

**IN THE HIGH COURT OF NEW ZEALAND  
DUNEDIN REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
ŌTEPOTI ROHE**

**CIV-2021-412-089**

**UNDER** the Declaratory Judgments Act 1908

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

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

**AND** **ROYAL FOREST AND BIRD PROTECTION  
SOCIETY INC**  
Defendant

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**SUBMISSIONS ON BEHALF OF  
OCEANA GOLD (NEW ZEALAND) LIMITED (“OGNZL”)  
Dated 27 January 2022**

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Next event date: 8 February 2022

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## INTRODUCTION

1. In these proceedings the Otago Regional Council (**ORC**) seeks declarations that will determine the process by which the Proposed Otago Regional Policy Statement June 2021 (**PORPS**) is to be developed.
  
2. There are three possible process routes available under the Resource Management Act 1991 (**RMA**) for developing a regional policy statement (**RPS**)<sup>1</sup>:
  - 2.1. The default standard process<sup>2</sup> involving a hearing before Commissioners appointed by the ORC with rights of appeal to the specialist Environment Court;
  - 2.2. The abbreviated freshwater planning process (**FPP**) established under section 80A RMA and Part 4 of the First Schedule involving a hearing before a freshwater hearings panel and no general right of appeal to the specialist Environment Court<sup>3</sup>;
  - 2.3. The streamlined planning process (**SPP**) established under section 80C RMA and Part 5 of the First Schedule involving an

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<sup>1</sup> There is also a process for proposals of national significance to be referred to a Board of Inquiry or direct to the Environment Court (Part 6AA RMA), see also the Departmental Report on the Resource Management Amendment Bill, MfE, March 2020 at page 87. Whilst this applies to regional policy statements, it only applies to changes or variations (see section 141 RMA) not complete reviews of a regional policy statement as is the case here. See *Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2017] NZRMA 87 at paragraph [32] for a discussion of the distinction between changes and reviews.

<sup>2</sup> Under Part 1 of the First Schedule of the RMA.

<sup>3</sup> Clauses 54 – 56 of the First Schedule of the RMA.

application to the Minister for the Environment and consideration by the Minister of submissions by interested persons and recommendations of the consent authority, and no general right of appeal to the specialist Environment Court<sup>4</sup>.

3. The appropriate process route for the PORPS is not a matter of election by the ORC. The RMA establishes entry criteria for both the FPP and SPP. The SPP is not relevant in this case as the ORC has not made an application to the Minister under section 80C. In any event I note that a council is prohibited from applying to the Minister to invoke the SPP where a freshwater planning instrument is concerned<sup>5</sup>.
4. At issue in these proceedings is the correct interpretation of section 80A and its application to the PORPS. If the PORPS is a “freshwater planning instrument” then the FPP is invoked. If the PORPS comprises parts which relate to freshwater and parts which do not relate to freshwater, it is only those parts relating to freshwater that follow the FPP. The parts that do not relate to freshwater must follow the default standard process.
5. Determining the application for declarations involves issues of law and fact. The key issue of law in these proceedings is what “relates to freshwater” means in section 80A(3). The implications of the

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<sup>4</sup> Clause 91 of the First Schedule of the RMA.

<sup>5</sup> Section 80C(2) RMA.

answer to that legal question depend on the subject matters of the PORPS, and to answer that the Court needs to consider the evidence.

6. I submit the PORPS in part relates to freshwater (and that the FPP is therefore invoked) but that parts of the PORPS do not reasonably relate to freshwater. Those parts that do not relate to freshwater must proceed via the standard process.
7. ORC has sought three declarations. The first two declarations sought are<sup>6</sup>:
  - 7.1. The Proposed Otago Regional Policy Statement 2021 is a freshwater planning instrument under section 80A(1)-(3) of the Resource Management Act 1991.
  - 7.2. The Otago Regional Council may continue to prepare the Proposed Otago Regional Policy Statement 2021 in its entirety under the freshwater planning process in Subpart 4 of Part 5 and Part 4 Schedule 1 of the Resource Management Act 1991.
8. The first declaration can be made if the Court is satisfied that the purpose of the PORPS is to give effect to the National Policy Statement for Freshwater Management 2020 (**NPSFM**) or otherwise relates to freshwater.

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<sup>6</sup> Statement of Claim for Declaratory Judgment dated 3 September 2021 at para [24].

