

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

CIV-2021-412-000089

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

IN THE MATTER

of application under the Declaratory
Judgements Act 1908

BETWEEN

OTAGO REGIONAL COUNCIL
Plaintiff

AND

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

Defendant

**SUBMISSIONS OF COUNSEL FOR THE ROYAL FOREST AND BIRD PROTECTION
SOCIETY OF NEW ZEALAND INC**

DATED 20 JANUARY 2022

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MAY IT PLEASE THE COURT

INTRODUCTION AND SUMMARY

1. This case relates to the interpretation of the freshwater planning process (**FPP**) referred to in section 80A(3) of the Resource Management Act 1991 (**RMA**).
2. The FPP provisions were inserted on 1 July 2020 as part of a broader package of legislative and policy changes to address the nationwide decline in freshwater quality. This included the National Policy Statement for Freshwater Management 2020 (**NPSFM**), which came into force on 3 September 2020 and a requirement to publicly notify a freshwater planning instrument (a proposed regional plan or regional policy statement (**RPS**)) that gives effect to the NPSFM by 31 December 2024.¹
3. The FPP provisions provide a streamlined process for freshwater planning instruments, using panels with technical expertise in freshwater disciplines, rather than the usual Schedule 1 process.
4. This is the context in which the statutory interpretation of s 80A(3) must be undertaken.
5. There is no doubt that the Otago Regional Council (**ORC**) has erred in its statutory interpretation of s 80A(3).
6. That this is the case is demonstrated by the fact that some parts of the Proposed Otago Regional Policy Statement 2020 (**PORPS**) are plainly unrelated to freshwater, which the ORC says should be subject to the FPP. There are numerous examples of this. The prime illustration of this are the parts of the PORPS that refer to activities or features that only occur in the coastal marine area (**CMA**), for example reclamation, aquaculture, and surfbreaks. It is untenable to suggest that these provisions are related to freshwater.
7. In doing such, the ORC has failed to adopt a purposive and contextual approach to the interpretation of the s 80A, with regard to the relevant legislative background and underlying objectives of the s 80A.
8. Properly interpreted, the scope of what “relates to freshwater” under s 80A(3) is informed by the regional council’s functions that refer to freshwater under s 30. These can be categorised as relating to freshwater quality, freshwater quantity, or freshwater ecology. Provisions beyond these categories, and which require expertise beyond these categories, do not relate to freshwater.

¹ Section 80A(4)(b), RMA.

9. The text of s80A read in light of both purpose and context, confirms that the only part of the PORPS that is related to freshwater, and therefore required to undergo the FPP, is the Land and Freshwater domain chapter.

INTERPRETATION PRINCIPLES

10. The issue at the core of this case is the interpretation of s 80A(3).
11. The interpretation of s80A(3) is to be approached with two principles of statutory interpretation in mind:
- a. The meaning of a statutory provision is to be ascertained from text, in light of purpose and context;²
 - b. Parliament is presumed to legislate in a manner that produces a practical, workable and sensible result.³
12. The starting point is section 10 of the Legislation Act 2019, which provides:

10 How to ascertain meaning of legislation

- (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.
13. ORC contends that:⁴
- 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 sufficient.*
14. That is an incorrect interpretation. The ORC has taken a broad and overly literal approach, which overlooks purpose and context (having regard to the general statutory scheme and object of s80A) as the second key drivers of statutory interpretation.⁵
15. Further, a statutory power which, on its own, may appear to be unqualified may in fact be limited if read in context. The Supreme Court in *Unison Networks Limited v Commerce Commission* observed:⁶

² Section 10, Legislation Act 2019.

³ *R v Salmond* [1992] 3 NZLR 8 (CA) at 13.

⁴ Submissions on behalf of the Otago Regional Council, dated 24 December 2021, at [57].

⁵ Legislation Act 2019, s 10(1); and *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

⁶ *Unison Networks Limited v Commerce Commission* [2007] NZSC 74 at [53].

A statutory power is subject to limits even if it is conferred in unqualified terms. Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act. These are ascertained from reading the Act as a whole.

16. It is presumed Parliament does not intend to legislate in a manner that is absurd.⁷ In *Frucor Beverages Ltd v Rio Beverages Ltd*, the Court of Appeal observed the following definition of “absurdity”:⁸

[V]irtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.

17. Where the wording of a legislative instrument may give rise to absurd or unreasonable outcomes, Courts should avoid those outcomes and instead favour an interpretation that will produce a workable result under the legislation.⁹

INTERPRETATION OF S 80A(3)

Text

18. Section 80A(3) provides:

80A Freshwater planning process

...

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

- (a) a proposed regional plan or 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—

⁷ *Frucor Beverages Ltd v Rio Beverages Ltd* [2001] 2 NZLR 604 (CA) at [28].

⁸ *Frucor Beverages Ltd v Rio Beverages Ltd* [2001] 2 NZLR 604 (CA) at [28].

⁹ *R v Kahu* [1995] 2 NZLR 3, (1995) 12 CRNZ 657 (CA) at 6, 660.

- (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.
19. Before addressing s 80A(3), it is necessary to also consider “freshwater planning instrument” as defined in s 80A(2). Section 80A(2) includes a proposed regional plan or RPS that will give effect to the NPS-FM, or otherwise relates to freshwater. In other words, a proposed regional plan or RPS may be caught by the definition of “freshwater planning instrument” by virtue of either giving effect to the NPS-FM 2020 in s 80A(2)(a) or otherwise relating to freshwater in s 80A(2)(b).
20. It is section 80(3), rather than s 80(2), that drives the task of determining which parts of the instrument “relate to freshwater” for the purpose of undergoing the FPP.¹⁰ Provisions that do not relate to freshwater cannot be considered using the FPP.¹¹ This task must be undertaken regardless of whether the instrument was caught by s80A(2)(a) or (b). The upshot is that those parts of the PORPS that ORC considers “give effect to the NPSFM” must still be subject to the question of whether those parts “relate to freshwater” under s 80(3). That is made clear in the second sentence of the chapeau in s 80A(3): *“However, if the council is satisfied that only part of the instrument relates to freshwater, the council must...”*. It is an inescapable task.
21. There are two elements of the text that require interpretation – “relates to”, and “freshwater”.

“Relates to freshwater”

22. The ORC contends that a connection with freshwater is sufficient to be caught by the phrase “relates to freshwater”.¹²
23. The catch-all phrase “relate to freshwater” in section 80A(3) is not defined. However, looking at s80A as a whole, indicates that the scope of “relates to freshwater” in s 80A(3) is limited.
24. The preceding clause, s80A(2)(a) states a proposed regional plan or RPS “for the purpose of giving effect to any national policy statement for freshwater management” is a freshwater planning instrument.¹³ This indicates the scope of the catch-all “relates to freshwater” as filling in any gap that could arise in the more specific provision preceding it. In other words, it may deal with unanticipated, incidental, or ancillary matters not addressed by the NPSFM. The

¹⁰ Section 80A(3)(a), RMA.

