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

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

CIV-2021-412-89

UNDER the Declaratory Judgments Act 1908

IN THE MATTER OF an application under the Declaratory Judgments Act 1908

BETWEEN OTAGO REGIONAL COUNCIL

Plaintiff

AND ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED

Defendant

SUBMISSIONS FOR THE MINISTER FOR THE ENVIRONMENT

27 January 2022

Next Event Date: Pre-trial conference, 2 February 2022

CROWN LAW
TE TARI TURE O TE KARAUNA
PO Box 2858
WELLINGTON 6140
Tel: 04 472 1719
Fax: 04 473 3482

Contact Person:
Rosemary Dixon

Rosemary.Dixon@crownlaw.govt.nz / Juliette.Derry@mfe.govt.nz

CONTENTS

The Minister’s Position	1
The Minister’s Interest	1
Background	1
The law.....	2
Key issue – interpretation of ‘freshwater planning instrument’	4
Key phrase: “relates to freshwater”	6
<i>Text and context</i>	6
<i>Purpose</i>	8
<i>FPP process</i>	10
Intended Outcomes of the FPP.....	11
List of Authorities.....	11
Schedule 1.....	12
THE FPP SCHEME	12
<i>Freshwater commissioners</i>	12
<i>The freshwater hearings panel</i>	15
<i>The panel hearing process and outcome</i>	16
<i>Appeal rights</i>	21
Statutes & Regulations	24
Cases	24
Other.....	24

May it Please the Court:**The Minister's Position**

1. The plaintiff Otago Regional Council (**ORC, Council**) seeks that the Court confirm that the Proposed Otago Regional Policy Statement 2021 (**pORPS**) is, in its entirety, a freshwater planning instrument under section 80A(1)-(3) of the Resource Management Act 1991 (**RMA**).
2. The Minister's position is neutral. The Minister wishes to assist the Court on the preliminary question: What is a freshwater planning instrument, by providing submissions on interpretation, context and intent. Counsel will not address the question of whether the pORPS is a freshwater planning instrument.

The Minister's Interest

3. This Government is committed to improving the quality of freshwater in New Zealand.¹ The Freshwater Planning Process (**FPP**) was introduced to the RMA to meet this commitment by speeding up the planning process in relation to freshwater.
4. The pORPS is one of the first planning instruments to utilise the FPP.
5. It is important that the outcome of this proceeding provides certainty as to the scope of a freshwater planning instrument. In particular, it is anticipated that the decision or declarations made in this proceeding will impact how other councils apply the FPP. It is therefore important to the delivery of improvements in freshwater outcomes.

Background

6. Freshwater quality in New Zealand continues to decline. The National Policy Statement for Freshwater Management in force from 1 August 2014, and subsequently updated, (**NPS-FM 2014**) was to be implemented by no later than 31 December 2025.² However, systemic barriers to the timely implementation of NPS-FM 2014 created by the process set out in

¹ Robert McClean *Impact Statement: A new planning process for freshwater* (Ministry for the Environment, 19 June 2019) at 7 citing Cabinet paper "Restoring our Freshwater and Waterways" (25 June 2018) CAB-18-MIN-0296.

² McClean, above n 2, at 9. This National Policy Statement for Freshwater Management was amended in 2017 with those amendments taking effect on 7 September 2017.

Schedule 1 to the RMA were identified.³ This meant that the existing plan-making system in the RMA could not deliver improved freshwater outcomes fast enough.

7. In response, the Government introduced a new plan-making process to the RMA for freshwater, the FPP, through the Resource Management Amendment Act 2020.⁴ This was a significant reform that was required to overcome the impediments in the existing plan-making process⁵ that were preventing plan changes for freshwater being delivered in the required timeframe. It is intended that the new FPP will assist regional and unitary councils to meet the 2025 deadline for implementing the requirements of the NPS-FM.⁶
8. The Government also provided an updated national direction on freshwater management through the implementation of a new National Policy Statement for Freshwater Management which came into force on 3 September 2020 (**NPS-FM 2020**).⁷ The FPP assists councils to implement the NPS-FM 2020 by: imposing deadlines for notification of proposed freshwater planning instruments that give effect to the NPS-FM 2020; retaining a two-year time limit for decision making; and restricting certain appeals.⁸

The law

9. Section 80A provides:
 - (1) The purpose of this subpart is to require all freshwater planning instruments prepared by a regional council to undergo the freshwater planning process.
 - (2) A **freshwater planning instrument** means—

³ McClean, above n 2, at 11, 12 and 13; Ministry for the Environment *Departmental report on the Resource Management Amendment Bill [Departmental Report]* (Ministry for the Environment, March 2020) at 81.

⁴ Resource Management Amendment Act 2020, ss 22 and 103(3); Resource Management Act 1991 [**RMA**], s 80A and pt 4 of sch 1. The Resource Management Amendment Act 2020 was given royal assent on 30 June 2020 and this is when the amendment to the RMA implementing the freshwater planning process came into force (see s 2 of the Resource Management Amendment Act 2020).

⁵ Found in the RMA, sch 1, pt 1.

⁶ Resource Management Amendment Bill 2019 No 180-2, Commentary, at 4.

⁷ Ministry for the Environment *A new Freshwater Planning Process – Technical guidance for councils [FPP Technical Guidance]* (Ministry for the Environment, ME 1524, September 2020) at 7.

⁸ FPP Technical Guidance, above n 7, at 8; RMA, s 80A(2)(a) and (4) and sch 1, pt 4, cls 51 and 54.

