of the awa as set out in the Statutory Acknowledgement in the Ngāi Tahu Claims Settlement Act 1998 referred to earlier in my evidence and in Dr Murchison's evidence.
- 90.** In my opinion, the proposal is inconsistent with the vision for each FMU and rohe in Otago and the Clutha Mata-au FMU vision.

LF-FW-Preserving natural character and instream values

- 91.** LF-FW-P13 requires the preservation of the natural character and instream values of rivers and the natural character of their beds and margins by:
- (a) avoiding the loss of values or extent of a river, unless:
 - (i) there is a functional need for the activity in that location, and
 - (ii) the effects of the activity are managed by applying the effects management hierarchy (in relation to rivers).
 - (b) not granting resource consent for activities in (a) unless the consent authority is satisfied that the application demonstrates how each step of the effects management hierarchy (in relation to rivers) will be applied to the loss of values or extent of the river.
 - (c) to the extent practicable, sustaining the form and function of a water body that reflects its natural behaviours.
 - (d) controlling the use of water and land that would adversely affect the natural character of the water body, and
 - (e) maintaining or enhancing the values of riparian margins to support habitat and biodiversity, reduce contaminant loss to water bodies and support natural flow behaviour.³⁰
- 92.** The Applicant has not demonstrated that there is a functional need for mining activity in this location, nor has the Applicant applied the effects management hierarchy to manage the effects of the activity.
- 93.** In my opinion, for the reasons discussed above, the proposal is inconsistent with LF-FW-P13 and does not preserve the natural character and instream values of the Tima Burn.

³⁰ The relevant provisions of LF-FW-P13 are paraphrased in this paragraph. LF-FW-P13 is set out in full in Appendix 1.

Conclusion on the Proposed Regional Policy Statement 2021

94. Overall, it is my opinion that the application is inconsistent with the relevant objectives and policies of the PORPS.

Regional Plan Water for Otago

95. The RPW was updated as required by the NPSFM to include **Policy 5.4.2A**
The loss of river extent and values is avoided, unless the council is satisfied:

- (a) *that there is a functional need for the activity in that location; and*
(b) *the effects of the activity are managed by applying the effects management hierarchy.*

96. In my opinion, for the reasons discussed above, the proposal is inconsistent with Policy 5.4.2A of the RPW.

Iwi Management Plans

97. The Kāi Tahu ki Otago Natural Resource Management Plan 2005 and the Te Rūnanga of Ngāi Tahu Freshwater Policy Statement are other matters which are relevant in considering this application under s104(1)(c).

98. I consider that the following direction in the iwi management plans, both in general objectives and policies and in those specifically relating to freshwater and mahika kai / biodiversity objectives and policies, are particularly relevant:

- (a) Recognition and support for the rakatirataka and kaitiakitaka of Kāi Tahu ki Otago and upholding their mana through management of resources.³¹
(b) Ki uta ki tai management of resources, and management of those resources for future generations.³²
(c) Recognition, in all water management, of the spiritual and cultural significance of water to Kāi Tahu ki Otago.³³
(d) Healthy waters that support Kāi Tahu customs,³⁴ and
(e) Protection and restoration of mauri, and recognition that each

³¹ NRMP 5.2.1, 5.2.3 and 5.2.4; NTFP 6.4.

³² NRMP 5.2.2.

³³ NRMP 5.3.3.1, 5.3.3.5, 5.3.4.2.2, 5.3.4.2.7; NTFP 6.1.

³⁴ NRMP 5.3.3.2; NTFP 6.3.

waterway has its own mauri, mana, values and uses.³⁵

- 99.** In my opinion, this application is inconsistent with the relevant objectives and policies of these Iwi Management Plans. The proposed alluvial mining activity does not sustain the relationship of mana whenua with the Clutha River / Mata-Au catchment, nor does it protect the mauri of the Clutha River/ Mata-Au and the Tima Burn.