¹¹ Section 80A(3)(b), RMA.

¹² Submissions on behalf of the Otago Regional Council, dated 24 December 2021, at 57.

¹³ Section 80A(2)(a), RMA.

following passage in the Departmental Report and identified in the ORC's submissions confirms this:¹⁴

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.

25. Section 80A(3) anticipates that there will be "parts" of freshwater planning instruments that do not relate to freshwater, which must undergo the standard planning process.
26. A unique feature of the freshwater planning process in s80A is the requirement for expertise on freshwater disciplines. S80A(5)(a) outlines the Chief Freshwater Commissioner's requirement to convene freshwater hearings panel to conduct the public hearing of submission on the freshwater planning instrument.¹⁵ The freshwater hearings panel must comprise two freshwater commissioners. When convening a freshwater hearings panel, the Chief Freshwater Commissioner must also consider the need for the panel to collectively have knowledge of expertise in relation to:¹⁶
 - (a) judicial processes and cross-examination; and
 - (b) freshwater quality, quantity, and ecology; and
 - (c) this Act; and
 - (d) tikanga Māori and mātauranga Māori; and
 - (e) Te Mana o te Wai; and
 - (f) water use in the local community; and
 - (g) subject areas likely to be relevant to the work of the panel.
27. Notably, the Minister for the Environment is required to appoint freshwater commissioners who collectively have knowledge of and expertise in relation to:¹⁷
 - (i) judicial processes and cross-examination; and
 - (ii) freshwater quality, quantity, and ecology; and**
 - (iii) this Act; and
 - (iv) tikanga Māori and mātauranga Māori
28. Contrary to the ORC's contention that the entire RPS relates to freshwater, including the chapters on air¹⁸ and the coastal environment¹⁹, there is no requirement to have commensurate knowledge and expertise in such matters (i.e. air quality and marine ecology).

¹⁴ 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].

¹⁵ Section 80A(5)(a), RMA.

¹⁶ Clause 59(6) of Schedule 1, RMA.

¹⁷ Clause 65(2)(b) of Schedule 1, RMA.

¹⁸ Submissions on behalf of the Otago Regional Council, dated 24 December 2021, at [120].

¹⁹ Submissions on behalf of the Otago Regional Council, dated 24 December 2021, at [128].

29. The express requirement for collective knowledge of and expertise in freshwater quality, quantity and ecology, (what can be seen as key freshwater disciplines) demonstrates the freshwater planning process is not tailored for wider resource management matters. There are boundaries as to what the FPP can consider .

“Freshwater”

30. “Water” is defined under the RMA to include both “fresh water” and “coastal water”.²⁰

Water means water in all its physical forms whether flowing or not and whether over or under the ground:

- (a) includes fresh water, coastal water, and geothermal water:
- (b) does not include water in any form while in any pipe, tank or cistern.

31. However, “freshwater” expressly excludes coastal water:²¹

freshwater or **fresh water** means all water except coastal water and geothermal water.

32. The definition of “coastal water” extends to seawater with a substantial fresh water component, and includes estuaries, harbours and embayments:²²

coastal water means seawater within the outer limits of the territorial sea and includes (a) seawater with a substantial fresh water component; and (b) seawater in estuaries, fiords, inlets, harbours, or embayments.

33. “Water body” is defined in the RMA as:²³

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.

34. “River” is defined in the RMA as:

River means a continually or intermittently flowing body of fresh water; and includes a stream and modified watercourse; but does not include any artificial watercourse (including an irrigation canal, water supply race, canal for the supply of water for electricity power generation, and farm drainage canal).

35. “Lake” means “a body of fresh water which is entirely or nearly surrounded by land.”

36. The “coastal marine area” means “the foreshore, seabed, and coastal water, and the air space above the water.”²⁴

²⁰ Section 2, RMA.

²¹ Section 2, RMA.

²² Section 2, RMA. Seawater is not defined.

²³ Section 2, RMA.

²⁴ Section 2, RMA.

37. The RMA makes clear distinctions between areas where freshwater is present and areas where coastal water is present.
38. The use of the term “freshwater” in section 80A(3) indicates a deliberate choice to confine the freshwater planning process to freshwater issues, rather than collateral issues relating to other resources more broadly.
39. The ORC’s arguments incorrectly conflate “freshwater” and “coastal water.” If the intention was for s80A(3) to capture issues beyond those pertaining to “freshwater”, the wider term “water” was available for the Legislature to use. But it did not.
40. Instead, s80A(3) employs the term “freshwater” to determine jurisdiction.
41. Section 80A does not once mention the term “coastal water”, refer to the wider CMA nor any other environments or natural resources as addressed by the ORC.

Purpose and context

42. The purpose of the freshwater planning process is stated in s 80A(1):

The purpose of this subpart is to require all freshwater planning instruments prepared by a regional council to undergo the freshwater planning process.
43. Such a brief summary of purpose does not assist greatly. However, it is useful to look at how far s 80A goes in pursuit of that purpose.
44. Section 80A(4) prescribes stringent deadlines by which freshwater planning instruments must be notified, and by which the freshwater planning process must be completed under part 4, Schedule 1 of the RMA. It requires regional councils to publicly notify their freshwater planning instruments by 31 December 2024.²⁵ Regional councils have two years from notification to make final decisions on the freshwater planning instrument.²⁶ Freshwater hearing panels must provide written recommendations to the relevant council on the freshwater planning instrument no later than 40 working days before the two-year period from publicly notifying the proposed instrument expires.²⁷
45. This underscores Parliament’s intention for water quality outcomes to be achieved expeditiously, via a more streamlined process compared to the standard Schedule 1 process.
46. Section 80A(8) also specifically precludes regional coastal plans from undergoing the freshwater planning process. This reflects the statutory scheme of the RMA, which distinguishes responsibility of for the management of the coastal marine area from other environments. The Minister of Conservation has

²⁵ Section 80A(4)(b) and (c), RMA.

²⁶ Schedule 1, clauses 51 and 52(5), RMA.