- (a) a proposed regional plan or regional policy statement for the purpose of giving effect to any national policy statement for freshwater management:
 - (b) a proposed regional plan or regional policy statement that relates to freshwater (other than for the purpose described in paragraph (a)):
 - (c) a change or variation to a proposed regional plan or regional policy statement if the change or variation—
 - (i) is for the purpose described in paragraph (a); or
 - (ii) otherwise relates to freshwater.
- (3) A regional council must prepare a freshwater planning instrument in accordance with this subpart and Part 4 of Schedule 1. However, if the council is satisfied that only part of the instrument relates to freshwater, the council must—
- (a) prepare that part in accordance with this subpart and Part 4 of Schedule 1; and
 - (b) prepare the parts that do not relate to freshwater in accordance with Part 1 of Schedule 1 or, if applicable, subpart 5 of this Part.
- (8) In subsection (2), a proposed regional plan does not include a proposed regional coastal plan or a change or variation to that plan.
10. Part 4 of Schedule 1 provides that submissions are heard by a panel of freshwater commissioners convened by the Chief Freshwater Commissioner.⁹ The panel make recommendations to the regional council which accepts or rejects these and notifies its decisions.¹⁰
11. Appeal rights are restricted compared to the standard plan-making process.
12. Where a council accepts the panel’s recommendation, a person who submitted on that matter can appeal to the High Court on a point of law followed by an appeal to the Court of Appeal only. Where a council rejects the panel’s recommendation, a merit appeal is available to the Environment Court by a person whose submission covered that particular matter.
13. Appeals related to a decision on a panel recommendation that is outside the scope of submissions are limited in the same way (depending on whether the council accepts or rejects the recommendation) except that the appeals

⁹ Clause 38

¹⁰ Clauses 49 and 52

are open to *any person* who made a submission on any matter.¹¹

14. Further detail on the FPP process and appeal rights is contained in Schedule 1 attached to these submissions.
15. Both “freshwater” and “fresh water” are defined in the RMA as meaning “all water except coastal water and geothermal water”.¹²
16. The RMA also provides a definition of “water”:¹³
 - “(a) means water in all its physical forms whether flowing or not and whether over or under the ground;
 - (b) includes fresh water, coastal water, and geothermal water;
 - (c) does not include water in any form while in any pipe, tank, or cistern”

Key issue – interpretation of ‘freshwater planning instrument’

17. Some guidance to this key term is provided from limited caselaw.
18. The only case to consider s 80A at all to date is *Bay of Islands Maritime Park Inc v Northland Regional Council*¹⁴ This was appealed to the High Court: *Minister of Conservation v Mangawhai Harbour Restoration Society Inc*.¹⁵ The Environment Court made some obiter but indicative comments on the scope of s 80A. While the High Court overturned the Environment Court’s central conclusion, the comments in relation to s 80A were not addressed substantively, being irrelevant to the central issue.
19. The case concerned the scope of the *Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F)*, and in particular whether these freshwater regulations applied to wetlands in the coastal marine area (**CMA**).
20. While s 80A was not the focus of the Environment Court’s consideration, the Court considered the section in assessing the scope of the freshwater regulations. In terms of the question before this Court, the

¹¹ Clauses 54 – 56.

¹² RMA, s 2(1) definition of “freshwater” and “fresh water”.

¹³ RMA, s 2(1) definition of water.

¹⁴ [2021] NZEnvC 006.

¹⁵ [2021] NZHC 3113.

Environment Court took a narrow view of the application of the s 80A regime to freshwater issues:¹⁶

While recognising the integrated nature of our environment, "management" under the NPS-FM focusses on potential effects on receiving environments – which ultimately lead to the sea. The wording of clause c) is not such that we can recognise a focus on managing effects other than those that arise on land, that is, in freshwater, and we are unable to come to the conclusion from those words alone that the NPSFM applies to all coastal marine environments. **If this were the case, it would be difficult to reconcile the NPS-FM with the freshwater provisions in s80A which treat freshwater issues as separate from land use and CMA issues.**

21. The Court further said that:¹⁷

Overall, we conclude that it is the intent of the NPS-FM, and of the relevant legislation with regard to which it was developed, to provide an integrated approach to freshwater management. **The objective was not to subsume the entire environment including the CMA and land use within the purview of the freshwater regulations or freshwater regime set up under s 80A. To do so would be anathema given the requirement to develop the regional plans and regional coastal plans separately to those for freshwater.** Having said that we acknowledge that it is intended that the NPS-FM should work together with other documents including the NZCPS, regional policies and plans and regional coastal plans to create a seamless whole.

22. The Court accordingly confirms that intent of the legislation is to provide an integrated approach to freshwater management, however this does not mean that the regime under s 80A subsumes (or includes) the entire environment.

23. The High Court overturned the Environment Court's findings in relation to the interpretation of the NES-F and held that the NES-F applied to natural wetlands in the CMA. The Court rejected the relevance of s 80A to that determination.¹⁸ The Court did not reject the Environment Court's underlying finding that s 80A treats freshwater issues as separate from land use (and CMA issues), although there was no need for the Court to consider this, given s 80A was found to be irrelevant to determining the scope of the NES-F.

¹⁶ At [26]. Emphasis added.

¹⁷ At [32]. Emphasis added.

¹⁸ At [115]. The concern was that if the NES-F applies to natural wetlands in the CMA, a proposed regional coastal plan would become a freshwater planning instrument. As the High Court pointed out, that cannot be the case because of s80A(8).

Key phrase: “relates to freshwater”

24. The High Court reiterated:¹⁹

The effect of s 80A 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.

25. The key question is what does “relates to freshwater” mean (where the NPS FM is not engaged).

26. The ordinary meaning of “relates to” is connected to or associated with. (Coastal water and geothermal water are already excluded by definition).

