

In the High Court of New Zealand  
Dunedin Registry

I Te Kōti Matua O Aotearoa  
Ōtepoti Rohe

**CIV-2021-412-000089**

Under the Declaratory Judgments Act 1908 (the Act)

Between **Otago Regional Council**

Plaintiff

And **Royal Forest and Bird Protection Society of New Zealand  
Incorporated**

Defendant

And **Dunedin City Council and Waitaki District Council**

Third Parties

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**Submissions of Counsel for Dunedin City Council and Waitaki District Council**

27 January 2022

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

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**anderson  
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## May it please the Court

- 1 Dunedin City Council and Waitaki District Council (**DCC** and **WDC**) take the position that parts of the proposed Regional Policy Statement (**pRPS**) are not giving effect to the National Policy Statement for Freshwater Management 2020 (**NPSFM**) nor do they relate to freshwater.
- 2 Accordingly DCC and WDC consider that the parts of the pRPS that do not relate to freshwater ought to follow the usual procedure for plan making in Part 1 of Schedule 1 in the RMA. This gives rise to those parts of the pRPS that do not relate to freshwater being considered by a hearing panel not a freshwater panel, and appeal rights on their merits regardless of the decision made at first instance.
- 3 DCC and WDC, based on the evidence on Dr Johnson and Ms van der Spek, consider that the following parts of the pRPS do either give effect to the NPSFM or relate to freshwater;
  - (a) Part 2 – Resource Management Overview;
    - (i) SRMR – significant resource management issues for the region (page 64)
    - (ii) RMIA – Resource management issues of significance to iwi authorities in the region (page 86)
    - (iii) IM - Integrated management (page 96).
  - (b) LF - Land and freshwater;
    - (i) WAI – Te Mana o te Wai (page 121)
    - (ii) VM – Visions and management (page 124)
    - (iii) FW – Freshwater (page 129).
  - (c) Part 4 – Evaluation and Monitoring (page 198).
  - (d) Part 5 – Appendices and Maps (page 200).
- 4 The following parts of the pRPS are considered to not give effect to the NPSFM or relate to freshwater;
  - (i) Mana whenua
  - (ii) Air

- (iii) Coastal environment
- (iv) Land and freshwater – the land and soil section of this chapter
- (v) Ecosystems and indigenous biodiversity
- (vi) Energy, infrastructure and transport
- (vii) Hazards and risks
- (viii) Historical and cultural values
- (ix) Natural features and landscapes
- (x) Urban form and development

### **Submissions of Counsel for the Royal Forest and Bird Protection Society of New Zealand Inc (Forest and Bird)**

- 5 The submissions of Counsel for Forest and Bird dated 20 January 2022 are supported in full. The balance of these submissions emphasise the position and interests of DCC and WDC as they relate to the pRPS.
- 6 The only difference in position from Forest and Bird is that it is considered that some additional Chapters set out in paragraph 3 above are considered to substantively relate to freshwater, although the position is the same on all the domain chapters containing policy and methods.
- 7 It is also noted that DCC and WDC also support the positions of the other territorial authorities that are parties to this proceeding.

### **The law**

- 8 There is no question from DCC and WDC that the governing body of the Otago Regional Council (**ORC**) did satisfy itself that the whole of the pRPS relates to freshwater and could follow the freshwater planning instrument procedure in section 80A RMA. It is submitted though that this statutory decision must be correct in law for the Court to make the declarations sought.
- 9 The declarations (paragraphs 24 (1) and (2)) are opposed.
- 10 It is submitted that to validly determine that the whole pRPS is a freshwater planning instrument it must qualify under section 80A(2)(a) or (b) of the RMA. That is, that the whole pRPS is for the purpose of giving effect to the NPSFM; or it entirely relates to freshwater.

- 11 It is accepted that parts of the proposed pRPS are giving effect to the NPSFM.
- 12 The key issue from DCC and WDC's perspective is whether the whole pRPS gives effect to the NPSFM, or "relates to freshwater" or whether it only does so in part.
- 13 It is important to note that section 80A(3) expressly anticipates the situation where a council is satisfied that only part of the instrument relates to freshwater. In that event, the council is required to, i.e. it must, prepare that part in accordance with the freshwater planning process, and prepare the remainder of the part that does not relate to freshwater in accordance with Part 1 of Schedule 1 to the RMA.
- 14 This is an issue of statutory interpretation about what "relates to freshwater" means in the context of this case.
- 15 The Westlaw Commentary on s80A states that:

In contrast to the optional streamlined planning process and the former collaborative planning process, the freshwater planning process is a mandatory approach to the preparation of regional planning documents that either implement a national policy statement for freshwater management, or otherwise relate to freshwater. If only part of a planning document relates to freshwater, the freshwater planning process is only used for that part, and another sch 1 process is used for the remainder.