²⁷ Schedule 1, clause 51, RMA.

a specialist role under the RMA in relation to the coastal marine area, which includes the approval of regional coastal plans.²⁸

47. The Minister of Conservation’s approval role provides a useful illustration of the flaws with the ORC’s interpretation of “relates to freshwater”. Section 64(3) of the RMA also employs the concept of “relates to”. Where a regional coastal plan forms part of a regional plan, the Minister of Conservation shall approve only “**that part which relates to** the coastal marine area”.²⁹ The ORC’s interpretation would allow the Minister of Conservation to go beyond provisions pertaining to the coastal marine area, and to approve entire regional plans. This would go beyond the clear geographic application of the MOC’s approval role over the CMA and risks impinging on the functions of regional and territorial councils – highlighting the need for limits to be applied to “relates to.”
48. The ORC provides examples where activities occurring outside the CMA may have effects on the CMA and notes the connections that the coastal waters have with freshwater, for example many indigenous fish species migrate from coastal waters to freshwater systems.³⁰ Such a connection could equally be used to argue that there is jurisdiction for the MOC to approve provisions affecting resources outside the CMA. For example, where a coastal plan was part of a wider regional plan that covered all the regional council’s functions, the ORC interpretation would mean that most if not all parts of the plan would have to be approved by the Minister of Conservation on the basis that they are related to the CMA.
49. This would be a perverse outcome unanticipated by the RMA, and has not occurred in practice.
50. Parliament did not intend the Minister of Conservation to have such a broad role. Similarly, Parliament did not intend that provisions with only a very tenuous link to freshwater, such as those relating to the CMA and air would be considered through the freshwater planning process.

Statutory scheme

51. When the scheme of the RMA is stepped through, it becomes plain that the RMA separates the management of freshwater from the management of other natural and physical resources.³¹ Likewise, coastal resources are also managed differently.
52. Section 5(1) of the RMA sets out its overarching purpose as “the sustainable management of natural and physical resources.” It is not of immediate

²⁸ Section 28, RMA.

²⁹ Section 64(3), RMA.

³⁰ Submissions on behalf of the Otago Regional Council, dated 24 December 2021, at [124].

³¹ “Natural and physical resources” is defined in s 2 of the RMA to include “land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures.”

assistance for present purposes because, as the Supreme Court has observed, s 5 is general in nature, and standing alone, its application is often uncertain and difficult in particular contexts.³² However, the Supreme Court has also observed that the concept of sustainable management is further teased out in a cascade of policy statements and plans made under the Act, increasingly detailed both as to content and location”.³³

53. The core duties and restrictions to control certain adverse effects are contained in Part 3 of the RMA. The sections within Part 3 set different duties and restrictions for different natural and physical resources:
- a. the use of land – section 9;
 - b. subdivision of land – section 11;
 - c. use of the coastal marine area – section 12;
 - d. use of beds of lakes and rivers – section 13;
 - e. use of water – section 14; and
 - f. discharge of contaminants – section 15.
54. In terms of the mechanics of these provisions, the use of land is permitted unless the use contravenes a rule in a district or regional plan (s 9). In relation to subdivision and “common” resources, uses are generally restricted unless they are expressly allowed (ss 11–15).
55. There are duties and restrictions contained within Part 3 which clearly do not relate to freshwater. For example, the relevant parts of section 12 provide:

12 Restrictions on use of coastal marine area

- (1) No person may, in the coastal marine area,—
- (a) reclaim or drain any foreshore or seabed; or
 - (b) erect, reconstruct, place, alter, extend, remove, or demolish any structure or any part of a structure that is fixed in, on, under, or over any foreshore or seabed; or
 - (c) disturb any foreshore or seabed, (including by excavating, drilling, or tunnelling) in a manner that has or is likely to have an adverse effect on the foreshore or seabed (other than for the purpose of lawfully harvesting any plant or animal); or
 - (d) deposit in, on, or under any foreshore or seabed any substance in a manner that that has or is likely to have an adverse effect on the foreshore or seabed; or
 - (e) destroy, damage, or disturb any foreshore or seabed (other than for the purpose of lawfully harvesting any plant or animal) in a manner that has or is likely to have an adverse effect on plants or animals or their habitat; or
 - (f) introduce or plant any exotic or introduced plan in, on, or under the foreshore or seabed: or

³² *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38 [2014], 1 NZLR 593, at [150].

³³ *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38 [2014], 1 NZLR 593, at [151].

- (g) destroy, damage, or disturb any foreshore or seabed (other than for the purpose of lawfully harvesting any plant or animal) in a manner than has or likely to have an adverse effect on historic heritage—
Unless expressly allowed by a national environmental standard, a rule in a regional coastal plan as well as a rule in a proposed regional coastal plan for the same region (if there is one), or a resource consent.

56. The activities restricted in section 12 are demarcated in terms of geographic application: they apply “in, on, under, or over any coastal marine area.”³⁴

57. Conversely, s 13 strictly relates to areas where freshwater is present:

13 Restrictions on certain uses of beds of lakes and rivers

- (1) No person may, in relation to the bed of any lake or river,—
 - (a) use, erect, reconstruct, place, alter, extend, remove, or demolish any structure or part of any structure in, on, under, or over the bed; or
 - (b) excavate, drill, tunnel, or otherwise disturb the bed; or
 - (c) introduce or plant or any part of any plant (whether exotic or indigenous) in, on or under the bed; or
 - (d) deposit any substance, in, on, or under the bed; or
 - (e) reclaim or drain the bed—
unless expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one) or a resource consent.
- (2) No person may do an activity described in subsection (2A) in a manner that contravenes a national environmental standard or a regional rule unless the activity—
 - (a) is expressly allowed by a resource consent; or
 - (b) is an activity allowed by section 20A.
- (2A) The activities are—
 - (a) to enter onto or pass across the bed of a lake or river:
 - (b) to damage, destroy, disturb, or remove a plant or part of a plant, whether exotic or indigenous, in, on or under the bed of a lake or river:
 - (c) to damage, destroy, or remove the habitats of plants or parts of plants, whether exotic or indigenous, in, on, or under the bed of a lake or river:
 - (d) to damage, destroy, disturb, or remove the habitats of animals in, on, or under the bed of a lake or river.
- (3) This section does not apply to any use of land in the coastal marine area.
- (4) Nothing in this section limits section 9.

58. Where “restrictions relating to water” are referred to in section 14, the RMA refers to the distinct terms of “freshwater,” “coastal water” or “geothermal water” to set out different restrictions associated with each. Section 14 relevantly provides:

³⁴ Section 12(3), RMA.

