

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

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

CIV-2021-412-00089

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

BETWEEN **OTAGO REGIONAL COUNCIL** a regional council under
Schedule 2 of the Local Government Act 2002

Plaintiff

AND **ROYAL FOREST AND BIRD PROTECTION SOCIETY
OF NEW ZEALAND INCORPORATED** an incorporated
society having its registered office at 205 Victoria Street,
Wellington

Defendant

**LEGAL SUBMISSIONS ON BEHALF OF CANTERBURY REGIONAL
COUNCIL
27 January 2022**

Canterbury Regional Council's Solicitor
PO Box 4341 CHRISTCHURCH 8140
DX WX11179
Tel +64 3 379 7622
Fax +64 3 379 2467

WYNNWILLIAMS

Solicitor: P A C Maw
(philip.maw@wynnwilliams.co.nz)

TABLE OF CONTENTS

INTRODUCTION	2
RELEVANCE OF THE DECLARATIONS TO CRC	2
CRC's key issues	3
CRC's future planning workstreams	4
FRESHWATER PLANNING PROVISIONS OF THE RMA	4
DIRECTION IN HIGHER ORDER DOCUMENTS – KI UTA KI TAI AND INTEGRATED MANAGEMENT	7
Position in Canterbury regarding integrated management and ki uta ki tai.....	7
National Policy Statement for Freshwater Management 2020	8
INTEGRATED MANAGEMENT WITHIN THE PORPS	10
IF THE PORPS WAS TO BE DIVIDED – HOW?	11
Ministry's opinion.....	12
Expert opinion in this case.....	12
Council's functions	14
BY CHAPTERS OR BY PROVISIONS?	16
Plan architecture	17
Section 80A.....	18
Objectives may have interrelationships that require being read together	18
Architecture of a planning document	19
Consequences of division arise on appeal.....	21
WHAT ABOUT WHERE A PROVISION RELATES TO FRESHWATER, BUT ALSO APPLIES TO MANY OTHER ASPECTS?	21
PRINCIPLES TO DETERMINE APPROPRIATE PLANNING PROCESS	22
LIST OF AUTHORITIES	25

MAY IT PLEASE THE COURT

Introduction

- 1 These legal submissions are filed on behalf of one of the defendants in this proceeding, the Canterbury Regional Council (**CRC**).
- 2 The CRC is interested in the declarations sought on the basis of their potential wider application, particularly in relation to other regional planning processes, given that CRC will shortly be undertaking some similar processes of its own.
- 3 The CRC's position in respect of the declarations sought is relatively neutral. The purpose of these submissions is largely to highlight to the Court the potential difficulties with splitting a regional policy statement to go through two separate planning processes, and to note some particular matters the CRC considers the Court should keep in mind when considering the declarations sought.

Relevance of the declarations to CRC

- 4 While the CRC acknowledges that the declarations sought are specific to the Proposed Otago Regional Policy Statement (**PORPS**), it wishes to provide assistance to the Court in understanding the wider implications of any such declarations.
- 5 As with all regional councils and unitary authorities around the country, the CRC is required to make changes to some of its planning documents as a result of the National Policy Statement for Freshwater Management 2020 (**NPS-FM**).
- 6 The NPS-FM requires that every local authority must give effect to it "as soon as reasonably practicable".¹ The Resource Management Act 1991 (**RMA**) provides that a regional council must publicly notify a freshwater planning instrument (**FPI**) that is to give effect to the NPS-FM by 31 December 2024.²
- 7 As such, given the requirements of the NPS-FM (including its requirements for Freshwater Visions to be included within a regional policy statement),³ the CRC (along with most, if not all, other regional

¹ NPS-FM, clause 4.1.

² RMA, s 80A(4)(b).

³ Affidavit of Anita Dawe dated 13 September 2021, at [11].

councils) will be required to notify changes to its various planning documents to give effect to the NPS-FM.

- 8 Therefore, the interpretation of the provisions relating to the freshwater planning process (**FPP**) is of utmost importance in terms of ensuring that the CRC's processes comply with the law.

CRC's key issues

- 9 The CRC is neutral on the question of whether the entire PORPS is a freshwater planning instrument. The CRC appears in this proceeding in order to assist the Court as to the difficulties that regional councils will face in determining which parts of planning documents should proceed through which processes.
- 10 While the CRC is neutral as to which planning process the PORPS proceeds through, it has some reservations as to how a regional policy statement could be effectively split between two planning processes. The key issues for the CRC of such an approach that it submits would need to be carefully considered include:
- (a) How submission points requesting further integration between provisions are to be considered if the whole PORPS is not considered to be an FPI, and the relevant provisions are required to be considered under two separate planning processes;
 - (b) The extent of the Council's discretion in terms of satisfying itself that the planning instrument "relates to freshwater" such that it should proceed through the FPP;
 - (c) The risks of splitting provisions up to proceed through separate planning processes – both in respect of considering objectives (often considered an holistic framework for the document) separately to each other, and splitting by provision (i.e. objectives going through a separate process to the policies that are required to implement them).
 - (d) Which planning process provisions that both give effect to the NPS-FM / relate to freshwater as well as other resources (i.e. integrated management, mana whenua) should proceed through.

