

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

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

CIV-2021-412-000089

UNDER the Declaratory Judgments Act 1908 (the Act)
IN THE MATTER of an application under the Act
BETWEEN **OTAGO REGIONAL COUNCIL**
Plaintiff
AND **ROYAL FOREST AND BIRD PROTECTION SOCIETY
OF NEW ZEALAND INCORPORATED**
Defendant
AND **QUEENSTOWN LAKES DISTRICT COUNCIL**
Third Party

SUBMISSIONS ON BEHALF OF QUEENSTOWN LAKES DISTRICT COUNCIL

Dated: 27 January 2022

Next Event : Hearing
Next Event Date: DOH: 8-9 February 2022
Case Manager: Rebecca Lau
Judicial Officer: Nation J

 **Simpson Grierson**
Barristers & Solicitors

S J Scott
Telephone: +64-3-968-4018
Email: sarah.scott@simpsongrierson.com
DX CX10092
Private Bag 92518
Christchurch

MAY IT PLEASE THE COURT:

Introduction and Summary

1. This case concerns the correct interpretation of legislative amendments introduced in 2020 to the Resource Management Act 1991 (**RMA**), in order to address the need to expeditiously improve freshwater management and outcomes in New Zealand. The declarations sought by the Otago Regional Council (**ORC**) will determine the process by which the proposed Otago Regional Policy Statement 2021 (**pRPS**) will be developed.
2. At issue is the correct interpretation of section 80A of the RMA and its application to the pRPS. If all of the pRPS is a Freshwater Planning Instrument (**FPI**) as defined in section 80A, then the entire document will be subject to the truncated Freshwater Planning Process (**FPP**).
3. It is clear that there are parts of the pRPS that relate to freshwater, and the FPP is therefore invoked. However, Queenstown Lakes District Council's (**QLDC**) position is that there are parts of the pRPS that neither give effect to the National Policy Statement for Freshwater Management 2020 (**NPSFM**)¹ nor otherwise relate to freshwater,² and those parts cannot be treated as a FPI.
4. Section 80A(3) is clear that those parts of the pRPS that do not relate to freshwater must follow the usual plan making process set out in Part 1 of Schedule 1 of the RMA, which involve a Council hearing and then merits appeals to the Environment Court.
5. The key issue of law in these proceedings is what "relates to freshwater" means in section 80A(3). ORC's position is that where there is any connection with freshwater, regardless of its proximity or centrality, a pRPS chapter or topic relates to freshwater for the purposes of section 80A and the FPP is therefore invoked.
6. I submit that ORC has taken an overly simplified literal interpretation and has ignored what was clearly intended by parliament when determining

1 Section 80A(2)(a) RMA.

2 Section 80A(2)(b) RMA.

what instruments - more importantly the express provision for parts of instruments - were suitable to go through the FPP. Section 80A(3) specifically anticipates that there are parts of a proposed regional policy statement that can go through the standard Schedule 1 process.

7. The affidavit evidence of Ms Hutton is relied on for its assessment of the extent to which particular parts of the pRPS, which are of interest to QLDC, relate to freshwater (or, perhaps more importantly, do not). The other territorial authorities have filed affidavit evidence that is largely consistent with Ms Hutton's, as has the likes of Oceana Gold New Zealand Limited.³ While ORC is critical of these parties for filing such affidavit evidence, it is submitted that planners are experts in the field of writing and interpreting planning instruments, and their evidence should be given considerable weight by the Court. Conversely, ORC has not provided evidence to justify its interpretation of the pRPS.

8. In relation to the parts of the pRPS that QLDC has an interest in (this is limited to the parts of the pRPS that it has submitted on):
 - (a) the Land and Freshwater Domain chapter is the only standalone chapter that relates to freshwater – noting that there are discrete parts within that chapter that do not, as submitted by Oceana; and

 - (b) there are other chapters that do not relate to freshwater or are focused on resources and outcomes that have no direct or causal relationship with freshwater (as listed directly below). Within these chapters there are a small number of provisions that you could argue are related to freshwater as identified by Ms Hutton. Those chapters, with the discrete exceptions, are submitted to be (as far as QLDC has an interest):
 - (i) the majority of the Significant Resource Management Issues, with the exceptions being SMR-I2, SMR-I5, SMR-I7;

³ 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.