KEY ISSUES ARISING FROM THE APPLICATION AND EVIDENCE

Precautionary Approach

- 100.** The precautionary principle is a broad statutory approach to activities that have the potential to cause harm when extensive knowledge is lacking or where there is uncertainty as to the effects of the activity. This approach emphasises caution, pausing and reviewing before proceeding.
- 101.** There are a range of options available to manage uncertainty in resource management decision-making and the appropriate response will vary depending on the circumstances. The range of possible precautionary measures include:
- (a) Research to reduce uncertainties and improve information for decision making including the use of scientific data and mātauraka Māori.³⁶
 - (b) Incorporating ‘safety margins’ or ‘uncertainty factors’ in risk assessments.
 - (c) Adaptive management to respond to new information (discussed below); and
 - (d) Declining consent.
- 102.** The appropriate course of action will depend on the circumstances of each case, which include:
- (a) The extent and significance of the information gaps and uncertainties.
 - (b) The prospects and potential costs and benefits of obtaining better information in the future.
- 103.** There are four areas of uncertainty with the current application:
- (a) The potential for unrecorded archaeological sites to be encountered

³⁵ NRMP 5.3.4.2.4; NTFP 6.2.

³⁶ PORPS, IM-P3 and IM-P6.

throughout the project area, including further sites of significance to manawhenua;³⁷

- (b) Restoration and rehabilitation of the site post mining;
- (c) The effects of the groundwater take on flows in the Tima Burn and consequently the effects on the natural character and instream values of this waterbody; and
- (d) The effects on water quality from mining in close proximity to the closed landfill on the northern boundary of the site.

104. There are options to manage the areas of uncertainty relating to effects on Māori archaeological values and restoration of the site post mining, including:

- (a) Archaeological monitoring of all topsoil stripping and the excavation of test trenches to identify any earlier archaeological remains present beneath flood deposits around the vicinity of the Tima Burn, as recommended by Ms Ross.³⁸
- (b) Requiring implementation of the Mine Site Rehabilitation Plan as a condition of consent. This plan was provided to Aukaha for comment on the 26th of April 2024. The rehabilitation plan proposes four 'biodiversity clusters' but lacks detail on the ecological value and composition of this planting. Planting of the riparian margins of the Tima Burn is not proposed by HML.

105. However, the areas of uncertainty relating to the effects of the groundwater take on the Tima Burn and effects on water quality are not able to be addressed through consent conditions; yet they are fundamental to understanding and managing the effects of the proposed activity.

106. It is my understanding that the groundwater assessment was informed by aquifer testing undertaken for a different purpose (irrigation) and by trial pit dewatering undertaken by HML. In contrast, Ms Badenhop notes that *"... for an activity of this scale, establishing surveyed groundwater monitoring bores to measure baseline groundwater level and quality conditions prior to the activity occurring is considered to be best practice."*

107. There is no information provided in the application on the interaction

³⁷ Evidence of Victoria Ross on behalf of Hawkeswood Mining Limited, paragraph 14.

³⁸ Evidence of Victoria Ross on behalf of Hawkeswood Mining Limited, paragraphs 17–34.

between groundwater and surface water in Tima Burn, and the effects on flows, natural character, and instream values in the Tima Burn from the groundwater take. Rather, an assessment of natural flow losses in the Tima Burn is proposed as a condition of consent.³⁹

108. The evidence of Mr Heller and Mr MacDonell address the effects of the mining operation on water quality:

(a) HML undertook groundwater quality testing within the existing mine pit to address ORC s42A and submitter concerns with respect to groundwater contamination and potential for acid mine drainage (AMD).⁴⁰

(b) Additional discharge quality monitoring (for metals and semi-metals) will be undertaken over time and be reported to the ORC and the MFWC.⁴¹

(a) Mr Heller references compliance monitoring information for Waikaia Gold Limited (WGL) as context for the mine dewatering discharge on this site, noting that “*at Waikaia (Freshford Flats) the depth to the water table is much smaller, the aquifer permeability is much higher, and the adjacent river (Waikaia River) is very small compared to the Clutha Mata-Au River.*”⁴²

109. The evidence of Mr Keogh addresses the PSI undertaken for the closed landfill. Mr Keogh collected and analysed 6 soil samples for “*heavy metals, organochlorine pesticides and polycyclic aromatic hydrocarbons.*” The potential for contaminants from the landfill to be mobilised in groundwater is an issue of concern for Kāi Tahu ki Otago. The four new groundwater monitoring bores proposed in the discharge permit are located on the site boundary with Teviot Road. There is no water quality monitoring proposed for “heavy metals, organochlorine pesticides and polycyclic aromatic hydrocarbons” between the landfill and the Clutha River / Mata-au.

110. Overall, the information gaps and uncertainties relating to water quantity and water quality are significant. In my opinion, the application is incomplete without that information. and it is not sufficient to rely on monitoring and an assessment of flow losses in the Tima Burn once consent has been granted.