CRC's future planning workstreams

- 11 When preparing documents such as a regional policy statement or regional plans, regional councils are required to give effect to national policy statements.⁴
- 12 “Give effect to” means to implement, and is a strong directive, creating a firm obligation on the part of those subject to it.⁵
- 13 As signalled in the affidavit of Mr Andrew Parrish, the CRC has a number of planning changes or new planning documents in the pipeline, in order to give effect to the NPS-FM. This includes a land and water regulatory framework that provides for a Ngāi Tahu and community vision, scheduled to be notified by December 2024.⁶
- 14 Part of that framework will be a review of the Canterbury Regional Policy Statement (**CRPS**), being the key document setting the strategic direction for planning in the Canterbury region.⁷ A new Land and Water Regional Plan and Coastal Environment Regional Plan will also form part of that framework.
- 15 Given that the CRPS and the new Land and Water Regional Plan will have at least some provisions that give effect to the NPS-FM and others which “relate” to freshwater, it is equally important to the CRC as it is to ORC how to interpret the legislation regarding the extent of what is considered to give effect to the NPS-FM or “relate” to freshwater, and therefore should proceed through the FPP.

Freshwater planning provisions of the RMA

- 16 The FPP and the relevant provisions have been summarised in detail in other parties’ legal submissions, as well as those provisions setting out what is required of a regional policy statement (**RPS**). The CRC simply adopts those descriptions of the legislation to avoid duplication.
- 17 As it stands, the CRC considers the key question to be determined in this case is the meaning of the phrase “relates to freshwater”, as it is used in section 80A(2)(b) of the RMA, in the definition of an FPI.

⁴ RMA, ss 62(3) and 67(3).

⁵ *Environmental Defence Society Incorporated v New Zealand King Salmon Company Limited* [2014] NZSC 38 at [77].

⁶ Affidavit of Andrew Parrish, dated 26 October 2021, at [14].

⁷ Affidavit of Andrew Parrish, dated 26 October 2021, at [15].

- 18 The definition of an FPI includes two components, being either:
- (a) A planning document for the purpose of giving effect to any NPS-FM; or
 - (b) A planning document that relates to freshwater (other than for the purpose of giving effect to an NPS-FM).
- 19 This clarifies that “relates” to freshwater means something different than giving effect to the NPS-FM. However, there is no guidance in the legislation itself to determine how a council is supposed to interpret what “relates” to freshwater.
- 20 In accordance with the orthodox approach to statutory interpretation, the meaning of legislation must be ascertained from its text in light of its purpose (and its context).⁸ Reference back to explanatory materials at the time the legislation was passed can assist to determine the purpose of the text, but are not determinative in and of themselves and cannot override the language of the statute where this is clear and unambiguous.⁹
- 21 It is noted that the Interpretation Act 1999 (which traditionally set out the approach to statutory interpretation) has recently been repealed and replaced by the Legislation Act 2019 (with the addition of context to the factors to be taken into account when interpreting legislation).
- 22 The Legislation Act applies to legislation, defined as the whole or a part of an Act or any secondary legislation.¹⁰ Secondary legislation is defined as an instrument that is made under an Act, if the Act states that the instrument is secondary legislation or is made under Royal Prerogative set out in Schedule 1A of the Act.¹¹
- 23 Recent amendments to the RMA to align with the Legislation Act confirm that a national policy statement is secondary legislation, and therefore subject to the Legislation Act test for interpretation.¹²
- 24 As noted by other parties, the FPP was introduced by way of amendment to the RMA in 2020, specifically to provide for the

⁸ Interpretation Act 1999, s 5 (now replaced by Legislation Act 2019, s 10).

⁹ *R v Howard* [1987] 1 NZLR 347 (CA) at 353.

¹⁰ Legislation Act 2019, s 5.

¹¹ Legislation Act 2019, s 5.

¹² RMA, s 52(4).

implementation of the Essential Freshwater policy package. The Departmental Report produced for the Select Committee by the Ministry for the Environment, considering the submissions on the proposed Amendment Bill, contains some helpful detail regarding the concerns of councils and members of the public in respect of this wording.

25 The relevant advice provided in this report is as follows:¹³

The phrase “giving effect to the NPS-FM”, captures all requirements that arise from the NPS-FM. This includes the NPS-FM requirements to consider and recognise Te Mana o te Wai and to recognise the interactions of Ki uta ki tai between the ecosystems of freshwater, land and sensitive receiving environments including the coast. Planning content will also be driven by regional council functions under section 30(1)(c) to control the use of land for the purpose of the maintenance and enhancement of the quality of water in water bodies and coastal water and the maintenance of the quantity of freshwater. **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.**

...

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. Councils may be able to have members in common for freshwater hearings panels and panels dealing with other matters.