- (ii) Domain, AIR – Air;
- (iii) Ecosystems and indigenous biodiversity with the exceptions of ECO-03, ECO-P10, ECO-M1 and ECO-M2;
- (iv) Energy, infrastructure and transport, with the exception of those provisions relating to structures on or near freshwater, or water based transport;
- (v) Hazards and risks, with the exception of those hazards relating to flooding or other hazards arising from water;
- (vi) Historical and cultural values, with the exception of where wāhi tūpuna is a freshwater body (ie a lake);
- (vii) Natural features and landscapes, with the exception of where an identified ONFL is a freshwater body;
- (viii) Urban form and development; and
- (ix) Integrated Management.⁴

9. Overall QLDC's position is that the chapters listed in (b)(ii) to (ix) above, are not related to freshwater. Listing the exceptions is taking a very literal approach to the question of whether the part of the pRPS relates to freshwater or not. The resource or subject in question generally does not (ie. urban form and development). It is also important that the inclusion of one or two provisions that might relate to freshwater, should certainly not taint the entire chapter, nor indeed the entire pRPS.
10. In QLDC's submission, the RMA requires a more nuanced approach to an assessment of which parts of a pRPS do (or do not) relate to freshwater, than undertaken by ORC.
11. Given the legislation clearly contemplates a situation where a regional policy statement is split with part being treated as a FPI and part being subject to standard RMA decision making, I submit that ORC cannot argue that everything relates to freshwater for the purposes of section 80A. While all resources are interconnected and they must be managed in an integrated way, that does not mean that an entire regional policy statement relates to freshwater. The first declaration cannot be made, nor can the second declaration because the part that does not relate to freshwater, must be subject to the standard Schedule 1 process.

4 Noting the Council submitted on IM-p2 and IM-p7.

12. While the Council agrees that the Court should conclude that part of the pRPS is not related to freshwater, the third declaration cannot be made under the words currently sought. ORC has not provided any evaluation of the correct split within the pRPS.

Submissions of Counsel for the Royal Forest and Bird Protection Society of New Zealand Inc

13. QLDC supports the submissions of Counsel for Forest and Bird with the only exception being that Ms Hutton's evidence acknowledges that there may be some discrete parts of the pRPS that are located within certain chapters, that on a literal interpretation, relate to freshwater.
14. This approach is submitted to be consistent with the approach outlined in the Departmental Report on the Resource Management Amendment Bill (Ministry for the Environment, March 2020).⁵
15. QLDC is otherwise fully supportive of Forest and Bird's submissions.
16. ORC's approach is submitted to be too broad-brush. A more nuanced assessment of the entire pRPS is required by ORC.

The Law

17. The test is whether the pRPS, or which parts of it, are for the purpose of giving effect to the NPSFM, or otherwise relate to freshwater.
18. It is submitted that to validly determine that the whole pRPS is a freshwater planning instrument, it must qualify under section 80A(2)(a) or (b) of the RMA. That is, that the whole pRPS is for the purpose of giving effect to the NPSFM; or otherwise relates to freshwater.
19. Section 80A(3) specifically provides for a situation where a council is satisfied that only part of the instrument gives effect to the NPSFM or otherwise relates to freshwater. In that event, the council must prepare

⁵ at [86]-[87]. Also referenced in; Submissions on behalf of the Otago Regional Council, dated 24 December 2021, at [19]; Submissions on behalf of the Royal Forest and Bird Protection Society, dated 20 January 2022 at [24].

that part which relates to freshwater in accordance with the FPP and it must prepare the remainder of the pRPS that does not relate to freshwater in accordance with Part 1 of Schedule 1 to the RMA.

20. This may mean a situation arises where a regional council is required to undergo separate processes for its regional policy statement. While this may give rise to increased administrative costs or inefficiencies, QLDC submit that parliament's intention was clear when drafting the above provisions. Parliament anticipates this as a potential outcome for regional policy statements.

Interpretation

21. It is accepted that parts of the pRPS are for the purpose of giving effect to the NPSFM, or otherwise relate to freshwater.
22. The issue for this Court is one of statutory interpretation about what "relates to freshwater" means in the context of this case, given ORC have concluded that the entire pRPS falls into these two categories, although the only assessment of this is at a domain/chapter level in ORC's legal submissions.
23. We refer to F&B's submissions on interpretation principles and their application to section 80A(3)⁶ and rather than repeating them, emphasise that the interpretation of section 80A(3) is to be approached with two principles of interpretation in mind:
- (a) The meaning of a statutory provision is to be ascertained from text, in light of purpose and context;⁷ and
 - (b) Parliament is presumed to legislate in a manner that produces a practical, workable and sensible result.⁸

6 Submissions of Counsel for the Royal Forest and Bird Protection Society of New Zealand Inc, dated 20 January 2022 at 10-29.

7 Section 10, Legislation Act 2019.

8 *R v Salmond* [1992] NZLR (CA) at 13.

