

**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

SUBMISSIONS ON BEHALF OF THE OTAGO REGIONAL COUNCIL

Dated 24 December 2021

Next Event: Hearing
Next Event Date: 8 and 9 February 2022
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Judicial Officer: Nation J

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Glossary of abbreviations used

("OGL")	Oceana Gold (New Zealand) Limited
("ORC")	Otago Regional Council
("POL")	Port Otago Limited
("pRPS")	Proposed Regional Policy Statement
("RMA")	Resource Management Act 1991
("SNA")	Significant Natural Areas
("F&B")	Royal Forest and Bird Protection Society of New Zealand Incorporated
("NPSFM")	National Policy Statement for Freshwater Management 2020

SUBMISSIONS ON BEHALF OF THE OTAGO REGIONAL COUNCIL

May it Please the Court:

PART A - INTRODUCTION

- 1 Is the proposed Otago Regional Policy Statement (“pRPS”) a freshwater planning instrument?
- 2 If not, which parts are a freshwater planning instrument?
- 3 These proceedings seek declarations under the Declaratory Judgments Act 1908 determining those issues.

PART B - SUMMARY

- 4 The pRPS is, in its entirety, a freshwater planning instrument. That statement seems counterintuitive. A regional policy statement must cover many subjects. But when this pRPS is carefully considered, freshwater is woven into its fabric. There is no severable part which neither gives effect to the National Policy Statement for Freshwater Management nor relates to freshwater in some other way.

PART C - JURISDICTION

- 5 Section 3 of that Act provides so far as relevant:

“3 Declaratory orders on originating summons

Where any person has done or desires to do any act the validity, legality, or effect of which depends on the construction or validity of any statute ... such person may apply to the High Court ... for a declaratory order determining any question as to the construction or validity of such statute ... or of any part thereof.”

- 6 The breadth of this jurisdiction has been affirmed by the Supreme Court in Mandic v Cornwall Park Trust Board¹.
- 7 The nature of the jurisdiction is illustrated by Earthquake Commission v Insurance Council of New Zealand Inc² where a Full Bench of the High Court granted declarations determining the meaning of provisions in the

¹ Mandic v Cornwall Park Trust Board [2011] NZSC 135 at [2], [5]-[9] and [82]

² Earthquake Commission v Insurance Council of New Zealand Inc [2015] 2 NZLR 381

Earthquake Commission Act 1993, in relation to policies for deciding claims under the Act, and setting the framework for future guidelines to be adopted by the Commission³.

8 Relief under the Act is discretionary⁴.

PART D - WHAT IS A FRESHWATER PLANNING INSTRUMENT

9 Section 80A of the Resource Management Act 1991 (“RMA”) states:

“(1) *The purpose of this subpart is to require all freshwater planning instruments prepared by a regional council to undergo the freshwater planning process.*

(2) **A freshwater planning instrument means—**

(a) *a proposed regional plan or regional policy statement for the purpose of giving effect to any national policy statement for freshwater management:*

(b) *a proposed regional plan or regional policy statement that relates to freshwater (other than for the purpose described in paragraph (a)):*

(c) *a change or variation to a proposed regional plan or regional policy statement if the change or variation—*

(i) *is for the purpose described in paragraph (a); or*

(ii) *otherwise relates to freshwater.*

(3) *A regional council must prepare a freshwater planning instrument in accordance with this subpart and Part 4 of Schedule 1. However, if the council is satisfied that only part of the instrument relates to freshwater, the council must—*

(a) *prepare that part in accordance with this subpart and Part 4 of Schedule 1; and*

(b) *prepare the parts that do not relate to freshwater in accordance with Part 1 of Schedule 1 or, if applicable, subpart 5 of this Part.”*

Parliamentary Background

10 The freshwater planning process was added to the RMA by the Resource Management Amendment Act 2020.

11 The Bill was introduced to Parliament on 23 September 2019. One of the purposes of the Bill was to respond to the urgent need to improve

³ *Earthquake Commission v Insurance Council of New Zealand Inc* [2015] 2 NZLR 381 at paragraphs [80], [88] and [93]

⁴ Section 10 of the Declaratory Judgments Act

freshwater management and outcomes⁵. For this reason, the Bill contained a new freshwater planning process.

12 After its first reading the Bill was referred to the Environment Committee.

13 Section 80A then read:

“(1) The purpose of this subpart is to require all freshwater planning instruments to undergo the freshwater planning process.

(2) A freshwater planning instrument means—

(a) a proposed regional plan or regional policy statement for the purpose of giving effect to the National Policy Statement for Freshwater Management 2020:

(b) a proposed regional plan or regional policy statement that relates to freshwater (other than for the purpose described in paragraph (a)):

(c) a change or variation to a proposed regional plan or regional policy statement if the change or variation—

(i) is for the purpose described in paragraph (a); or

(ii) otherwise relates to freshwater.

(3) A regional council must prepare a freshwater planning instrument in accordance with this subpart and Part 4 of Schedule 1.”⁶

14 Submissions were received by the Committee on the scope of “*freshwater planning instrument*”.

15 Some submitters sought that the freshwater planning process be extended to cover all regional council functions.

16 Other submitters sought clarity about the matters captured by the freshwater planning process.

17 The Departmental report to the Environment Committee, written by the Ministry for the Environment stated:

“Council submitters and others had questions on the scope of what is captured by the freshwater planning process. Some consider the scope is broad and more clarity is required around the term “relates to freshwater”. Bathurst Resources Ltd and BT Mining Ltd submitted that given a holistic view of the world almost anything has a relationship to freshwater. It was concerned that if a proposed

⁵ www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_91358/resource-management-amendment-bill

⁶ Select Committee Report – Resource Management Amendment Bill: <https://documentcloud.adobe.com/link/track?uri=urn:aaid:scds:US:100cac92-27ac-4f54-89c7-e26ce8dc1656> at page 7

regional policy statement or regional plan in part “relates to freshwater” this would mean that the entire regional policy statement and regional plan would become a freshwater planning instrument.”⁷

- 18 The Departmental report turned to the “*effect on integrated management and relationship to regional coastal plans*” and said:

“Other submitters considered that restricting the scope to “freshwater” is too narrow. Submitters were concerned about the separation of freshwater from other aspects of councils’ planning functions under the RMA, and felt the Bill discouraged integrated management across the freshwater/coastal boundary. They consider the Bill needs to take a more holistic approach and recognise the connections between freshwater and coastal water (and its management), particularly at the interface zones of estuary and river mouth. ... Other councils felt that having to use two different processes works against integration and could lead to unintended consequences. Otago Regional Council submitted that to isolate the development of freshwater planning is contrary to good integrated plan making and resource management. Waikato Regional Council and Environment Canterbury submitted that in practice it is difficult to ring-fence freshwater issues. Attempting to do so can result in less integrated management of resources – particularly when the purpose of controlling land use activities is to prevent adverse effects on freshwater.

...

Local Government New Zealand submitted that it is likely to be difficult and inappropriate to contain the scope of plan changes to “just” the NPS-FM, or even just freshwater. This is due to relevant provisions extending across multiple parts of a plan, and the need to give effect to multiple documents including other NPS’s and planning standards, Treaty Settlement legislation and associated documents.”⁸

- 19 The Ministry’s analysis was:

“The phrase “giving effect to the NPS-FM”, captures all requirements that arise from the NPS-FM. This includes the NPS-FM requirements to consider and recognise Te Mana o te Wai and to recognise the interactions of Ki uta ki tai between the ecosystems of freshwater, land and sensitive receiving environments including the coast. Planning content will also be driven by regional council functions under section 30(1)(c) to control the use of land for the purpose of the maintenance and enhancement of the quality of

⁷ Ministry for the Environment, Departmental Report on the Resource Management Amendment Bill March 2020 https://www.parliament.nz/resource/en-NZ/52SCEN_ADV_91358_EN20429/7fc0f498a9bee504e5b067a9e7d70245baf3ede4, page 87

⁸ Ministry for the Environment, Departmental Report on the Resource Management Amendment Bill March 2020 https://www.parliament.nz/resource/en-NZ/52SCEN_ADV_91358_EN20429/7fc0f498a9bee504e5b067a9e7d70245baf3ede4, pages 87 to 88

water in water bodies and coastal water and the maintenance of the quantity of freshwater.”⁹

“The phrase “or otherwise relates to freshwater” is intended to be a catchall for any water related matter that might not be captured under the NPS-FM. For example, to manage structures in the beds of rivers/lakes or flood management policies/rules. This seeks to avoid a situation where a matter that is clearly water related cannot go through the freshwater planning process because it is not captured by the NPS-FM.”¹⁰

20 The Ministry was wary of extending the scope of the freshwater planning process:

“We acknowledge the efficiencies that this may bring, but this must be considered against the key driver of the policy change, which is to have freshwater planning instruments in place by 2025.”¹¹

21 The Ministry recommended against changes to allow freshwater hearings panel to address wider regional matters.

22 The Ministry acknowledged the points about integrated plans, integrated catchment management and efficient processes but concluded that *“the policy directive to have plans notified by 2023 makes this change impracticable at this time. Councils may be able to have members in common for freshwater hearings panels and panels dealing with other matters.”¹²*

23 In short, the Ministry advised against any substantive changes to section 80A.

24 In its report, the Environment Committee stated *“we recognise that what constitutes a “freshwater planning instrument” may not be clear-cut, and*

⁹ Ministry for the Environment, Departmental Report on the Resource Management Amendment Bill March 2020 https://www.parliament.nz/resource/en-NZ/52SCEN_ADV_91358_EN20429/7fc0f498a9bee504e5b067a9e7d70245baf3ede4, page 89

¹⁰ Ministry for the Environment, Departmental Report on the Resource Management Amendment Bill March 2020 https://www.parliament.nz/resource/en-NZ/52SCEN_ADV_91358_EN20429/7fc0f498a9bee504e5b067a9e7d70245baf3ede4, page 89

¹¹ Ministry for the Environment, Departmental Report on the Resource Management Amendment Bill March 2020 https://www.parliament.nz/resource/en-NZ/52SCEN_ADV_91358_EN20429/7fc0f498a9bee504e5b067a9e7d70245baf3ede4, page 89

¹² Ministry for the Environment, Departmental Report on the Resource Management Amendment Bill March 2020 https://www.parliament.nz/resource/en-NZ/52SCEN_ADV_91358_EN20429/7fc0f498a9bee504e5b067a9e7d70245baf3ede4, page 90

that some planning instruments may have provisions that relate to freshwater, and other provisions that do not". To address this issue, it was proposed that 80A(3) be amended and that the Council decide at notification whether the whole or part of a planning document is a freshwater planning instrument. The part that is not a freshwater planning instrument would undergo the standard planning process under Part 1 of Schedule 1 of the Act. The Committee's report stated "some of us believe this approach would provide greater transparency and reduce confusion"¹³.