The discussion about the scope of matters that is subject to the freshwater planning process has been discussed above in clause 80A(2). We agree that when the plan is publicly notified, transparency would be beneficial around what is included in the plan change that will go through the freshwater planning process (and what part(s) of the regional plan will proceed via Part 1 of Schedule 1). We consider councils should issue a summary statement on notification, which briefly sets out what is included in the plan change, and identifies the additional aspects of the regional plan that will be progressed via a Part 1 of Schedule 1 process. **Examples may include land based rules where their purpose is not to achieve water outcomes, sections on biodiversity or the coastal part of an integrated plan.** We consider a statement of this nature is good practice and will provide transparency for submitters on the plan, and reduce the risk of confusion.

[emphasis added]

26 With this in mind, it is necessary to consider the directions in the higher order documents with respect to integrated management and the key

¹³ Ministry for the Environment, Departmental Report on the Resource Management Amendment Bill (March 2020) at page 89-90.

principle of ki uta ki tai. It is also necessary to consider the scope of the NPS-FM, to determine what falls within the scope of giving effect to it.

Direction in higher order documents – ki uta ki tai and integrated management

RMA

27 Integrated management is one of the key principles underpinning the development of regional planning documents. One of the functions of regional councils (and territorial authorities) under the RMA is “the establishment, implementation and review of objectives, policies and methods to achieve integrated management of the natural and physical resources of the region”.¹⁴

28 In addition, integrated management is integral to the purpose of a regional policy statement:¹⁵

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.

Position in Canterbury regarding integrated management and ki uta ki tai

29 While the concept may be relatively new to other parts of the country, Canterbury has been utilising a ki uta ki tai approach in its planning documents for some time.

30 Ki uta ki tai and its role in water management is set out in the operative Canterbury Land and Water Regional Plan:¹⁶

Water management applies the ethic of ki uta ki tai — from the mountains to the sea — and land and water are managed as integrated natural resources recognising the connectivity between surface water and groundwater, and between fresh water, land and the coast.

31 Ki uta ki tai has also been applied in the Canterbury context to aspects other than freshwater management, including indigenous biodiversity.¹⁷

¹⁴ RMA, s 30(1)(a).

¹⁵ RMA, s 59.

¹⁶ Canterbury Land and Water Regional Plan, Objective 3.2 (Exhibit E to the affidavit of Andrew Parrish).

¹⁷ Canterbury RPS, Chapter 9 — Ecosystems and Indigenous Biodiversity, Policy 9.3.3, at p 146 (included in Exhibit D of the Affidavit of Andrew Parrish).

National Policy Statement for Freshwater Management 2020

- 32 The NPS-FM is the key higher order document that the FPP has been designed to implement.
- 33 The NPS-FM sets out Te Mana o Te Wai as its “fundamental principle”, requiring that freshwater resources are managed in a way that prioritises:¹⁸
- (a) First, the health and well-being of water bodies and freshwater ecosystems;
 - (b) Second, the health needs of people (such as drinking water); and
 - (c) Third, the ability of people and communities to provide for their social, economic and cultural well-being, now and in the future.
- 34 Policy 3 of the NPS-FM (to which regional planning documents must give effect) is particularly relevant, and states:
- Freshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments.
- 35 Part 3 of the NPS-FM covers implementation. The Overview of Part 3 states that it “sets out a non-exhaustive list of things that local authorities must do to give effect to the objective and policies in Part 2 of the National Policy Statement.”¹⁹
- 36 One such implementation clause specifically relates to integrated management. This clause provides:²⁰
- (1) Adopting an integrated approach, ki uta ki tai, as required by Te Mana o te Wai, requires that local authorities must:
 - (a) recognise the interconnectedness of the whole environment, from the mountains and lakes, down the rivers to hāpua (lagoons), wahapū (estuaries) and to the sea; and
 - (b) recognise interactions between freshwater, land, water bodies, ecosystems, and receiving environments; and
 - (c) manage freshwater, and land use and development, in catchments in an integrated and sustainable way to avoid, remedy, or mitigate adverse effects, including cumulative effects, on the health and well-being of water bodies, freshwater ecosystems, and receiving environments; and

¹⁸ NPS-FM, Objective 1.

¹⁹ NPS-FM, clause 3.1.

²⁰ NPS-FM, clause 3.5.

(d) encourage the co-ordination and sequencing of regional or urban growth.

(2) Every regional council must make or change its regional policy statement to the extent needed to provide for the integrated management of the effects of:

(a) the use and development of land on freshwater; and

(b) the use and development of land and freshwater on receiving environments.

(3) In order to give effect to this National Policy Statement, local authorities that share jurisdiction over a catchment must co-operate in the integrated management of the effects of land use and development on freshwater.

(4) Every territorial authority must include objectives, policies, and methods in its district plan to promote positive effects, and avoid, remedy, or mitigate adverse effects (including cumulative effects), of urban development on the health and well-being of water bodies, freshwater ecosystems, and receiving environments.

37 This demonstrates that to give effect to the NPS-FM and its fundamental principle of Te Mana o Te Wai, councils must also give effect to the concept of integrated management (or ki uta ki tai), in order to recognise the interconnectedness of the whole environment. This includes the consideration of potential effects on receiving environments.

