

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

No. CIV-2021-412-000089

UNDER

**the Declaratory Judgments
Act 1908**

IN THE MATTER

**of an application under the
Declaratory Judgment Act
1908**

BETWEEN

**OTAGO REGIONAL
COUNCIL**

Plaintiff

AND

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

Defendant

SUBMISSIONS ON BEHALF OF PORT OTAGO LTD
27 JANUARY 2022

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I INTRODUCTION

1.1 The response to the two questions formulated by the ORC is:

Question 1.

Is the proposed Otago Regional Policy Statement (“pORPS”) a freshwater planning instrument?

Answer:

“No”. It contains policies that do not relate to freshwater including policies relating to coastal water.

Question 2.

If not, which parts are a freshwater planning instrument:

Answer:

The parts that are not a Freshwater Planning Instrument are those parts which either:

- (a) Are not for the purpose of giving effect to a national policy statement for freshwater management; or
- (b) Do not otherwise relate to freshwater.

1.2 s80A(3) requires the Council to be satisfied that the parts of the instrument that are considered under the freshwater planning process relate to freshwater and does not give the Council power to designate as freshwater items that do not satisfy the definition of freshwater

II OVERVIEW

2.1 Under the NPSFM, every regional council is required to “adopt an integrated approach, ki uta ki tai, to the management of freshwater”¹. In doing so, they are required to recognise the interconnectedness of the whole environment², and the interactions between freshwater and receiving environments (including the CMA)³.

2.2 The error made by the ORC in considering the pORPS as being wholly a freshwater instrument arises from the following:

¹ Part 3, Subpart 1, 3.2(2)(e), National Policy Statement for Freshwater Management 2020

² Part 3, Subpart 1, 3.5(1)(a), National Policy Statement for Freshwater Management 2020

³ Part 3, Subpart 1, 3.5(1)(c), National Policy Statement for Freshwater Management 2020

- (a) It has failed to apply the definitions of “freshwater” and “coastal water” which establish that freshwater (by definition) excludes seawater even where there is a substantial freshwater component;
- (b) It has wrongly treated section 80A as an enabling provision rather than a procedural provision when the purpose of section 80A is clearly expressed in subclause 1 as being to require all Freshwater Planning Instruments to undergo the freshwater planning process (not all planning instruments) and it does not purport to authorise any policy that is not part of a Freshwater Planning Instrument to undergo the freshwater planning process;
- (c) It has confused the requirement for integrated planning which includes the requirement that provisions relating to freshwater must properly take account of and be taken account of in respect of policies affecting other matters with the process which gives Freshwater Planning Instruments a “fast track” process because of time constraints in resolving issues relating to freshwater.

III WHAT IS A FRESHWATER PLANNING INSTRUMENT

- 3.1 The concept of a Freshwater Planning Instrument needs to be seen in the context that one of the key drivers of the freshwater reforms was to have freshwater planning instruments in place by 2025, and the RMA Amendment Act was enacted to help achieve that goal by expediting freshwater planning. For this target to be achieved, matters relating to freshwater needed to be carved out from other matters so they could be given priority. This objective will be defeated if a Freshwater Planning Instrument can contain matters outside the intended scope.
- 3.2 A Freshwater Planning Instrument is relevantly defined in section 80A in relation to a regional policy statement as being:
 - (a) A regional policy statement for the purpose of giving effect to any national policy statement for freshwater management; or
 - (b) A proposed regional policy statement that otherwise relates to freshwater.
- 3.3 Key to that definition are two other RMA definitions contained in section 2 RMA:
 - (a) Freshwater is defined as:

Freshwater or fresh water means all water except coastal water and geothermal water.

- (b) “Coastal water” is defined as:

Coastal water means seawater within the outer limits of the territorial sea and includes -

- (a) Seawater with substantial freshwater components; and**
- (b) Seawater in estuaries, fiords, inlets, harbours or embayments.**

- 3.4 There are consequently, two elements of freshwater are:

- (a) It is water; and
- (b) It specifically excludes (inter alia) seawater with a substantial freshwater component, and seawater in estuaries, fiords, inlets harbours or embayments.

- 3.5 To replace the relevant defined words in section 80A(2) with their definitions obtains the following:

(2) A freshwater planning instrument means –

- (a) a proposed regional policy statement for the purpose of giving effect to any national policy statement for management of all water except seawater (including seawater with substantial freshwater components) or geothermal water;**
- (b) a proposed regional policy statement that relates to all water except seawater (including seawater with substantial freshwater components) or geothermal water**

- 3.6 Proposed regional coastal plans are excluded from the definition by virtue of s 80A(8).

- 3.7 In so far as the pORPS relates to matters other than freshwater including seawater then it is not a Freshwater Planning Instrument. Seawater is not transmogrified into freshwater by an ORC resolution.