The intention is to enable streamlined preparation of freshwater planning documents and therefore facilitate enhanced freshwater management frameworks being put in place efficiently yet through a robust process. The freshwater planning process applies automatically to qualifying planning documents that are notified after 1 July 2020.

- 16 The guiding interpretation principle is in section 10 Legislation Act 2019. This requires the meaning of legislation must be ascertained from its text and in light of its purpose and its context.

### **Text**

- 17 In terms of the text of section 80A(3) the active verb is that the pRPS must at least "relate to freshwater". "Relate to" is not defined in the RMA. A

dictionary definition<sup>1</sup>, defines relate, as "establish a cause or connection between".

- 18 It is our submission that the statutory words require a causal connection between provisions in the pRPS that are seeking to establish policy and freshwater management. The corollary is that where provisions have no direct causal connection to freshwater, then they do not relate to freshwater management.

### **Purpose and Context**

- 19 The purpose and context of these provisions is a streamlined planning path developed to implement the NPSFM and freshwater management.

#### *Need for efficiency*

- 20 This new streamlined planning path applies to changes to an RPS or a new pRPS that gives effect to the NPSFM. The context of this change is that the RMA requires that the NPSFM be implemented, and promptly.

- 21 In 2019 the Ministry for the Environment (**MfE**) prepared a Regulatory Impact Statement (**RIS**) regarding the proposed streamlined path for freshwater planning instruments. The RIS identified the problem that needed to be addressed was the continuing decline in New Zealand's freshwater quality and that the "options available to deliver the NPS-FM under the current regulatory system will not produce outcomes fast enough."<sup>2</sup>

- 22 MfE determined that the key benefit of the proposal was that "NPS-FM outcomes will be achieved faster, leading to environmental benefits, namely improved water quality."<sup>3</sup>

- 23 MfE anticipated that:

- (a) "the 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".
- (b) "plan changes this would capture would include, for example, changes to regional plans to set limits on water use or discharges,

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<sup>1</sup> Oxford Dictionary 10<sup>th</sup> Edition

<sup>2</sup> *Impact statement: a new planning process for freshwater*, Ministry for the Environment, 2019, p.1

<sup>3</sup> *Impact statement: a new planning process for freshwater*, Ministry for the Environment, 2019, p.1

such as nitrogen, or provisions to identify outstanding water bodies to ensure the protection of these."<sup>4</sup>

- 24 The goal for establishing the streamlined planning process for freshwater instruments was to achieve efficiency by speeding up the processing of freshwater instruments. It is submitted that given this context, "relates to" was intended to apply to those instruments, or parts of them, that relate directly to freshwater, and maintaining its quality and quantity.
- 25 The policy context is that freshwater changes are seen as urgent and it is appropriate for a specialist freshwater panel to consider them. This process avoids going through the usual Part 1 of Schedule 1 hearing, and merit-based appeals to the Environment Court on the provisions that do relate to freshwater. The context is also that ordinary regional policy statement provisions that do not relate to freshwater are required to carry on through the normal Part 1 of Schedule 1 process for their development. This enables a hearing panel that is not a specialist freshwater panel to consider provisions that do not relate to freshwater. Merit based appeals by any submitter to the specialist Environment Court remain to resolve such provisions.

#### *Public participation and appeals*

- 26 Public participation in decision-making and merit-based appeals on planning policy is an essential and usual component of the RMA context within which section 80A and the words "relates to" must be interpreted. Section 80A is an exception to this normal public participatory framework with merit-based appeals on regulatory documents.
- 27 In a different context, when considering the notification of consent applications, Elias CJ emphasised the importance of care when dispensing with public rights to participate in RMA decision-making and noted that:

Many of the principles of natural justice are based on the hard experience that assumptions that cases are open and shut are often disappointed when opposing views are heard. Additional care is required in the circumstances of the Resource Management Act itself with its policies of public participation and principles of open decision-making, opportunity for reconsideration of the merits of a decision by the Environment Court (effectively excluded by a decision not to notify), and the

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<sup>4</sup> *Impact statement: a new planning process for freshwater*, Ministry for the Environment, 2019, p.18

specific requirement of s 94(2)(a) that the consent authority be carried to the point of satisfaction.<sup>5</sup>

