

Otago Regional Council

**Proposed Otago Regional Policy Statement 2021**

**SECOND MINUTE AND DIRECTIONS OF HEARINGS PANEL**

**On preparation for hearing of submissions**

**Minute 2**

**INTRODUCTION**

1. On 28 February 2022, the panel issued its first Minute and Directions, which included a Notice of Hearing (commencing Monday 30 May 2022, and directions for preparation for hearing).
2. Minute 1 recorded our understanding of the task of the panel under section 80A(5) of the Resource Management Act 1991, (“RMA”) to conduct the public hearing of submissions in accordance with its powers set out in Part 4 of Schedule 1 RMA , and subsequently make recommendations to the Council (Council or ORC) on this instrument as a freshwater planning instrument.
3. Under the heading “Hearing plan”, we recorded in paragraph 5 that current directions might be subject to change depending on the outcome of the recent High Court hearing concerning the status of the pORPS as a freshwater instrument. That remains an important consideration.
4. On 15 March 2022, counsel for the Council filed a memorandum for the panel which attached a copy of an undated memorandum of counsel for all parties in the High Court matter, to the Judge in that case, respectfully enquiring about timing of a decision, and expressly noting our above-mentioned paragraph 5. The 15 March memorandum to us also attached a Minute of Justice Nation of the same date in response, indicating that pressure of caseload pointed to the judgment being unlikely to be available before the end of June 2022. Further, given the terms of the

legislation and the importance of the issues raised before him, Justice Nation noted that his judgment might well be the subject of an appeal.

## **ISSUES ARISING, AND POSSIBLE CONSEQUENCES**

5. The comparative timings of the High Court judgment (and any activity on appeal after that), and our directions for preparation, need no reiteration or explanation.
6. If the hearings before us were taking place under traditional Schedule 1 RMA processes, respect for the High Court and its processes would likely point to our hearings being adjourned and the timetable suspended.
7. Another factor that would weigh with us is that were the High Court decision (or any later one on appeal) to be that the pORPS is not holistically a freshwater instrument, the Council, the panel and the submitters might, if we had proceeded without adjournment, have caused cost that might or might not be wasted.
8. We consider that fairness requires us to consult the parties, not least the council, about whether we should adjourn, or whether other factors call for consideration of other approaches.
9. We infer that there would be little challenge to the proposition that at least part of the pORPS is a freshwater instrument as defined in s80A RMA. That introduces time factors that differ markedly from the general RMA obligation of acting as promptly as is reasonable in the circumstances (Section 21, and Schedule 1 clause 1(3)). Some time constraints on ORC's freshwater planning can be said to arise on a "recommendatory" basis, while others have a mandatory legislative quality in the new freshwater planning processes in the Act and Schedule 1 Part 4. What we have called "recommendatory" matters derive from actions by the Minister under s24A RMA on 18 November 2019 about promulgation of new planning instruments by ORC by certain dates. The council appears to have worked hard to meet those recommendations. We infer that the Minister holds discretion about such matters, so having noted them, we consider them no further.

10. Since the s24A processes were initiated, s80A and the National Policy Statement for Freshwater Management 2020 (NPS-FM) have come into force. We list matters of statutory direction flowing from them, and other relevant factors that we perceive as being in play in the current situation.
11. The pORPS is a necessary precursor to the forthcoming proposed LWRP.
12. Both are defined in s80A as freshwater instruments (at least in part).
13. The pORPS is described by the council in its June 2021 resolution as having the purpose of giving effect to the NPS-FM.
14. The LWRP to follow must be to serve that same purpose (at least in part).
15. By s80A(4), Councils issuing such instruments must publicly notify them by 31 December 2024. That means the LWRP must, as required by the statute, be notified by that date.
16. The provisions of the pORPS will need to be settled through Schedule 1 processes, and any appeals against panel decisions or council decisions on panel recommendations settled, with sufficient time left available after that for council to finalise preparation of a plan and notify it by that date (or the Minister's recommended date of 30 December 2023).
17. By clause 51 of Part 4, our panel must report to the council on whatever may be freshwater matters, by a date that is no later than 40 working days before the expiry of 2 years after public notification of the RPS. Taking notification date as 26 June 2021, we must report by mid-April 2023.
18. The panel chair is also the Chief Freshwater Commissioner and, in that role, holds a discretion under clause 47 to extend that timeframe, but considers he would need to do so on a principled basis and presently has insufficient knowledge of relevant factors to know how that discretion would be exercised.
19. By clause 52 of Part 4, the Council has 40 working days to make its decisions on our recommendations, in this case by early June 2023. That could be followed by a 15-day appeal period, and possibly many months to resolve High Court appeals where our recommendations have been

accepted, and Environment Court appeals where not accepted and on any recommendations outside scope of submissions.

20.If we adjourn our hearings, the dates in paragraphs 18 and 20 will move out.

21.The time pressures and risks are quite palpable.

22.We do not support carrying on with our hearings regardless of the proceeding in the High Court, for reasons touched on above.

23.We pose questions we would value responses on from the parties, concerning some other possible approaches.

24. The Panel is considering whether we could continue with hearings, but on a restricted basis, in order at least to maintain some momentum. The Council, with comment from parties, might identify chapters, topics, submission points, or provisions that are unquestionably freshwater issues, and we could proceed to conduct hearings of submissions about those matters in the meantime. This could align with our thinking already revealed, that the hearings should in any event proceed topic-by-topic.

25.Another approach might be for the appointment by the Council (no doubt without prejudice to its case in the High Court) of a second panel of identical membership, the new one to make decisions under traditional Schedule 1 processes, and the existing to make recommendations under Part 4. We have been told that the Council's counsel has advised that this might be possible, but we have no knowledge of the Council's own view. All members of the existing panel are appropriately qualified to serve on each. We are under no illusion that accurate separation of the two types of issue would need work and care, but one possible outcome from the High Court proceeding might be that that very approach must be taken in any event.

26.We recognise that decision-making and appeal provisions differ as between the two parts of Schedule 1, so the council and submitters would need to be "on their toes" every bit as much as the panel(s).

27. A different result in the declaration proceedings could see the work of the panels folded back together after time, and the later set of appointments rescinded.

28. The panel would greatly appreciate input on all these matters from the parties. If a common position were to be reached that respects the role of the High Court in the declaration proceedings, but allows of only limited slippage in our processes, that would be advantageous.

29. We ask for parties' responses in writing by 12pm on 13 April 2022.

30. At this time, we direct that all dates in our First Minute from paragraph 4 onwards, are delayed exactly one month. We understand from the Council that work on the s42A report might take some more time as well. At this stage we hope to commence the hearings on 27 June 2022, and the Notice of Hearing already issued is now modified to that effect.

For the panel,



Judge Laurie Newhook,  
Chair and Freshwater Commissioner.

18 March 2022.