³⁹ Appendix 1B – Recommended water permit conditions, Condition 7.

⁴⁰ Evidence of Tom Heller on behalf of Hawkeswood Mining Limited, paragraph 45.

⁴¹ Evidence of Tom Heller on behalf of Hawkeswood Mining Limited, paragraph 92.

⁴² Evidence of Tom Heller on behalf of Hawkeswood Mining Limited, paragraphs 51–56.

Efficacy of conditions

111. Rather than providing information pertaining to effects on water quality and quantity in the application, the applicant appears to be relying on a combination of monitoring and adaptive management conditions to ‘fill the knowledge gap.’
112. The Environment Court has stated in *Port of Tauranga Ltd v. Bay of Plenty Regional Council*⁴³
- We consider the time has passed when conditions of consent can be based on statements of intent as to what will be done at some time in the future. We will require greater certainty of what will occur, by when, what outcomes are to be achieved, who will be responsible and what enforcement mechanisms will be available.*
113. In my view, adaptive management conditions are a useful tool where the effects of an activity on the environment are understood but may vary in a dynamic receiving environment. For example, my understanding is that adaptive management conditions have been used on permits to take groundwater in some catchments in Canterbury to adjust the seasonal amount of water taken relative to groundwater recharge rates, which will vary with annual rainfall. However, before the consent is granted, the consent authority must be satisfied that the activity, if managed in accordance with the adaptive management conditions, will achieve the purpose of the Act.
114. Management plans are another suitable mechanism for ensuring that conditions are complied with, and detailed environmental effects are managed appropriately. Management plans avoid cluttering the conditions with excessive detail, particularly with regard to how complex mining activities or mitigation actions will occur.
115. A management plan condition must specify the purpose or objective of the plan, ideally which conditions it is designed to assist with implementing, the minimum contents of the plan, who is to prepare it, and who else should be consulted or involved in that process.
116. Both adaptive management and management plans are tools to manage effects once the consent authority is satisfied the activity achieves the purpose of the Act. Adaptive management and management plan

⁴³ *Port of Tauranga Ltd v. Bay of Plenty Regional Council*²⁹ [2023] NZEnvC 270.

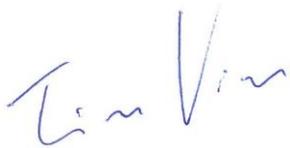
conditions are not an appropriate substitute for a lack of information.

- 117.** There is provision under the RMA for a consent authority to review consent conditions, including to address unanticipated environmental effects. However, it is my understanding that consent conditions cannot be changed to the extent that they frustrate the exercise of the consent(s) granted. Therefore, the duty is on the consent authority to be satisfied when making its decision on the consent applications that there is sufficient information to demonstrate the proposed activity (or activities) achieve the purpose of the Act.

CONCLUSION

- 118.** The submission of Kā Rūnaka on this application arises from concerns that the application does not appropriately protect the mauri of the Clutha River / Mata Au and the Tima Burn, nor does the application protect wāhi tūpuna values.
- 119.** As Dr Murchison noted in her evidence, Kāi Tahu ki Otago and Te Rūnanga o Ngāi Tahu do not automatically oppose proposals to use or develop land and other resources within the takiwā. Mahika kai by its very nature is the procurement and use of resources to sustain people and communities; but it is resource use to an environmental and cultural ethic.
- 120.** To be satisfied that any proposed resource use or development aligns with this ethic, Kāi Tahu need sufficient information to be able to understand the proposal and the associated environmental effects.
- 121.** Some effects of the proposed activity have been addressed in the application, for example, the aquatic ecology of the Tima Burn has been assessed. However, the application has not addressed effects on water quality, nor has it addressed the effects of the groundwater take on the Tima Burn.
- 122.** In relation to the Clutha River/Mata-au and the Tima Burn, the application has not addressed the effects on the health and resilience of these waterbodies and the environmental integrity of habitats for taoka species nor does the application address the relationship of mana whenua with this significant catchment.
- 123.** The effects of the groundwater take on the natural character, extent and values of the Tima Burn are not assessed by Applicant, contrary to the direction of the NPSFM, PORPS and the RPW.

124. Overall, the proposed activity is inconsistent with the statutory framework and the aspirations of Kāi Tahu as set out in the relevant iwi management plans. The proposal does not provide for wāhi tūpuna values and the mauri of the Clutha River / Mata-au and the Tima Burn, nor does it give effect to Te Mana o te Wai.
125. In my view, there is insufficient information submitted with the application to be satisfied that the activity achieves the purpose of the Act. Rather the applicant is relying on the use of consent conditions to 'fill the knowledge gap.' In my view, this is an inappropriate use of consent conditions.