Purpose and Context

24. ORC argue that “a connection to freshwater is sufficient”.⁹ F&B argue that a more limited interpretation should be preferred where the scope of the catch-all ‘relates to freshwater’ is filling in any gap that could arise in the more specific provision preceding it, or in other words it may deal with unanticipated, incidental or ancillary matters not addressed by the NPSFM.¹⁰
25. QLDC submits that F&B’s approach is the correct one. Interpretation of the RMA in particular requires consideration of the Supreme Court decision in *West Coast ENT Inc v Buller District Council* [2013] NZSC 87 where the majority held that where a literal interpretation of section 104(1)(a) RMA would produce anomalous outcomes, and subvert the scheme of the RMA, such interpretations should not be adopted.¹¹
26. ORC’s “overall” approach has been taken because the policy statement is seen as an integrated whole, with parts of it managing effects on freshwater meaning the entire document is a freshwater planning instrument.
27. Policy 3 of the NPSFM is that “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.” While it is accepted that provisions within the pRPS that are unrelated to freshwater may need to be integrated with (and can be complementary to) freshwater management, this does not mean that these provisions themselves are related to freshwater (and therefore a FPI).
28. There also appears to be an inconsistency in ORC’s submission – in that they rely heavily on the ‘integrated’ approach to the preparation of the pRPS, as taken from the NPSFM objective. However, the parts of the pRPS that appear to be in question between the parties, do not fall within section 80A(2)(a), they instead fall under 80A(2)(b) which is the ‘catch-all’ clause intended to allow matters which clearly relate to freshwater but

9 Submissions on behalf of ORC, dated 24 December 2021, at [57].

10 Submissions of Counsel for the Royal Forest and Bird Protection Society of New Zealand Inc, dated 20 January 2022.

11 *West Coast ENT Inc v Buller District Council* [2013] NZSC 87 at paras [169] – [174].

are not captured by the NPSFM to be processed via the FPP. The submission made by ORC that the NPSFM requires an integrated approach be taken and therefore the entire pRPS is a FPI, effectively renders section 80A(2)(b) obsolete.

29. Even if it is held that ORC's 'interpretation test' is correct, it is submitted that ORC have incorrectly applied its 'connected to freshwater' test to the pRPS in concluding that all parts of it, including provisions within certain chapters, relate to freshwater. The approach taken is broad and overly literal, which indeed ignores the relevance of the words "relates to freshwater" as operating as filling in any gap that could arise in the more specific reference to the NPSFM in section 80A(2).
30. The following passage in the Departmental Report and also identified by ORC and F&B¹², confirms F&B's interpretation is correct:

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 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.

Queenstown Lakes District

Overview of QLDC's interest

31. QLDC's interest in this case is triggered in particular by the process that will be followed for those parts of the pRPS that are not a FPI. As noted in Ms Hutton's affidavit,¹³ the pRPS addresses a broad range of matters which do not relate to freshwater. To ensure good planning outcomes, those provisions require examination through a hearing process where the appointed panel is tasked with reviewing them through a broader

12 Departmental Report on the Resource Management Amendment Bill (Ministry for the Environment, March 2020) at 86-87. Submissions on behalf of the Otago Regional Council, dated 24 December 2021, at [19]. Submissions on behalf of the Royal Forest and Bird Protection Society, dated 20 January 2022 at [24].

13 At [25].

resource management lens, rather than with a focus on freshwater issues.

32. The Minister for the Environment is required to appoint freshwater commissioners who collectively have knowledge of and expertise in relation to freshwater quality, quantity and ecology, as well as the RMA.¹⁴ The requirements for the Chief Freshwater Commissioner when convening a panel are similar. There is no requirement for Freshwater Commissioners, or indeed Freshwater Hearings Panels to have commensurate knowledge and expertise in many of the matters that QLDC is interested in.
33. The absence of merits based appeals is a further and significant concern.
34. QLDC submitted on a large number of the provisions contained in the pRPS. Of note, QLDC made extensive submissions in relation to the Natural Feature and Landscapes section of the pRPS which concerns the management of features or landscapes identified as an “Outstanding Natural Feature” or “Outstanding Natural Landscape” (**ONFL**). Approximately 97% of the Queenstown Lakes District is identified as an ONFL¹⁵ and 18.1% of the District’s GDP is derived from the value of these highly valued landscapes¹⁶.
35. The pRPS, as a higher order planning document, will have significant impacts on the approach taken by QLDC in its management of natural resources within Queenstown Lakes District. As QLDC must give effect to the objectives, policies and methods contained in the pRPS, the proper and considered formation of this planning document is critical to the exercise of QLDC’s responsibilities and functions.
36. PRPS provisions that do not relate to freshwater management can and should be developed with merit based appeals because they have further mandatory flow on implications that require they must be implemented, once established.