25 An amended version of section 80A(3) was included in the report, reading:

*"(3) A regional council must prepare a freshwater planning instrument in accordance with this subpart and **Part 4 of Schedule 1**. However, if the council is satisfied that only part of the instrument relates to freshwater, the council must–*

(a) prepare that part in accordance with this subpart and Part 4 of Schedule 1; and

(b) prepare the parts that do not relate to freshwater in accordance with Part 1 of Schedule 1."

26 The amendment was adopted by Parliament.

27 The 2020 Act also added detailed provisions for the freshwater process to the First Schedule of the Act.

Freshwater Process

28 A freshwater planning instrument must undergo the freshwater planning process¹⁴. Once submissions and further submissions have been received, ORC must, no later than 6 months after it has publicly notified a freshwater planning instrument, submit that instrument and other specified documents to the Chief Freshwater Commissioner¹⁵.

29 In summary, the rest of the freshwater planning process entails:

¹³ Final Report of the Environment Committee, 30 March 2020, page 5 – Resource Management Amendment Bill: https://www.parliament.nz/resource/en-NZ/SCR_96439/40a17936019812cd667f8dc16ee1e2b915ef4fea

¹⁴ Section 80A(1) of the RMA

¹⁵ As the PORPS was notified on 26 June 2021, the ORC must submit the instrument and other documents to the Chief Freshwater Commissioner by 26 December 2021. The documents were submitted on 10 December 2021.

- 29.1 The Chief Freshwater Commissioner convenes a Freshwater Hearings Panel to conduct the public hearing of submissions on the freshwater planning instrument;
- 29.2 The Freshwater Hearings Panel must conduct public hearings in accordance with its powers and procedures set out in Part 4 of Schedule 1 of the RMA. Panels have expanded procedural powers;
- 29.3 After the public hearing of submissions, the Freshwater Hearings Panel must make recommendations to ORC on the freshwater planning instrument. The panel may make recommendations outside the scope of submissions¹⁶. The panel must report its recommendations to ORC no later than 40 working days before 26 June 2023¹⁷;
- 29.4 ORC may accept or reject any recommendation;
- 29.5 If the Council rejects a recommendation, it must adopt an alternative solution. If the Council rejects a recommendation outside the scope of submissions, the alternative it adopts may also be outside the scope of recommendations¹⁸;
- 29.6 There are limited appeal rights;
- 29.7 There are rights of appeal on the merits to the Environment Court if:
- 29.7.1 The Council rejects a recommendation and adopts an alternative solution in relation to a matter or a provision on which the appellant addressed in a submission; or
- 29.7.2 The Council rejects a recommendation outside the scope of submissions by any person who made a submission¹⁹; and
- 29.8 There are rights of appeal on questions on law only to the High Court if:

¹⁶ Clause 49 of the First Schedule of the RMA

¹⁷ Clause 51 of the First Schedule of the RMA

¹⁸ Clause 52 of the First Schedule of the RMA

¹⁹ Clause 55 of the First Schedule of the RMA

29.8.1 The Council accepts a recommendation on a provision or matter upon which the appellant made a submission; or

29.8.2 The Council accepts a recommendation outside the scope of submissions by any person who made a submission²⁰.

29.9 The Court of Appeal is the final Court.

Standard Process

30 However, if the PORPS is not a freshwater planning instrument, or part of it does not relate to freshwater, then the standard procedure for making a Regional Policy Statement in Part 1 of Schedule 1 of the RMA must be followed (or for the part of the PORPS that does not relate to freshwater). In short, the Council, or its delegates, conducts hearings on submissions, makes decisions on those submissions and those decisions are subject to appeal to the Environment Court on their merits.

NPSFM 2020

31 A freshwater planning instrument includes a planning document which gives effect to a National Policy Statement for Freshwater Management.

32 The fundamental concept in the NPSFM is Te Mana o te Wai:

“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.”*

²⁰ Clause 56 of the First Schedule of the RMA

- 33 Te Mana o te Wai plainly looks beyond freshwater to the wider environment.
- 34 Te Mana o te Wai entails a hierarchy of obligations that prioritises:
- 34.1 First, the health and well-being of water bodies and freshwater ecosystems;
 - 34.2 Second, the health needs of people (such as drinking water);
 - 34.3 Third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and into the future²¹.
- 35 The sole objective of the NPSFM is “*to ensure that natural and physical resources²² are managed in a way that*” gives effect to these priorities²³.
- 36 It is notable that this objective requires the management of “*natural and physical resources*” – not just freshwater to achieve the stipulated outcomes for freshwater. This objective recognises that the interconnection between the use and protection of resources is fundamental to freshwater management. This interconnection is applied in the pRPS.
- 37 To achieve this objective the NPSFM includes the following policies:
- “**Policy 1:** *Freshwater is managed in a way that gives effect to Te Mana o te Wai.*
 - ...
 - “**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 4:** *Freshwater is managed as part of New Zealand’s integrated response to climate change.*”
- 38 As well as these general policies, there are specific policies focused on freshwater, freshwater bodies, aquatic ecosystems and their constituent parts.

²¹ NPSFM, Clause 1.3(5)

²² Section 2 RMA: “*Natural and physical resources includes land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures*”

²³ NPSFM, Objective 2.1

39 Part 3 of the NPSFM contains a “*non-exhaustive list of things which local authorities must do to give effect to the objective and policies*” of the NPSFM. This includes obligations for the integrated management of “*natural and physical resources*”:

“3.5 Integrated management

- (1) *Adopting an integrated approach, ki uta ki tai, as required by Te Mana o te Wai, requires that local authorities must:*
 - (a) *recognise the interconnectedness of the whole environment, from the mountains and lakes, down the rivers to hāpua (lagoons), wahapū (estuaries) and to the sea; and*
 - (b) *recognise interactions between freshwater, land, water bodies, ecosystems, and receiving environments; and*
 - (c) *manage freshwater, and land use and development, in catchments in an integrated and sustainable way to avoid, remedy, or mitigate adverse effects, including cumulative effects, on the health and well-being of water bodies, freshwater ecosystems, and receiving environments; and*
 - (d) *encourage the co-ordination and sequencing of regional or urban growth.*
- (2) *Every regional council must make or change its regional policy statement to the extent needed to provide for the integrated management of the effects of:*
 - (a) *the use and development of land on freshwater; and*
 - (b) *the use and development of land and freshwater on receiving environments.*
- (3) *In order to give effect to this National Policy Statement, local authorities that share jurisdiction over a catchment must co-operate in the integrated management of the effects of land use and development on freshwater.*
- (4) *Every territorial authority must include objectives, policies, and methods in its district plan to promote positive effects, and avoid, remedy, or mitigate adverse effects (including cumulative effects), of urban development on the health and well-being of water bodies, freshwater ecosystems, and receiving environments.”*

40 To give effect to the NPSFM:

- 40.1 It is necessary to manage the environment²⁴ to protect the health of freshwater²⁵.
- 40.2 The objective requires the management of “*natural and physical resources*”, and that objective extends beyond freshwater to the management of other resources.
- 40.3 It is necessary to manage the use and development of land on a whole of catchment basis, including effects on receiving environments²⁶.
- 40.4 “*Receiving environment*” includes, but is not limited to, any waterbody (such as a river, lake, wetland or aquifer) and the coastal marine area (including estuaries). Receiving environments is a broad term. A “*water body*” is freshwater body²⁷.
- 40.5 Integrated management is mandatory. Integrated management requires:
- 40.5.1 Recognition of the interconnectedness of the whole environment.
- 40.5.2 Recognition of the interactions between water, land, ecosystems and receiving environments.
- 40.5.3 Management of freshwater, as well as land use and development of to avoid, remedy or avoid adverse effects, including cumulative effects, on the health and well-being of water bodies, freshwater ecosystems and receiving environments.
- 40.5.4 Encouraging the coordination and sequencing of regional and urban growth.

²⁴ Note the definition of “*environment*” in section 2 RMA is “***environment*** includes—
(a) *ecosystems and their constituent parts, including people and communities; and*
(b) *all natural and physical resources; and*
(c) *amenity values; and*
(d) *the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters*”

²⁵ NPSFM, Clause 1.3(1)

²⁶ NPSFM, Policy 3

²⁷ Section 2 RMA: water body “*means fresh water or geothermal water in a river, lake, stream, pond, wetland, or aquifer, or any part thereof, that is not located within the coastal marine area*”

40.6 Freshwater must also be managed as part of New Zealand's integrated response to climate change²⁸.

National Planning Standards

- 41 A regional policy statement must be prepared in accordance with and give effect to the National Planning Standards²⁹.
- 42 The National Planning Standards require a nationally consistent structure³⁰.
- 43 In particular a regional policy statement must comply with Table 2³¹ of the Standards.
- 44 The Regional Policy Statement Structure Standard directs provisions that apply predominantly to only one topic must be located in the relevant chapter under the Topic's heading. The provisions that apply to more than one topic, must be located in the relevant chapters under the Domains heading.
- 45 The Domains section anticipates chapters on Air, Coastal Environment including a section on the coastal marine area, Geothermal, and Land and Freshwater.
- 46 "*Tangata whenua/mana whenua*" provisions must be integrated throughout the policy statement if the Council considers it appropriate³².
- 47 In the RPS, mana whenua content is both the subject of separate chapters and included in other chapters throughout the document³³.
- 48 With the exception of mana whenua provisions, the standards tend to create the appearance of subject matter silos with seemingly discrete treatment of individual topics. The structure required by the Standards for

²⁸ Section 2 RMA: Climate change is defined to mean "*a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods*"

²⁹ Section 61(1)(da) and section 62(3) RMA

³⁰ National Planning Standards 2019, Foundation Standard, Purpose, page 5

³¹ National Planning Standards 2019, Pages 8 to 10

³² National Planning Standards 2019, Foundation Standard, Mandatory direction 5, page 6 and Introduction and General Provisions Standard, Tangata whenua/mana whenua, Clause 25, page 30

³³ Separate chapters to Mana Whenua, pRPS, pages 47-63 and Resource Management Issues of Significance to Iwi Authorities in the Region, pRPS, pages 86-95

the pRPS superficially conceals the way in which freshwater is integrated into all parts the pRPS.