3.8 The ORC refers to the Departmental Report to the Environment Committee at paragraphs 17 to 24 and the significance is that the eventual recommendation that the scope of the Freshwater Process should not be expanded⁴ followed submissions by various councils (including the Plaintiff) that sought to enable wider regional matters (including those relating to the CMA) to be dealt with alongside freshwater matters on the basis it would enhance integrated planning⁵. With the benefit of that report, parliament specifically chose to pass s80A(2) without expanding the scope of the provision, indicating that the phrase “relates to freshwater” was not intended to be interpreted expansively to enable matters which do not directly relate to freshwater to be prepared in accordance with the Freshwater Process. Having lost the battle to have the legislation expanded, the ORC has acted as if it succeeded in that argument and as if the definition of “freshwater” had been expanded to include coastal water.

IV SIGNIFICANCE OF DESIGNATION AS FRESHWATER PLANNING INSTRUMENT

4.1 Port Otago Limited (**Port Otago**) is an interested party in this proceeding. It is a limited liability company operating international ports at Port Chalmers in Dunedin.

4.2 This issue is of considerable importance to Port Otago because of the New Zealand Coastal Policy Statement.

4.3 The well-known decision in *King Salmon*⁶ has identified that the New Zealand Coastal Policy Statement is very prescriptive and has caused real difficulties in terms of the formulation and implementation of the previous Otago Regional Council Proposed Regional Policy Statement (“first PORPS”).

4.4 The current situation with the policies in the first PORPS that directly affect Port Otago are:

- (a) An interim decision⁷ was issued by the Environment Court on 28 September 2018;

⁴ Ministry for the Environment *Departmental Report on the Resource Management Amendment Bill* (March 2020) at p 89-90

⁵ Ministry for the Environment *Departmental Report on the Resource Management Amendment Bill* (March 2020) at p 87-89

⁶ *The Environmental Defence Society v. New Zealand King Salmon Company* [2014] NZSC 38, [2014] 1 NZLR 593

⁷ [2018] NZ ENVC 83

- (b) The decision was appealed by Environmental Defence Society and was overturned in the High Court on 11 September 2019 in [2019] NZHC 2278;
 - (c) The Court of Appeal dismissed Port Otago's appeal by a 2 to 1 majority on 2 December 2021 in [2021] NZCA 638 but varied the High Court decision to make it clear that minor encroachments on the values protected by the NZCPS in the coastal area were permissible and that the use of adaptive management was a permissible means of avoiding adverse effects to the coastal marine area;
 - (d) Port Otago Ltd has applied for leave to appeal to the Supreme Court from the Court of Appeal decision.
- 4.5 The fast track procedure proposed for Freshwater Planning Instruments is not appropriate for an issue as complex as the application of the NZCPS in the coastal marine area. This is clearly identified by Victoria van der Spek for Waitaki District Council at [62] of her affidavit:

...treating the entire PORPS as a freshwater planning instrument goes beyond integration and would allow all resource management issues to be forced into a process that was intended specifically to deal with freshwater issues. The effect of this will not be an integrated approach that allows for appropriate consideration of all aspects of sustainable management but rather a process that sees all issues through the lens of freshwater management, and deals with them only in that context.

V VALIDITY OF COUNCIL DECISION

5.1 Section 80A(3) RMA subsection 3 provides:

(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.

5.2 This is a procedural provision and does not give the Council the ability to designate status or entitle the Council to designate saltwater as freshwater. Its effect is clearly stated by the High Court in *Minister of Conservation v Mangawhai Harbour Restoration Society Inc*⁸ at [18]:

The effect of s80A of the RMA is that where only part of a plan relates to freshwater, a regional council must use the freshwater planning process for those parts that relate to freshwater and the standard Sch 1 process for the balance.

5.3 The word “satisfied” in s80A(3) RMA means that there must be an appropriate basis for the Council’s decision that only part of the instrument relates to freshwater. It is why the High Court has said it “must use the freshwater planning process for those parts that relate to freshwater and [must use] the standard sch 1 process for the balance”.

5.4 There is no proper basis for the ORC to reach any conclusion other than only part of the pORPS related to freshwater if it considers the issue as required under s80A(3) RMA.

5.5 The reason that ORC did not make that decision is that it did not ever turn its mind to which parts of the pORPS need to be determined in accordance with the freshwater planning process and which parts needs to be determined in accordance with the Sch 1 process. The advice given to the Council⁹ on this issue is significant for the following reasons:

⁸ [2021] NZHC 3113

⁹ Paragraphs 394 to 399

- (a) There is no reference to the definition of freshwater and, in particular, no reference to the fact it cannot include seawater;
- (b) The significance of the decision under s80A(3) is not spelt out with the only reference to s80A(3) being a passing reference at [42];
- (c) Staff make the following statement in respect of a failure to treat the whole document as a Freshwater Planning Instrument:

The alternative to this position is that only parts of the PORPS 2021 are Freshwater Planning Instruments. If this is the decision, then the RPS will need to be split in two, and there is no national guidance available to assist with this differentiation, for example whether it occurs at chapter, objective or policy level.