27. Caselaw provides some insight. The expression has been found to be synonymous with “concern”²⁰, “in respect of”, “about”.²¹

28. In the employment law context interpreting when a strike may be unlawful, the Court applied a definition of “significantly referable to”.²² Elsewhere it has been held that there must be “a sufficiently direct connection”.²³

29. How direct or significant the connection is guided by the context.

Text and context

30. Consistent with the legal principles of statutory interpretation the meaning and intent of the wording “relates to freshwater” in section 80A(3) must be ascertained from its text and in light of its purpose and its context.²⁴ In determining the purpose, the Court will have regard to both the immediate and the general legislative context.²⁵

31. In terms of the immediate context, the presumption that underlies the FPP process and s 80A is that not all parts of a planning instrument will necessarily relate to freshwater. As noted by the Environment Committee in its final report:

¹⁹ At [18].

²⁰ *Mercury NZ Ltd v The Waitangi Tribunal* [2021] 2 NZLR 142 at [70].

²¹ *Mercury NZ Ltd v The Waitangi Tribunal* [2021] 2 NZLR 142 at [72].

²² *The New Zealand Public Service Association Incorporated v Designpower New Zealand Ltd* [1992] ERNZ 669 at 691.

²³ *Auckland Harbour Board v NZ Harbours IUOW* (1987) ERNZ Sel Cas 178 (CA) at 182.

²⁴ Legislation Act 2019, s 10(1).

²⁵ *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767

We recognise that what constitutes a “freshwater planning instrument” may not be clear-cut, and that some planning instruments may have some provisions that relate to freshwater, and other provisions that do not.²⁶

32. The determination is not what is excluded from the FPP but what is to be included. The starting position is the normal schedule 1 plan or policy statement development with the full submitter participatory rights.
33. Further, just as it is mandatory for a freshwater planning instrument to go through the FPP process²⁷ so also is it mandatory that those parts of a plan or policy statement that are not related to freshwater do not.²⁸
34. As the requirements of s 80A(3)(a) and (b) are mandatory (and not discretionary), the test must be rigorously applied. This suggests an interpretation of “relates to” that leans towards a significant connection rather than simply a connection.
35. This reflects the position in the Regulatory Impact Statement:²⁹

It is intended that the [freshwater planning] process would include regional plan changes that relate directly to water quality and quantity, and also to the control of land use for the purpose of the maintenance and enhancement of water quality and quantity, recognising the impact the control of land use can have on freshwater management. Plan changes this would capture could include, for example, changes to regional plans to set limits on water use or discharges, such as nitrogen, or provisions to identify outstanding water bodies to ensure the protection of these.

36. The Departmental Report directly addressed the scope of “relates to freshwater”:³⁰

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

37. In terms of the general legislative context, the RMA’s underlying philosophy

²⁶ Final Report of the Environment Committee (30 March 2020) at page 5

²⁷ RMA, s 80A(3).

²⁸ RMA, s 80A(3)(b).

²⁹ RIS at page 18

³⁰ At page 89

is integrated management and a progressive national planning management approach of “ki uta ki tai” (from the mountains to the sea) reflecting Te Ao Māori. That is the wider RMA context reflected in part 2 (section 5 in particular). Section 59 of the Act provides that the purpose of a regional policy statement is to:

Achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.

38. The Act recognises that everything in the natural world is, to some extent, connected to everything else. It is best planning practice to draft plans and policy statements in an integrated fashion to properly recognise and plan for interdependencies, co-dependencies, and interconnectedness.
39. But the actual drafting and formatting of a regional policy statement divides that natural world by topic. It is possible to divide those topics administratively for hearing as most councils do. Splitting some topics to go down a different hearing track (the FPP track) while some continue on the normal schedule 1 track, is little different. Different hearing panels often hear submissions on different topics even when Council hears all submissions on its plan or policy statement. However, when one body hears all submissions it is obviously easier for there to be a process at the end which brings together all the thinking and shaping of the Plan or RPS.

Purpose

40. The purpose behind the introduction of the FPP process assists understanding of the scope of the phrase “relates to” and what a freshwater planning instrument is.
41. The overall state of freshwater in New Zealand is unsatisfactory and the quality of freshwater in some areas is in decline.³¹ The Government has committed to restoring New Zealand’s Freshwater and Waterways³² and, as a result of that commitment, the FPP was introduced to support the need

³¹ McClean, above n 2, at 7 citing Ministry for the Environment *Environment Aotearoa 2019* (Ministry for the Environment, ME 1416, 9 April 2019).

³² McClean, above n 2, at 7 citing Cabinet paper “Restoring our Freshwater and Waterways” (25 June 2018) CAB-18-MIN-0296.

for urgent action to improve freshwater outcomes.³³

42. The Bill was introduced to Parliament on 23 September 2019 to respond to the urgent need to improve freshwater management and outcomes. The Minister said in introducing the Bill: ³⁴

Changes are ... necessary to support the delivery of the Essential Freshwater action plan, which is currently out for consultation. The Government's committed to improving New Zealand's freshwater quality by stopping further degradation and loss, and reversing past damage. Key to achieving this will be a new National Policy Statement for Freshwater Management under the RMA... However, we already know that the majority of councils will not be fully implementing even the 2017 national policy statement (NPS) until 2030 or later. That 13-year delay makes it clear that the standard RMA planning process is too slow to implement the new freshwater NPS. So to ensure that necessary plan changes are made by 2025, after which time the NPS will have prospective effect, the bill introduces a new specialised planning process for freshwater plans...