Tim Vial

8 May 2024

Appendix 1 – Statutory Framework

Resource Management Act

Definition of a river:

“... means a continually or intermittently flowing body of fresh water; and includes a stream and modified watercourse; but does not include any artificial watercourse (including an irrigation canal, water supply race, canal for the supply of water for electricity power generation, and farm drainage canal).”

National Policy Statement for Freshwater Management 2020 (Updated 2024)

Part 1: Preliminary provisions

1.3 Fundamental Concept – Te Mana o te Wai

Concept

- (1) Te Mana o te Wai is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.
- (2) Te Mana o te Wai is relevant to all freshwater management and not just to the specific aspects of freshwater management referred to in this National Policy Statement.

Framework

- (3) Te Mana o te Wai encompasses 6 principles relating to the roles of tangata whenua and other New Zealanders in the management of freshwater, and these principles inform this National Policy Statement and its implementation.
- (4) The 6 principles are:
 - (a) Mana whakahaere: the power, authority, and obligations of tangata whenua to make decisions that maintain, protect, and sustain the health and well-being of, and their relationship with, freshwater
 - (b) Kaitiakitanga: the obligations of tangata whenua to preserve, restore, enhance, and sustainably use freshwater for the benefit of present and future generations
 - (c) Manaakitanga: the process by which tangata whenua show respect, generosity, and care for freshwater and for others
 - (d) Governance: the responsibility of those with authority for making decisions about freshwater to do so in a way that prioritises the health and well-being of freshwater now and into the future
 - (e) Stewardship: the obligations of all New Zealanders to manage freshwater in a way that ensures it sustains present and future generations
 - (f) Care and respect: the responsibility of all New Zealanders to care for freshwater in providing for the health of the nation.
- (5) 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

Part 2: Objectives and Policies

2.1 Objective

- (1) The objective of this National Policy Statement is to ensure that natural and physical resources are managed in a way that prioritises:
 - (a) first, the health and well-being of water bodies and freshwater ecosystems
 - (b) second, the health needs of people (such as drinking water)
 - (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

2.2 Policies

Policy 1: Freshwater is managed in a way that gives effect to Te Mana o te Wai.

Policy 2: Tangata whenua are actively involved in freshwater management (including decision-making processes), and Māori freshwater values are identified and provided for.

Policy 3: Freshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments.

Policy 7: The loss of river extent and values is avoided to the extent practicable.

Policy 9: The habitats of indigenous freshwater species are protected.

Part 3: Implementation

Section 3.2 Te Mana o te Wai

- (1) Every regional council must engage with communities and tangata whenua to determine how Te Mana o te Wai applies to water bodies and freshwater ecosystems in the region.

3.21 Definitions relating to wetlands and rivers

- (1) In clauses 3.21 to 3.24, and 3.34:

Effects management hierarchy, in relation to natural inland wetlands and rivers, means an approach to managing the adverse effects of an activity on the extent or values of a wetland or river (including cumulative effects and loss of potential value) that requires that:

- (a) adverse effects are avoided where practicable; then
- (b) where adverse effects cannot be avoided, they are minimised where practicable;

then

- (c) where adverse effects cannot be minimised, they are remedied where practicable; then
- (d) where more than minor residual adverse effects cannot be avoided, minimised, or remedied, aquatic offsetting is provided where possible; then
- (e) if aquatic offsetting of more than minor residual adverse effects is not possible, aquatic compensation is provided; then
- (f) if aquatic compensation is not appropriate, the activity itself is avoided.

functional need means the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment.

loss of value, in relation to a natural inland wetland or river, means the wetland or river is less able to provide for the following existing or potential values:

- (a) any value identified for it under the NOF process
- (b) any of the following values, whether or not they are identified under the NOF process:
 - (i) ecosystem health
 - (ii) indigenous biodiversity
 - (iii) hydrological functioning
 - (iv) Māori freshwater values
 - (v) amenity values

3.24 Rivers

- (1) Every regional council must include the following policy (or words to the same effect) in its regional plan:

“The loss of river extent and values is avoided, unless the council is satisfied that:

