

**IN THE HIGH COURT OF NEW ZEALAND**  
**DUNEDIN REGISTRY**  
**I TE KŌTI MATUA O AOTEAROA**  
**ŌTEPOTI ROHE**

No. CIV-2021-412-000089

**UNDER** the Declaratory Judgments Act 1908

**IN THE MATTER** of an application under the  
Declaratory Judgment Act 1908

**BETWEEN** **OTAGO REGIONAL COUNCIL**

**Plaintiff**

**AND**

**ROYAL FOREST AND BIRD**  
**PROTECTION SOCIETY OF NEW**  
**ZEALAND INCORPORATED**

**Defendant**

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**STATEMENT OF DEFENCE BY PORT OTAGO LTD**  
**TUESDAY THE 26<sup>th</sup> DAY OF OCTOBER 2021**

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**Port Otago Ltd says:**

**Parties**

1. It admits paragraphs 1 and 2 of the Statement of Claim.
2. It is a New Zealand limited liability company operating international ports at Port Chalmers and Dunedin.

**Facts upon which the application is based**

3. It admits paragraphs 3-8 of the Statement of Claim.

**The proposed Otago Regional Policy Statement 2021**

4. It states that the Otago Regional Council (“ORC”) purported to notify the PORPS on 26 June 2021 and says that the notification was invalid as it failed to comply with the obligation under section 5(2A) of Part 1, Schedule 1 of the Resource Management Act 1991 (“RMA”) to state in the notification the parts of PORPS that were not subject to the freshwater planning process and to state that such parts would undergo the processes in Part 1 of Schedule 1 of RMA. Save as is hereby admitted, it denies each and every of the allegations in paragraph 9 of the Statement of Claim.
5. It admits paragraphs 10 to 12 of the Statement of Claim and says that the provisions in CE- Coastal Environment are not able to be included in a freshwater planning instrument.

*Particulars*

The definition of “freshwater” in both RMA and PORPS excludes coastal water.

**Decision to subject PORPS to freshwater planning process**

6. It admits paragraph 13 of the Statement of Claim and says:
  - (a) PORPS is not a freshwater planning instrument in its entirety as it includes policies relating to coastal water which the RMA does not permit to be part of a freshwater planning instrument as “freshwater” in both RMA and PORPS is defined to specifically exclude coastal water (including water in harbours);
  - (b) Section 80A(3) RMA requires ORC to consider whether part of the instrument relates to freshwater and, when only part of the instrument relates to freshwater, then the parts that do not relate

to freshwater (including all provisions relating to coastal water) are required to be prepared in accordance with Part 1 of Schedule 1 of the Act.

7. It admits paragraphs 14 to 16 of the Statement of Claim but says that the recommendation was only able to be made because the definition of “freshwater” in RMA was overlooked and no reference was made to the definition of freshwater specifically excluding coastal water (including Otago harbour).

*Particulars*

The report claims that section 80A(2) “sets out the definition of a freshwater planning instrument” which is not correct as it does not refer to the definition of “freshwater” or state that coastal water cannot be freshwater.

8. It admits paragraph 17 of the Statement of Claim and says that the Council’s decision was wrong in law as PORPS cannot be a freshwater planning instrument when it contains polices relating to coastal water.

*Particulars*

The ORC cannot decide that matters that do not relate to freshwater (including coastal water) are “freshwater” as such a decision is contrary to the ORC’s obligations under section 80A RMA and is not permitted by the definition of “freshwater” in section 2 RMA.

9. It admits paragraph 18 of the Statement of Claim and states that such notice was invalid and did not comply with RMA as the whole of PORPS was not a freshwater planning instrument.

10. It states that paragraphs 19 to 21 of the Statement of Claim would be correct in relation to the provisions in PORPS relating to freshwater if s 80A(3) RMA had been complied with and PROPS solely related to freshwater but the failure to identify those parts of PORPS that are not freshwater means the process followed by ORC is invalid. Save as is hereby expressly admitted, it denies each and every of the allegations contained in paragraphs 19 to 21 of the Statement of Claim.

11. It denies each and every allegation in paragraphs 22 and 23 of the Statement of Claim and says:
  - (a) If PORPS was a freshwater planning instrument then paragraphs 22 and 23 would be correct;
  - (b) As a result of PORPS not being a freshwater planning instrument then:
    - (i) PORPS cannot lawfully be submitted to the Chief Freshwater Commissioner; and
    - (ii) If PORPS is submitted to the Chief Freshwater Commissioner then Port Otago Ltd (and other submitters) will incur wasted costs in having a hearing on matters that are not freshwater as the Chief Freshwater Commissioner has no jurisdiction to determine matters that are completely unrelated to freshwater including provisions relating to coastal water.
  
12. It denies that the declarations sought in paragraph 24 of the Statement of Claim accurately state the legal position or are otherwise available to the ORC and says:
  - (a) The decision of the Otago Regional Council on 16 June 2021 to affirm the Proposed Otago Regional Policy Statement 2021 is a freshwater planning instrument is void as the Otago Regional Council failed to consider that policies referring to coastal water are not able to be included in a freshwater policy instrument;
  - (b) The Proposed Otago Regional Policy Statement 2021 is not a freshwater planning instrument under section 80A(1)-(3) of the Resource Management Act 1991 as only part of the Proposed Otago Regional Policy Statement 2021 relates to freshwater with the Proposed Otago Regional Policy Statement 2021 including matters that are not freshwater including policies relating to coastal water;
  - (c) There is no jurisdiction for the Otago Regional Council to commence or continue to prepare the Proposed Otago Regional Policy Statement 2021 in its entirety under the freshwater planning process in subpart 4 of Part 5 and Part 4 of Schedule 1 of the Resource Management Act 1991 and the process adopted by the Otago Regional Council is contrary to the express provisions of section 80A(3) which requires the Otago Regional Council to determine which parts of the Proposed Otago Regional Policy Statement 2021 relate to freshwater;

- (d) There is no basis for the Otago Regional Council continuing to have the whole or any part of the Proposed Otago Regional Policy Statement 2021 considered under the freshwater planning process in subpart 4 of Part 5 of the Resource Management Act 1991 as the Otago Regional Council has not made a valid decision as to what parts of the Proposed Otago Regional Policy Statement 2021 relate to freshwater as defined in the Resource Management Act 1991;
- (e) The Otago Regional Council is required to consider its obligations under section 80A(3) to determine which parts of the Proposed Otago Regional Policy Statement 2021 are related to freshwater and then proceed to publicly notify the Proposed Otago Regional Policy Statement 2021 in accordance with section 80A(4) of the Act as that notification is required under section 5(2A) of Part 1 of Schedule 1 of RMA to specify which part of Proposed Otago Regional Policy Statement 2021 will undergo the freshwater planning process and which part of Proposed Otago Regional Policy Statement 2021 will undergo the processes in Part 1 of Schedule 1.

This document is filed by Sally Louise McMillan, Solicitor for the above-named Port Otago Ltd of the firm of McMillan & Co, whose postal address is PO Box 5547, Dunedin.

The address for service of the above-named Port Otago Ltd is at the offices of McMillan & Co situated at Donald Reid Building, 110 Vogel Street, Dunedin.

Documents for service on the above-named Port Otago Ltd, may be left at that address for service or may be -

- (a) Posted to the solicitor at PO Box 5547, Dunedin; or
- (b) Transmitted to the solicitor by fax to (03) 474 5588.