43. The FPP achieves this by providing an expedited planning pathway for freshwater planning instruments in s 80A and Part 4 of Schedule 1 of the RMA³⁵ that by enabling regional council and unitary councils to make changes to their freshwater plans more efficiently than they could utilising the standard planning pathway in part 1 of schedule 1.
44. In the context of addressing integrated management, the departmental analysis addressed submissions seeking that the fast track process should be amended to apply to all planning documents. The submissions were rejected on the basis that such a change would interfere with the expedited process for freshwater.³⁶

We acknowledge the points made about integrated plans, integrated catchment management and efficient processes. However, the policy directive to have plans notified by 2023 makes this change impracticable at this time. Council may be able to have members in common for freshwater hearings panels and panels dealing with other matters.

³³ Departmental Report at 81.

³⁴ Hansard, 26 September 2019, https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20190926_20190926_20

³⁵ RMA s 80A(1), (3) and (4).

³⁶ At page 89.

We note that the Government is undertaking a wider RMA System Review, which includes looking at more efficient plan making processes for all RMA matters.

FPP process

45. This expedited planning pathway includes the establishment of independent freshwater hearing panels with enhanced powers.³⁷ Freshwater commissioners are intended to be persons with specialist skills (in freshwater, tikanga Māori and mātauranga Māori) who will review and test new freshwater plan changes and then make recommendations to the relevant local authority for decisions.³⁸
46. The process is overseen by the Chief Freshwater Commissioner who will ensure the timely delivery of freshwater hearings.³⁹
47. When determining the composition of the freshwater hearings panel the Chief Freshwater Commissioner is obligated to consider the need for the panel to collectively have knowledge of and expertise in relation to:⁴⁰
- (a) judicial processes and cross-examination; and
 - (b) freshwater quality, quantity and ecology; and
 - (c) this Act [the Resource Management Act 1991]; 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.
48. Appeal rights are deliberately limited. Rather than an automatic right of appeal to the Environment Court on merit, such an appeal is only available where the council does not accept the recommendation of the hearing panel.
49. In essence, the purpose of the FPP is to provide a plan-making system that is fit for purpose and will deliver plan changes (including its higher order regional policy statements) implementing the NPS-FM in an expedited

³⁷ RMA, sch 1, pt 4.

³⁸ Minister for the Environment (27 May 2020) 746 NZPD at 18247 – 18248; Resource Management Amendment Bill 2019 No 180-2, Commentary at 9.

³⁹ FPP Technical Guidance, above n 7, Factsheet, p 2.

⁴⁰ RMA, sch 1, pt 4, cl 59(6).

timeframe that is acceptable to the Government to achieve its expected outcomes for freshwater.

50. As the RIS noted:⁴¹

Only requiring freshwater 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.

Intended Outcomes of the FPP

51. The primary objective of the FPP is to deliver the NPS-FM outcomes efficiently and quickly with consequential environmental benefits particularly improved water quality.

52. An additional intended outcome is to ensure regional council plans are updated in a manner that is both expeditious and consistent with Te Mana o te Wai. Te Mana o te Wai forms a fundamental concept of the NPS-FM.⁴² It is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment.⁴³ Consistency with Te Mana o te Wai is achieved through the Chief Freshwater Commissioner, when convening a freshwater hearings panel, to consider the need for a panel to collectively have knowledge of and expertise in relation to Te Mana o te Wai.⁴⁴

List of Authorities

53. A list of authorities is **annexed**.

27 January 2022



Rosemary Dixon / Juliette Derry
Counsel for the Minister

⁴¹ At 18.

⁴² Ministry for the Environment *The National Policy Statement for Freshwater Management 2020* (Ministry for the Environment, ME 1518, 1 August 2020) [NPS-FM] at [1.3].

⁴³ NPS-FM at [1.3](1).

⁴⁴ RMA, sch 1, pt 4, cl 59(6)(e).

Schedule 1**THE FPP SCHEME**

54. By way of explanation only, and not limiting or affecting other provisions of the RMA,⁴⁵ s 80A(5) provides an outline of the FPP as set out in Part 4 of Schedule 1:

- “(a) the Chief Freshwater Commissioner must convene a freshwater hearings panel to conduct the public hearing of submissions on the freshwater planning instrument:
- (b) the freshwater hearings panel must conduct the public hearing of submissions in accordance with its powers and the procedures set out in Part 4 of Schedule 1:
- (c) after the public hearing of submissions is concluded, the freshwater hearings panel must make recommendations to the regional council on the freshwater planning instrument:
- (d) the regional council may accept or reject any recommendation. However,—
 - (i) the regional council must provide reasons for rejecting a recommendation; and
 - (ii) a person who made a submission on the freshwater planning instrument may make an appeal in accordance with subpart 2 of Part 4 of Schedule 1.”

Freshwater commissioners

55. Broadly, the Chief Freshwater Commissioner’s role is to convene freshwater hearings panels and then, after regional councils have referred regional planning documents and information to the Chief Freshwater Commissioner, to refer regional planning documents to a freshwater hearings panel to make recommendations.⁴⁶ Freshwater commissioners are intended to be persons with specialist skills who will review and test new freshwater plan changes and then make recommendations to the relevant local authority for decisions.⁴⁷ Freshwater commissioners fulfil this role through membership of freshwater hearings panels.⁴⁸

⁴⁵ RMA, s 80A(11).

⁴⁶ Resource Management Amendment Bill No 180-2, Commentary, at 4.

⁴⁷ Minister for the Environment (27 May 2020) 746 NZPD at 18247 – 18248; Resource Management Amendment Bill 2019 No 180-2, Commentary at 9.

⁴⁸ Resource Management Amendment Bill No 180-2, Commentary, at 5.