9. The second declaration can only be made if the Court is satisfied, after making the first declaration, that all parts of the PORPS relate to freshwater. To put it another way, if parts of the PORPS do not “relate to freshwater” the second declaration must fail, and section 80A(3) requires the PORPS to be processed via the FPP as to those parts relating to freshwater, and via the standard process for those parts that do not.
10. The third declaration sought is essentially in the alternative in the event that the second declaration is not made. If the Court determines that the PORPS is a freshwater planning instrument but that “*only part of the instrument relates to freshwater*”<sup>7</sup> the ORC seeks a declaration that it may not continue to prepare that part or parts that do not relate to freshwater under the FPP. The statement of claim is silent as to which part or parts of the PORPS should be subject to such a declaration, consistent with the advice given to the ORC Councillors on this matter.<sup>8</sup> In my submission, that advice is opaque, in the sense that it does not spell out the reasoning behind its conclusion that the PORPS is wholly a freshwater planning instrument. Equally unhelpfully, the ORC’s position in these proceedings is that where there is *any connection* with freshwater, regardless of its proximity or centrality, a provision “*relates to freshwater*” for the purpose of section 80A and the FPP is therefore

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<sup>7</sup> Section 80C(3) RMA

<sup>8</sup> See the discussion at paragraph 22 below.

invoked. In my submission neither approach meets the requirements of section 80A(1) – (3).

11. The first declaration sought by the ORC cannot be made on the wording sought. The PORPS is not “*for the purpose of giving effect to any national policy statement for freshwater management*” and the test in section 80A(2)(a) is not met. Parts (but not all) of the PORPS otherwise relate to freshwater and the instrument therefore qualifies as a freshwater planning instrument under section 80A(2)(b) but must then be prepared in accordance with section 80A(3), which requires a “split” process. Any declaration should address this requirement, and accordingly be limited and precise, and should refer to the part of the definition of “freshwater planning instrument” that the PORPS meets.

12. The second declaration must fail because:

12.1. While part of the PORPS relates to freshwater, by the ORC’s own evidence not *every* part of the PORPS relates to freshwater. In that circumstance the PORPS must as a matter of law be split for processing purposes, and the second declaration must fail.

12.2. If the Court accepts the ORC submissions, it would mean that every part of every RPS would need to follow the FPP, contrary to the clear expectation expressed in section 80A(3).

13. In relation to the third declaration there is a problem. Despite the ORC staff apparently having undertaken an analysis as to those parts of the PORPS that are neither for the purpose of giving effect to the NPSFM nor otherwise relate to freshwater, that analysis is not in evidence, and the ORC is not providing assistance to the Court on where the “split” should be made in the event that the proper interpretation of section 80A requires that exercise to be undertaken.

14. The Royal Forest and Bird Protection Society’s (**RFBPS**) position is that the PORPS chapter entitled “Land and Freshwater” relates to freshwater and therefore must proceed under the FPP. RFBPS says the other parts of the PORPS do not relate to freshwater and must proceed under the standard process.

15. OGNZL agrees with the analysis presented by Counsel for RFBPS in relation to those parts of the PORPS other than the Land and Freshwater chapter. In relation to the Land and Freshwater chapter I submit some parts relate to freshwater and some do not, and those parts that do not must proceed under the standard process rather than the FPP.

16. In particular, the section entitled “Land and soil”<sup>9</sup> contains two objectives. The first objective<sup>10</sup> is not related to freshwater and reads “*The life-supporting capacity of Otago’s soil resources is*

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<sup>9</sup> LF-LS, pages 137 – 141 of the PORPS.

<sup>10</sup> LF-LS-O11, page 137 of the PORPS.



*safeguarded and the availability and productive capacity of highly productive land for primary production is maintained now and for future generations*". This objective is supported by several policies<sup>11</sup> that also do not relate to freshwater. These provisions cannot proceed via the FPP.

17. Any declaration along the lines of the third declaration being sought should specify which parts of the PORPS are to follow the FPP and which parts are to follow the standard process.

**“RELATES TO FRESHWATER”**

18. Section 80A(3) addresses what happens when a freshwater planning instrument contains parts that *“relate to freshwater”* and parts that do not.

19. The first point to be made is that this situation has been clearly contemplated by and provided for in the legislation. On that basis it cannot be credibly argued:

- 19.1. that all resources are interconnected;
- 19.2. that they must be managed in an integrated way; and
- 19.3. therefore everything inevitably “relates to” freshwater for the purposes of section 80A.