The statement should say that only the parts that are Freshwater Planning Instruments follow the Freshwater Planning Process and the Council has to identify those parts in order to enable this to occur.

- 5.6 It is easy to identify that some matters such as policies relating to seawater, policies relating to geothermal water and policies relating to port infrastructure cannot relate to freshwater with the first two being excluded by definition and the third one because it does not relate to water.
- 5.7 It is also significant that under Part 3 of the pORPS, freshwater is treated as an entirely separate domain to the coastal environment. This division is reflected throughout the pORPS. For example:
 - (a) Section P2 of CE outlines “links with other chapters” but does not identify any overlap between the coastal and freshwater environments¹⁰;
 - (b) The coastal environment section is specifically concerned with coastal water and does not mention freshwater; and
 - (c) Only the land and freshwater domain contains any reference to Te Mana o te Wai.

¹⁰ Part 3, CE-P1, Proposed Otago Regional Policy Statement 2021

VI RESPONSE TO ORC'S SUBMISSIONS

6.1 Paragraphs 14 to 27

It is clear from the Environment Committee report that Parliament was concerned to allow all matters relating to freshwater (including managing structures and beds of rivers, lakes or flood management policies/rules) but were not otherwise prepared to expand the freshwater planning process to other matters. The decision making power in s80A(3) was consequently designed to enable the Council to identify what were water related matters that are appropriately dealt with under the freshwater process.

6.2 Paragraphs 31 to 40.6

The important point that the ORC omits to mention is that the NPSFM confirms that the definition of "freshwater" in NPSFM is the RMA definition at paragraph 1.4(2).

6.3 Paragraph 53

The ORC's confirmation that the pORPS is a Freshwater Planning Instrument is incorrect but not surprising in light of the advice given to it.

6.4 Paragraph 68

The domain CE – Coastal Environment will fall outside the Freshwater Planning Instrument in so far as it relates to coastal water. It is difficult to consider that any matter in that section could legitimately be considered as a Freshwater Planning Instrument.

6.5 Paragraph 74

The pORPS adopts the RMA definition plans of freshwater and coastal water. Despite the importance of the definition, it is not detailed in the document and it is necessary to consult the RMA to find out that it excludes coastal water.

6.6 Paragraph 125

The justification for including coastal policies within the Freshwater Planning Process that management of the coastal environment includes management of freshwater in the coastal environment does not stand up to scrutiny:

- (a) The management of freshwater in the coastal environment is very limited as seawater with a substantial freshwater component, estuaries, fiords, inlets, harbours and embayments are all excluded from the definition of freshwater;
- (b) The management of freshwater in the coastal environment cannot be the subject of a Freshwater Planning Process if it is governed by a coastal plan as s80A(8) excludes proposed regional coastal plans from the Freshwater Planning Process;
- (c) As freshwater in the coastal environment cannot be managed in a Regional Coastal Plan under the Freshwater Planning Process, it is illogical to claim that policies that regulate the rules in that plan are able to be managed within the process;
- (d) The necessity to manage the interface does not mean that the same procedure can be used to determine the appropriateness of the objectives, policies and rules regulating each part of the interface.

6.7 Paragraph 214

- 6.7.1 This submission reflects the error in the ORC's approach and its failure to recognise the direction by Campbell J in *Minister of Conservation v Mangawhai Harbour Restoration Society Inc*¹¹ at [18] that it must use the Freshwater planning process for those parts that relate to freshwater and the standard sch 1 process for the balance.
- 6.7.2 The ORC is not entitled to decide that matters that do not satisfy the definition of freshwater are freshwater for the purposes of s 80A.

6.8 Paragraph 219

In stating that the coastal environment chapter can relate to freshwater, the ORC relies upon the interrelationship between freshwater and the coastal water identified at paragraphs 121 and 128 of the submissions. However, that does not deal with the specific point that freshwater (by definition) excludes coastal water and the ORC have confused the concept of integrated management (which the whole of the pORPS is designed to achieve) and the mechanism by which it is achieved with the

¹¹ [2021] NZHC 3113

freshwater matters having a “fast track” because of the timeframe imposed in respect of the decisions on freshwater matters.

6.9 Paragraph 220

The issue is misstated. It is not whether freshwater can relate to “coastal water” but whether freshwater can include coastal water and it cannot:

- (a) Freshwater excludes coastal water by definition; and
- (b) Coastal water is seawater even if it has a substantial freshwater component and where the seawater is in estuaries, fiords, inlets, harbours or embayments.

6.10 Paragraph 221

In so far as the NPSFM states that the national policy statement relates to receiving environments, that does not make the receiving environments freshwater and the ORC is confusing the application of the NPSFM to coastal water with freshwater when the application is making it clear that the statement applies:

- (a) To all freshwater; and
- (b) To coastal waters to the extent they are affected by freshwater.

6.11 Paragraphs 223 and 224

It is correct there must be an integrated approach to freshwater and coastal water but an integrated approach does not transmogrify coastal water into freshwater as there are two separate processes by which the integrated management is resolved.

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