38 It is submitted that in order to give effect to this aspect of the NPS-FM, a range of matters that may not be traditionally thought of (especially in a Western sense) as relating to freshwater such that they are required to give effect to the NPS-FM. This can include aspects such as the co-ordination and sequencing of regional or urban growth, as set out above in clause 3.5.²¹

39 This is further emphasised in the evidence of Kā Rūnaka, where Mr Ellison states:²²

Water is the lifeblood of the environment, and of the many life forms that depend on it. The resource management approach “ki uta ki tai” emphasises the holistic management of the interrelated elements within the natural environment. For Kāi Tahu, the water bodies and the environment they are part of cannot be considered in isolation from each other.

40 From a regional council’s perspective, this makes it even more difficult to determine which parts or provisions of a planning document are for the purpose of giving effect to the NPS-FM, otherwise relate to freshwater,

²¹ Affidavit of Andrew Parrish, dated 26 October 2021, at [25].

²² Affidavit of Edward Ellison dated 22 December 2021, at [9].

or are unrelated such that they should proceed through the usual Schedule 1 process.

- 41 As noted by Mr Parrish, in reference to a regional council's planning obligations:²³

In adopting a planning approach consistent with ki uta ki tai, the CRC has a responsibility to ensure that the effects of activities are managed holistically, and to recognise that the interconnectedness of the environment as a whole means that some activities (although they may not seem on their face to relate to freshwater) do have impacts on freshwater.

- 42 Therefore, many matters in a regional plan or regional policy statement will be included for the purpose of giving effect to the NPS-FM, or otherwise relating to freshwater, such that they are required to proceed through the freshwater planning process.
- 43 The approach to integrated management in the NPS-FM reflects the general trend of recent planning practice (also promoted by the National Planning Standards), being to reduce the number of planning documents.²⁴ As noted by Andrew Parrish, "it would be much easier to explicitly link the quality of water in our rivers, estuaries, and oceans if they were dealt with holistically rather than in separate planning documents".²⁵
- 44 Seeking to deal with different aspects of plan provisions through different planning processes (which may involve a differently constituted decision-making panel, focussing on different elements), and which carry different rights of appeal, does not seem to promote the consideration of integrated management.

Integrated management within the PORPS

- 45 The range of activities that can affect freshwater is broad, and perhaps wider than what is commonly understood. The PORPS sets out some of these interrelationships in the "significant resource management issues for the region" section.

²³ Affidavit of Andrew Parrish, dated 26 October 2021, at [29].

²⁴ Affidavit of Andrew Parrish, dated 26 October 2021, at [20]; National Planning Standards, November 2019, 3 – Regional Plan Structure Standard (Exhibit C of Affidavit of Andrew Parrish).

²⁵ Affidavit of Andrew Parrish, dated 26 October 2021, at [20].

- 46 For example, in relation to the statement that “freshwater demand exceeds capacity in some places”, the PORPS notes that “population growth and land-use intensification in urban and rural environments can create increased demand for freshwater for human consumption, irrigation, and other economic uses.”²⁶
- 47 In addition, it notes that:²⁷
- Freshwater abstraction can reduce water level or flow and connections between different water bodies. This can negatively impact ecosystems by affecting freshwater habitat size and the shape and condition of the water body, including bed, banks, margin, riparian vegetation, connections to groundwater, water chemistry (for example by increasing concentrations of pollutants) and interaction between species and their habitats.
- 48 The PORPS also notes the broad range of activities that can impact freshwater quality, both in terms of groundwater and surface water. This includes:²⁸
- (a) stock entering water bodies;
 - (b) wintering cattle creating leaching effects which may cause spikes in nutrient loads in surface water;
 - (c) sediment created by urban development, agricultural intensification, mining and forestry;
 - (d) agricultural intensification causing nutrients and/or contaminants to leach into groundwater or run off into surface water bodies;
 - (e) urban environmental contaminants (such as hydrocarbons and metals from roads and structures) washing into stormwater systems and passing unfiltered into water bodies, or coastal marine area.

If the PORPS was to be divided – how?

- 49 As noted above, the CRC takes a neutral position on whether or not the entire PORPS is a freshwater planning instrument, and therefore should proceed through the FPP. In the event that the Court determines that the whole PORPS is not an FPI, the CRC wishes to highlight some matters for the Court’s consideration in determining which parts of the

²⁶ PORPS, SRMR-15 (Context)

²⁷ PORPS, SRMR-15 (Environmental – impact snapshot).

²⁸ PORPS, SRMR-16 (Environmental – impact snapshot).

PORPS should proceed through the FPP, and which should proceed through the usual Schedule 1 process.

- 50 A wide range of provisions and rules could be said to be eligible to proceed through the FPP. It is also currently unclear how such a split should take place – whether this is on a chapter-by-chapter basis, or provision-by-provision.