56. A “freshwater commissioner” means a person appointed by the Minister for the Environment⁴⁹ (**the Minister**) under clause 65 of Schedule 1. The Chief Freshwater Commissioner is defined in s 2(1) of the RMA as the Chief Freshwater Commissioner appointed under cl 65(3) of Schedule 1. It is mandatory for the Minister to appoint either an Environment Court Judge or a retired Environment Court Judge as the Chief Freshwater Commissioner.⁵⁰
57. The Chief Freshwater Commissioner facilitates the creation and composition of freshwater hearings panels. This is achieved through the imposition of a number of duties and functions and the granting of powers to comply with the Chief Freshwater Commissioner’s duties and fulfil their functions.
58. The duties imposed on the Chief Freshwater Commissioner in Schedule 1 are:
- 58.1 As soon as practicable after receipt of the documents submitted in accordance with clause 37 of Schedule 1 the Chief Freshwater Commissioner is required by clause 38 to convene a freshwater hearings panel for the freshwater planning instrument as soon as practicable.
- 58.2 The Chief Freshwater Commissioner must appoint the chairperson of a freshwater hearings panel after taking into consideration the desirability of the chairperson having knowledge and expertise in relation to judicial processes and cross-examination.⁵¹
- 58.3 The Chief Freshwater Commissioner must notify members of their appointment to a freshwater hearings panel and when the appointment commences.⁵²
- 58.4 The Chief Freshwater Commissioner must also tell a member being removed from a freshwater hearing panel in writing the date on which the removal takes effect and the reasons for the removal.⁵³

⁴⁹ RMA, s 2(1) definition of “Minister”.

⁵⁰ RMA, sch 1, pt 4, cl 65(3).

⁵¹ RMA, sch 1, pt 4, cl 60(1) and (2).

⁵² RMA, sch 1, pt 4, cl 62(2).

⁵³ RMA, sch 1, pt 4, cl 62(3).

59. The powers and functions provided to the Chief Freshwater Commissioner by Schedule 1 are:
- 59.1 The Chief Freshwater Commissioner may, on request, extend the timeframes in cls 37, 40, 51 and 52 in relation to a freshwater planning instrument and.⁵⁴
- 59.2 In relation to the creation of freshwater hearings panels the Chief Freshwater Commissioner can:
- 59.2.1 Decide when freshwater hearing panels are to be convened:⁵⁵
- 59.2.2 Determine the appropriate size and composition of a freshwater hearings panel:⁵⁶
- 59.2.3 Consider nominations for appointment to a freshwater hearings panel:⁵⁷
- 59.2.4 Appoint members of a freshwater hearings panel:⁵⁸
- 59.2.5 Appoint the chairperson of a freshwater hearings panel.⁵⁹
- 59.3 The Chief Freshwater Commissioner may direct that a freshwater hearings panel can be split into 2 panels if the Commissioner considers it appropriate in the circumstances.⁶⁰
- 59.4 The Chief Freshwater Commissioner, if no nomination is made by the regional council, can appoint a person with an understanding of tikanga Māori and mātauranga Māori as a member of a freshwater hearings panel.⁶¹
60. The Minister is empowered by cl 65(1) of Schedule 1 to appoint additional freshwater commissioners and it is mandatory for the additional freshwater

⁵⁴ RMA, sch 1, pt 4, cl 47(3).

⁵⁵ RMA, sch 1, pt 4, cl 58(1)(a).

⁵⁶ RMA, sch 1, pt 4, cl 58(1)(b).

⁵⁷ RMA, sch 1, pt 4, cl 58(1)(c).

⁵⁸ RMA, sch 1, pt 4, cl 58(1)(d).

⁵⁹ RMA, sch 1, pt 4, cl 58(1)(e).

⁶⁰ RMA, sch 1, pt 4, cl 58(2).

⁶¹ RMA, sch 1, pt 4, cl 59(c)(ii).

commissioners to both be accredited under s 39A of the RMA and, collectively, have knowledge of and expertise in: relation to judicial processes and cross-examination; freshwater quality, quantity and ecology; the RMA; and tikanga Māori and mātauranga Māori.⁶²

The freshwater hearings panel

61. The functions of a freshwater hearings panel are, as set out in clause 39 of Schedule 1:

- “(a) to conduct a hearing of submissions on a freshwater planning instrument referred to it by the Chief Freshwater Commissioner; and
- (b) to make recommendations, after the hearing of submissions is concluded, to the relevant regional council; and
- (c) to hear any objections made in accordance with clause 40(2).”

62. Ordinarily, as required by clause 59(1), a freshwater hearings panel must comprise of five members.⁶³ Two of these must be freshwater commissioners.⁶⁴ Two must be nominated by the relevant regional council and may or may not be elected regional council members.⁶⁵ The final member must be a person with an understanding of tikanga Māori and mātauranga Māori.⁶⁶ This person should be nominated by local tangata whenua but if no nomination is made then they may be appointed by the Chief Freshwater commissioner.⁶⁷

63. The group of persons who make up any freshwater hearings panel, by virtue of the requirements in clauses 59(1)(c), (6) and (7) and 65(1)(2) and the minimum requirements for panel member numbers in clause 59(3) and (4), will always have expertise appropriate to freshwater, including expertise on freshwater quality, quantity and ecology, Te Mana o te Wai, and water use in the local community.

⁶² RMA, sch 1, pt 4, cl 65(2).

⁶³ RMA, sch 1, pt 4, cl 59(1).

⁶⁴ RMA, sch 1, pt 4, cl 59(1)(a).

⁶⁵ RMA, sch 1, pt 4, cl 59(1)(b).