20. The first two propositions are correct, but the third does not follow.

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<sup>11</sup> LF-LS-P17, P19 and P20, pages 137-138 of the PORPS.

21. As set out in Ms Hunter's evidence, the Ministry for the Environment Technical Guidance September 2020, acknowledged that there would be situations where not all matters related to freshwater. The Guidance says<sup>12</sup>:

**However, it will be more complicated where proposed provisions are not limited to freshwater and NPS-FM 2020 matters. For example, when changes are proposed across a number of domains (such as freshwater, coast, air, urban etc) during the review of a regional policy statement, or development or review of a combined planning document (such as a combined regional policy statement and regional plan, or unitary plan). In these situations, a regional council will need to identify which provisions will go through FPP and which provisions will go through the standard Schedule 1 process. Councils are required to provide reasons for which parts will undergo the FPP and which parts will not in the public notice, and reasons could be discussed in the relevant section 32 report.**

*(emphasis added)*

22. Attached to Ms Dawe's affidavit for ORC is her report to the Council recommending adoption of the PORPS for public notification<sup>13</sup>.

Paragraph 24 of that report says:

*Significant parts of the PORPS 2021 are clearly able to be classified as a freshwater planning instrument, either because they are designed to give effect to a national policy statement for freshwater, or because they are a matter that relates to freshwater. For other parts it is less straight forward.*

23. The analysis of what parts give effect to the NPSFM and what parts relate to freshwater is not provided. The "less straight forward" parts

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<sup>12</sup> Ministry for the Environment, Essential Freshwater Wai Māori Mātuatua – A new Freshwater Planning Process – Technical Guidance for Councils, September 2020 <https://environment.govt.nz/assets/Publications/Files/a-new-freshwater-planning-process-technical-guidance-for-councils.pdf> at page 13.

<sup>13</sup> Report SPS2135 by Anita Dawe Manager Policy and Planning dated 16 June 2021. Beginning at page 391 of Exhibit 1 to the affidavit of Anita Dawe dated 13 September 2021.

of the PORPS are not identified, although later in the Report at paragraph 42 it is concluded (emphasis added) “*There are no aspects of the provisions within the PORPS 2021 that do not have some connection with freshwater*”<sup>14</sup>.

24. Exclusion from the FPP based on an absence of “some connection with freshwater” is not the test in section 80A(3). Rather, to be included in the FPP a part of the PORPS must “relate to freshwater”. Counsel for RFBPS submit that in the present context “relates to freshwater” means where a provision is implementing a regional council function regarding freshwater quality, freshwater quantity or freshwater ecology<sup>15</sup>. I adopt that submission. As the quote above from Ms Dawe’s Report shows, the ORC staff appear to have identified (but not disclosed, even to their governors) those parts of the PORPS that they consider are designed to give effect to the NPSFM or are a matter that relates to freshwater. That constitutes the exclusive set of provisions that must be subject to the FPP. The remaining provisions which it is asserted “have some connection” with freshwater (but which do not relate to freshwater), together with any provisions that have no sensible connection with freshwater at all, must proceed via the standard process.

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<sup>14</sup> Report SPS2135 by Anita Dawe Manager Policy and Planning dated 16 June 202, Exhibit 1 to the affidavit of Anita Dawe dated 13 September 2021 at page 397.

<sup>15</sup> Submissions for RFBPS dated 20 January 2022, paragraph [145].

25. At some level all parts of the environment are connected. This is acknowledged in the purpose of RPSs as set out in section 59 RMA where reference is made to policies and methods to achieve *integrated management* of the natural and physical resources of the whole region.

26. That connection is also evident in the functions given to regional councils by section 30 RMA which include “*the establishment, implementation, and review of objectives, policies and methods to achieve integrated management of the natural and physical resources of the region*”<sup>16</sup>. As set out in the affidavit of Ms Hunter for OGNZL, there is a range of matters which the RPS must set out and have regard to<sup>17</sup>. As Ms Hunter says in her evidence, providing provisions which manage freshwater resources is not the primary or only function of the RPS, and the RPS is much broader than that<sup>18</sup>.