Ministry's opinion

- 51 The Ministry for the Environment's guidance information and Departmental Report provided on the Amendment Bill that introduced the FPP appears to suggest that there are defined sections of planning documents that do not relate to freshwater, or give effect to the NPS-FM. This includes land-based rules where their purpose is not to achieve water outcomes, sections on biodiversity, or the coastal part of an integrated plan.²⁹
- 52 The Ministry's opinion appears to be that water-related matters that do not relate to the NPS-FM "relate" to freshwater (and therefore should also go through the FPP). For example, this would include provisions to manage structures in beds of rivers or lakes or flood management policies and rules.³⁰
- 53 However, as noted above, these matters are guidance only, and should not be given significant weight when interpreting the legislation itself. The High Court has recently cast doubt on the value of publicly released Ministry "factsheets" as an aid to interpretation.³¹
- 54 As such, the CRC submits that the Ministry's view as expressed in Departmental reports prepared prior to the amendments being passed into law is not determinative of the interpretation of what "relates" to freshwater, or otherwise gives effect to the NPS-FM.

Expert opinion in this case

- 55 The evidence presented by parties in this proceeding demonstrates the wide range of views on the matter of whether the PORPS is an FPI (or

²⁹ Ministry for the Environment, Departmental Report on the Resource Management Amendment Bill (March 2020) at pages 89-90.

³⁰ Ministry for the Environment, Departmental Report on the Resource Management Amendment Bill (March 2020) at pages 89-90.

³¹ *Minister of Conservation v Mangawhai Harbour Restoration Society Inc* [2021] NZHC 3113, at [105].

which parts of the PORPS are an FPI). The evidence presented establishes that it is not straightforward to determine which parts of an RPS are for the purpose of giving effect to the NPS-FM, or otherwise relate to freshwater.

- 56 There is a divergence in views for the experts in this proceeding as to which parts of the PORPS could be considered to be an FPI. For example, of the expert planners that have provided evidence:
- (a) Clare Hunter on behalf of Oceana Gold New Zealand anticipates a split on a provision-by-provision basis, with only the provisions “unquestionably” relating to freshwater being subject to the FPP. Ms Hunter appears to suggest that some of the Land and Freshwater domain should be subject to the FPP, while other provisions (such as those solely relating to land within the domain, and integrated management) should not be subject to the FPP.³²
 - (b) Ann Rodgers on behalf of the Central Otago District Council and Victoria van der Spek on behalf of the Waitaki District Council consider that only the integrated management provisions and the land and freshwater provisions (relating to Te Mana o te Wai, visions and management, freshwater) should proceed through the FPP.³³
 - (c) Alyson Hutton on behalf of the Queenstown Lakes District Council (**QLDC**) considers that the split should also be on a provision-by-provision basis, noting her view that some of the integrated management provisions do not relate to freshwater, and that the provisions that QLDC has submitted on do not relate to freshwater.³⁴
 - (d) Dr Anna Johnson on behalf of Dunedin City Council considers that the parts of the PORPS that are an FPI are parts of the Land and Freshwater domain, and any ancillary content in Part 1, significant resource management issues for the region and resource management issues of significance to iwi authorities in the region, and Parts 4 and 5, with overarching content in the integrated

³² Affidavit of Clare Hunter dated 20 December 2021, at Exhibits CH-1 and CH-2.

³³ Affidavit of Ann Rodgers dated 3 December 2021, at [51]; Affidavit of Victoria van der Spek dated 3 December 2021, at [67].

³⁴ Affidavit of Alyson Hutton dated 3 December 2021, at [53] – [60].

management section to be considered through the full Schedule 1 process.³⁵

- 57 This divergence in views demonstrates the difficulty of this particular task with no clear guidance on how it is to be done, particularly even in terms of whether the split should be based on entire chapters / domains or whether it should come down to a provision-by-provision analysis.
- 58 Alternatively, the Kāi Tahu view emphasises the importance of an integrated RPS, where Ms McIntyre notes “a segregated decision making process, where different parts of the PORPS are considered through different processes and at different times, would carry the very real risk that the PORPS does not end up as an integrated management package.”³⁶
- 59 This is emphasised by the Kāi Tahu submission seeking greater integration between chapters and provisions in some cases, particularly between the Land and Freshwater chapter and the Coastal Environment chapter.³⁷ It is unclear how ORC would be able to deal with this submission point if the chapters were to proceed through separate and different planning processes.

Council's functions

- 60 Regional councils have a specific list of functions under the RMA, for the purpose of giving effect to the RMA in their region.³⁸ An RPS is required to be prepared in accordance with the functions set out in section 30 of the RMA.³⁹
- 61 These functions may provide some guidance on the aspects of an RPS that may relate to freshwater, or give effect to the NPS-FM. Where a provision has been prepared in accordance with a regional council function that relates to freshwater (even if the provision itself does not necessarily explicitly relate to freshwater), then this could also provide an avenue through which to examine whether a provision is for the purpose of giving effect to the NPS-FM, or relates to freshwater.

³⁵ Affidavit of Dr Anna Johnson dated 3 December 2021, at [29] – [31].

³⁶ Affidavit of Sandra McIntyre dated 23 December 2021, at [41].

³⁷ Affidavit of Sandra McIntyre dated 23 December 2021, at [31].

³⁸ RMA, s 30.

³⁹ RMA, s 61(1)(a).