14 Restrictions relating to water

- (1) No person may take, use, dam, or divert any open coastal water, or take or use any heat or energy from any open coastal water, in a manner that contravenes a national environmental standard or a regional rule unless the activity,—
 - (a) is expressly allowed by a resource consent; or
 - (b) is an activity allowed by section 20A.
- (2) No person may take, use, dam, or divert any of the following, unless the taking, using, damming, or diverting is allowed by subsection (3)—
 - (a) water other than open coastal water; or
 - (b) heat or energy from water other than open coastal water; or
 - (c) heat or energy from the material surrounding geothermal water.
- (3) A person is not prohibited by subsection (2) from taking, using, damming, or diverting any water, heat, or energy if—
 - (a) the taking, using, damming, or diverting is expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent; or
 - (b) in the case of fresh water, the water, heat, or energy is required to be taken or used for—
 - (i) an individual’s reasonable domestic needs; or
 - (ii) the reasonable needs of a person’s animals for drinking water,—and the taking or use does not, or is not likely to, have an adverse effect on the environment; or
 - (c) in the case of geothermal water, the water, heat, or energy is taken or used in accordance with tikanga Maori for the communal benefit of the tangata whenua of the area and does not have an adverse effect on the environment; or
 - (d) in the case of coastal water (other than open coastal water), the water, heat, or energy is required for an individual’s reasonable domestic or recreational needs and the taking, use, or diversion does not, or is not likely to, have an adverse effect on the environment; or
- ...

59. The separation of freshwater from other natural and physical resources is reinforced in other parts of the RMA. Section 30(1) defines the functions of regional councils, and specifies the following functions relevant to freshwater:

- (c) the control of the use of land for the purpose of—
 - ...
 - (ii) the maintenance and enhancement of the **quality of water in water bodies** and coastal water:
 - (iii) the maintenance of the **quantity of water in water bodies** and coastal water:
 - (iiia) the maintenance and enhancement of **ecosystems in water bodies** and coastal water.
- ...
- (f) the control of discharges of contaminants into or onto land, air, or water and discharges of water into water:
- (fa) if appropriate, the establishment of rules in a regional plan to allocate any of the following:
 - (i) the taking or use of water (other than open coastal water):
 - (ii) the taking or use of heat or energy from water (other than open coastal water):

(iii) the taking or use of heat or energy from the material surrounding geothermal water:

...

(g) in relation to **any bed of a water body**, the control of the introduction or planning of any plant in, on, or under that land, for the purpose of-

...

(ii) the maintenance and enhancement of the **quality of water in that water body**:

(iii) the maintenance of the **quantity of water in that water body**:

60. Functions over the coastal marine area are also separated, where the regional council (in conjunction with the Minister of Conservation) has broad control over its use, including the taking, use, damming, and diversion of water within it.³⁵
61. Conversely, district councils have broad control over the use of land, including the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of the maintenance of indigenous biological diversity.³⁶ District councils do not have a role in relation to the coastal marine area or the taking, use, damming and diversion of water.
62. The key point that can be taken from reading Part 3 and sections 30 and 31 is that the RMA clearly distinguishes the management of freshwater from other natural and physical resources.
63. National guidance also confirms the division between the management of freshwater vis-à-vis other areas. For example, the NPSFM addresses the management of freshwater, while the NZCPS addresses the coastal environment (including the CMA) and has the specific purpose “to state objectives and policies in order to achieve the purpose of this Act in relation to the coastal environment of New Zealand”.³⁷ A NZCPS must be prepared, recommended, and issued by the Minister of Conservation.³⁸ The NZCPS is empowered to provide for numerous matters unique to the coastal environment, for example, national priorities for the preservation of natural character of the coastal environment.³⁹
64. When interpreting the phrase “relates to freshwater” in s 80A(3). It naturally follows that provisions designed to address matters falling within the clear spatial bounds of the CMA must be precluded. However, provisions designed to fulfil the regional council’s specific functions over freshwater would be captured.

³⁵ Section 30(1)(d), RMA.

³⁶ Section 30(1)(b)(iii)

³⁷ Section 56, RMA.

³⁸ Section 57, RMA.

³⁹ Section 58(1)(c), RMA.

Background of s80A

65. Although the statutory text and scheme clearly demonstrates that there are parameters around the concept of “relate to freshwater”, the legislative history puts this beyond doubt.
66. In determining purpose, the Court must consider both the immediate and the general legislative context, and of relevance too may be the social, commercial or other objective of the enactment.⁴⁰ The background material leading to the insertion of section 80A confirms the underlying objectives and policy intent.
67. The extrinsic materials traversed below, and which culminated in the introduction of s 80A, confirm that Parliament intended to create a bespoke process to improve outcomes for freshwater quality per se. The legislative background explains the mischief that s80A was designed to address, being the continued decline of freshwater quality, which has been a longstanding issue in New Zealand.⁴¹
68. The materials repeatedly make clear the intention behind the freshwater planning process – to introduce an expedited process to address freshwater quality decline.

Impact Statement: A new planning process for freshwater

69. The Cabinet paper seeking Cabinet agreement to progress legislative amendments to implement the freshwater planning process was accompanied by a Regulatory Impact Statement *Impact Statement: A new planning process for freshwater* (19 June 2019) (“RIS”).
70. The RIS identified the overarching policy problem that the freshwater planning processes was designed to address:⁴²

“freshwater quality in New Zealand continues to decline, and the options available under the current system will not deliver required outcomes quickly”.
71. The RIS notes that the long-term policy objective is “to ensure there is not further decline, and where possible, improve freshwater quality, quantity, and ecosystem health.”⁴³

⁴⁰ *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] NZLR 767 at [22].

⁴¹ *Impact Statement: A new planning process for freshwater* (Ministry for the Environment, Wellington, 2019), at 11.

⁴² *Impact Statement: A new planning process for freshwater* (Ministry for the Environment, Wellington, 2019), at 11.

⁴³ *Impact Statement: A new planning process for freshwater* (Ministry for the Environment, Wellington, 2019), at 11.

72. The specific policy problem recognised in the RIS is that:⁴⁴

“the [National Policy Statement for Freshwater Management] is not being implemented fast enough and the proposed amendment is required now due the scale and urgency of the issue.”

73. The RIS identified three issues underpinning the specific policy problem:⁴⁵

- a. The planning processes under the RMA are not fit for purpose for freshwater management;
- b. There are political challenges at the local government level; and
- c. Freshwater is technical and complex.

74. The RIS acknowledged the unique challenges relating to freshwater:⁴⁶

Making competent freshwater plans is highly technical and complex. It requires a large amount of information and sophisticated decision-making tools. People making decisions need to have specialist RMA, legal, tikanga Māori and scientific/technical skills. There are a limited pool of people in New Zealand that have this mix of skills and they will be in high demand as councils with regional functions need to undertake plan changes to implement the NPS-FM. Freshwater also requires adaptive management, as good science, reliability of information and best practices change over time.