27. In the context of freshwater, clause 3.5 of the NPSFM is headed “Integrated management” and requires regional councils to “*recognise the interconnectedness of the whole environment*”; to “*recognise interactions between freshwater, land, water bodies, ecosystems and receiving environments*”; and to “*manage freshwater and land use and development within catchments in an integrated and sustainable way*” to manage adverse effects on the

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<sup>16</sup> Section 30 (1)(a) RMA

<sup>17</sup> Affidavit of Claire Hunter dated 20 December 2021 at paras [10] and [11].

<sup>18</sup> Affidavit of Claire Hunter dated 20 December 2021 at para [14].

health and well-being of water bodies, freshwater ecosystems, and receiving environments.

28. Those concepts of interconnectedness and the need for integrated management are also reflected in the *ki uta ki tai* philosophy. As the PORPS expresses it<sup>19</sup>:

*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.*

29. To interpret “relates to freshwater” as the phrase appears in section 80A(3) as meaning “having some connection with freshwater” will lead to the inevitable conclusion that every part of the PORPS is to be developed via the FPP. The concepts of interconnection and integrated management will take you there. So for example, while provisions relating to identifying and protecting land for urban development and primary production are not related to freshwater, there is nevertheless (and obviously) some connection with freshwater in the sense that urban and primary production activities will always interact with freshwater. If “relates to freshwater” is synonymous with “some connection with freshwater” then it is hard to see how section 80A(3) can have any practical application.

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<sup>19</sup> PORPS, page 51

30. But that is not what Parliament can have intended. Within the integrated management framework of the RMA, and recognising the interconnectedness of all resources including freshwater, Parliament has nevertheless made it clear that there will be freshwater planning instruments containing a mix of parts relating to freshwater and parts not relating to freshwater. That is why section 80A(3) is included. That is why the standard process for plan development – with its stronger process designed to achieve better outcomes – must be followed for those parts of an instrument that, while having some connection with freshwater, do not relate to freshwater.

31. ORC has not provided any evidence as to whether each chapter or provision relates to freshwater. Whilst it is accepted that the legislation does not provide guidance as to the level at which this analysis should be undertaken, ORC has elected not to assist the Court by providing evidence that does this at any level. Instead it has treated this as a purely a matter of law and dealt with it in legal submissions. As Ms Hunter notes in her evidence<sup>20</sup>:

*There appears to be no active consideration given to the Council's role in "satisfying" itself as to the subject matter of the instrument beyond this very high-level conclusion offered in the recommending report by Council staff.*

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<sup>20</sup> Affidavit of Claire Hunter dated 20 December 2021 at para [20].

32. In contrast, other parties to these proceedings have provided expert planning analysis as to where the 'split' should be made<sup>21</sup>. ORC is critical of the parties for doing so, saying the evidence amounts to legal submissions<sup>22</sup>. I say that planners are experts in the writing and application of planning instruments, including understanding the interconnectedness of resources, the need to manage resources in an integrated way, and the requirement to give effect to higher order instruments. Their opinions as to what parts of the PORPS are properly related to freshwater and what parts are not should be given considerable weight.

33. In her affidavit for OGNZL, Ms Hunter has assessed the provisions which OGNZL submitted on and given her expert opinion as to whether they "relate to" freshwater as set out in her table, Exhibit CH-2. In summary, LF-FW-P13, LF-LW-P9 clearly relate to freshwater and should proceed under the FPP. The other provisions submitted on do not relate to freshwater, or are focused on outcomes which are broader than just freshwater and should proceed under the standard Schedule 1 process<sup>23</sup>. Ms Paul for OGNZL has also provided her assessment of the facts, in terms of matters OGNZL submitted on which do not relate to freshwater<sup>24</sup>. The affidavits of the planners for other parties, and in particular the

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<sup>21</sup> For example see the affidavits of Alison Paul and Claire Hunter for OGNZL, affidavit of Victoria van der Spek for Waitaki District Council and affidavit of Dr Anna Johnson for Dunedin City Council.

<sup>22</sup> ref

<sup>23</sup> See the affidavit of Claire Hunter dated 20 December 2021 at paras [23] to [29].

<sup>24</sup> Affidavit of Alison Paul dated 15 October 2021 at para [15].

planners for the territorial local authorities, provide evidence as to where they see the appropriate 'split' to be. There is a large amount of agreement between most of the planners.