- 62 It is submitted that the following section 30 functions could be said to relate to freshwater (depending on the particular circumstances):
- (a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:
 - (b) the preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance:
 - ...
 - (c) the control of the use of land for the purpose of—
 - (i) ...
 - (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:
 - (iv) the avoidance or mitigation of natural hazards:
 - ...
 - (e) the control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—
 - (i) the setting of any maximum or minimum levels or flows of water:
 - (ii) the control of the range, or rate of change, of levels or flows of water:
 - (iii) the control of the taking or use of geothermal energy:
 - (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:
 - (iv) the capacity of air or water to assimilate a discharge of a contaminant:
 - ...
 - (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—
 - (i) ...
 - (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
- (iv) the avoidance or mitigation of natural hazards:
- (ga) the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity:

...

- 63 It is apparent from this list of functions that a large proportion of a regional council's functions relate to freshwater or other matters that are relevant to giving effect to the NPS-FM. As such, given that an RPS must be prepared in accordance with these functions, it is to be expected that the majority of an RPS contains provisions that relate to freshwater or give effect to the NPS-FM.
- 64 It is noted that this analysis does not provide a complete answer to whether chapters or provisions do in fact relate to freshwater. For example, some natural hazards (i.e. earthquakes) may not relate to freshwater, but others may do depending on the circumstances (i.e. floods). In addition, maintaining indigenous biological diversity may not always relate to freshwater, but indigenous biodiversity is an important value mentioned several times throughout the NPS-FM.⁴⁰
- 65 As such, while this mechanism may assist in determining which parts of a planning instrument relate to freshwater or give effect to the NPS-FM, it may not be determinative.

By chapters or by provisions?

- 66 Another important matter to be determined, if the Court finds that the entire PORPS is not an FPI, is whether the parts of the PORPS that should proceed through the FPP is determined on a provision-by-provision basis, or in entire chapters.
- 67 Some of the evidence presented by planners in this case anticipates a splitting up of each of the provisions, into those which "relate" to freshwater or give effect to the NPS-FM, versus those which do not (and should proceed through a Schedule 1 process).⁴¹

⁴⁰ See for example NPS-FM, cl 3.22. Indigenous biodiversity is also included as a value which is to be considered when measuring any loss of value in a wetland or river— see definition of "loss of value".

⁴¹ Affidavit of Clare Hunter dated 20 December 2021; Affidavit of Alyson Hutton dated 3 December 2021.

- 68 It is important to analyse the internal structure and inherent hierarchy of a planning document to assess the practicalities of each approach.

Plan architecture

- 69 The National Planning Standards (**Standards**), first published in April 2019, provide a compulsory set of requirements for planning documents around the country to achieve nationally consistent documents. This includes standards for the structure of an RPS, as well as definitions and particular spatial layers (for example).
- 70 Regional councils notifying a proposed RPS after the Standards come into effect must comply with the Standards for that document.⁴² The PORPS appears to have been prepared in compliance with these standards.
- 71 According to the Standards, an RPS is required to contain:
- (a) Part 1: an introduction and general provisions, including an interpretation section and explanation of how the policy statement works;
 - (b) Part 2: a resource management overview, including significant resource management issues for the region and issues of significance to iwi authorities;
 - (c) Part 3: Domains (including air, coastal environment, geothermal and land and freshwater), and topics (covering the more narrow areas such as ecosystems and indigenous biodiversity to historical and cultural values and urban form and development).
- 72 The Standards require that:⁴³
- Provisions (excluding the provisions in Part 2) that:
- a. apply predominantly to only one topic must be located in the relevant chapter under the Topics heading.
 - b. apply to more than one topic must be located in the relevant chapters under the Domains heading.
- 73 Given this structure, and the broad scope of a domain dealing with both land and freshwater, it is anticipated that there will be many provisions in

⁴² National Planning Standards, November 2019, 17 – Implementation Standard.

⁴³ National Planning Standards, November 2019, 2 – Regional Policy Statement Standard, at clause 9.

the Land and Freshwater domain section of the PORPS that relate to multiple topic chapters.

- 74 In addition, the structure does not prevent provisions in the Topic chapters containing provisions that relate to freshwater ecosystems or biodiversity. For example, objective ECO-O1 states that “Otago’s indigenous biodiversity is healthy and thriving and any decline in quality, quantity and diversity is halted.”⁴⁴ This objective would equally apply to freshwater indigenous biodiversity as all other indigenous biodiversity, and the NPS-FM recognises indigenous biodiversity as a value which is to be considered when measuring any loss of value in a wetland or river.⁴⁵
- 75 The Standards also anticipate a chapter on integrated management, as part of the resource management overview. There may be many objectives and provisions relating to many topics, including freshwater, that form part of an RPS.

Section 80A

- 76 In addition, section 80A(3) provides that a regional council must prepare the part that does not relate to freshwater in accordance with the usual Schedule 1 process, only if it is satisfied that only part of the instrument relates to freshwater.⁴⁶ This ultimately leaves a relatively broad discretion in the relevant council’s hands to determine which parts of the plan give effect to the NPS-FM or otherwise relate to freshwater, such that they should proceed through the FPP.