28 This policy was similarly reinforced by Blanchard, J who stated:

The leading case in the Court of Appeal on s 94 is *Bayley v Manukau City Council*, whose general approach was not challenged by any party to this appeal. In *Bayley* the Court said that there is a policy evident upon a reading of Part VI of the Act, dealing with the grant of resource consents, that the process is to be public and participatory and that s 94 “spells out exceptions which are carefully described circumstances in which a consent authority may dispense with notification”. In order to determine whether those circumstances exist in relation to a proposed activity, a consent authority must have before it sufficient information to be able to assess the circumstances, bearing in mind especially the following observation from *Bayley*:

“In the exercise of the dispensing power and in the interpretation of the section, however, the general policy must be observed. Care should be taken by consent authorities before they remove a participatory right of persons who may by reason of proximity or otherwise assert an interest in the effects of the activity proposed by an applicant on the environment generally or on themselves in particular.”<sup>6</sup>

29 Exempting the decisions of the freshwater panel from merit-based appeals to the Environment Court is a significant departure from the general policy in favour of public participation and merit-based appeals. Interpreting “relates to” within this context again supports an interpretation that provisions to benefit from this streamlined process must directly relate to freshwater management.

#### *District Plans*

30 Also important context is that District Plans are required by the RMA to give effect to regional policy statements once they are operative (section 75(3)(c) RMA).

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<sup>5</sup> *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZSC 17 at [27]

<sup>6</sup> *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZSC 17 at [105]

- 31 This means that pRPS provisions that do not relate to freshwater management are normally developed with merit-based appeals because they have further mandatory flow on implications that require they must be implemented, once established.

*Conclusion on text and purpose/context*

- 32 Overall it is our submission that the text and context of section 80A require an interpretation that to be a freshwater planning instrument, provisions of the pRPS need to be implementing freshwater management to take the benefit of this streamlined planning process.
- 33 The corollary is where provisions do not implement freshwater management, or relate to freshwater management then the usual Part 1 of Schedule 1 procedure is required.
- 34 Clearly an "overall" approach has been taken by ORC that because the pRPS is seen as an integrated whole with parts of it managing effects on freshwater, then that makes the entire PRPS a freshwater instrument.
- 35 It is submitted this approach is both incorrect and too broad brush and overlooks the content within the chapters and topics that the pRPS addresses that do not relate to freshwater.

**Applying these principles to the pRPS**

- 36 Drawing on the affidavit evidence of Dr Johnson filed on behalf of DCC, the following is a good example. In addition to the NPSFM, the pRPS is also intended to give effect to the National Policy Statement for Urban Development (**NPSUD**). This requires provisions to set policy to manage urban growth and the supporting infrastructure. DCC has submitted in relation to these issues seeking a significant number of changes to the pRPS (Chapter UFD – Urban form and development). In particular DCC's submission is that the pRPS does not appropriately provide for the infrastructure required to support urban growth and the policy framework does not adequately direct a range of options for accommodating housing demand to be pursued through district plans. Rewording of many of the relevant objectives and policies on this topic is sought (DCC Submission page 83-96).
- 37 DCC considers that the balance is not currently appropriately struck in the draft pRPS to deal with infrastructure and urban development, as required by the NPSUD.



- 38 It is of concern to DCC that this chapter is considered by the ORC to all relate to freshwater management, to be determined by a specialist freshwater panel.
- 39 DCC considers such issues to be of much wider planning ambit, and focused on implementing the NPSUD. None of the material shift in policy on this topic that DCC seeks relates to managing the effects on freshwater, nor are these policies addressing freshwater quality or quantity.
- 40 Similarly it is WDC's submission that the pRPS does not recognise carbon forestry as a significant resource management issue for the Otago region. The affidavit evidence of WDC planner Ms Victoria van der Spek noted concerns that carbon forestry is becoming more common in the Otago region, leading to wide ranging issues including:
- (a) Loss of productive land needed for primary production (WDC submission paragraphs 39-40);
  - (b) Wilding conifer spread, including impacts on Significant Natural Areas (WDC submission paragraphs 48-51); and
  - (c) Negative impacts on outstanding and highly valued landscapes (WDC submission paragraph 52).
- 41 It is possible at a stretch to find connections between these issues and freshwater management – for example carbon forestry may occur in areas containing wetlands and other water bodies; and carbon forests depend on rainwater to grow. However, approaching these issues from a freshwater management perspective misses the essence of WDC's policy concerns. The policies that need to be introduced and/or amended to address the issues that WDC raises are not freshwater management policies.
- 42 The affidavit evidence of Dr Johnson and Ms van der Spek are relied on for their assessment of the relationship of the chapters to freshwater management and the extent to which they relate to other topics.