 - (a) there is a functional need for the activity in that location; and National Policy Statement for Freshwater Management 2020 29
 - (b) the effects of the activity are managed by applying the effects management hierarchy.”
- (2) Subclause (3) applies to an application for a consent for an activity:
 - (a) that falls within the exception to the policy described in subclause (1); and
 - (b) would result (directly or indirectly) in the loss of extent or values of a river
- (3) Every regional council must make or change its regional plan to ensure that an application referred to in subclause (2) is not granted unless:
 - (a) the council is satisfied that:
 - (i) the applicant has demonstrated how each step in the effects management hierarchy will be applied to any loss of extent or values of the river (including cumulative effects and loss of potential value), particularly (without limitation) in relation to the values of: ecosystem health, indigenous biodiversity,

- hydrological functioning, Māori freshwater values, and amenity; and
- (ii) if aquatic offsetting or aquatic compensation is applied, the applicant has complied with principles 1 to 6 in Appendix 6 and 7, and has had regard to the remaining principles in Appendix 6 and 7, as appropriate; and
 - (iii) there are methods or measures that will ensure that the offsetting or compensation will be maintained and managed over time to achieve the conservation outcomes; and
- (b) any consent granted is subject to:
- (i) conditions that apply the effects management hierarchy; and
 - (ii) conditions that specify how the requirements in (a)(iii) will be achieved.

Operative Regional Policy Statement (RPS)

PART B Chapter 1 Resource management in Otago is integrated

Objective 1.2:

Recognise and provide for the integrated management of natural and physical resources to support the wellbeing of people and communities in Otago, including promoting healthy ecosystems and ecosystem services.

Policy 1.2.1 Integrated Resource Management

Achieve integrated management of Otago's natural and physical resources, by all of the following:

- a) Coordinating the management of interconnected natural and physical resources.
- b) Taking into account the impacts of management of one natural or physical resource on the values of another, or on the environment.
- c) Recognising that the value and function of a natural or physical resource may extend beyond the immediate, or directly adjacent, area of interest.
- d) Ensuring that resource management approaches across administrative boundaries are consistent and complementary.
- e) Ensuring that effects of activities on the whole of a natural or physical resource are considered when that resource is managed as subunits.
- f) Managing adverse effects of activities to give effect to the objectives and policies of the Regional Policy Statement.
- g) Promoting healthy ecosystems and ecosystem services.
- h) Promoting methods that reduce or negate the risk of exceeding sustainable resource limits.

PART B Chapter 2 Kāi Tahu values and interests are recognised and kaitiakitaka is expressed

Objective 2.1

The principles of Te Tiriti o Waitangi are taken into account in resource management processes and decisions.

Policy 2.1.2

Ensure that local authorities exercise their functions and powers, by:

- a) Recognising Kāi Tahu's status as a Treaty partner; and
- b) Involving Kāi Tahu in resource management processes implementation.
- c) Taking into account Kāi Tahu values in resource management decision-making processes and implementation.
- d) Recognising and providing for the relationship of Kāi Tahu's culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taoka.
- e) Ensuring Kāi Tahu have the ability to:
 - i. Identify their relationship with their ancestral lands, water, sites, wāhi tapu, and other taoka;
 - ii. Determine how best to express that relationship.
- f) Having particular regard to the exercise of kaitiakitaka.
- g) Ensuring that district and regional plans:
 - i. Give effect to the Ngāi Tahu Claims Settlement Act 1998.
 - ii. Recognise and provide for statutory acknowledgement areas in Schedule 2.
 - iii. Provide for other areas in Otago that are recognised as significant to Kāi Tahu.
- h) Taking into account iwi management plans.

Objective 2.2:

Kāi Tahu values, interests and customary resources are recognised and provided for.

Policy 2.2.1:

Manage the natural environment to support Kāi Tahu wellbeing by all of the following:

- a) recognising and providing for their customary uses and cultural values in Schedules 1A and B and
- b) safeguarding the life-supporting capacity of natural resources.

PART B Chapter 3 Otago has high quality natural resources and ecosystems

Objective 3.1:

The values (including intrinsic values) of ecosystems and natural resources are recognised and maintained or enhanced where degraded.

PART B Chapter 5 People are able to use and enjoy Otago's natural and built environment

Objective 5.4

Adverse effects of using and enjoying Otago's natural and physical resources are minimised.