75. The RIS considered three options beyond the standard planning process under the RMA, ultimately preferring Option 1:⁴⁷

- a. Option 1: Freshwater hearing panel with council as decision maker;
- b. Option 2: Regional freshwater panel makes decision on plan;
- c. Option 3: Freshwater Commission to assist with development of Plans, and determine process to be used under existing RMA provisions.

76. The RIS also foresaw the difficulty in separating out freshwater aspects, but recognised the benefits for freshwater management of doing so:⁴⁸

Despite difficulties councils may face in separating out freshwater related plan changes, a clear requirement to use the process removes a perceived avenue for challenge over the choice of process and makes it more likely that the NPS-FM timeframes will be met, a key objective of the proposal. It is considered that requiring water related plan changes, which can include regional land use rules, is the most effective in terms of integrated management. Only requiring freshwater

⁴⁴ *Impact Statement: A new planning process for freshwater* (Ministry for the Environment, Wellington, 2019), at 12. The NPSFM at the time came into force in 2011 and was amended in 2014 and 2017.

⁴⁵ *Impact Statement: A new planning process for freshwater* (Ministry for the Environment, Wellington, 2019), at 12.

⁴⁶ *Impact Statement: A new planning process for freshwater* (Ministry for the Environment, Wellington, 2019), at 14.

⁴⁷ *Impact Statement: A new planning process for freshwater* (Ministry for the Environment, Wellington, 2019), at 27-30.

⁴⁸ *Impact Statement: A new planning process for freshwater* (Ministry for the Environment, Wellington, 2019), at 18.

related plan changes to progress through the process will limit the impact of the proposal on other aspects of the resource management system, meaning that implementation should be more straightforward. There will also be greater consistency in decision-making regarding freshwater management throughout the country, through standardised procedures.

Departmental Report on the Resource Management Amendment Bill

77. In addressing the intent behind freshwater planning process, the Departmental Report on the Resource Management Amendment Bill records:⁴⁹

The Government is committed to improving New Zealand's freshwater quality by stopping further degradation and loss, and reversing past damage. Key to achieving the freshwater goals is a new NPS-FM which is expected to be in place by mid-2020. This needs to be implemented by regional councils in a timely way if it is to be effective.

As previously noted, recent reporting from councils to the Ministry has shown that the majority of regional councils are unlikely to meet the existing deadline of fully implementing the 2017 NPS-FM by 2025 and are likely to take until 2030 or later the deadline can currently be extended to 2030 in certain circumstances). The Government's view is that such delays are unacceptable and risk further degradation of rivers, lakes and aquifers.

The reasons for delay are varied but include slow standard RMA plan-making processes. The freshwater planning process would require plans to be in place by 2025 which the Government sees as an essential first step.

Environment Committee Report on the Resource Management Amendment Bill

78. The Environment Committee's Report echoed the intent of expediting implementation of the NPSFM:⁵⁰

"It is intended that the new freshwater planning process would assist regional and unitary councils to meet the 2025 deadline for implementing the requirements of the National Policy Statement for Freshwater Management."

79. The Environment Committee recognised what may constitute a freshwater planning instrument may not be straightforward, and that "some planning instruments may have some provisions that relate to freshwater, and other provisions that do not."⁵¹

WHERE TO DRAW THE LINE?

80. A critical issue relates to the where to draw the line in terms of what is related to freshwater and what is not.

⁴⁹ Departmental Report on the Resource Management Amendment Bill (Ministry for the Environment, March 2020) at 86-87.

⁵⁰ Resource Management Amendment Bill 2019 (180-2), (Select Committee Report) at 4.

⁵¹ Resource Management Amendment Bill 2019 (180-2), (Select Committee Report) at 5.

81. The ORC's interpretation subsumes all provisions concerning natural and physical resources, including land and the coastal marine area, into the freshwater planning process.
82. There is no justification for interpreting Parliament's words in such a broad manner. There are parts of the PORPS that are plainly not related to freshwater. The Air chapter is a good example. This is discussed in detail below. The Air chapter does not include the word "freshwater". It is not an available interpretation that the Air chapter relates to freshwater when it makes no reference to freshwater.
83. On the other hand, an overly narrow interpretation potentially risks neglecting critical freshwater components. This interpretation is untenable as there are some parts of the PORPS that are related to freshwater. The Land and Freshwater chapter is the obvious example.
84. Given the stringent timeframes required by the freshwater planning process, freshwater panels and freshwater commissioners should not be burdened with additional matters that are unrelated or only remotely related to freshwater, that are more appropriately dealt with the standard Schedule 1 process. The freshwater planning process should not be congested by topics of little to no relevance to freshwater – a perverse outcome contrary to the intentions behind the process. Shoehorning an entire proposed through the freshwater planning process would lead to significant unintended consequences and absurdity.
85. The ORC's approach of selecting some provisions from each chapter of the PORPS with some connection to freshwater, despite the remaining provisions having little to no connection, is not a tenable basis to conclude the whole PORPS must undergo the freshwater planning process.
86. The interpretation taken by ORC would justify further proposed regional policy statements and variations and changes to regional policy statements undergoing the freshwater planning process. Their approach risks frustrating the intent behind the freshwater planning process – a streamlined process intended to expedite protection and restoration of freshwater.
87. There are components of PORPS that clearly do not "relate to" freshwater. There is no jurisdiction under the RMA for these components to undergo the freshwater planning process.
88. The scope of what "relates to freshwater" must be capable of pragmatic assessment that is consistent with the RMA's careful and deliberate separation of decision-making procedures for natural and physical resources.
89. Provisions related to freshwater must be objectively determined. Section 30 of the RMA provides practical jurisdictional lines to assist. Provisions that implement a specific function that explicitly refers to water bodies in s30 of the

RMA will clearly fall within the jurisdictional ambit of “relates to freshwater”. Those s 30 matters that refer to water bodies can be categorised as addressing:

- a. Freshwater quality:
 - i. section 30(1)(c)(ii): *“the control of the use of land for the purpose of the maintenance and enhancement of the quality of water in water bodies;”*
 - ii. Section 30(1)(g): *in relation to any bed of a water body, the control of the introduction or planting of any plant in, on, or under that land, for the purpose of the maintenance and enhancement of the quality of water in that water body.”*
 - b. Freshwater quantity:
 - i. section 30(1)(c)(iii): *“the maintenance of the quantity of water in water bodies;”*
 - ii. Section 30(1)(g)(iii): *“in relation to any bed of a water body, the control of the introduction or planting of any plant in, on, or under that land, for the purpose of the quantity of water in that water body.”*
 - c. Freshwater ecology: section 30(1)(c)(iiia): *“the maintenance and enhancement of ecosystems in water bodies”*.
90. The “freshwater ecology” category would capture provisions concerning structures in beds of rivers and lakes or flood management raised in the Department Report⁵² as these are activities that affect freshwater ecology. For example, the placement of structures such as a culverts or weirs affects freshwater ecology as it can impact the passage of freshwater species.
91. Section 30(1)(f) refers to the *“control of discharges of contaminants into or onto land, air, or water and discharges of water into water”*. It does not distinguish one element over the other, but can be tied back to either the category of freshwater quality, freshwater quantity or freshwater ecology. For example, where the discharge of a contaminant is into freshwater, freshwater quality will be affected.
92. To go beyond these boundaries otherwise leads to a coarse subjective assessment – obfuscating matters that do not concern freshwater which are more appropriately dealt with under the standard Schedule 1 process.
93. A final consideration in determining whether a “part” is related to freshwater is the expertise required. If a part requires expertise beyond freshwater quality, quantity, or ecology (such as terrestrial or marine ecology) the less likely the part relates to freshwater.

⁵² Departmental Report on the Resource Management Amendment Bill (Ministry for the Environment, March 2020) at 86-87.

94. A particular issue that arises is where a single provision relates to freshwater but is embedded in a chapter focussed on broader subjects unrelated to freshwater. A prime example is the Ecosystems and Indigenous Biodiversity chapter. This addresses indigenous biodiversity in general, and includes provisions relating to freshwater, coastal and terrestrial ecosystems.
95. The question that arises is whether these parts of the PORPS are “related to freshwater”.
96. The requirement for freshwater panels to have collective expertise in “freshwater quality, quantity, and ecology” in clause 65(2)(b) of the First Schedule is telling. It does not require that the panel members would have expertise in marine or terrestrial ecology that would be relevant to the consideration of provisions relating to such matters.
97. The requirement for such specialist expertise demonstrates an intention that freshwater hearing panels would deal with freshwater matters per se and not stray into other matters.
98. If the Ecosystems and Indigenous Biodiversity Topic went through the standard Schedule 1 process the hearings panel would be constituted by the Council under s 39B of the RMA. This contains requirements for accreditation but otherwise gives the Council the discretion to determine the expertise of the panel.
99. The extrinsic materials also confirm that “related to” freshwater was a catchall for matters that are clearly freshwater related. It does not anticipate that important parts of an RPS, which concern terrestrial and marine ecology, would be included.

PARTS OF THE PROPOSED OTAGO REGIONAL POLICY STATEMENT THAT RELATE TO FRESHWATER

100. The ORC’s submission that “there is no severable part which neither gives effect to the National Policy Statement for Freshwater Management nor related to freshwater in some other way”⁵³ is incorrect.
101. When objectively assessed, it becomes clear that the Land and Freshwater domain chapter is related to freshwater and should be subject to the FPP. This domain implements the ORC’s functions for freshwater quality, freshwater quantity and freshwater ecology and should be subject to the FPP.
102. There are other parts of the PORPS which refer to freshwater. However, these tend to be isolated provisions in domains or topics that do not relate to freshwater. For example, as is discussed below, the Coastal Environment

⁵³ Submissions on behalf of the Otago Regional Council, dated 24 December 2021, at [123].

domain chapter makes no reference to freshwater, except in a provision (Policy CE-P4(1)(c)) related to natural character.

103. It would not be consistent with s 80A(3) to make the entire Coastal Environment Domain, including parts which are unrelated to freshwater, subject to the FPP because Policy CE-P4(1)(c) refers to freshwater. This would mean that parts of the PORPS unrelated to freshwater would be subject to the FPP, an outcome contrary to s 80A(3).
104. In relation to provisions which reference freshwater in particular Domains or Topic chapters that are otherwise unrelated to freshwater, the appropriate approach to determine whether the provision should be subject to the FPP. This involves consideration of the provision itself and the practicality of that provision being subject to the FPP.
105. Applying this approach to the PORPS, the Land and Freshwater Domain chapter is the only part of the PORPS that relates to freshwater. The balance of the PORPS does not relate to freshwater and must undergo appropriate consideration under the standard schedule 1 process.
106. The exception to this is the parts of the PORPS which relate to cultural matters. Examples include MW – Mana Whenua and the “RMIA – Resource management issues of significance to iwi authorities in the region” which includes numerous references to freshwater. Forest & Bird defers to mana whenua on these sections.

Introduction and Resource Management Overview

107. Parts 1 and 2 of the PORPS are broad in nature and include some matters that are related to freshwater and some that are not. For example, the description of the region includes discussion of several matters including climate, coast and water bodies.
108. It also includes a definition section which includes some freshwater related definitions and some definitions that are not related to freshwater.
109. As some of the matters are not related to freshwater, there is no jurisdiction for these matters to be subject to the FPP.
110. Parts 1 and 2 do not implement and freshwater function and there are broad matters that go beyond the expertise of freshwater hearings panels. As a result, these are not related to freshwater and should not be subject to the FPP.

Air

111. The ORC bases their contention that provisions in the Air domain chapter contribute to implementing the NSPFM and relates to freshwater on the RMA's definition of "water":⁵⁴

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

112. This approach is problematic. Firstly, the PORPS chapter on Air does not mention "water", "water vapour", "steam", or "freshwater". Rather, the chapter focuses on the "vital role clean air has on supporting a healthy population and the environment".⁵⁵
113. Secondly, the Resource Management (National Environmental Standards for Air Quality) Regulations 2004 ("NES-AQ") sets limits in outdoor air for PM₁₀, carbon monoxide, nitrogen dioxide, sulphur dioxide and ozone to provide a minimum level of health protection for all New Zealanders.⁵⁶ The NES-AQ also sets prohibitions and restrictions on discharges to air caused by certain activities.⁵⁷ No limits, prohibitions, nor restrictions are set in relation to water, water vapour, steam, or freshwater.
114. Despite the ORC's submission that "discharges to air arise from the use of land", and that "the NPSFM directs that the effects of the use and development of land on freshwater must be addressed in ORC's Regional Policy Statement",⁵⁸ the PORPS chapter on Air does not once refer to waterbodies or refer to flow-on effects discharges to air may have on waterbodies.
115. The NPSFM itself is not concerned with water vapour. Instead, it contains standards for water quality in Appendix 2A "Attributes requiring limits on resource use", which apply to rivers or lakes. These do not apply to discharges to air. The NPSFM does not set any attributes and bottom lines for water vapour nor any of the contaminants referred in the NES-AQ.
116. The Air domain chapter does not relate to freshwater and must be prepared in accordance with the standard Schedule 1 process.