Objectives may have interrelationships that require being read together

- 77 An RPS is required to contain the objectives sought to be achieved by the RPS, the policies for those issues and objectives, and the methods to be used to implement the policies.⁴⁷ This creates a hierarchy of provisions, whereby the objectives set out the overall direction for the RPS, the policies are what is required to be done to achieve the objectives, and the methods are the on-the-ground actions (other than rules) to implement the policies.

⁴⁴ PORPS, ECO-O1.

⁴⁵ NPS-FM, Definitions – loss of value.

⁴⁶ RMA, s 80A(3).

⁴⁷ RMA, s 62(1).

- 78 Recently, the Environment Court in dealing with a regional plan (relating to freshwater) considered that all provisions of the plan were to be interpreted and applied in a manner giving effect to Te Mana o te Wai and implemented in accordance with ki uta ki tai.⁴⁸ As part of this process, the Environment Court considered that the particular plan in question meant that all objectives were required to be considered together, with each successive objective building on the foregoing.⁴⁹
- 79 Evidently, if such an approach was also required to be taken in this case, this could create difficulties with objectives proceeding through separate planning processes.
- 80 Case law in the higher Courts has suggested a similar approach. For example, when considering an appeal against the grant of a resource consent, the High Court has noted:⁵⁰

The inter-relationship of Objectives must be recognised and the [Environment] Court referred to Gendall J's observation that

... depending on the circumstances [there may be] more than one objective having different, and overlapping, ways of achieving sustainable management of natural and physical resources (the purpose of the Act). But objectives cannot be looked at in isolation, because "the extent" of each may depend upon inter relationships.

- 81 It is submitted that the holistic nature of objectives and the interrelationships between them could cause a planning document to become fragmented, and risk the objectives losing their intended meaning and aspirations, if objectives were split between two different planning processes.

Architecture of a planning document

- 82 One of the key considerations the CRC submits that the Court should keep in mind when determining whether the whole PORPS is an FPI, or which parts of the PORPS are an FPI, is the architecture of a planning document. The hierarchy set out above in relation to objectives, policies

⁴⁸ *Aratiatia Livestock Ltd v Southland Regional Council* [2019] NZEnvC 208 (First Interim Decision), at [65].

⁴⁹ *Aratiatia Livestock Ltd v Southland Regional Council* [2020] NZEnvC 93 (Second Interim Decision), at [7] and [10].

⁵⁰ *Harewood Gravels Company Ltd v Christchurch City Council* [2018] NZHC 3118, at [61], citing *Rational Transport Society Inc v New Zealand Transport Agency* [2012] NZRMA 298 (HC), at [46].

and methods is also clearly set out in relation to regional plans, where the RMA requires a regional plan to state:⁵¹

- (a) The objectives for the region;
- (b) The policies to implement the objectives; and
- (c) The rules (if any) to implement the policies.

83 This approach has been recognised as the “orthodox top down and integrated approach to resource management planning demanded by the RMA.”⁵²

84 One of the difficulties with separating a planning document into different processes is the risk of splitting provisions from those to which they are related in the hierarchy (i.e. the objective proceeding through one planning process, and the policies which implement the objective proceeding through a separate process).

85 Any recommended changes in wording to one of the provisions throughout the hearings process may have consequential effects or require changes to the provisions higher or lower in the hierarchy. This may be highly challenging if the provisions are being heard through separate processes.

86 As the High Court noted in *Albany North Landowners* (in respect of a regional plan):

Submissions on the higher order objectives and policies inevitably bear on the direction of lower order objectives and policies and methods, including zoning rules given the statutory directions at ss 66-75 of the RMA. Given that all parts of the combined plan are being developed contemporaneously, it would have been wrong for the IHP to promulgate objectives, policies and rules without regard to all topically relevant submissions, including submissions dealing only with the higher order matters.

87 Although this statement was specifically in relation to a question on the scope of submissions on a planning document, the CRC submits that it provides guidance that is equally applicable to the current case. It is difficult to see how provisions could be split between planning processes, yet still allow the hierarchical structure (required by the RMA) to be effectively implemented.

⁵¹ RMA, s 67(1).

⁵² *Albany North Landowners v Auckland Council* [2017] NZHC 138, at [114].

- 88 This difficulty is also highlighted in the evidence for Kāi Tahu, where Ms McIntyre states:⁵³

While I accept that there are individual provisions in the PORPS that do not have a clear link to freshwater, an individual provision cannot be effectively considered separately from the broader context of the package of objectives, policies and methods that it is part of.