Regional Policy Statements

- 49 The RMA requires the Otago Regional Council to have a regional policy statement for the Otago region³⁴.
- 50 The function of a regional policy statement is to achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region³⁵. The single purpose of the Act is the sustainable management of natural and physical resources³⁶.
- 51 A regional policy statement must give effect to any National Policy Statement and the National Planning Standards³⁷.

PART E - THE PROPOSED RPS

- 52 As a result of a ministerial review into freshwater management and allocation in Otago, ORC embarked on the preparation of a new regional policy statement.
- 53 ORC considered the pRPS at its meeting on 16 June 2021. It resolved to proceed with public notification. It affirmed that the pRPS is a freshwater planning instrument, as defined in section 80A.

³⁴ Section 60 RMA

³⁵ Section 59 RMA; see section 30(1)(a) RMA which confers on regional councils the function of establishing, implementing and reviewing objectives, policies and methods to achieve integrated management of the natural and physical resources of a region

³⁶ “Section 5 Purpose

(1) *The purpose of this Act is to promote the sustainable management of natural and physical resources.*

(2) *In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—*

(a) *sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*

(b) *safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*

(c) *avoiding, remedying, or mitigating any adverse effects of activities on the environment.”*

³⁷ Section 62(3) RMA

54 On 26 June 2021, the pRPS was notified. The public notice recorded that the whole pRPS is a freshwater planning instrument and will be subject to the freshwater planning process.

55 Submissions and further submissions have now closed. In accordance with section 80A(4)(c) the pRPS and associated documentation were submitted to the Chief Freshwater Commissioner on 10 December 2021.

PART F - ORC SUBMISSIONS

56 A “*freshwater planning instrument*” includes a proposed regional policy statement that:

(a) is for the purpose of giving effect to a national policy statement for freshwater management (in this case the NPSFM 2020; or

(b) “*Relates to freshwater*” in some other way.

57 “*To give effect to*” means “*implement*”³⁸. The words “*relates to*” are not qualified. Reading in a qualifier is not permissible. The words bear their natural and ordinary meaning. A connection to freshwater is sufficient³⁹.

58 If the pRPS is a freshwater planning instrument under either or both of the tests in s 80A(2), then it is mandatory for it to undergo the freshwater planning process.

59 Section 80A(3) recognises that a planning document may be a freshwater planning instrument in whole or in part.

60 The freshwater planning process cannot be used for a part of the pRPS that cannot be categorised as a freshwater planning instrument. This exception applies if “... *the Council is satisfied that only part of the instrument relates to freshwater*”.

61 This exception contemplates there may be freshwater planning instruments that only partially relate to freshwater.

³⁸ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593, paragraph [77]

³⁹ https://www.oxfordlearnersdictionaries.com/definition/english/relate_1#:~:text=%2Fr%C9%AA%CB%88le%C9%AA%5%8B%2F-%2Fr%C9%AA%CB%88le%C9%AA%5%8B%2F,will%20be%20related%20to%20productivity

- 62 It does not follow that this will always or even often be the case. There may be cases where the Council is satisfied, and others when it is not.
- 63 The Council's decision is not conclusive. The correctness of its decision is a question of law to be determined by applying section 80A to the instrument, properly construed.
- 64 If only part of a document relates to freshwater, then it is separated into distinct parts to follow different processes under the First Schedule of the RMA.
- 65 It follows that each part must be capable of following different processes. Each must be capable of being fully considered without reference to or consequences for the other. Each must be capable of being read, considered and adjudicated upon on a stand-alone basis.
- 66 What is therefore required is a detailed consideration of the RPS, to see whether there is some distinct part which does not give effect to the NPSFM and does not relate to freshwater. This assessment is carried out in the next Part.

PART G - THE pRPS

pRPS Overview

- 67 The PORPS has 5 parts:
- 67.1 Part 1 – Introduction and General Provisions;
 - 67.2 Part 2 – Resource Management Overview;
 - 67.3 Part 3 – Domains and Topics;
 - 67.4 Part 4 – Evaluation and Monitoring; and
 - 67.5 Part 5 – Appendices and Maps.
- 68 Part 3 includes 3 domains:
- 68.1 AIR – Air;
 - 68.2 CE - Coastal Environment; and
 - 68.3 LF - Land and Freshwater.

- 69 Part 3 includes 6 topics:
- 69.1 ECO – Ecosystems and indigenous biodiversity;
 - 69.2 EIT – Energy, infrastructure and transport;
 - 69.3 HAZ – Hazards and risks;
 - 69.4 HCV – Historical and cultural values;
 - 69.5 NFL – Natural features and landscapes; and
- 70 UFD – Urban form and development. The introductory section contains a foreword or mihi.
- 71 A description of the region follows. This discussion covers Otago’s climate, water bodies, natural character and landscapes.
- 72 The introduction summarises key issues for Kāi Tahu⁴⁰, including their relationships with natural and physical resources.
- 73 Cross-boundary issues are noted, including the fact that the region’s major rivers cross local authority boundaries⁴¹.
- 74 There is a section devoted to definitions⁴².
- 75 National directions are set out⁴³, these directions include the NPSFM and the NPS for Renewable Electricity Generation. They also include National Environmental Standards for Sources of Human Drinking Water, Plantation Forestry, and Freshwater.
- 76 Regulations made under the Resource Management Act are listed. They include regulations for the measurement and reporting of water takes and stock exclusion from lakes, rivers and wetlands. A Water Conservation Order in force in Otago is identified.
- 77 The first substantive chapter is “*Mana Whenua*”.

⁴⁰ pRPS, page 10

⁴¹ pRPS, pages 10 and 11

⁴² pRPS, pages 14-42

⁴³ pRPS, pages 45-46

Mana Whenua⁴⁴

78 This chapter deals with the role of Mana Whenua in the region and in particular in the integrated management of natural and physical resources.

79 Te Mana o te Wai is the fundamental concept of the NPSFM⁴⁵.

80 It encompasses six principles, three of which specifically relate to the role of tangata whenua in the management of freshwater:

- “(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 obligation 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”⁴⁶*

81 Kāi Tahu are takata whenua of the Otago region⁴⁷.

82 The mana whenua chapter acknowledges the principles of Te Tiriti o Waitangi and sets out general considerations for the incorporation of Kāi Tahu values and interests into resource management planning, consenting, and implementation processes. These are integrated throughout the document, “... and this chapter serves to tie the strands together. It reflects the philosophy embraced by Kāi Tahu of holistic resource management, *ki uta ki tai* – often described as “from the mountains to the sea”⁴⁸.

83 The chapter describes Kāi Tahu values including:

83.1 Whakapapa: “*Whakapapa binds Kāi Tahu to the mountains, forests and waters and the life supported by them, and this is reflected in attitudes towards the natural world and resource management*”⁴⁹.

⁴⁴ pRPS, pages 47-63

⁴⁵ 1.3(1) and (2) NPSFM, page 5

⁴⁶ NPSFM, page 5

⁴⁷ pRPS, page 47

⁴⁸ pRPS, page 50

⁴⁹ pRPS, page 50

- 83.2 Ki uta ki tai: the concept used to describe holistic natural resource management, recognising all environmental elements are interconnected and must be managed as a whole⁵⁰.
- 83.3 Rakatirataka: the mana or authority to give effect to Kāi Tahu culture and traditions in the management of the natural world. *“Recognition of the relationship of Kāi Tahu and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taoka are embedded in the RMA 1991 and the Treaty of Waitangi.”*⁵¹
- 83.4 Kaitiakitaka: the exercise of guardianship over natural and physical resources which includes the ethic of stewardship; *“Kaitiakitaka is fundamental to the relationship between Kāi Tahu and the environment. The objectives of kaitiakitaka are to protect the mauri and life supporting capacity of the environment and to pass the environment on to future generations in an enhanced state.”*⁵²
- 83.5 Tikaka: *“... observing tikaka is part of the ethic and exercise of kaitiakitaka.”*⁵³
- 83.6 Taoka: *“All natural resources - air, land, water, and indigenous biological diversity - are taoka. Taoka are treasured resources that are highly valued by Kāi Tahu, derived from the atua (gods), and left by the tūpuna (ancestors) to provide and sustain life.”*⁵⁴
- 83.7 Makiha kai: *“... the customary gathering of food and natural materials and the places where those resources are gathered or produced.”*⁵⁵
- 84 The chapter identifies the resources of significance to Kāi Tahu.
- 84.1 Wai Māori, or water: *“all water is seen to have originated from the separation of Rakinui and Papatūānuku and their continuing tears for one another. Rain is Rakinui’s tears for his beloved*

⁵⁰ pRPS, page 51

⁵¹ pRPS, page 51

⁵² pRPS, page 51

⁵³ pRPS, pages 51 to 52

⁵⁴ pRPS, page 52

⁵⁵ pRPS, page 52

Papatūānuku and mist is regarded as Papatūānuku's tears for Rakinui. ... Water plays a significant role in Kāi Tahu spiritual beliefs and cultural traditions. Kāi Tahu have an obligation through whakapapa to protect wai and all the life it supports, as ko te wai te ora o kā mea katoa (water is the life giver of all things). The condition of water is seen as a reflection of the condition of the people. ... When the natural environment is strong and healthy, the people are strong and healthy and so too is their mana.”⁵⁶

84.2 Taoka species and habitats, which include freshwater species and habitat⁵⁷.

84.3 Wāhi tupuna, which include freshwater locations⁵⁸.

84.4 Air and atmosphere: *“In Kāi Tahu traditions, air and atmosphere emerged through the creation traditions and the movement from Te Kore through Te Pō to Te Ao Marama. Following the separation of Raki and Papatūānuku, one of their many children, Tāwhirimātea, fled with Raki into the sky. From there he controls the wind and weather. The air and atmosphere are integral parts of the environment that must be valued, used with respect, and passed on intact to the next generation.”⁵⁹*

84.5 Coastal environment: *“The coastal waters are a receiving environment for fresh water, gravels and sediment from the terrestrial landscape ... Recognising the interconnection of the land and sea environments is consistent with the ki uta ki tai philosophy.”⁶⁰*

Reference is made to the statutory acknowledgement areas in the Ngāi Tahu Claims Settlement Act 1998 over several water bodies⁶¹.

⁵⁶ pRPS, page 52

⁵⁷ pRPS, pages 52-53

⁵⁸ pRPS, page 53

⁵⁹ pRPS, page 53

⁶⁰ pRPS, page 53

⁶¹ pRPS, page 54; including Lakes Roxburgh, Catlins, Hāwea, Wanaka, Dunstan and Wakatipu and rivers such as Kakanui, Clutha River/Mata-Au, Pomahaka, Wataki and the Waihola/Waipori Wetland.