⁵⁴ Submissions on behalf of the Otago Regional Council, dated 24 December 2021, at [113].

⁵⁵ AIR-PR1, PORPS at page 106.

⁵⁶ Regulation 13, NES-AQ 2004.

⁵⁷ Regulations 4-12, NES-AQ 2004.

⁵⁸ Submissions on behalf of the Otago Regional Council, dated 24 December 2021, at [119].

Coastal Environment

117. The ORC's contention that the Coastal Environment Domain chapter relates to freshwater because the "coastal environment extends landward of the coastal marine area and includes freshwater bodies (rivers, lakes, wetlands, aquifers and springs)"⁵⁹ is misplaced.
118. There is only one provision in the Coastal Environment Domain chapter that refers to freshwater: Policy CE-P4(1)(c) directs "identifying areas and values of high and outstanding natural character which may include matters such as natural landforms such as headlands, peninsulas, cliffs, dunes, wetlands, estuaries, reefs, freshwater springs and surf breaks".
119. While Policy PE-P4(1)(c) refers to freshwater, this provision relates to natural character of the coastal environment and cannot easily be tied back to freshwater quality, quantity, or ecology. In addition, it would be unworkable to excise just this provision from the chapter and make it subject to the FPP.
120. That this is the correct interpretation is supported by the fact that the subject matter of the provision, natural character of the coastal environment,⁶⁰ is not something that the freshwater hearings panel will have expertise in.
121. Numerous provisions in Coastal Environment chapter refer to areas that are spatially distinct from freshwater and water bodies:
- a. CE-O1(5): "*surf breaks of national significance are protected*" (and related policy CE-P7-Surf breaks). Surf breaks can only occur in the coastal marine area, and therefore do not relate to freshwater.
 - b. CE-P8 – Public access: "*maintain or enhance public access to and along the coastal marine area, unless restricting public access is necessary...*". Public access to the coastal marine area is not related to freshwater.
 - c. CE-P10– Activities within the coastal marine area. This provision expressly refers activities that only occur in the coastal marine area.
 - d. CE-P11 – Aquaculture. Aquaculture involves the occupation of the coastal marine area and therefore does not relate to freshwater.

⁵⁹ Submissions on behalf of the Otago Regional Council, dated 24 December 2021, at [123].

⁶⁰ See NZCPS Policy 13(2)(b), "natural character" includes "*biophysical, ecological, geological and geomorphological aspects.*"

e. CE-P12 – Reclamation. The activity of reclamation, by its very nature, can only occur in the coastal marine area.⁶¹

122. The Coastal Environment chapter is not related to freshwater. There is no clear link between freshwater and provisions relating to surfbreaks, aquaculture, reclamation and activities in the CMA. These provisions are jurisdictionally barred from being subject to the FPP.

123. One of the ORC submissions is that 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.⁶² The ORC goes on to say that connections between the coastal environment and freshwater are recognised and provided for to achieve integrated management.⁶³

124. Section 80A(3) requires that provisions can only be subject to the FPP if they are related to freshwater. That a provision gives effect to the NPSFM is not determinative of whether provisions can be subject to the FPP. The effect of this is that provisions giving effect to broad directions in the NPSFM such as integrated management cannot be subject to the FPP unless they are related to freshwater. Put another way, provisions unrelated to freshwater cannot be subject to the FPP simply because they need to be integrated with freshwater matters. In any event, integrated management of the coastal environment is required by Policy 4 of the NZCPS:

Provide for the integrated management of natural and physical resources in the coastal environment, and activities that affect the coastal environment. This requires:

- (a) co-ordinated management or control of activities within the coastal environment, and which could cross administrative boundaries, particularly:
 - (i) the local authority boundary between the coastal marine area and land;
 - (ii) local authority boundaries within the coastal environment, both within the coastal marine area and on land; and
 - (iii) where hapū or iwi boundaries or rohe cross local authority boundaries;

⁶¹ Reclaimed land is defined in section 29 of the Marine and Coastal Area (Takutai Moana) Act 2011 as “permanent land formed from land that formerly was below the line of mean high-water springs and that, as a result of reclamation, is located above the line of mean high-water springs, but does not include—(a) land that has arisen above the line of mean high-water springs as a result of natural processes, including accretion; or (b) structures such as breakwaters, moles, groynes, or sea walls”.

⁶² Submissions on behalf of the Otago Regional Council, dated 24 December 2021, at [124].

⁶³ Submissions on behalf of the Otago Regional Council, dated 24 December 2021, at [125].

- (b) working collaboratively with other bodies and agencies with responsibilities and functions relevant to resource management, such as where land or waters are held or managed for conservation purposes; and
- (c) particular consideration of situations where:
 - (i) subdivision, use, or development and its effects above or below the line of mean high water springs will require, or is likely to result in, associated use or development that crosses the line of mean high water springs; or
 - (ii) public use and enjoyment of public space in the coastal environment is affected, or is likely to be affected; or
 - (iii) development or land management practices may be affected by physical changes to the coastal environment or potential inundation from coastal hazards, including as a result of climate change; or
 - (iv) land use activities affect, or are likely to affect, water quality in the coastal environment and marine ecosystems through increasing sedimentation; or
 - (v) significant adverse cumulative effects are occurring, or can be anticipated.

Ecosystems and Indigenous Biodiversity

125. The Ecosystems and Indigenous Biodiversity Topic addresses ecosystems and indigenous biodiversity in terrestrial, coastal and freshwater environments.
126. As is discussed above, it was not intended that the FPP be used where a part of the RPS raises matters which require expertise beyond the freshwater expertise required for freshwater commissioners. On this basis, the Ecosystems and Indigenous Biodiversity Chapter should be considered through the standard Schedule 1 process.

The remaining topics

127. The remaining topics⁶⁴ are not related to freshwater.⁶⁵ The provisions were not designed to address freshwater quality, quantity or ecology and do not implement any of the Regional Council's freshwater functions in this regard. In addition, the matters that are addressed require expertise beyond that prescribed for freshwater panels.
128. The Natural Landscapes and Features Topic chapter itself says that it implements s 6(b) and 7 of the RMA.

⁶⁴ EIT - Energy Infrastructure and Transport, HAZ - Harards and Risks, HCV - Historic and Cultural Values, NFL - Natural Features and Landscapes and UFD - Urban Form and Development

⁶⁵ The exception to this is the HCV-WT – Wāhi tūpuna part of the HCV Topic. Forest & Bird defers to mana whenua as to whether this section is related to freshwater.

