

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE

CIV-2021-412-000089

IN THE MATTER of application under the Declaratory Judgments Act
1908

BETWEEN **OTAGO REGIONAL COUNCIL**, a regional council
under Schedule 2 of the Local Government Act
2002

Plaintiff

AND **ROYAL FOREST AND BIRD PROTECTION
SOCIETY OF NEW ZEALAND INCORPORATED**,
an incorporated society having its registered office
at 205 Victoria St, Wellington

Defendant

**PLAINTIFF'S REPLY TO AFFIRMATIVE DEFENCES PLEADED BY
ERNSLAW ONE LIMITED IN ITS STATEMENT OF DEFENCE**

Dated: 2 December 2021

Next Event date: Hearing, 8 and 9 February 2022
Case Manager: Rebecca Lau
Judicial Officer: Nation J

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**PLAINTIFF’S REPLY TO AFFIRMATIVE DEFENCES PLEADED BY
ERNSLAW ONE LIMITED IN ITS STATEMENT OF DEFENCE**

In response to the affirmative defences pleaded by Ernslaw One Limited, the Plaintiff by its solicitors says: –

Provisions relating to “*coastal water*” cannot form part of a freshwater planning instrument

Statement of Defence, paragraph 7

1. The Plaintiff denies that the provisions relating to “*coastal water*” cannot form part of a freshwater planning instrument.
2. While the Plaintiff agrees that the definition of “*freshwater*” excludes “*coastal water*”, coastal waters are a receiving environment for freshwater; freshwater relates.
3. The National Policy Statement for Freshwater Management 2020 (NPSFM), under the heading “*Application*” states:

“This National Policy Statement applies to all freshwater (including groundwater) and, to the extent they are affected by freshwater, to receiving environments (which may include estuaries and the wider coastal marine area)”¹.
4. The pORPS must give effect to the NPSFM and is therefore a freshwater planning instrument.
5. The NPSFM also directs the Plaintiff must:
 - a. adopt an integrated management approach, *ki uta ki tai*², and
 - b. recognise the interconnectedness of the whole environment;³ and
 - c. recognise the interactions between freshwater and receiving environments⁴ (such as the coastal environment).
6. Coastal waters are a receiving environment for freshwater.

¹ NPSFM at 1.5

² National Policy Statement for Freshwater Management 2020 at 3.2

³ Ibid at 3.5(a)

⁴ Ibid at 3.5(b)

7. Provisions relating to coastal water must be included in the pORPS to give effect to the NPSFM. The interaction between freshwater and coastal water plainly relates to freshwater.

PORPS not a freshwater planning instrument in its entirety due to consequences

Statement of Defence, paragraph 8 (a) to (d)

8. The Plaintiff denies that any parts of the pORPS are not for the purpose of giving effect to the NPSFM, or do not otherwise relate to freshwater.
9. The Plaintiff denies that the reasons given in the recommending report for the pORPS notification would justify every proposed regional policy statement being considered a freshwater planning instrument in its entirety.
10. The procedural consequences which follow from the pORPS being a freshwater planning instrument are irrelevant to whether the pORPS is a freshwater planning instrument.
11. The Plaintiff denies that notifying the pORPS as a freshwater instrument in its entirety is contrary to s 80A.
12. The Plaintiff denies that preparation of the whole pORPS as a freshwater planning instrument risks overreach because all of the pORPS could be considered to give effect to the NPSFM. A freshwater planning instrument may give effect to a NPSFM or relate to freshwater.
13. Regulation 6(1)(a) of the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017 provides that a rule in a plan may be more stringent than the regulations if the rule gives effect to an objective developed to give effect to the NPSFM. Whether the pORPS is a freshwater planning instrument is immaterial to the application of Regulation 6(1)(a).

Links to freshwater does not make PORPS a freshwater planning instrument

Statement of Defence, paragraph 9

14. The ability to draw “links” between freshwater parts of the pORPS and parts of the pORPS addressing other matters/resources does mean the pORPS in its entirety is a freshwater planning instrument.
15. If links can be drawn between other resources and freshwater, then they “relate to freshwater”.

No jurisdiction as parts of PORPS not for purpose of giving effect to NPSFM or otherwise relate to freshwater

Statement of Defence, paragraph 17(a)-(c)

16. The Plaintiff denies that parts of the pORPS are not for the purpose of giving effect to the NPSFM, nor otherwise relate to freshwater and consequently denies that there is no jurisdiction for the Plaintiff to continue to prepare the entire pORPS under the freshwater planning process in Subpart 4 Part 4 and Part 4 Schedule 1 RMA.
17. The pORPS is a freshwater planning instrument as defined in s 80A(2) of the Act.
18. Section 80A(3) mandates that the freshwater planning process be followed.
19. The only exception is “if the Council is satisfied that only part of the instrument relates to freshwater”.
20. The Plaintiff was not satisfied that only part of the instrument relates to freshwater; consequently, section 80A(3)(a) and (b) were not engaged.
21. ORC must continue to prepare the pORPS in accordance with Part 4 of Schedule 1⁵.
22. No changes are required to the pORPS.
23. Renotification is not required.

⁵ Section 80A(3) RMA