- 84.6 Tōpuni: there are a number of areas on public conservation land that have significant values to Kāi Tahu because of their cultural, spiritual, historic and traditional associations are recognised in the Ngāi Tahu Claims Settlement Act. *“Although the specific provisions in the NTCSA 1998 relate only to management of conservation land, the interests of Kāi Tahu should be recognised and provided for when considering activities in nearby areas that may impact on the values of tōpuni or waters flowing from them.”*⁶²
- 84.7 Nohoaka: entitlements to seasonal occupation and use by Kāi Tahu on specified areas of Crown-owned land near water bodies for harvest of natural resources⁶³. Sites along the eight Otago rivers and two sites adjacent to nine Otago freshwater bodies are identified.
- 84.8 Customary fisheries, both coastal and freshwater⁶⁴.
- 85 Against that background the chapter sets out objectives, policies and methods:
- 85.1 MW-O1 – 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 region⁶⁵.
- 85.2 MW-P1, MW-P2 and MW-P3 set out how local authorities must exercise their functions and powers in accordance with treaty principles, tikaka Māori and kaupapa Māori by involving Kāi Tahu in resource management, including the management of freshwater.
- 85.3 MW-P3 is to support Kāi Tahu well-being by managing the natural environment to protect customary uses, Kāi Tahu values and the relationship of Kāi Tahu to resources in areas of

⁶² pRPS, page 55

⁶³ pRPS, page 55

⁶⁴ pRPS, page 56

⁶⁵ pRPS, page 60

significance, and restoring these uses and values where they have been degraded by human activities⁶⁶.

86 The methods include collaboration with Kāi Tahu⁶⁷, working with Kāi Tahu⁶⁸, developing or maintaining resource management relationships with Kāi Tahu⁶⁹, and facilitating Kāi Tahu participation in resource management⁷⁰. Further, local authorities must amend regional and district plans to take iwi management plans and resource management issues of significance to Kāi Tahu into account, and incorporate active protection of various areas and resources identified in the Ngāi Tahu Claims Settlement Act⁷¹. These areas and resources include freshwater and resources supported by freshwater.

87 The chapter gives effect to key parts of the NPSFM⁷² and relates to freshwater.

Resource Management Issues Significance to Iwi Authorities

88 Unsurprisingly, freshwater is a prominent theme in this chapter:

88.1 RMIA-WAI-I1 *“The loss and degradation of water resources through drainage, abstraction, pollution, and damming has resulted in material and cultural deprivation for Kāi Tahu ki Otago”*⁷³.

88.2 RMIA-WAI-I2 *“Current water management does not adequately address Kāi Tahu cultural values and interests”*⁷⁴.

88.3 RMIA-WAI-I3 *“The effects of land and water use activities on freshwater habitats have resulted in adverse effects on the diversity and abundance of mahika kai resources and harvesting activity”*⁷⁵.

⁶⁶ pRPS, page 61

⁶⁷ MW-M1, pRPS, page 61

⁶⁸ MW-M2, pRPS, page 61

⁶⁹ MW-M3, pRPS, pages 61-62

⁷⁰ MW-M4, pRPS, page 62

⁷¹ MW-M5, pRPS, page 62

⁷² In particular Clause 1.3 Fundamental Concept – Te Mana o te Wai, Objective 2.1, policies 1, 2, 3 and implementation clauses 3.2, 3.4 and 3.5

⁷³ pRPS, page 86

⁷⁴ pRPS, page 86

⁷⁵ pRPS, page 87

- 88.4 RMIA–WAI–I4 “*Effective participation of Kāi Tahu in freshwater management is hampered by poor recognition of mātauraka*”⁷⁶.
- 88.5 RMIA–WAI–I5 “*Poor integration of water management, across agencies and across a catchment, hinders effective and holistic freshwater management*”⁷⁷.
- 88.6 RMIA–MKB–I1 “*The diversity and abundance of terrestrial and aquatic indigenous species has been reduced due to adverse effects of resource use and development*”⁷⁸.
- 88.7 RMIA–MKB–I2 “*Regulatory and physical barriers have impeded the ability of Kāi Tahu to access mahika kai and to undertake customary harvest*”⁷⁹. The accompanying text refers to obstacles to accessing mahika kai sites including a lack of physical access, pollution, and changes in flow, velocity and/or depth of water.
- 88.8 RMIA–MKB–I3 “*Impacts of climate change on both species/habitat viability and increasing pest (flora/fauna) encroachments*”⁸⁰.
- 88.9 RMIA–MKB–I4 “*Shortage of protected and secure areas for biodiversity*”⁸¹.
- 88.10 RMIA–WTU–I1 “*The values of wāhi tūpuna are poorly recognised in resource management in Otago*”⁸². In the accompanying text specific concerns include the effects of earthworks on water bodies.
- 88.11 RMIA–WTA–I1 “*Land use activities have resulted in disturbance and degradation of wāhi tapu and wāhi taoka sites and the cultural and spiritual values associated with these areas*”⁸³. Wastewater disposal is specifically identified as a concern in the accompanying text.

⁷⁶ pRPS, page 87

⁷⁷ pRPS, page 87

⁷⁸ pRPS, page 89

⁷⁹ pRPS, page 89

⁸⁰ pRPS, pages 89 to 90

⁸¹ pRPS, page 90

⁸² pRPS, pages 90-91

⁸³ pRPS, pages 91-92

88.12 RMIA-CE-I1 “*Mahika kai and coastal systems are adversely affected by lack of integrated management across the land-water interface*”⁸⁴.

88.13 RMIA-CE-I3 “*The ability for Kāi Tahu ki Otago to access and harvest kaimoana has been impeded by the effects of activities in the coastal and marine environment*”⁸⁵. The accompanying text refers to freshwater-saltwater interface.

89 This chapter plainly gives effect to the NPSFM and relates to freshwater⁸⁶.

Significant Resource Management Issues for the Region⁸⁷

90 A regional policy statement must state the resource management issues for the region⁸⁸.

91 The objectives, policies and methods in the RPS respond to those issues. For each issue there is a statement of the issue, description of the context and a summary of the environmental, economic and social impacts.

92 There are 11 regionally significant issues. The introduction to this chapter concludes:

*“While the issues in this section are considered individually, this RPS considers and responds to them in a joined-up manner as part of a complex system with biophysical limits, inherent uncertainty, potentially irreversible and sometimes catastrophic impacts, and interdependent behaviours.”*⁸⁹

93 All of the 11 issues involve freshwater to varying degrees:

93.1 SRMR-I1 – Natural hazards pose a risk to many Otago communities: heavy rainfall and flooding exacerbated by the effects of climate change are identified⁹⁰.

93.2 SRMR-I2 – Climate change is likely to impact the economy and environment: changes to precipitation, more extreme weather

⁸⁴ pRPS, page 93

⁸⁵ pRPS, page 94

⁸⁶ Clause 1.3 Te Mana o te Wai, Objective 2.1, Policies 1 and 2; Clause 3.2 and Clause 3.4 NPSFM

⁸⁷ pRPS, pages 64-85

⁸⁸ Sections 59 and 62(1)(a) of the RMA

⁸⁹ pRPS, page 65

⁹⁰ pRPS, pages 65-66

events, flooding, landslides and erosion, reduced snow and ice and changes in river flows are identified⁹¹.

- 93.3 SRMR-I3 – Pest species pose an ongoing threat to indigenous biodiversity, economic activities and landscapes: aquatic pests and weeds such as didymo, lake snow and lagarosiphon affecting lakes and rivers are identified “*Pest species destabilise aquatic habitats and negatively modify water flow with consequences for drainage, irrigation, power generation and recreational activities*”⁹².
- 93.4 SRMR-I4 – Poorly managed urban and residential growth affects productive land, treasured natural assets, infrastructure and community well-being. Demand for the supply of water, adverse effects on waterways and disposal of contaminants to water are described as potential adverse effects⁹³.
- 93.5 SRMR-I5 – Freshwater demand exceeds capacity in some places⁹⁴.
- 93.6 SRMR-I6 – Declining water quality has adverse effects on the environment, our communities, and the economy⁹⁵.
- 93.7 SRMR-I7 – Rich and varied biodiversity has been lost or degraded due to human activities and the presence of pests and predators. The environmental issues discussed include threats to nationally rare lake and river systems and losses of indigenous fish species and their habitats⁹⁶.
- 93.8 SRMR-I8 – Otago’s coast is rich natural, cultural and economic resource that is under threat from a range of terrestrial and marine activities. Poor water quality as the result of inland activities is considered to contribute to degrading of the marine environment. Rivers are conduits for contaminants conveyed to the coast⁹⁷.

⁹¹ pRPS, pages 67-69

⁹² pRPS, pages 69-71

⁹³ pRPS, pages 71-74

⁹⁴ pRPS, pages 74-75

⁹⁵ pRPS, pages 75-78

⁹⁶ pRPS, pages 78-80

⁹⁷ pRPS, pages 80-81

93.9 SRMR-I9 – Otago lakes are subject to pressures from tourism and population growth⁹⁸.

93.10 SRMR-I10 – Economic and domestic activities in Otago use natural resources but do not always properly account for the environmental stresses or the future impacts they cause. The discussion mentions sediment from development and forestry activities, water abstraction, and wastewater and stormwater discharges adversely affecting the natural environment, as well as economic activities leading to biodiversity loss, poor water quality, and the loss of wetlands⁹⁹.

93.11 SRMR-I11 – Cumulative impacts and resilience – the environmental costs of activities in Otago are adding up with tipping points potentially being reached. The discussion highlights the need to identify thresholds and set limits on the use of natural resources (which includes freshwater) to avoid permanent and potentially catastrophic changes occurring if a tipping point is reached¹⁰⁰.

94 The word “*freshwater*” appears 34 times. Water is mentioned 140 times.

95 These issues set the context for implementing the NPSFM in the Otago Region.

96 All of the regionally significant issues relate to freshwater.

Integrated Management

97 Integrated management is the core concept of the pRPS. This emphasis accords with ORC’s statutory obligations¹⁰¹.

98 The foreword or mihi states:

“We have placed the environment at the centre of all we do in our long-term vision:

“The management of natural and physical resources in Otago, by and for the people of Otago, including Kāi Tahu, and as expressed in all resource management plans and decision-making, achieves healthy, resilient, and safeguarded natural

⁹⁸ pRPS, pages 81-83

⁹⁹ pRPS, pages 83-84

¹⁰⁰ pRPS, pages 84-85

¹⁰¹ ss 30(1)(a) and 59 RMA

systems, and the ecosystem services they offer, and supports the well-being of present and future generations, mō tātou, ā, mō kā uri ā muri ake nei.”