## **PRINCIPLES OF STATUTORY INTERPRETATION**

34. Section 10 "How to ascertain meaning of legislation" in the Legislation Act 2019 says:

*(1) The meaning of legislation must be ascertained from its text and in the light of its purpose and its context.*

*(2) Subsection (1) applies whether or not the legislation's purpose is stated in the legislation.*

*(3) The text of legislation includes the indications provided in the legislation.*

*(4) Examples of those indications are preambles, a table of contents, headings, diagrams, graphics, examples and explanatory material, and the organisation and format of the legislation.*

35. In a decision concerning the RMA, the majority of the Supreme Court held that where a literal interpretation of section 104(1)(a) RMA would produce anomalous outcomes, and subvert the scheme of the RMA then such interpretations should not be adopted<sup>25</sup>.

36. The purpose of section 80A is given in subsection (1), to "*require all freshwater planning instruments to undergo the freshwater planning process*". Section 80A was inserted in response to Parliament's view that urgent action is required to better manage and protect New

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<sup>25</sup> *West Coast ENT Inc v Buller District Council* [2013] NZSC 87 at paras [169] – [174].



Zealand's freshwater resources. That view has been arrived at because the evidence is that, despite regional councils having a clear statutory function to manage freshwater for the purpose of giving effect to the RMA in each region<sup>26</sup>, and despite previous national direction on the management of freshwater<sup>27</sup>, freshwater has often been managed poorly, with the consequence that the water quality in many of our rivers and lakes is poor, and in some places continues to deteriorate.

37. In addressing this imperative, section 80A provides a limited exception to the normal procedural requirements for making RMA policy instruments. It is a pragmatic trade-off in which Parliament has decided that the urgency of better management of freshwater by regional councils outweighs the benefits of appeal rights and specialist judicial oversight contained in the standard plan-making process.

38. The ORC says the procedural consequences of the FPP are not relevant<sup>28</sup>. However I submit that the significance of the procedural differences between the FPP and standard processes was front of mind when Parliament legislated for the FPP, needs to be appreciated, and – consistent with that - is dealt with in the evidence of several parties to these proceedings. I would particularly direct

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<sup>26</sup> Section 30(1) RMA, especially clauses (e), (f), and (fa).

<sup>27</sup> In the form of an earlier National Policy Statement on freshwater management in 2014, substantially amended in 2017.

<sup>28</sup> Submissions of ORC dated 24 December 2021 at para [231.3].

the Court to the evidence of Dr Johnson for Dunedin City Council in which she explains the benefits to good plan-making that are available because of the ability of the Environment Court to consider substantive appeals<sup>29</sup>. Given the importance, scale and complexity of planning instruments, and the often challenging timeframes in which they are developed, with limited consultation and engagement with stakeholders on important issues, and limited resources within Councils to complete the required work, it should come as no surprise to learn that it is often not until Environment Court appeals are lodged and addressed that Council officers are in a position to understand and have the motivation to address the implications of the plans they write. As Dr Johnson explains in her evidence, the ability to lodge substantive appeals provides the opportunity for experts to conference and for parties to mediate issues, often leading to significant improvements in the contents of planning instruments. Where issues remain unresolved and need to go to hearing the expertise of the Environment Court is invaluable in delivering reasoned and principled determinations.

39. Because the FPP operates as an exception to the standard process, involves procedural compromise to that standard process, and exists in response to a particular urgency in relation to freshwater management, we should be cautious in allowing the process to extend beyond topics that Parliament has clearly identified.

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<sup>29</sup> Affidavit of Anna Louise Johnson dated 30 November 2021, paras [10-16].

40. The procedural compromises inherent in the FPP are partially offset by the use of a freshwater consenting panel with the power to allow questioning and cross examination so that the panel is hopefully in possession of better evidence on which to make decisions<sup>30</sup>. That said, the benefit the use of an expert freshwater consenting panel brings should not be overstated. Under the standard process Councils typically engage independent expert Commissioners (so the idea that a freshwater hearings panel will be better qualified to determine the contents of an instrument cannot be assumed), and the composition of freshwater hearings panels is weighted towards expertise in freshwater issues (so for topics which are more remote from freshwater the panel may be lacking)<sup>31</sup>.

41. In the present context, where the PORPS contains provisions that at best have a tenuous connection with freshwater and are instead directly related to other important regional resource management issues such as urban development; identification and protection of land for primary production; energy; transportation; infrastructure; and the protection and maintenance of biodiversity, the FPP is poorly suited as the process for developing regional policy.