Policy 5.4.2 Adaptive management approach

Apply an adaptive management approach, to avoid, remedy or mitigate actual and potential adverse effects that might arise and that can be remedied before they become irreversible, by both:

- a) Setting appropriate indicators for effective monitoring of those adverse effects; and

- b) Setting thresholds to trigger remedial action before the effects result in irreversible damage.

Policy 5.4.3

Apply a precautionary approach to activities where adverse effects may be uncertain, not able to be determined, or poorly understood but are potentially significant or irreversible.

Decisions Version - Proposed Otago Regional Policy Statement 2021

MW – Mana whenua

Objectives

MW–O1 – Principles of Te Tiriti o Waitangi

The principles of Te Tiriti o Waitangi are given effect in resource management processes and decisions, utilising a partnership approach between councils and papatipu rūnaka to ensure that what is valued by mana whenua is actively protected in the region.

Policies

MW–P3 – Supporting Kāi Tahu hauora

The natural environment is managed to support Kāi Tahu hauora by:

- (1) recognising that Kāi Tahu hold an ancestral and enduring relationship with all whenua, wai māori and coastal waters within their takiwā,
- (2) protecting customary uses, Kāi Tahu values and relationships as identified by Kāi Tahu to resources and areas of significance, and restoring these uses and values where they have been degraded by human activities,
- (3) safeguarding the mauri and life-supporting capacity of natural resources, recognising the whakapapa connections of Kāi Tahu with these resources as taoka, and the connections to practices such as mahika kai, and
- (4) working with Kāi Tahu to incorporate mātauraka into resource management processes and decision-making.

IM – Integrated Management

Objectives

IM–O1 – Long term vision (mō tatou, ā, mō kā uri ā muri ake nei)

The management of natural and physical resources, by and for the people of Otago, in partnership with Kāi Tahu, achieves a healthy and resilient natural environment, including the ecosystem services it provides and supports the well-being of present and future generations.

IM–O2 – Ki uta ki tai

The management of natural and physical resources embraces ki uta ki tai, recognising that the environment is an interconnected system which depends on its connections to flourish and must be managed as an interdependent whole.

IM-03 – Sustainable impact

Otago's communities provide for their social, economic, and cultural well-being in ways that support or restore environmental integrity, form, functioning, and resilience, so that the life-supporting capacities of air, water, soil, and ecosystems are sustainably

managed, for future generations.

Policies

IM-P3 – Providing for mana whenua cultural values in achieving integrated management

Recognise and provide for the relationship of Kāi Tahu with natural resources by:

- (1) enabling mana whenua to exercise rakatirataka and kaitiakitaka,
- (2) facilitating active participation of mana whenua in resource management processes and decision making,
- (3) incorporating mātauraka Māori in processes and decision-making, and
- (4) ensuring resource management provides for the connections of Kāi Tahu to wāhi tūpuna, wai māori (including awa [rivers] and roto [lakes] and wai tai (including te takutai moana [coastal marine area]) and mahika kai and habitats of taoka species.

IM-P5 – Managing environmental interconnections

Manage the use and development of interconnected natural and physical resources by recognising:

- (1) situations where the value and function of a natural or physical resource extends beyond the immediate, or directly adjacent, area of interest,
- (2) situations where effects of an activity extend to a different part of the environment, and
- (3) the impacts of management of one natural or physical resource on the values of another, or on the environment.

IM-P6 – Managing Uncertainties

In resource management decision-making, manage uncertainties by using the best information available at the time, including scientific data and mātauraka Māori, and:

- (1) taking all practicable steps to reduce uncertainty, and
 - (a) in the absence of complete and scientifically robust data, using information obtained from modelling, reliable partial data, and local knowledge, with preference for sources of information that provide the greatest level of certainty, and
 - (b) avoiding unreasonable delays in making decisions because of uncertainty about the quality or quantity of the information available, and
- (2) adopting a precautionary approach, including through use of adaptive management, towards activities whose effects are uncertain, unknown, or a little understood, but potentially significantly adverse.

LF – Land and freshwater

Objectives

LF-WAI-01 – Te Mana o te Wai

Otago's water bodies and their health and well-being are protected, and restored where they are degraded, so that the mauri of those water bodies is protected, and the management of land and water recognises and reflects that:

- (1) water is the foundation and source of all life – na te wai ko te hauora o ngā mea katoa,
- (2) there is an integral kinship relationship between water and Kāi Tahu whānui, and this relationship endures through time, connecting past, present and future,
- (3) each water body has a unique whakapapa and characteristics,
- (4) fresh water, land, and coastal water have a connectedness that supports and perpetuates life,
- (4A) protecting the health and well-being of water protects the wider environment,
- (5) Kāi Tahu exercise rakatirataka, manaakitaka and their kaitiakitaka duty of care and attention over wai and all the life it supports, and
- (6) all people and communities have a responsibility to exercise stewardship, care, and respect in the management of fresh water.