This statement reflects that a healthy, flourishing environment is fundamental to our well-being. Integration is the central tenet, seeing the environment as a single connected system, ki uta ki tai, and weaving this in to the RPS fabric.

Our long-term vision takes its cue from the holistic perspective of Te Mana o te Wai in the National Policy Statement for Freshwater Management 2020. (Underlining added).

99 This principle is repeated under the heading “Purpose”. “*The Otago Regional Policy Statement (ORPS) provides a policy framework that aims to achieve long-term environmental sustainability by integrating the protection, restoration, enhancement and use of Otago’s natural and physical resources*”¹⁰² (underlining added).

100 “*Integrated Management*” forms a distinct, overarching chapter in the pRPS. The objectives in the chapter are:

“IM–O1 – Long term vision

The management of natural and physical resources in Otago, by and for the people of Otago, including Kāi Tahu, and as expressed in all resource management plans and decision making, achieves healthy, resilient, and safeguarded natural systems, and the ecosystem services they offer, and supports the well-being of present and future generations, mō tātou, ā, mō kā uri ā muri ake nei.

IM–O2 – Ki uta ki tai

Natural and physical resource management and decision making in Otago embraces ki uta ki tai, recognising that the environment is an interconnected system, which depends on its connections to flourish, and must be considered as an interdependent whole.

IM–O3 – Environmentally sustainable impact

Otago’s communities carry out their activities in a way that preserves environmental integrity, form, function, and resilience, so that the life-supporting capacities of air, water, soil, ecosystems, and indigenous biodiversity endure for future generations.

IM–O4 – Climate change

*Otago’s communities, including Kāi Tahu, understand what climate change means for their future, and climate change responses in the region, including adaptation and mitigation actions, are aligned with national level climate change responses and are recognised as integral to achieving the outcomes sought by this RPS.”*¹⁰³

¹⁰² pRPS, page 5

¹⁰³ pRPS, page 96

- 101 The first objective relates to freshwater. It is a “*natural and physical resource*”.
- 102 The second objective implements the NPSFM which mandates integrated management or *ki uta ki tai*¹⁰⁴.
- 103 The third objective is that activities are carried out in a way that ensures the life supporting capacity of water (among other resources).
- 104 The fourth objective is about climate change and relates to freshwater.
- 105 There is a series of policies to achieve these objectives.

“IM-P1 – Integrated approach

The objectives and policies in this RPS form an integrated package, in which:

- (1) all activities are carried out within the environmental constraints of this RPS,*
- (2) all provisions relevant to an issue or decision must be considered,*
- (3) if multiple provisions are relevant, they must be considered together and applied according to the terms in which they are expressed, and*
- (4) notwithstanding the above, all provisions must be interpreted and applied to achieve the integrated management objectives IM-O1 to IM-O4.”*

- 106 The policies include coordinating the management of interconnected natural and physical resources by recognising and providing for:
- 106.1 situations where the value and function of a natural and physical resource extends beyond the immediate, or directly adjacent, area of interest;
- 106.2 the effects of activities on a natural or physical resource as a whole when that resource is managed as sub-units; and
- 106.3 the impacts of management of one natural or physical resource on the values of another, or on the environment¹⁰⁵.

- 107 Other policies:

¹⁰⁴ Clauses 3.2(e) and 3.5

¹⁰⁵ IM-P5 – Managing environmental interconnections, page 97

- 107.1 Give first priority to securing the long-term life-supporting capacity and mauri of the natural environment¹⁰⁶;
- 107.2 Recognise and provide for Kāi Tahu’s relationship with natural resources¹⁰⁷;
- 107.3 Set a strategic approach to ecosystem health¹⁰⁸;
- 107.4 Manage environmental interconnectedness¹⁰⁹;
- 107.5 Deal with climate change (which has a substantial freshwater component)¹¹⁰;
- 107.6 Manage cumulative effects on natural and physical resources¹¹¹; and
- 107.7 Preserve opportunities for future generation by limiting the use of resources¹¹².
- 108 Methods in the Chapter include adopting a ki uta ki tai approach to resource management by establishing policy and implementation frameworks that treat Otago’s environments as an integrated system¹¹³.
- 109 The principal reasons for adopting these provisions are to “... *set out core facets of integration – the interconnections and interdependencies within the environment, involvement of mana whenua in resource management, the fundamental importance of environmental health to human well-being, and holistic assessment of human effects on the environment. They also address the effects of climate change as the key threat to environmental stability ... They set an expectation of integrated resource management that flows through to all other provisions of the RPS, and informs the limits and thresholds we set on human activities for protecting environmental health.*”¹¹⁴ (Underlining added).
- 110 The concept of ki uta ki tai is an important principle of the proposed RPS:

¹⁰⁶ pRPS, IM-P2, page 97

¹⁰⁷ pRPS, IM-P3, page 97

¹⁰⁸ pRPS, IM-P4, page 97

¹⁰⁹ pRPS, IM-P5, page 97

¹¹⁰ pRPS, IM-P8 to IM-12, pages 97-99

¹¹¹ pRPS, IM-P13, page 99

¹¹² pRPS, IM-P14, page 99

¹¹³ IM-M1(5) – Regional and district plans, page 100

¹¹⁴ IM-PR1 – Principal reasons, pages 101 and 102

“Ki uta ki kai is a philosophy that has become synonymous with the way Kāi Tahu think about natural resource management. Ki uta ki tai is the concept used to describe holistic natural resource management, recognising all environmental elements are interconnected and must be managed as a whole. It is a way of understanding the natural environment, including how it functions, how people relate to it and how it can be looked after appropriately.”¹¹⁵ (Underlining added).

111 The chapter uses and applies the language, concepts and directions of the NPSFM.¹¹⁶

112 The Integrated Management chapter both gives effect to the NPSFM and relates to freshwater.

Air

113 “Water means water in all its physical forms”¹¹⁷. This definition encompasses water vapour. Water as a gas is a natural and physical resource¹¹⁸. As steam, water vapour has a range of uses, including as a source of energy. Water vapour is a contaminant, when discharged to air¹¹⁹. The discharge of contaminants to air is regulated by the RMA¹²⁰.

114 The Air chapter of the pRPS contains objectives, policies and methods to protect human health, amenity and mana whenua values from the adverse effects of discharges to air.

115 Both objectives reference the life-supporting capacity of ecosystems¹²¹. Water, like air, is an integral part of every ecosystem.

116 Offensive, objectionable, noxious and dangerous effects must be avoided¹²².

117 The pRPS directs discharges to air that adversely affect mana whenua values must be avoided¹²³.

¹¹⁵ Page 51

¹¹⁶ E.g., Te Mana o te Wai, Ki uta ki tai, the role of Kai Tahu, integrated management

¹¹⁷ Section 2 RMA

¹¹⁸ Section 2 RMA

¹¹⁹ Section 2 RMA

¹²⁰ Section 15 RMA

¹²¹ pRPS, page 103

¹²² AIR-02, page 103; AIR-P3 and AIR-P4, page 104; AIR-M2, page 104-105 and AIR-AER-4, page 107

¹²³ AIR-P6, page 104

- 118 Discharges to air can have adverse effects on receiving environments, including freshwater (for example, spray drift). The pRPS stipulates for controls to manage these effects¹²⁴.
- 119 Discharges to air arise from the use of land. The NPSFM directs that the effects of the use and development of land on freshwater must be addressed in ORC’s Regional Policy Statement.¹²⁵
- 120 Provisions in this chapter contribute to implementing the NPSFM and relate to freshwater.

Coastal Environment

- 121 At first sight, freshwater would not appear to relate to the coastal environment. That is incorrect.
- 122 The statutory term “*water body*” applies to freshwater in a river, lake, stream, pond, wetland, or aquifer or any part thereof not located within the coastal marine area¹²⁶.
- 123 The coastal environment extends landward of the coastal marine area and includes freshwater bodies (rivers, lakes, wetlands, aquifers and springs)¹²⁷.
- 124 The pRPS describes how coastal waters are a receiving environment for freshwater, gravels, sediment and other contaminants from terrestrial activities transported by rivers to other waterways¹²⁸. Stormwater¹²⁹ from urban environments can also have a detrimental impact on marine environments because of the contaminants it entrains¹³⁰. Many indigenous fish species migrate from coastal waters to freshwater systems¹³¹. Managing the interconnections of land and marine environments is consistent with the concept of *ki uta ki tai*.

¹²⁴ AIR-P5, page 104 and AIR-M2(1), page 104

¹²⁵ NPSFM Clause 3.5(2)

¹²⁶ Section 2 RMA

¹²⁷ New Zealand Coastal Policy Statement, Policy 1; pRPS CE-P2, CE-P4 and CE-PR1

¹²⁸ pRPS pages 53, 79, 81, 83 and 119; the proposed RPS records the adverse effects on kelp forests in the marine environment of sediment transported by rivers and other waterways

¹²⁹ National Planning Standards 2019: “*Stormwater*” means run-off that has been intercepted, channeled, diverted, intensified or accelerated by human modification of a land surface, or run-off from the surface of any structure, as a result of precipitation and includes any contaminants contained within at page 64; pRPS, page 37

¹³⁰ Pages 77, 81 and 94

¹³¹ Pages 93 to 94

- 125 Management of the coastal environment includes the management of freshwater in the coastal environment. Because of the interface of coastal waters and freshwater, management of the coastal environment is necessary to give effect to the NPSFM, in particular to ki uta ki tai. .
- 126 Connections between the coastal environment and freshwater are recognised and provided for in the pRPS to achieve integrated management.
- 127 Links between the Coastal Environment Chapter and the Land and Freshwater Chapter are noted in the explanation¹³².
- 128 The Chapter both gives effect to the NPSFM and relates to freshwater.

Land and Freshwater

- 129 The Land and Freshwater chapter comprises of four sections:
- 129.1 LF-WAI – Te Mana o te Wai;
 - 129.2 LF-VM – Visions and management;
 - 129.3 LF-FW – Freshwater; and
 - 129.4 LF-LS – Land and soil.

LF-WAI – Te Mana o te Wai¹³³

- 130 This section unequivocally gives effect to the NPSFM and also relates to freshwater¹³⁴.

LF-VM – Visions and management¹³⁵

- 131 This section contains the long-term visions for Otago Freshwater Management Units. Clause 3.3 of the NPSFM requires ORC to include the visions in its regional policy statement.
- 132 These provisions plainly implement the NPSFM.