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<sup>30</sup> Clause 48(2) of the First Schedule.

<sup>31</sup> Clause 59(6) of the First Schedule.

42. In OGNZL's case many of the key provisions of the PORPS upon which it has submitted do not relate to freshwater<sup>32</sup>. The provisions of the current operative RPS were arrived at via the standard process, and as Ms Paul notes in her affidavit<sup>33</sup> in the development of the PORPS, the Council was happy to divide the matters up amongst 11 different reference groups, with freshwater appearing in only one of those groups (land and freshwater). The PORPS's treatment of many of the non-freshwater matters addressed in the operative RPS is quite different and highly prejudicial to OGNZL in comparison to existing provisions. A conscious decision has been made to move away from existing treatment of mining and extractives, in ways that have no clear link back to the management of freshwater. OGNZL seeks to ensure that those matters in the PORPS are able to be properly scrutinised via the standard process and considers this accords with Parliament's intention.

#### **NOT FOR THE PURPOSE OF GIVING EFFECT TO THE NPSFM**

43. Section 80A(2) of the Resource Management Act 1991 (**RMA**) says that:

*(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:*

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<sup>32</sup> See the affidavit of Claire Hunter, dated 20 December 2021, Exhibit CH-2.

<sup>33</sup> Affidavit of Alison Paul dated 15 October 2021, paras [15]–[18].

44. All RPSs must give effect to every national policy statement (**NPS**) which is in force, including the NPSFM<sup>34</sup>. In the case of the PORPS this includes 5 national policy statements, as recorded at page 45 of the PORPS. Section 80A(2)(a) deals with a RPS which is prepared *“for the purpose of giving effect to”* any NPSFM.

45. That reference in section 80A(2)(a) must mean Parliament contemplates proposed RPSs being prepared other than for that singular purpose.

46. Because every RPS must give effect to the NPSFM, if that requirement alone was sufficient to qualify an RPS as a freshwater planning instrument section 80A(2)(a) would not be expressed in the way it is. Rather, Parliament would have simply said that every proposed RPS is a freshwater planning instrument.

47. The PORPS was not prepared for the purpose of giving effect to the NPSFM. As detailed in the ORC’s chronology, and Ms Dawe’s affidavit<sup>35</sup>, Professor Skelton’s report stated the regional planning framework was inadequate and not fit for purpose and on 18 November 2019 the Minister for the Environment directed the ORC to prepare a new PORPS. Later on 27 August 2020 the ORC requested an extension to the time for notification to allow the work

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<sup>34</sup> Section 62(3) RMA.

<sup>35</sup> Affidavit of Anita Dawe dated 13 September 2021 at paras [7] and [8].

on freshwater management units to be carried out<sup>36</sup>. However that does not mean the purpose of the PORPS was to give effect to the NPSFM. Its purpose had already been set in 2019.

48. Indeed the purpose of the PORPS<sup>37</sup> refers to providing a policy framework that aims for environmental sustainability by integrating “*the protection, restoration, enhancement, and use of Otago’s natural and physical resources*”. It records that the PORPS gives effect to the national direction instruments, however it does not mention the NPSFM or any other NPS by name. Although the broad terms of environment and natural and physical resources are mentioned in the purpose, neither of the words “water” nor “freshwater” appears in the purpose. “Water” may appear 431 times in the PORPS<sup>38</sup> but it does not appear once in the purpose.

49. Section 80A(2)(a) therefore is not satisfied in the PORPS.

50. Given that section 80A(2)(a) is not satisfied, parts of the PORPS that give effect to the NPSFM or otherwise relate to freshwater will qualify the PORPS as a freshwater planning instrument.

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<sup>36</sup> Affidavit of Anita Dawe dated 13 September 2021 at para [11] and her Exhibit 1 at page 10.

<sup>37</sup> Proposed Otago Regional Policy Statement June 2021 at page 5.

<sup>38</sup> Submissions on behalf of Otago Regional Council dated 24 December 2021 at para [233].

## WIDER IMPLICATIONS OF DECLARATIONS SOUGHT

51. If the Court were to make a declaration that the PORPS in its entirety relates to freshwater for the purpose of section 80A(3) the logical conclusion is that all RPSs would similarly be related to freshwater in their entirety and therefore subject to the freshwater planning process.