Consequences of division arise on appeal

- 89 The CRC acknowledges that there are aspects of the FPP that mean that the risk of the above difficulties eventuating is minimised (as recognised in the Departmental Reports for example, “Councils may be able to have members in common for freshwater hearings panels and panels dealing with other matters”⁵⁴).
- 90 However, the CRC submits that the risks highlighted above still crystallise, simply at a later stage (if and when the RPS provisions are appealed). There would still need to be some level of clarity regarding which provisions were to proceed through which process in order to determine whether an appeal on the merits of the decision is available or not (as there are different appeal rights under the FPP and the Schedule 1 process).
- 91 In addition, splitting an RPS may lead to submitters needing to file two separate appeals if the provisions they were interested in went through two separate processes, and they are unhappy with the outcome (one in the Environment Court on the Schedule 1 section of the RPS, and one in the High Court on an error of law in relation to the part that proceeded through the FPP). This risks further separation in the provisions, as there may be further changes to the text made on appeal in two different courts, which would not enable the provisions to necessarily reflect one another.

What about where a provision relates to freshwater, but also applies to many other aspects?

- 92 A difficult circumstance arises in determining which planning process a provision that relates to freshwater (or gives effect to the NPS-FM), but also relates to a wider set of circumstances, should proceed through.

⁵³ Affidavit of Sandra McIntyre, dated 22 December 2021, at [32].

⁵⁴ Ministry for the Environment, Departmental Report on the Resource Management Amendment Bill (March 2020) at pages 89-90.

- 93 For example, the integrated management provisions, particularly those which recognise the environment as an interdependent whole,⁵⁵ would apply both to freshwater resources but also other resources (such as land and air).
- 94 Given that it is a requirement of the RMA for parts of a planning document that relate to freshwater or give effect to the NPS-FM to proceed through the FPP, the CRC considers that where a provision relates to freshwater or gives effect to the NPS-FM but also has other wider implications, it must proceed through the FPP.
- 95 This may be the case for provisions such as those relating to integrated management or mana whenua, given that these have a strong freshwater focus but also apply to all resources more broadly.
- 96 This is evidenced by the affidavit of Mr Ellison on behalf of Kā Rūnaka:⁵⁶
- From a Kāi Tahu perspective, the central place of wai māori within the wider taiao renders the requirements of the Mana Whenua chapter as inseparable from the sustainable management of freshwater as set out under the Land and Fresh Water provisions. Separating consideration the Mana Whenua chapter from consideration of the Land and Fresh Water chapter would run counter to a holistic and integrated management of the taiao and would not be consistent with the principles of Te Tiriti o Waitangi.

Principles to determine appropriate planning process

- 97 The CRC acknowledges that the issues raised in this case require a detailed understanding of the function and design of regional planning documents, and deal with difficult tensions between many different interests.
- 98 However, this case presents an opportunity to interpret the FPP in a way that allows regional councils in the future to apply a set of principles when establishing the parts of planning documents that give effect to the NPS-FM, or otherwise relate to freshwater.
- 99 The key principles which the CRC considers should be considered by this Court when it is determining whether a declaration should be granted (and an appropriate declaration), are:

⁵⁵ PORPS, IM-O2.

⁵⁶ Affidavit of Edward Ellison dated 22 December 2021, at [46].

- (a) In order to deal with submission points requesting further integration between provisions if the whole PORPS is not considered to be an FPI, the Court should err on the side of including more parts of the PORPS to go through the FPP rather than less, to allow these submissions to be considered through the same hearings process;
- (b) Section 80A(3) provides regional councils a broad discretion to determine whether or not a planning instrument as a whole gives effect to the NPS-FM or relates to freshwater. It is for the council (with the expertise of the local environment and views of mana whenua) to determine which is the appropriate approach in each case.
- (c) The risks of splitting provisions up to proceed through separate planning processes are acknowledged – both in respect of splitting objectives (which in many cases are considered to be interdependent) and splitting by provision (i.e. objectives going through a separate process to the policies that are required to implement them). The CRC considers that in order to achieve an RPS's purpose of including policies and methods to achieve integrated management of the natural and physical resources of the region, the provisions that have relationships between each other should proceed through the same planning process as far as practicable.
- (d) Given the RMA's requirement that planning documents that give effect to the NPS-FM or relate to freshwater must proceed through the FPP, where provisions relate to freshwater but also other matters, they should proceed through the freshwater planning process.

100 The CRC recognises that in many instances in this case it has simply highlighted the difficulties of each particular approach. Given its neutral position on the declarations sought, the CRC simply wished to highlight the difficult nature of some of the delineations to be made. The CRC will leave the merits (or otherwise) of the declarations sought to the other parties to establish.

DATED this 27th day of January 2022



.....

P A C Maw

Solicitor for the Canterbury Regional Council

LIST OF AUTHORITIES

Albany North Landowners v Auckland Council [2017] NZHC 138.

Aratiatia Livestock Ltd v Southland Regional Council [2019] NZEnvC 208.

Aratiatia Livestock Ltd v Southland Regional Council [2020] NZEnvC 93.

Environmental Defence Society Incorporated v New Zealand King Salmon Company Limited [2014] NZSC 38.

Harewood Gravels Company Ltd v Christchurch City Council [2018] NZHC 3118.

Minister of Conservation v Mangawhai Harbour Restoration Society Inc [2021] NZHC 3113.

R v Howard [1987] 1 NZLR 347 (CA).

Rational Transport Society Inc v New Zealand Transport Agency [2012] NZRMA 298 (HC).