⁶⁶ RMA, sch 1, pt 4, cl 59(1)(c).

⁶⁷ RMA, sch 1, pt 4, cl 59(1)(c)(i) and (ii).

64. When determining the composition of the freshwater hearings panel the Chief Freshwater Commissioner is obligated to consider the need for the panel to collectively have knowledge of and expertise in relation to:⁶⁸

- “(a) judicial processes and cross-examination; and
- (b) freshwater quality, quantity and ecology; and
- (c) this Act [the Resource Management Act 1991]; 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.”

These requirements are similar to those imposed by clause 65(1) on the Minister when appointing additional freshwater commissioners.⁶⁹

65. In the circumstances where the Chief Freshwater Commissioner considers that the scale and complexity of the FPI does not warrant appointment of 5 members⁷⁰ the panel is still required to have a freshwater commissioner,⁷¹ a person nominated by the relevant regional council,⁷² and a person with knowledge of tikanga Māori and mātauranga Māori.⁷³

66. Similarly, where the Chief Freshwater Commissioner considers that there are special circumstances in the region to which the FPI applies the panel may exceed five members⁷⁴ it is still a requirement that at least five of the panel members are those as set out in clause 59(1) and its subsections.

The panel hearing process and outcome

67. In addition to the requirements for relevant expertise put in place by part 4 of schedule 1 the freshwater hearings panel is granted enhanced powers to deal with freshwater management. Freshwater hearings panels are granted

⁶⁸ RMA, sch 1, pt 4, cl 59(6).

⁶⁹ Compare RMA sch 1, pt 4, cl 65(2)(b)(i) – (iv) and RMA sch 1, pt 4, cl 59(6)(a) – (d).

⁷⁰ RMA, sch 1, pt 4, cl 59(2)(b).

⁷¹ RMA, sch 1, pt 4, cl 59(3)(c).

⁷² RMA, sch 1, pt 4, cl 59(3)(a).

⁷³ RMA, sch 1, pt 4, cl 59(3)(b).

⁷⁴ RMA, sch 1, pt 4, cl 59(2)(a).

the same duties and powers as granted to a local authority by ss 39 – 42A of the RMA to the extent that they are applicable to the freshwater hearings panel process.⁷⁵ Additional duties and powers specific to freshwater hearings panels are imposed on, and granted to, freshwater hearings panels in clauses 40(3) and (4), 41, 43, 44, 45, 46, and 48(2).

68. A freshwater hearings panel must regulate its own proceedings in a manner that is appropriate and fair in the circumstances.⁷⁶ It also has the power to permit a party to question another party or witness and to prohibit cross-examination.⁷⁷ Clause 40(3) grants freshwater hearing panels a discretion to accept or reject any late submissions. Clause 40(4) grants freshwater hearing panels the power to recommend to a relevant regional council that a variation be made to an FPI.
69. There are three avenues to resolve matters and issues between parties that is available to the freshwater hearings panel. The first is found in clause 41 which allows for the chairperson of a freshwater hearings panel to convene pre-hearing meetings.⁷⁸ The second is found in clause 43 which allows a freshwater hearings panel to, at any time during a hearing, direct that a conference of experts be held.⁷⁹ The third is found in clause 44 which allows a freshwater hearings panel, at any time during a hearing, to refer persons (listed in clause 44(2)) to mediation or any other alternative dispute resolution process.⁸⁰
70. Clause 41 allows the chairperson of a freshwater hearings panel to convene pre-hearing meetings for three reasons.⁸¹ The first is to clarify a matter or issue (and this is not restricted to issues with the FPI).⁸² The second is to facilitate resolution of a matter or issue (this is not restricted to issues with the FPI).⁸³ The third is to deal with matters of an administrative or procedural

⁷⁵ RMA, sch 1, pt 4, cl 40(1)(a) – (j).

⁷⁶ RMA, sch 1, pt 4, cl 48(1)(a).

⁷⁷ RMA, sch 1, pt 4, cl 48(2).

⁷⁸ RMA, sch 1, pt 4, cl 41(1).

⁷⁹ RMA, sch 1, pt 4, cl 43(1).

⁸⁰ RMA, sch 1, pt 4, cl 44(1).

⁸¹ RMA, sch 1, pt 4, cl 41(1).

⁸² RMA, sch 1, pt 4, cl 41(1)(a).

⁸³ RMA, sch 1, pt 4, cl 41(1)(b).

nature.⁸⁴ Parties who may be invited to a pre-hearing meeting are persons who made a submission on the FPI, the relevant regional council, and any person who the chairperson considers has relevant expertise.⁸⁵ On conclusion of the pre-hearing meeting, the chairperson of that meeting must provide the panel with a report setting out any clarification or resolution of a matter or issue agreed between attendees, any outstanding matters or issues between the attendees, and addresses any matters or issues identified by the chairperson of the pre-hearing meeting.⁸⁶

71. In contrast, any conference of experts established pursuant to clause 43 is only able to clarify matters or issues relating to the FPI or to facilitate resolution of a matter or issue relating to the FPI.⁸⁷ If there is no facilitator the attendees of the conference must provide a report of the outcomes to the freshwater hearings panel,⁸⁸ however, if an independent facilitator has been appointed (as the panel must if the conference requires one⁸⁹) then that facilitator must prepare a report and provide it to both the panel and the attendees.⁹⁰
72. The availability of alternative dispute resolution pursuant to clause 44 is more limited. It is available if the panel considers that it is appropriate to do so and likely to resolve issues between the parties that relate to the FPI.⁹¹ Persons who can be referred to alternative dispute resolution are 1 or more submitters, the relevant regional council and any other person the panel considers appropriate.⁹² The panel appoints the mediator or facilitator for the alternative dispute resolution process and the person appointed must report the outcome to the freshwater hearings panel (subject to certain limitations regarding without prejudice material).⁹³

⁸⁴ RMA, sch 1, pt 4, cl 41(1)(c).