LF-FW – Freshwater¹³⁶

¹³² pRPS, page 118
¹³³ pRPS, pages 121-124; Clause 1.3, Objective 2.1 and Policy 1 of the NPSFM
¹³⁴ LF-WAI-PR1, pRPS, pages 123 and 124
¹³⁵ pRPS, pages 124-128
¹³⁶ pRPS, pages 129-136

133 This section contains objectives, policies and methods for the management of freshwater. It gives effect to the NPSFM and otherwise relates to freshwater¹³⁷.

LF-LS – Land and soil¹³⁸

134 This section of the Land and Freshwater chapter seeks to “maintain the health of Otago’s soils” but also to “manage land uses as part of an integrated approach to sustaining soil and water health. The connections and interactions between these resources require a holistic approach to management”¹³⁹.

135 An integrated approach to effects of land use on freshwater is a requirement of the NPSFM¹⁴⁰.

136 The provisions in this section plainly give effect to the NPSFM and relate to freshwater.

Ecosystems and Indigenous Biodiversity¹⁴¹

137 This Chapter is expressed in general terms, covering freshwater and terrestrial environments.

138 The word “*ecosystem*” is not defined in either the RMA nor the proposed RPS.

139 “*Ecosystem*” is generally understood as being an interacting system of living and non-living parts, with the latter including elements such as sunlight, air, water, minerals and nutrients. Water comprises a life-supporting element of all ecosystems. There are also distinct freshwater ecosystems.

140 Indigenous biological diversity embraces native fish species including eel, galaxiids¹⁴² and migratory fish. Migratory species such as eel and inanga have lifecycles which include time in both fresh and coastal water¹⁴³.

¹³⁷ pRPS, pages 135-136

¹³⁸ pRPS, pages 137-141

¹³⁹ LF-LS-E4, pRPS, page 140

¹⁴⁰ Clause 3.5 Integrated Management

¹⁴¹ Pages 142 to 150

¹⁴² Page 79

¹⁴³ pRPS, RMIA-CE-I1, page 93

- 141 The Chapter therefore clearly covers freshwater habitats, freshwater species and freshwater ecosystems.
- 142 ECO-P2¹⁴⁴ directs the identification of significant natural areas (“SNAs”) applying the criteria in Appendix 2¹⁴⁵. These criteria include freshwater environments and species.
- 143 Priority areas for identification of SNAs include braided rivers¹⁴⁶.
- 144 The Chapter contains provisions for taoka and mahika kai species¹⁴⁷. Taoka and mahika kai species include freshwater fauna¹⁴⁸.
- 145 The methods state the respective responsibilities of local authorities including for the management of wetlands, lakes and rivers¹⁴⁹.
- 146 This chapter gives effect to the NPSFM in particular to:
- 146.1 Objective 2.1(a) the first priority: “*the health and wellbeing of water bodies and freshwater ecosystems*”;
- 146.2 Policy 5 Freshwater is managed to ensure the health and well-being of degraded water bodies is improved and the health and well-being of all other water bodies and ecosystems is at least maintained (through the National Objectives Framework whose compulsory values include ecosystem health¹⁵⁰ and threatened species¹⁵¹);
- 146.3 Policy 6 No further loss of natural inland wetlands;
- 146.4 Policy 8 The significant values of outstanding wetlands are protected;
- 146.5 Policy 9 The habitats of indigenous freshwater species are protected; and
- 146.6 Policy 13 Monitoring of freshwater bodies and ecosystems.

¹⁴⁴ Page 142

¹⁴⁵ Pages 203 to 204

¹⁴⁶ ECO-M2(5)(c), page 146

¹⁴⁷ ECO-P1, ECO-P2, ECO-P3, ECO-P4, ECO-P8, pages 142 to 144 and ECO-M3, page 146

¹⁴⁸ Pages 78 and 86 to 90

¹⁴⁹ ECO-M1, ECO-M2, ECO-M4 pages 145 to 147

¹⁵⁰ Ecosystem health has five biophysical elements: water quality, water quantity, habitat, aquatic life and ecological processes: NPSFM, Appendix 1A, page 36

¹⁵¹ op cit

147 The Chapter plainly gives effect to the NPSFM and relates to freshwater.

Energy¹⁵².

148 Energy is dealt together with infrastructure and transport. This topic is a separate sub-chapter.

149 The focus is on renewable electricity generation¹⁵³.

150 “*Renewable electricity generation*” includes generation of electricity from hydroelectric sources¹⁵⁴.

151 At present, in Otago, there are significant hydroelectric generation facilities¹⁵⁵.

152 The pRPS has provisions for the management of existing hydro facilities and a framework for future hydroelectric development.

153 “*The provisions in this chapter assist in giving effect to the NPSREG¹⁵⁶ and NPSFM and implementing section 7(j) of the RMA 1991*”¹⁵⁷.

154 The chapter clearly gives effect to the NPSFM and relates to freshwater.

Infrastructure¹⁵⁸

155 “*Infrastructure*” includes infrastructure that directly relates to freshwater: “(e) a water distribution system, including a system for irrigation: (f) a drainage or sewerage system”. It also includes facilities for the generation of electricity¹⁵⁹.

156 Infrastructure also comprehends pipelines, structures, and other things which may impact upon freshwater and freshwater environments¹⁶⁰.

157 This chapter includes provisions to provide for and manage infrastructure. Management includes protections for freshwater¹⁶¹.

¹⁵² Chapter EIT – Energy, infrastructure and transport, pages 151-164 as required by the National Planning Standards

¹⁵³ Pages 151-155

¹⁵⁴ Page 33

¹⁵⁵ Page 6

¹⁵⁶ National Policy Statement for Renewable Electricity Generation

¹⁵⁷ Page 155

¹⁵⁸ Pages 156-160

¹⁵⁹ Section 2 RMA

¹⁶⁰ Pages 25-26

¹⁶¹ pRPS, EIT-INF-04, EIT-INF-05, page 156 and EIT-INF-P11, EIT-INF-P13, EIT-INF-P14, EIT-INF-P16, pages 156-158

- 158 The policy directions in the pRPS include avoiding the location of infrastructure in significant natural areas (which may be freshwater environments), outstanding natural features and landscapes (which may be or include freshwater), natural wetlands, outstanding freshwater bodies (a NPSFM category), areas of high or outstanding natural character, areas or places of significant or outstanding historic heritage, wāhi tapu, wāhi taoka, and areas with protected customary rights and areas of high recreational and amenity value¹⁶².
- 159 If these locations cannot be avoided then, the effects of nationally or regionally significant infrastructure are to be managed in the case of indigenous biodiversity in accordance with ECO-P4 in the Ecosystems and Indigenous Biodiversity chapter, for natural wetlands in accordance with the National Environmental Standards for Freshwater; in the case of outstanding water bodies in accordance with LF-P12 in the Land and freshwater chapter and in other areas, by, minimising the adverse effects on the values that contribute to the areas importance.
- 160 For all other infrastructure the direction is to avoid adverse effects on the values that contribute to an area's outstanding nature or its significance.
- 161 Nationally significant infrastructure includes state highways, the National Grid, renewable electricity generation facilities connected to the Grid, the New Zealand rail network, and airports used for regular transport services by planes capable of carrying more than 30 passengers¹⁶³.
- 162 Regionally significant infrastructure includes roads of regional importance, electricity sub-transmission infrastructure, renewable electricity generation facilities that connect with the local distribution network, telecommunications and radio communication facilities, specified infrastructure, navigation facilities, community drinking water abstraction, supply, treatment and distribution infrastructure, community stormwater infrastructure, wastewater, sewage collection, treatment and disposal infrastructure and Regional Council hazard mitigation works including flood protection infrastructure and drainage schemes.

¹⁶² pRPS, EIT-INF-P13, pages 156-157

¹⁶³ Pages 28-29

- 163 The chapter also provides for “*development infrastructure*” and additional infrastructure to service existing, planned and expected urban growth, linking it to the Urban Form and Development chapter.
- 164 “*Development infrastructure*” is network infrastructure for water supply, wastewater and stormwater and land transport. Water supplies are sourced from water bodies. Discharges of wastewater and stormwater from reticulated systems have the potential (at least) to impact freshwater.
- 165 Methods include requirements for the management of activities in the beds of lakes and rivers, the taking, use, damming and diversion of water and the discharge of water or contaminants, and activities on the surface of rivers and lakes.
- 166 The principal reasons record “*the policies in this chapter give effect to the NPSREG, NPSET¹⁶⁴, NPSFM and NPSUD¹⁶⁵ ...*”¹⁶⁶.
- 167 The chapter clearly gives effect to the NPSFM and relates to freshwater.

Transport¹⁶⁷

- 168 The first objective is an integrated air, land and sea transport network that is effective, efficient and safe, connects communities and activities and is resilient to natural hazards¹⁶⁸.
- 169 In the Otago context freshwater hazards threaten the resilience of the transport systems¹⁶⁹.
- 170 This chapter also deals with public transport¹⁷⁰. “*Public transport*” means a service for the carriage of passengers by vehicle, rail, or a ferry¹⁷¹.
- 171 Ferry services operate on the surfaces of lakes and rivers. Land transport interacts with freshwater with bridges, culverts, drains and other infrastructure. These activities trigger the application of the infrastructure provisions in the RPS which implement the NPSFM. They plainly relate to freshwater.

¹⁶⁴ National Policy Statement for Electricity Transmission

¹⁶⁵ National Policy Statement on Urban Development

¹⁶⁶ Page 160

¹⁶⁷ Pages 161-164

¹⁶⁸ EIT-TRAN-07, page 161

¹⁶⁹ pRPS, pages 65 and 170-171

¹⁷⁰ EIT-TRAN-P20, pages 161 to 162

¹⁷¹ Page 32; see also methods EIT-TRAN-M7(1), page 162 and EIT-TRAN-M8(4), page 163

Hazards¹⁷²

- 172 Natural hazard “*means any atmospheric or earth or water related occurrence (including ... erosion, ... landslip, subsidence, sedimentation, ... drought, ... flooding) the action of which adversely affects or may adversely affect human life, property, or other aspects of the environment*”.¹⁷³
- 173 In Otago flooding is the most frequently occurring natural hazard event¹⁷⁴.
- 174 This hazard may be exacerbated by the greater frequency and intensity of extreme weather events induced by climate change¹⁷⁵. Extreme rain events can result in landslides, subsidence and erosion, and the consequential release and deposition of sediment.
- 175 Earthquakes can trigger tsunamis in lakes and debris flows.
- 176 The chapter plainly relates to freshwater hazards and their effects¹⁷⁶.