14 Clause 65(2)(b) of Schedule 1, RMA.

15 Affidavit of Alyson Anne Hutton, affirmed 3 December 2021 at [41]. The reference to 90% in paragraph 48 is an error.

16 Queenstown Lakes District Council, Submission on the Propose Otago Regional Policy Statement (3 September 2021) at page 5.

Outstanding Natural Features and Landscapes

37. After notifying a Proposed District Plan in 2015, QLDC has only recently completed a comprehensive and contentious series of Environment Court hearings on appeals lodged on the merits of the identification of, and appropriate regulatory framework for, the protection of those ONFLs from inappropriate development. The content of ORC's partially operative Regional Policy Statement, that itself was subject to contentious appeals, was an important factor in the final content of the QLDC Proposed District Plan. The policy direction in the pRPS is therefore of absolute importance to QLDC given its protection of ONFLs is comprehensively directed by the pRPS.
38. As an example, ORC have submitted that the entire NFL – Natural features and landscapes chapter “clearly relates to freshwater”.¹⁷
39. QLDC has sought amendments to incentives and mechanisms which ORC propose to protect ONFLS. QLDC consider that some of these are not feasible due to the extent of ONFLS in the district; including that QLDC or ORC should purchase ONFLS or that it should provide rates relief.¹⁸
40. ORC's view is that this chapter of the pRPS ‘relates to freshwater’ appears to be based on the fact that certain ONFLs contain areas of freshwater – for example an Outstanding Natural Feature may be a river. The ORC submission ignores the significant portion of ONFLs located within the Queenstown Lakes District that have no relationship to freshwater whatsoever. Further, the ORC submission that formative processes of ONFs such as through the action of ice or water is in QLDC's submission, a significantly strained interpretation that the provision in question, is related to freshwater.
41. There is no other national policy statement relevant to ONFLs, rather the provisions are required to give effect to section 6(c) of the RMA. It does not stand to reason that issues such as incentives to landowners to

17 Submissions on behalf of ORC, dated 24 December 2021, at 188.
18 NFL-M4.

protect ONFLs can properly be considered as relating to freshwater and should be subject to a truncated process with limited appeal rights.

42. Another example is the UFD – Urban Form and Development chapter. QLDC has, for example, made a submission on parts of this topic seeking greater clarity around the definition of “affordable housing”¹⁹. This is particularly important to QLDC due to the district being subject to high house prices yet, with while subject to affordable housing issues, the fact that the majority of the district is an ONFL reduces the land available for development.
43. Again it is an entirely strained interpretation that the urban form chapter is connected to freshwater because, for example (in ORC’s submission), the chapter provides for “development infrastructure” which includes network infrastructure for the “three waters” and land transport (which includes ferries or barges on rivers and lakes). It is also worth noting here that water within the “three waters” infrastructure is explicitly excluded from the definition of water in the RMA.²⁰
44. The consequence of taking ORC’s approach and applying a broad-brush analysis will mean that these provisions are considered by a hearing panel specifically required to hold freshwater expertise.
45. Ordinarily regional policy provisions are required to be progressed through the Schedule 1 process which allows for a hearing panel with wider expertise tasked with taking a broader view of resource management issues within the region. Merit based appeals by territorial authorities such as QLDC and other interested parties would also remain under the Schedule 1 process.
46. Given the extent to which QLDC’s responsibilities and management of natural resources other than freshwater is directed by the pRPS, it is imperative that the provisions of the pRPS are subject to a rigorous process whereby affected territorial authorities are fully involved and merits based appeals are enabled.

19 UFD-AER9.
20 See affidavit of Ayson Anne Hutton, affirmed 3 December 2021 at [29] and [30].

Response to ORC's submissions

47. ORC submit that the technical guidance and Ministry for the Environment documents cannot be relied on. QLDC submit that as the FPI and FPP provisions have not yet been tested before a court that materials such as parliamentary debates, technical guidance documents and ministerial reports are correct documents to consider when determining the intent of parliament as well as the context if those provisions.
48. This approach avoids the absurd outcome which results from ORC's interpretation.

Relief Sought

49. In relation to the declarations sought by ORC at paragraph 24 of its Statement of Claim, QLDC submit:
- (a) that the first and second declarations be declined; and
 - (b) the third declaration be declined, given ORC have provided no details on what statutory process would be followed.

Dated this 27th Day of January 2022



Sarah Scott
Counsel for the Third Party

CASES REFERRED TO

R v Salmond [1992] NZLR (CA) at 13.

West Coast ENT Inc v Buller District Council [2013] NZSC 87 at paras [169] – [174].