Freshwater Planning Instrument Appeals

Oceana Gold: LF-WAI-O1: reference to restoration, rather than improvement, of degraded water bodies.

Policies

LF-WAI-P1 – Prioritisation

In all decision-making affecting 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) together with and the exercise of mana whenua to uphold these,
- (2) second, the health needs of people, (te hauora o te tangata) interacting with water through ingestion (such as drinking water and consuming resources harvested from the water body) and immersive activities (such as harvesting resources and primary contact), and
- (3) third, the ability of people and communities to provide for their social, economic, and cultural wellbeing, now and in the future.

Freshwater Planning Instrument Appeals

QLDC: LF-WAI-P1: Failure to include water supply for sanitation in second tier priorities.

Oceana Gold: LF-WAI-P1: inclusion of reference to “the contribution of this to the health and wellbeing of the environment (te hauora o te taiao)”.

LF-WAI-P2 – Mana whakahaere

Recognise and give practical effect to Kāi Tahu rakatirataka in respect of fresh water by:

- (1) facilitating partnership with, and the active involvement of, mana whenua in freshwater management and decision-making processes,
- (2) sustaining the environmental, social, cultural and economic relationships of Kāi Tahu with waterbodies,
- (3) providing for a range of customary uses, including mahika kai, specific to each water body,

- (4) incorporating mātauraka into decision making, management and monitoring processes, and
- (5) managing wai and its connections with whenua in a holistic and interconnected way – ki uta ki tai.

LF-WAI-P3 – Integrated management/ki uta ki tai

Manage the use of fresh water and land, using an integrated approach that is consistent with tikaka and kawa, that:

- (1) sustains and, to the greatest extent practicable, restores or improves:
 - (a) the natural connections and interactions between water bodies (large and small, surface and ground, fresh and coastal, permanently flowing, intermittent and ephemeral),
 - (b) the natural connections and interactions between land and water, from the mountains to the sea,
 - (c) the habitats of mahika kai and indigenous species, including taoka species associated with the water bodies,
- (4) manages the effects of the use and development of land to maintain or enhance the health and well-being of freshwater, coastal water and associated ecosystems,
- (5) encourages the coordination and sequencing of regional or urban growth to ensure it is sustainable,
- (6) has regard to foreseeable climate change risks, and the potential effects of climate change on waterbodies, including on their natural functioning,
- (7) has regard to cumulative effects, and
- (8) applies a precautionary approach where there is limited available information or uncertainty about potential adverse effects, in accordance with IM-P6.

LF-WAI-P4 – Giving effect to Te Mana o te Wai

All persons exercising functions and powers under this RPS and all persons who use, develop or protect resources to which this RPS applies must recognise that LF-WAI-O1, LF-WAI-P1, LF-WAI-P2 and LF-WAI-P3 are fundamental to upholding Te Mana o te Wai, and must be given effect to when making decisions affecting fresh water, including when interpreting and applying the provisions of the LF chapter.

LF-FW – Fresh water

Objectives

LF-FW-O1A – Visions set for each FMU and rohe

In each FMU and rohe in Otago and within the timeframes specified in the freshwater visions in LF-VMO2 to LF-VM-O6:

- (1) healthy freshwater and estuarine ecosystems support healthy populations of indigenous species (including non-diadromous galaxiids and Canterbury mudfish) and mahika kai that are safe for consumption,
- (2) the interconnection of land, freshwater (including springs, groundwater, ephemeral water bodies, wetlands, rivers, and lakes) and coastal water is recognised,
- (3) fish passage within and between catchments is provided for except where it is

desirable to prevent the passage of some fish species in order to protect desired fish species, their life stages, or their habitats,

- (4) the form, function and character of water bodies reflects their natural characteristics and natural behaviours to the extent reasonably practicable,
- (5) the ongoing relationship of Kāi Tahu with wāhi tūpuna, including access to and use of water bodies, is sustained,
- (6) the health of the water supports the health of people and their connections with water bodies
- (7) sustainable land and water management practices:
 - (a) support food and fibre production and the continued social, economic, and cultural wellbeing of Otago's people and communities, and
 - (b) improve the resilience of communities to the effects of climate change, and
 - (c) ensure communities are appropriately serviced by community water supplies, and other three waters infrastructure,
- (8) direct discharges of wastewater to water bodies are phased out to the extent reasonably practicable, and
- (9) freshwater is managed as part of New Zealand's integrated response to climate change and renewable electricity generation activities are provided for.