⁸⁵ RMA, sch 1, pt 4, cl 41(2)(a) – (c).

⁸⁶ RMA, sch 1, pt 4, cl 41(4)(a) – (c).

⁸⁷ RMA, sch 1, pt 4, cl 43(1)(a) – (b).

⁸⁸ RMA, sch 1, pt 4, cl 43(3).

⁸⁹ RMA, sch 1, pt 4, cl 43(4).

⁹⁰ RMA, sch 1, pt 4, cl 43(5).

⁹¹ RMA, sch 1, pt 4, cl 44(1)(a).

⁹² RMA, sch 1, pt 4, cl 44(1) and (2).

⁹³ RMA, sch 1, pt 4, cl 44(3) – (5).

73. A freshwater hearings panel may also, at any time before or during a hearing, commission reports on 1 or more submissions, any matter arising from hearing, and any other matter that the panel considers necessary for the purpose of the panel making its recommendations.⁹⁴ The report can be considered at the hearing or when the panel is making its recommendations.⁹⁵ The panel can also request and receive information and advice from the person who prepared the report if it is relevant and reasonably necessary for the panel to make its recommendations.⁹⁶
74. These are the special features of the freshwater hearings panel process. Otherwise, all other facets of the freshwater hearings panel process are largely as set out in ss 39 – 42A (to the extent that they are applicable⁹⁷) and align with the standard statutory process for hearings in relation to proposed policy statements or plans. The only amendments to the standard processes in s 39A – 42A are that:
- 74.1 Subsections 39(2)(c) and (d) (which prohibit the question of parties or witnesses and cross-examination) do not apply;⁹⁸ and
- 74.2 if the panel exercises a power under s 41D to strike out submissions the objection process set out in ss 357, 357C, 357D and 358 will apply to the freshwater hearings panel as the relevant body.
75. For ease of reference the below table sets out a summary of the duties and powers of freshwater hearings panels:

Standard duties and powers in the RMA (also applicable to freshwater hearings panels)	Additional duties and powers that apply to freshwater hearings panels specifically
hearings to be public and without unnecessary formality (section 39, except restrictions on cross-examination)	permit, regulate or prohibit cross examination (clause 48(2))

⁹⁴ RMA, sch 1, pt 4, cl 45(1).

⁹⁵ RMA, sch 1, pt 4, cl 45(4)(a).

⁹⁶ RMA, sch 1, pt 4, cl 45(5).

⁹⁷ RMA, sch 1, pt 4, cl 40(1).

⁹⁸ RMA, sch 1, pt 4, cl 40(1)(a).

limit number of parties with the same interest to speak or call evidence (section 40)	convene pre-hearing meetings (clause 41)
exercise powers under the Commissions of Inquiry Act 1908 (section 41, eg, power to maintain order and summon witnesses)	direct a conference of experts (clause 43)
direct applicants to provide briefs of evidence before the hearing (section 41B)	refer submitters to alternative dispute resolution, such as mediation (clause 44)
direct order of business, take evidence and submissions as read, and limit speaking time (section 41C)	commission reports (clause 45)
request further information (section 41C)	appoint a special advisor(s) (clause 46)
strike out a submission (section 41D)	appoint a friend of the submitter (clause 46)
protect sensitive information (section 42)	accept or reject any late submissions (clause 40(3))
commission hearings reports (section 42A).	recommend to the relevant regional council that a variation be made to a freshwater planning instrument (clause 40(4)).

76. On completion of the panel hearing process a freshwater hearings panel must make recommendations on the FPI.⁹⁹ These recommendations must be provided to the relevant regional council in 1 or more written reports.¹⁰⁰ There are several items that must mandatorily be included in the written reports as stipulated by clause 49(4)(a) – (c). These items relate to consideration of, and reasons for accepting or rejecting, submissions made on the scope of the FPI. There are also a number of discretionary items that can be included in the written reports as set out in clause 49(5)(a) and (b). These items are matters relating to consequential adjustments necessary to

⁹⁹ RMA, sch 1, pt 4, cl 49(1).

¹⁰⁰ RMA, sch 1, pt 4, cl 49(3).

the FPI arising from submissions and any other relevant matter.

77. In addition to the various items that must, or may, be included when preparing a written report a freshwater hearings panels must also have regard to various types of reports, advice, and assistance provided to the panel (as set out in clause 50(a)(i) – (iv)) when formulating its recommendations. The panel must also take into account any alternative dispute resolution outcomes reported under clause 44,¹⁰¹ include a further evaluation of the FPI undertaken in accordance with s 32AA,¹⁰² and be sure that if the relevant regional council was to accept the panel's recommendations then certain sections of the RMA, or any other provision of any enactment that applies to the council's preparation of the plan, would be complied with.¹⁰³
78. Finally, there is a deadline imposed on freshwater hearings panels for any recommendations; its report must be provided to the relevant regional council no later than the date that is 40 working days before the expiry of 2 years after the date on which the freshwater planning instrument was publicly notified by the relevant regional council.¹⁰⁴

Appeal rights

79. The appeal rights that are available during the FPP are set out in Subpart 2 of Part 4 of Schedule 1. Clause 54 limits the FPP appeal rights to those in clauses 55 and 56 and, to avoid doubt, states that no further appeal lies to the Supreme Court (by leave or otherwise).¹⁰⁵ This does, however, leave open the option of appealing to the Court of Appeal (on questions of law only as appeals on merit are further limited by clause 55(4)(a) as discussed below at [81]).
80. The appeal rights granted in clause 55 allow those persons who made a submission on a FPI to appeal to the Environment Court in respect of a

¹⁰¹ RMA, sch 1, pt 4, cl 50(b).