Contaminated Land¹⁷⁷

- 177 The objective in this chapter is to manage “*Contaminated land and waste materials to protect human health, mana whenua values and the environment in Otago*”¹⁷⁸. The “*environment*” is a broad all-encompassing term which includes freshwater.
- 178 There are policies and methods to manage the effects of contaminated land on water quality and on the beds of water bodies¹⁷⁹.
- 179 Waste facilities and services are to minimise the potential for adverse effects on the environment (including freshwater)¹⁸⁰.
- 180 This chapter plainly relates to freshwater. Equally, it implements the obligations in the NPSFM to manage land use in a way which deals with the potential effects on freshwater.¹⁸¹

¹⁷² Pages 165-171

¹⁷³ Page 29

¹⁷⁴ Page 65

¹⁷⁵ Page 65

¹⁷⁶ Note the definition of hard protection structure on page 24 which includes dams, weirs, stopbanks, groynes, reservoirs and retaining walls

¹⁷⁷ Pages 172-174

¹⁷⁸ HAZ-CL-O3, page 172

¹⁷⁹ HAZ-CCP14 and P15, page 172 and HAZ-CL-M6, page 173

¹⁸⁰ HAZ-CL-P18m, pages 172 and 173

¹⁸¹ Clause 3.5 NPSFM in particular

Historical and Cultural Values¹⁸²

181 The purpose of this chapter is to identify and protect Kāi Tahu cultural landscapes¹⁸³ by identifying and protecting wāhi tūpuna¹⁸⁴.

182 Wāhi tūpuna means “*landscapes and places that embody the relationship of manawhenua and their culture and traditions with their ancestral lands, water, sites. wāhi tapu and other taoka*”¹⁸⁵.

183 APP7 is a guide to identifying wāhi tūpuna¹⁸⁶ and, includes:

183.1 Nohoaka, seasonal settlements distributed long the main river systems from the source lakes to the sea;

183.2 Repo raupo, wetlands or swamps providing valued habitat for taoka species and mahika kai resources; and

183.3 Wai Māori, freshwater areas important to Māori, including wai puna (springs), roto (lakes) and awa (rivers)¹⁸⁷.

184 This chapter clearly relates to freshwater.

Historic Heritage¹⁸⁸

185 The sole objective in this chapter is that “*Otago’s unique historic heritage contributes to the region’s character, sense of identity, and social, cultural, and economic well-being is preserved for future generations*”¹⁸⁹.

186 Otago’s historic heritage embraces:

186.1 Māori culture and historic heritage values (which overlaps in part with wāhi tūpuna);

186.2 Archaeological sites (again an overlap with Kāi Tahu sites and values);

186.3 Roads, bridges and routes;

¹⁸² Pages 175-177

¹⁸³ HCV-WT-O1, page 175

¹⁸⁴ HCV-WT-P1, HCV-WT-P2, HCV-WT-M1, HCV-WT-M2, HCV-WT-M3, pages 175-176

¹⁸⁵ Page 40; compare section 6(e) RMA

¹⁸⁶ HCV-WT-M1(2), page 176

¹⁸⁷ Pages 212-213

¹⁸⁸ Pages 178-181

¹⁸⁹ HCV-HH-O3, page 178

186.4 Gold and other mining systems and settlements which often took place in freshwater environments or used freshwater¹⁹⁰; and

186.5 Dredges and ship wrecks.

187 The Regional Council through its regional plans is to manage historic heritage in the beds of lakes, rivers and wetlands¹⁹¹.

188 This chapter clearly relates to freshwater.

Natural features and landscapes¹⁹²

189 The objective in this chapter is to identify the areas and values of Otago's outstanding and highly valued natural features and landscapes and protect outstanding natural features and landscapes and maintain and enhance highly valued natural features and landscapes.

190 To this end, policies and methods require the identification of such landscapes and features. The criteria in Appendix 9 are to be applied¹⁹³.

191 In Appendix 9,¹⁹⁴ the physical attributes listed include the presence of water such as in lakes, rivers and streams; the sensory attributes include the legibility or expressiveness of the landscape or feature, "*how obviously the feature, landscape or seascape demonstrates its formative processes*" such as through the action of ice or water¹⁹⁵.

192 The methods implementing the policy framework require the regional council to control the use and development of waterbodies, the beds of lakes, rivers and wetlands.¹⁹⁶

193 The proposed RPS states in the principal reasons "*Natural features include resources that are the result of natural processes, particularly those reflecting a particular geology, topography, geomorphology, hydrology, ecology, or other physical attribute that creates a natural feature or combination of natural features. Landscapes include the natural and physical attributes of land together with air and water, which*

¹⁹⁰ Weirs, dams, water takes, dredges, water races were the product of water use –sluccings and takings for example

¹⁹¹ HCV-HH-M4(1) and (2), page 179

¹⁹² Pages 182-185

¹⁹³ NFL-P1, page 182

¹⁹⁴ Page 216

¹⁹⁵ Water is defined to include water in all its physical forms, section 2 RMA

¹⁹⁶ NFL-M2, page 183

*change over time and which is made known by people's evolving perceptions and associations. Natural features and landscapes also have significant cultural value to Kāi Tahu. There are many sites of significance across Otago, reflecting the relationship of Kāi Tahu with the land, water and sea.*¹⁹⁷.

194 This chapter plainly relates to freshwater.

Urban form and development¹⁹⁸

195 While this chapter facilitates urban and rural growth and development, it also sets out to maintain or enhance the significant values and features identified in the RPS and the character and resources of each urban area¹⁹⁹. These matters plainly relate to freshwater and values associated with freshwater.

196 Accordingly, the pRPS directs activities must, among other things:

196.1 Respect, wherever possible, and enhance the area's history, setting and the natural and built environment;

196.2 Improve connectivity within urban areas, particularly by active transport and public transport;

196.3 Manage the exposure to risk from natural hazards;

196.4 Result in sustainable and efficient use of water; and

196.5 Be guided by the input and involvement of mana whenua²⁰⁰.

197 Strategic planning is to be undertaken in advance of significant development, expansion, or redevelopment of urban areas to ensure, among other things, development is located, designed and delivered in a way and at a rate that recognises and provides for regionally significant features and values identified by the RPS, (which includes freshwater) facilitates the involvement of mana whenua and provides for their values and aspirations²⁰¹.

¹⁹⁷ NFL-PR1, pages 184-185

¹⁹⁸ Pages 186-197

¹⁹⁹ UFD-O1, page 186

²⁰⁰ UFD-O2, page 186

²⁰¹ UFD-O3, UDF-P1(8), P(3)(5) and (6), P4-(4) and (5), P7(1) and P8(6), pages 186-191; see also NPSFM Clause 3.5(1)(d) and 3.5(2)(a) and (b)

- 198 Land use, particularly urban growth and development is primarily regulated by district plans. All local authorities are directed by the NPSFM to manage the effects of land use on freshwater and in the case of territorial authorities, the effects of urban development on freshwater.²⁰² Regional councils must include provisions in their regional policy statements for integrated management of the effects of the use and development of land and freshwater on receiving environments.²⁰³
- 199 The impacts of climate change must be accommodated²⁰⁴.
- 200 Provisions in the chapter deal with water supply and consumption, wastewater reticulation and disposal and stormwater management²⁰⁵.
- 201 A key element in the chapter is the provision of “*development infrastructure*” which includes network infrastructure for the “*three waters*” and land transport²⁰⁶ (which includes ferries or barges on rivers and lakes).
- 202 Development in rural areas is constrained to avoid impacts on significant values and features identified in the RPS (which includes freshwater) and to maintain or enhance the natural or physical resources that support productive capacity and rural character²⁰⁷.
- 203 The explanations links the Chapter to the Land and Freshwater Chapter²⁰⁸, as is necessary to implement the NPSFM.
- 204 This chapter implements the NPSFM provisions for integrated management, including the coordinated sequencing of regional and urban growth. It also relates to freshwater in other ways.

PART H – OTHER PARTIES

Royal Forest and Bird Protection Society of New Zealand Incorporated (“F&B’s”) Position

²⁰² NPSFM Clause 3.5(1), (3) and (4)

²⁰³ NPSFM Clause 3.5(2)

²⁰⁴ UFD-O5, page 187

²⁰⁵ UFD-M2, pages 192-193; see also the UFD-E1 – Explanation, pages 193-194 and principal reasons, pages 195-196

²⁰⁶ pRPS, page 20

²⁰⁷ UFD-O4, page 187

²⁰⁸ pRPS, page 194

- 205 F&B disagrees that the PORPS is a freshwater planning instrument in its entirety²⁰⁹.
- 206 It pleads that ORC's notification report was in error because it failed to comply with section 80A(3) in that it did not identify which parts of the PORPS were related to freshwater²¹⁰.
- 207 This is incorrect.
- 208 The report considered whether any part of the pRPS did not relate to freshwater²¹¹.
- 209 It concluded "*There are no aspects of the provisions within the PORPS 2021 that do not have some connection to freshwater*".
- 210 In any event, this proceeding is not about the decision-making process, but whether the product of that process, the pRPS is in law a freshwater planning instrument, in whole – or only in part.

Port Otago Limited ("POL's") Position

Mistake / Illegality

- 211 Port Otago Limited ("POL") claims that ORC failed to comply with the obligations under clause 5(2A) of Part 1, Schedule 1 of the RMA²¹².
- 212 This is not correct.
- 213 In accordance with clause 5(2A)(a), the public notice published on 26 June 2021 stated:
- "The Otago Regional Council is satisfied that the whole PORPS 2021 is a freshwater planning instrument and will therefore be subjected to the freshwater planning process set out in Section 80A of the Resource Management Act 1991"*
- 214 ORC did not need to state which parts will undergo the process in Part 1 of Schedule 1 (and the reasons why)²¹³, because it considered the whole

²⁰⁹ Amended Statement of Defence dated 5 November 2021 at paragraphs 13, 14, 16 and 17

²¹⁰ Amended Statement of Defence dated 5 November 2021 at paragraph 15

²¹¹ ORC Recommending Report dated 16 June 2021 at paragraphs [24] and [35] to [40]

²¹² POL's Statement of Defence dated 26 October 2021 at paragraphs 4 and 12(e)

²¹³ Section 5(2A)(b) of Part 1, Schedule 1 of the RMA

instrument was subject to the freshwater planning process; clause 5(2A)(b)(ii) was not applicable.

215 ORC was not mistaken nor was its decision wrong in law as alleged by POL.

216 The issue in these proceedings is whether the pRPS is a freshwater planning instrument.

217 The proceedings do not relate to the Plaintiff's decision-making process.

CE Coastal Environment Chapter not capable of relating to Freshwater

218 POL claims that the CE Coastal Environment Chapter in the PORPS is not capable of relating to freshwater and accordingly, cannot be included in a freshwater planning instrument²¹⁴.