52. Some submitters on the Resource Management Amendment Bill requested that the freshwater planning process be widened to capture all regional functions<sup>39</sup>. The ORC submitted that to isolate the development of freshwater planning is contrary to good integrated plan making and resource management. The Departmental Report responded<sup>40</sup>:

*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...We do not recommend a change to allow the hearings panel to address wider regional matters or district plan provisions at this time.*

53. Furthermore, if the PORPS in its entirety relates to freshwater it would mean that any change or variation to the PORPS required to give effect to the forthcoming NPS on indigenous biodiversity<sup>41</sup> and potentially other new or changed national instruments would “*be related to freshwater*” since they have some connection with

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<sup>39</sup> Departmental Report on the Resource Management Amendment Bill, MfE, March 2020 at page 88.

<sup>40</sup> Ibid at page 89-90.

<sup>41</sup> The release of an exposure draft of this instrument is to be made in the first half of 2022 (see <https://environment.govt.nz/acts-and-regulations/national-policy-statements/proposed-nps-indigenous-biodiversity/> accessed 20/01/22)

freshwater, and would therefore need to use the FPP. This would be an absurd result and cannot have been Parliament's intention. The purpose of the FPP was to create an accelerated planning process to expedite implementation of the NPSFM<sup>42</sup>. To then extend the reach of the FPP process with RPSs or changes and variations which are not related to freshwater, and to increase the workload of the Chief Freshwater Commissioner and potential appointees to the freshwater hearings panel on matters which are not related to freshwater would both run counter to the very reason for enactment of sub-part 4, and forgo the benefits and protections the standard process provides.

## **CONCLUSION**

54. The parties agree that there are some provisions which relate to freshwater and therefore the FPP is invoked. The ORC has interpreted section 80A(3) to require that because all aspects of the environment are connected and must be managed in an integrated way, and that therefore every part of the PORPS is in one way or another connected with freshwater, the PORPS in its entirety must proceed under the FPP.

55. The ORC satisfied itself that this was the position on the basis of internal advice that said<sup>43</sup> "*There are no aspects of the provisions*

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<sup>42</sup> See for example the Departmental Report on the Resource Management Amendment Bill (MfE, March 2020) at pages 86-87.

<sup>43</sup> Report SPS2135 by Anita Dawe Manager Policy and Planning dated 16 June 202, Exhibit 1 to the affidavit of Anita Dawe dated 13 September 2021 at page 397, para [42].



*within the PORPS 2021 that do not have some connection with freshwater”.*

56. While that statement is perhaps a reasonable one having regard to the interconnectedness of all resources and the need for them to be managed in an integrated way, it does not have regard to the more disciplined approach that is required in the context of section 80A which requires that only those parts that relate to freshwater be subject to the FPP.

57. OGNZL’s position is that the standard plan-making process must be used for provisions that do not properly relate to freshwater (as opposed to simply having some connection with freshwater). This is because the FPP is a truncated process which bypasses the usual rights of appeal that has been designed as an exception to the usual process. Its purpose is to expedite the making of freshwater policy in response to an identified need for urgency in relation to that topic. The FPP sacrifices some procedural safeguards to achieve a more expeditious outcome and must only be used in the limited circumstance provided for in section 80A.

58. OGNZL agrees with RFBPS that the Land and Freshwater chapter of the PORPS is the place where provisions relating to freshwater are located, but notes that within that chapter there is an objective

and supporting policies that do not relate to freshwater and therefore must not be subject to the FPP<sup>44</sup>.

59. The making of declarations by this Court is a discretionary matter.

Any declarations made should:

- 59.1. Identify that the PORPS is a freshwater planning instrument under section 80A(2)(b) (and not section 80A(2)(a));
- 59.2. Identify as required by section 80A(3) those parts of the PORPS that relate to freshwater and are therefore to proceed under the FPP, and those parts that do not relate to freshwater and must be progressed using the standard process.



Stephen Christensen/Jackie St John

Counsel for Oceana Gold (New Zealand) Limited

Dated 27 January 2022

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<sup>44</sup> Objective LF-LS-O11 and Policies LF-LS-P17, P19 and P20, pages 137-138 of the PORPS.

**CASES REFERRED TO**

*Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2017]  
NZRMA 87

*West Coast ENT Inc v Buller District Council* [2013] NZSC 87 (SC)