¹⁰² RMA, sch 1, pt 4, cl 50(c).

¹⁰³ RMA, sch 1, pt 4, cl 50(d).

¹⁰⁴ RMA, sch 1, pt 4, cl 51.

¹⁰⁵ RMA, sch 1, pt 4, cl 54(1) and (2).

provision or matter relating to the FPI.¹⁰⁶

- “(a) that the person addressed in the submission; and
- (b) in relation to which the relevant regional council rejected a recommendation of the freshwater hearings panel and decided an alternative solution which resulted in:
 - (i) a provision or matter being included in the freshwater planning instrument; or
 - (ii) a provision or matter being excluded from the freshwater planning instrument.”

81. Where a regional council decides to reject a recommendation of the freshwater hearings panel that is outside the scope of submissions appeal is available to the Environment Court, by any person who made a submission, in respect of the decision or the alternative solution proposed by the council.¹⁰⁷ Clause 55 also facilitates the procedural elements of any appeal to the Environment Court through the operation of subclauses 55(3) and (4) which give jurisdiction to the Environment Court and extend the standard Environment Court processes (with necessary modifications) to FPP appeals save for the fact that clause 55(4)(a) excludes s 308 of the RMA from applying. The effect of excluding s 308 is that further appeal to the Court of Appeal is not available for any FPP matter that has been appealed to the Environment Court.

82. Clause 56 provides that a person who made a submission on a FPI may appeal to the High Court in respect of a provision or matter relating to the FPI in two circumstances.¹⁰⁸ The first circumstance is where the person addressed it in their submission.¹⁰⁹ The second is if the relevant regional council accepted a recommendation of the freshwater hearings panel which resulted in a provision or matter being excluded from, or included in, an FPI.¹¹⁰ Additionally, if a regional council decides to accept a recommendation

¹⁰⁶ RMA, sch 1, pt 4, cl 55(1).

¹⁰⁷ RMA, sch 1, pt 4, cl 55(2).

¹⁰⁸ RMA, sch 1, pt 4, cl 56(1).

¹⁰⁹ RMA, sch 1, pt 4, cl 56(1)(a).

¹¹⁰ RMA, sch 1, pt 4, cl 56(1)(b).

of the freshwater hearings panel that is outside the scope of submissions any person who made a submission may appeal that decision to the High Court.¹¹¹ However, the appeal rights granted in clause 56 are limited in that any appeal under that clause may be on a question of law only.¹¹² Clause 56(4) ensures that there is a procedural framework in place to allow appeals pursuant to clause 56, that the High Court has jurisdiction, and that decisions of the High Court can be appealed to the Court of Appeal when leave is granted. It does this through incorporation of those sections of the RMA , ss 299(2) and 300 – 308, which provide for appeals from Environment Court decisions on questions of law.

83. While appeal rights are limited clause 57 clarifies that judicial review remains available. Nothing in part 4 of schedule 1 limits or affects any rights of judicial review a person may have in respect of any matter to which part 4 of schedule 1 applies except as provided in clause 55(4) (which applies s 296; decisions may not be reviewed unless rights of appeal have been exercised).¹¹³ There is a qualification to this. If a person wants to both apply for a judicial review of a decision made under Part 4 of Schedule 1 and appeal to the High Court under clause 56 both applications must be lodged together.¹¹⁴ If applications are lodged together the High Court must try to hear both proceedings together, but need not if it is impracticable to do so in the circumstances of the particular case.¹¹⁵ The intended effect of clause 57(1) incorporating the exceptions in clause 55(4) (particularly that in s 296) and subclause 57(2) is to prevent the High Court from hearing a judicial review and then subsequently receiving an appeal.¹¹⁶

¹¹¹ RMA, sch 1, pt 4, cl 56(2).

¹¹² RMA, sch 1, pt 4, cl 56(3).

¹¹³ RMA, sch 1, pt 4, cl 57(1).

¹¹⁴ RMA, sch 1, pt 4, cl 57(2).

¹¹⁵ RMA, sch 1, pt 4, cl 57(3).

¹¹⁶ Resource Management Amendment Bill 2019 No 180-2, Commentary, at 12.

LIST OF AUTHORITIES**Statutes & Regulations**

1. Legislation Act 2019, s 10.
2. Resource Management Act 1991, ss 2, 80A & sch1 pt 4.
3. Resource Management Amendment Act 2020, ss 2, 22 & 103.

Cases

4. *Auckland Harbour Board v NZ Harbours IUOW* (1987) ERNZ Sel Cas 178 (CA).
5. *Bay of Islands Maritime Park Inc v Northland Regional Council* [2021] NZEnvC 6.
6. *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767.
7. *Minister of Conservation v Mangawhai Harbour Restoration Society Inc* [2021] NZHC 3113.

Other

8. Ministry for the Environment *Departmental report on the Resource Management Amendment Bill* (Ministry for the Environment, March 2020).
9. Ministry for the Environment *A new Freshwater Planning Process: Technical guidance for councils* (ME 1524, September 2020).
10. Ministry for the Environment *The National Policy Statement for Freshwater Management 2020* (ME 1518, 1 August 2020).
11. Resource Management Amendment Bill 2019 No 180-2.
12. Robert McClean *Impact Statement: A new planning process for freshwater* (Ministry for the Environment, 19 June 2019).