### **ORC Submissions**

- 43 In response to the submissions provided on behalf of the Plaintiff, it is submitted that the key statutory tests are properly set out in paragraph 57 of the Plaintiff's submissions. It is agreed that the test is whether the provisions of the pRPS give effect to the NPSFM or relate to freshwater.
- 44 It is submitted that the ORC submissions seem to in applying this test assert that it is the whole pRPS, or significant "stand alone" parts of the pRPS that this test applies to.

- 45 The ORC analysis is that because freshwater is mentioned somewhere in each chapter, then that chapter is tainted by the notion that it relates to freshwater and therefore the chapter as a whole qualifies as a freshwater instrument.
- 46 It is submitted that this is an oversimplification and has led to a global or "broad brush approach", which is both incorrect and of concern.
- 47 It is submitted in response that the context of a pRPS is critical. An pRPS establishes objectives, and policy that must then be given effect to by District Councils and other decision makers in the RMA hierarchy.
- 48 It is policy and mandatory methods that the pRPS sets out that have legal effect that must be given effect to by District Plans and had regard to by decision makers for a resource consent in the statutory hierarchy<sup>7</sup>. It is therefore submitted that that it is pRPS policy and mandatory methods that must give effect to the NPSFM or relate to freshwater management to be the parts that are a freshwater instrument.
- 49 Applying this approach then, just because freshwater is managed in one part of a domain chapter this does not render that whole chapter, or the whole pRPS, to "relate to freshwater", where there are a range of other substantive and unrelated policy issues also being addressed. Just mentioning freshwater in a chapter does not taint that chapter to make it entirely relating to freshwater.
- 50 This is the key difference between the position of ORC and that of DCC and WDC.
- 51 Further, ORC submit that integrated management is a strong policy directive in preparing an pRPS (paragraph 97-112). This is accepted, but it is submitted in response that the policy direction in the NPSFM requiring the integrated management of freshwater does not mean that all provisions in the pRPS necessarily relate to freshwater or should go through the streamlined freshwater planning process.
- 52 Policy 3 of the NPSFM is that "Freshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-of catchment basis, including the effects on receiving environments." While it is accepted that provisions within the pRPS that are unrelated to freshwater may need to be integrated with (and be complementary to)

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<sup>7</sup> See sections 75(3)(c) for District Plans, and section 104(1)(b)(v) RMA, for resource consents.

freshwater management, this does not mean that these provisions themselves are freshwater planning instruments.

#### **Affidavit evidence filed on behalf of DCC and WDC**

- 53 The submissions on behalf of the ORC assert that to the extent affidavit evidence is on point, it amounts to legal submission and is neither material nor substantially helpful (paragraphs 231-232).
- 54 In reply, it is submitted that this is a wide sweeping criticism of the evidence of two highly experienced professional planners that is unduly disparaging. The planners have identified parts of the RPS that in their professional judgement do not give effect to the NPSFM, or relate to freshwater. This evidence demonstrates a genuine difference of views from that adopted by the ORC. The planners are familiar with the content of the issues that both DCC and WDC have submitted on and genuinely hold views that the policy issues in the pRPS on which changes are sought are not matters which relate to freshwater.
- 55 This evidence does support the position expressed in these submissions for the reasons set out. This evidence should be given material weight when the Court evaluates the application of the law to the pRPS.

#### **Relief sought**

- 56 It is the DCC and WDC position that the declaration sought should not be issued. The consequence is that the Court could declare that only the parts of the pRPS outlined above that relate to freshwater do so, and the balance of the pRPS needs to follow the normal Part 1 of Schedule 1 procedure in the RMA for its development.
- 57 Given the pro-active manner in which this declaration has been sought, and the opportunity to participate, DCC and WDC have no issue of costs.

Dated this 27<sup>th</sup> day of January 2022



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Michael Garbett / Rebecca Kindiak  
Counsel for the Third Parties Dunedin City Council  
and Waitaki District Council

## **List of authorities**

### **Enactments**

1. Resource Management Act 1991
2. Legislation Act 2019

### **Cases**

1. *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZSC 17

### **Other**

1. National Policy Statement for Freshwater Management 2020
2. *Impact statement: a new planning process for freshwater*, Ministry for the Environment, 2019