Freshwater Planning Instrument Appeals

Fish & Game: LF-FW-O1A: Failure to include provision for protection and restoration of the habitat of trout and salmon, and to include reference to harvesting food that is safe to consume from water bodies.

LF-VM-O2 – Clutha Mata-au FMU vision

In the Clutha Mata-au FMU, and in addition to the matters in LF-FW-O1A:

- (1) management of the FMU recognises that:
 - (a) the Clutha Mata-au is a single connected system ki uta ki tai, and
 - (b) the source of the wai is pure, coming directly from Tāwhirimātea to the top of the mauka and into the awa,
- (1A) sustainable abstraction occurs from lakes, river main stems or groundwater in preference to tributaries, to the extent reasonably practicable,
- (6) the national significance of the ongoing operation, maintenance and upgrading of the Clutha hydroelectricity generation scheme, including its generation capacity, storage and operational flexibility and its contribution to climate change mitigation, is recognised and protected, and potential further development is provided for within this modified catchment,
- (6A) water bodies support a range of outdoor recreation opportunities,
- (7) in the Upper Lakes rohe, the high quality waters of the lakes and their tributaries are protected, and if degraded are improved recognising the significance of the purity of these waters to Kāi Tahu and to the wider community,
- (7A) in the Lower Clutha rohe, opportunities to restore the natural form and function of

water bodies are promoted wherever practicable, and

(8) the outcomes sought are to be achieved within the following timeframes:

(c) by 2030 in the Upper Lakes rohe,

(d) by 2045 in the Dunstan and Roxburgh rohe, and

(e) by 2050 in the Manuherekia and Lower Clutha rohe.

Freshwater Planning Instrument Appeals

Fish & Game: LF-VM-O2: Failure to include provision for protection and restoration of the habitat of trout and salmon, and to include reference to harvesting food that is safe to consume from water bodies.

Kāi Tahu: In relation to LF-VM-O2 and O4, deletion of references to potential further development for hydroelectricity within these catchments.

LF-FW-O10 – Natural character

The natural character of wetlands, lakes and rivers and their margins is preserved and protected from inappropriate subdivision, use and development.

Policies

LF-FW-P13 – Preserving natural character and instream values

Preserve the natural character and instream values of lakes and rivers and the natural character of their beds and margins by:

- (1) avoiding the loss of values or extent of a river, unless:
 - (a) there is a functional need for the activity in that location, and
 - (b) the effects of the activity are managed by applying the effects management hierarchy (in relation to natural inland wetlands and rivers)
- (2) not granting resource consent for activities in (1) unless the consent authority is satisfied that:
 - (a) the application demonstrates how each step of the effects management hierarchy (in relation to natural inland wetlands and rivers) will be applied to the loss of values or extent of the river, and
 - (b) any consent is granted subject to conditions that apply the effects management hierarchy (in relation to natural inland wetlands and rivers) in respect of any loss of values or extent of the river,
 - (c) if aquatic offsetting or aquatic compensation is applied, the applicant has complied with principles 1 to 6 in Appendix 6 and 7 of the NPSFM, and has had to regard to the remaining principles in Appendix 6 and 7 of the NPSFM, as appropriate, and
 - (d) if aquatic offsetting or aquatic compensation is applied, any consent granted is subject to conditions that will ensure that the offspring or compensation will be maintained and managed over time to achieve the conservation outcomes
- (3) establishing environmental flow and level regimes and water quality standards that support the health and well-being of the water body,
- (4) to the extent practicable, sustaining the form and function of a water body that

reflects its natural behaviours,

- (5) recognising and implementing the restrictions in Water Conservation Orders,
- (6) preventing the impounding or control of the level of Lake Wanaka,
- (7) preventing modification that would permanently reduce the braided character of a river,
- (8) controlling the use of water and land that would adversely affect the natural character of the water body, and
- (9) maintaining or enhancing the values of riparian margins to support habitat and biodiversity, reduce contaminant loss to water bodies and support natural flow behaviour.

Note: LF-FW-P13 was not included in the Freshwater Planning Instrument.