219 This assertion is incorrect for the reasons already given²¹⁵.

220 While the definition of "freshwater" in the RMA excludes "coastal water"²¹⁶, it is not correct that "freshwater" cannot relate to "coastal water". They are connected.

221 The 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 area²¹⁷)"*²¹⁸.

222 Coastal waters are a receiving environment for freshwater and for the contaminants carried by freshwater.

223 The NPSFM 2020 directs every regional council must:

²¹⁴ POL's Statement of Defence dated 26 October 2021 at paragraphs 5-8, and 12(a)

²¹⁵ Especially paragraphs 121 and 128 of these submissions

²¹⁶ Section 2 RMA

²¹⁷ As defined in section 2 RMA: "*coastal marine area means the foreshore, seabed, and coastal water, and the air space above the water—*

(a) of which the seaward boundary is the outer limits of the territorial sea:

(b) of which the landward boundary is the line of mean high water springs, except that where that line crosses a river, the landward boundary at that point shall be whichever is the lesser of—

(i) 1 kilometre upstream from the mouth of the river; or

(ii) the point upstream that is calculated by multiplying the width of the river mouth by 5"

²¹⁸ NPSFM at 1.5

- 223.1 adopt an integrated management approach, ki uta ki tai²¹⁹, and
- 223.2 recognise the interconnectedness of the whole environment;²²⁰
and
- 223.3 recognise the interactions between freshwater and receiving environments²²¹ (such as the coastal environment).
- 224 The Coastal Environment chapter manages freshwater in the coastal environment and the effects of freshwater discharged to the coastal environment. The connectivity between river systems and the coast which is essential for migratory indigenous fish species is emphasised throughout the pRPS²²².
- 225 This chapter both implements the NPSFM and relates to freshwater.

Oceana Gold Limited (“OGL’s”) Position

- 226 OGL contends that only the Land and Freshwater Chapter, is “*unquestionably*” related to freshwater, and should go through the freshwater planning process²²³. It acknowledges that there are other provisions that relate to freshwater “*but are focused on outcomes which are broader than just freshwater*”²²⁴.
- 227 This contention is not consistent with the definition of a freshwater planning instrument in s80A, nor an integrated approach to the management of natural and physical resources.
- 228 A freshwater planning instrument includes a document that gives effect to a NPSFM. The relevant NPSFM is not limited to freshwater management. It embraces the wider environment, especially activities which impact on freshwater. OGL’s narrow approach does not give effect to the NPSFM.
- 229 To attach a gloss such as “*unquestionably*” to the words “*relates to*” freshwater is to insert words which Parliament did not use.

²¹⁹ NPSFM at 3.2(2)(e)

²²⁰ Ibid at 3.5(1)(a)

²²¹ Ibid at 3.5(1)(b)

²²² pRPS, pages 88, 93, 108, 111 124 to 126 and 145

²²³ Affidavit of Claire Elizabeth Hunter dated 18 October 2021, page 16 at paragraph [30]

²²⁴ Ibid at page 16, paragraph [27]

230 The words “*relates to freshwater*” embrace provisions that relate to freshwater “*but are focused on outcomes broader than just freshwater*”. That outcome is not surprising. Freshwater underpins life. To promote “*sustainable management*”, and to, as the RMA and the NPSFM directs, achieve integrated management of natural and physical resources, it is necessary to make, at every step decisions which relate to freshwater. OGL’s approach is at odds with ss 5 and 59²²⁵ as well as s 80A RMA.

Affidavit Evidence

231 This evidence contains a lot of material which is irrelevant to whether the pRPS is a freshwater planning instrument.

231.1 The reasons for the development of a new regional policy statement²²⁶;

231.2 The nature and extent of consultation undertaken by ORC before notification of the pRPS²²⁷;

231.3 The procedural consequences, including the nature and extent of appeal rights, of the pRPS being a freshwater planning instrument²²⁸ are not material to the construction of s 80A nor its application to the pRPS. Neither the meaning nor the application of s 80A can depend on the procedural consequences of the correct classification of a planning instrument;

231.4 The matters raised in submissions on the pRPS²²⁹; whether a planning document is a freshwater planning instrument is determined before notification and before submissions are received.

231.5 The merits of matters raised in submissions²³⁰.

²²⁶ Affidavit of Anna Johnson, paragraph 7

²²⁷ Affidavit of Anna Johnson, paragraphs 9 and 24

²²⁸ Affidavit of Anna Johnson, paragraphs 10-16, 28, 31, 33-35 and Affidavit of Ann Rodgers, paragraphs 48, 50; Affidavit of Alyson Hutton, paragraphs 25, 45-46 and 48

²²⁹ Affidavit of Anna Johnson, paragraphs 17-27; Affidavit of Ann Rodgers, paragraphs 12-46; Affidavit of Alyson Hutton, paragraphs 39-45; Affidavit of Victoria van der Spek, paragraphs 23-58

²³⁰ Affidavit of Claire Hunter, paragraphs 41 to 42 and Exhibit 2

231.6 The composition and expertise of the freshwater hearings panels²³¹; the Chief Freshwater Commissioner must appoint members who collectively have knowledge and expertise in relation to not only freshwater quality, quantity and ecology, but also subject areas likely to be relevant to the work of the panel²³².

231.7 The absence of any justification for classifying the pRPS as a freshwater planning instrument in the public notice or in the section 32 report²³³; the public notice must only give reasons if part of a proposed policy statement is to undergo the freshwater planning process²³⁴; section 32 was not amended by the Resource Management Amendment Act 2020 and contains no obligation for a regional council to justify all or part of a pRPS as a freshwater planning instrument.

231.8 Citation of “*MfE technical guidance*”²³⁵; this “*technical guidance*” has no legal standing in determining the interpretation of a statutory provision. Each document has an express disclaimer that it has no legal status²³⁶

232 To the extent that it is actually on point, the affidavit evidence is simply “legal submission”. It is neither material nor substantially helpful.

PART I - CONCLUSION

233 “*Water*”, of which freshwater is a subset, appears 431 times in the pRPS: 197 times in the Introduction, Definitions, Significant resource management issues for the region (SRMR) and Resource management issues of significant to iwi authorities (RMIA) sections; the balance is in the Integrated Management, Coastal Environment, Land and Freshwater, Ecosystems and Indigenous Biodiversity, Energy, Infrastructure and Transport, Hazards and Risks, Natural Features and Landscapes, Urban Form and Development chapters, as well as in appendices which relate to criteria for

²³¹ Affidavit of Anna Johnson, paragraphs 35-36, Affidavit of Ann Rodgers, paragraphs 48-49, Affidavit of Alyson Hutton, paragraphs 24-25 and 46; Affidavit of Victoria van der Speak, paragraphs 64-65

²³² Clause 59(6)(g) of the First Schedule RMA

²³³ Affidavit of Alyson Hutton, paragraph 38

²³⁴ Clause 5(2A) of the First Schedule RMA

²³⁵ Affidavit of Alyson Hutton, paragraph 37

²³⁶ Ministry for the Environment – *A new Freshwater Planning Process: Technical Guidance for Councils*, September 2020, pages 2 and 7 and Ministry for the Environment – *Freshwater Planning Process Fact Sheet*, June 2020, page 7

identifying outstanding water bodies (APP1) significance criteria for indigenous biodiversity (APP2), criteria for biodiversity compensation (APP4), criteria for identifying wāhi tūpuna (APP7) and criteria for identifying outstanding and highly valued natural features, landscapes and seascapes (APP9). In addition, there are words and phrases (for example “*natural and physical resources*”, “*environment*”, “*ecosystem*”) deployed throughout the pRPS which comprehend freshwater. This is purely indicative. The chapters on Air and Historical and Cultural Values also relate to freshwater.

- 234 The definition of a freshwater planning instrument in section 80A of the Act is broad. It includes a proposed regional policy statement for the purpose of giving effect to any national policy statement for freshwater management or that relates to freshwater.
- 235 The pRPS must give effect to the NPSFM. It does.
- 236 Examination of the pRPS shows that it is permeated throughout by provisions on freshwater. Often the provisions are to implement the NPSFM. In other cases, they go beyond or complement the NPSFM but plainly relate to freshwater.
- 237 The pRPS is clearly a freshwater planning instrument as defined in s 80A(2) of the RMA. It is a package of interlocking provisions that both give effect to the NPSFM and relate to water.
- 238 Section 80A(3) RMA mandates that the freshwater planning process be followed.
- 239 The only exception is “*if the Council is satisfied that only part of the instrument relates to freshwater*”.
- 240 In the present case, the council was not satisfied that only part of the instrument relates to freshwater and consequently section 80A(3)(a) and (b) were not engaged.
- 241 Questioning the ORC’s reasoning is not available in these proceedings. The issue is whether the publicly notified pRPS when read against s 80A(2) is, as a whole, a freshwater planning instrument. It is.
- 242 For the reasons given ORC correctly notified the pRPS in its entirety as a freshwater planning instrument.

- 243 The pRPS takes an integrated management approach to the use and development of natural and physical resources. Resources are not dealt with in isolation. Nor are activities singled out for distinct treatment. The pRPS is laced with references to and provisions relating to freshwater.
- 244 Accordingly, as a whole, the pRPS is a freshwater planning instrument. It is not possible to sever sections of the pRPS as unrelated to freshwater. Every chapter has a freshwater element.
- 245 Some chapters deal not only with freshwater but also with other resources. They still relate to freshwater. The same management applies to all forms of resources.
- 246 It is impossible to remove on a provision-by-provision, or line-by-line basis, an objective or policy here, a method there, or a paragraph or sentence. To do so would create an absurd result. The structure and integrity of the document would be lost. All parts dovetail together within and across chapters to form a coherent whole.
- 247 Freshwater is woven into the fabric of the pRPS. The document cannot simply be broken up into separate stand-alone parts, which can be considered in isolation from and without consequences for freshwater.

Relief

- 248 The Plaintiff seeks the declarations set out in paragraphs 24.1 and 24.2 of its Statement of Claim.
- 249 There are no issues as to costs between the Plaintiff and Defendant.



A J Logan/ T M Sefton
Counsel for Otago Regional Council

Dated: 24 December 2021

CASES REFERRED TO

1. Mandic v Cornwall Park Trust Board [2011] NZSC 135
2. Earthquake Commission v Insurance Council of New Zealand Inc [2015] 2 NZLR 381
3. Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd [2014] 1 NZLR 593