The policies in this chapter are designed to require outstanding and highly valued natural features and landscapes to be identified using regionally consistent attributes, then managing activities to either protect outstanding natural features and landscapes in accordance with section 6(b) of the RMA 1991 or maintain highly valued natural features or landscapes in accordance with section 7 of the RMA 1991

129. The ORC submission is that this topic is related to freshwater because water (or ice) was part of the formative processes of the landscape or feature and water forms part of the landscape or feature. This submission should not be accepted. The policies relate to landscape not any freshwater function. Further the expertise that a freshwater hearing panel is required to have does not extend to expertise in landscape.
130. The Historic Heritage part of the HCV- Historic and Cultural Values Topic is aimed at implementing s 6(f) of the RMA.⁶⁶
131. The ORC submissions address the Wāhi tūpuna part of the HCV Topic but not the Historic Heritage part of the HCV chapter. The Historic Heritage part of the HCV Topic does not implement any freshwater function and requires expertise beyond that of freshwater hearings panels. It is not related to freshwater.
132. The policies for Urban Form and Development were not designed to address any freshwater matter:
- The policies in this chapter are designed to facilitate the provision of sufficient housing and business capacity and ensure all of the region's urban areas demonstrate the features of well-functioning urban environments and meet the needs of current and future communities....
133. The ORC argument is that this topic is freshwater related because urban development has to maintain significant values and features, and freshwater is impacted by urban development.⁶⁷
134. This submission should not be accepted. The topic uses the word "freshwater" only once, and this is to refer to the Land and Freshwater Domain chapter. It is not tenable to say a topic is related to freshwater when it makes no substantive reference to it.
135. This topic does not implement any freshwater function and the expertise required of freshwater hearing panels is not relevant to the issues in this topic.
136. The Energy, Infrastructure and Transport Topic is similar to the Ecosystems and Indigenous Biodiversity Topic. There are elements, such as the provisions regarding renewable energy that relate to freshwater. However, the majority of the topic, including the provisions regarding electricity transmission and transportation are not related to freshwater. As is discussed above, the intention of the FPP was to address freshwater matters and not stray into non-

⁶⁶ See Principal Reasons on Page 179.

⁶⁷ Paragraph 195

freshwater related matters outside the expertise of the FPP. As the topic strays into address non-freshwater matters, the topic is therefore not related to freshwater.

137. Similarly, the Natural Hazards Topic was aimed at natural hazards not freshwater.

The policies in this chapter are designed to reduce the level of natural hazard risk within the region through sound preparation, investigation and planning.

138. As with the preceding topics, this is not related to freshwater. The word “freshwater” is not included in this topic, the provisions do not implement any freshwater function and freshwater hearings panels will not have the expertise required to deal with natural hazards.

139. To allow Energy Infrastructure and Transport, Hazards and Risks, Historic and Cultural Values, Natural Features and Landscapes and Urban Form and Development to be subject to the FPP would frustrate the statutory purpose, which is to provide a specialist process with freshwater experts to progress freshwater plans expeditiously to address the decline in water quality. As referred above the RIS noted New Zealand’s limited pool of people with the necessary mix of skills to competently deal with freshwater matters. It is contrary to this purpose to have the limited pool of freshwater experts addressing matters outside their requisite expertise, such as landscape, urban development, natural hazard and historic heritage.

CONCLUSION AND RELIEF

140. The FPP was implemented to address the national decline in freshwater quality. The slower pace of the standard Schedule 1 process was identified as one of the causes of the decline.

141. In response to this decline the FPP was developed as a specialist process that would deliver timely freshwater planning documents. The usual two-step process of Council hearing with possible appeals to the Environment Court was replaced with the FPP, a one step process using freshwater hearing panels consisting of commissioners with specialist expertise in freshwater related matters. FPP’s consider freshwater planning instruments.

142. In order to address the situation where a freshwater planning instrument included freshwater and non-freshwater matters, s 80A(3) provides for the freshwater related parts to be subject to the FPP.

143. Section 80A(3) was intended as a catch all, ensuring that clearly freshwater related provisions were able to go through the FPP. It was not Parliament’s intent to allow an entire RPS, including provisions unrelated to freshwater, to be considered by a FPP.

144. This is where the ORC has erred. They have applied s 80A(3) as providing for the FPP to be used where a part of the plan includes some reference to freshwater, however remote. This has resulted in their view that the FPP can be applied to some provisions that have no link to freshwater, such as aquaculture, surf breaks and reclamations. An unworkable outcome.
145. Properly applied, s 80A(3) provides that the FPP can be used for the parts of the freshwater planning instrument that implement a function regarding freshwater quality, freshwater quantity or freshwater ecology.
146. There will be circumstances where part of a freshwater planning instrument includes freshwater and non-freshwater related matters. This is the case here in the Ecosystems and Indigenous Biodiversity Topic chapter as well as the Energy Infrastructure and Transport Topic chapter. The requirement that the commissioners have experience in freshwater related matters indicates that they should not stray into matters unrelated to freshwater, where they do not have expertise. These parts of the plan should go through the standard Schedule 1 process.
147. When this approach is applied the only part of the PORPS that is related to freshwater is the Land and Freshwater Domain chapter. The balance of the RPS must go through the Schedule 1 process.

Relief

148. Forest & Bird seeks the declaration sought by ORC be declined.
149. Forest & Bird has no issues as to costs.

Dated 20 January 2022

The image shows two handwritten signatures. The first signature, on the left, is in black ink and appears to be 'Anderson'. The second signature, on the right, is in blue ink and appears to be 'May Downing'.

Peter Anderson/May Downing
Counsel for the Royal Forest and Bird Protection Society of New Zealand Inc

LIST OF AUTHORITIES

Enactments

1. Legislation Act 2019, s 10.
2. Marine and Coastal Area (Takutai Moana) Act 2011, s 29.
3. Resource Management Act 1991, ss 2, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 30, 31, 56, 57, 58, 64, 80A, Schedule 1.
4. Resource Management (National Environmental Standards for Air Quality) Regulations 2004.

Cases

5. *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767.
6. *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38 [2014], 1 NZLR 593.
7. *Frucor Beverages Ltd v Rio Beverages Ltd* [2001] 2 NZLR 604 (CA).
8. *R v Kahu* [1995] 2 NZLR 3, (1995) 12 CRNZ 657 (CA).
9. *R v Salmond* [1992] 3 NZLR 8 (CA).
10. *Unison Networks Limited v Commerce Commission* [2007] NZSC 74.

Other

11. New Zealand Coastal Policy Statement 2010.
12. National Policy Statement for Freshwater Management 2020.
13. Resource Management Amendment Bill 2019 (180-2), (Select Committee Report).