

BEFORE THE FRESHWATER COMMISSIONERS

IN THE MATTER of the Resource Management Act 1991

AND of the Proposed Otago Regional Policy Statement

**MEMORANDUM ON BEHALF OF ROYAL FOREST & BIRD PROTECTION SOCIETY OF NEW
ZEALAND INC AND ENVIRONMENTAL DEFENCE SOCIETY INC**

Royal Forest and Bird Protection Society of New Zealand Inc
Solicitors acting: Peter Anderson/May Downing
PO Box 631 Wellington 0212866992/022 048 1970
p.anderson@forestandbird.org.nz/m.downing@forestandbird.org.nz

Environmental Defence Society Inc
Solicitor acting: C Woodhouse
PO Box 91736 Auckland 09 302 2972
cordelia@eds.org.nz

MAY IT PLEASE THE COMMISSIONERS

1. This memorandum is filed on behalf of the Royal Forest & Bird Protection Society Inc (“**Forest & Bird**”) and Environmental Defence Society Inc (“**EDS**”). It responds to matters raised by the Second Minute and Directions of Hearings Panel dated 18 March 2022.
2. Forest & Bird and EDS seek the hearings are adjourned and timetable suspended pending the High Court’s decision.
3. Forest & Bird and EDS consider that filing evidence in advance of the High Court’s decision is premature. There are serious risks that costs incurred in the process, including legal costs and the costs associated with evidence, are wasted. Key risks include:
 - a. A process to consider submissions under Part 1 of Schedule 1 is not yet in train for the Proposed Otago Regional Policy Statement (“**PORPS**”), and it may need to be re-notified as such.
 - b. The High Court’s decision may be appealed.
 - c. The High Court’s decision may require provisions under the Proposed Otago Regional Policy Statement to be redrafted, and therefore re-notified – resulting in further delays.
4. The Otago Regional Council sought the following Declarations from the High Court:
 1. *The Proposed Otago Regional Policy Statement 2021 is a freshwater planning instrument under section 80A(1)-(3) of the Resource Management Act 1991.*
 2. *The Otago Regional Council may continue to prepare the Proposed Otago Regional Policy Statement 2021 in its entirety under the freshwater planning process in Subpart 4 of Part 5 and Part 4 of Schedule 1 of the Resource Management Act 1991.*
 3. *In the alternative to (1) and (2), if the Court finds that Otago Regional Council may not continue to prepare part of the Proposed Otago Regional Policy Statement 2021 under the freshwater planning process in Subpart 4 of Part 5 and part 4 of Schedule 1 of the Resource Management Act 1991, then:*
 - (a) That part must be prepared in accordance with Part 1 of Schedule 1 of the Resource Management Act 1991; and*
 - (b) That part must be removed from the freshwater planning process in Subpart 4 of Part 5 and Part 4 of the Schedule 1 of the Resource Management Act 1991 and further prepared in accordance with Part 1 of Schedule 1 of the Resource Management Act 1991; and*
 - (c) That part need not be re-notified under Schedule 1 of the Resource Management Act 1991; and*
 - (d) The remainder of the Proposed Otago Regional Policy Statement 2021 must continue to be prepared, and need not be re-notified under the freshwater planning process in Subpart 4 of the Part 5 and Part 4 of Schedule 1 of the Resource Management Act 1991.*
 4. *Such further order as the Court sees fit.*

5. A number of risks arise if Declaration 3 is made by the High Court.
6. If Declaration 3 is made, then parts of the PORPS will have to be considered through the standard Schedule 1 process. There is a real question of whether the notification of the PORPS in July 2021 is valid in such circumstances. Clause 5(2) of Schedule 1 provides:
 - (2) *Public notice under subclause (1) shall state—*
 - (a) *where the proposed policy statement or plan may be inspected; and*
 - (b) *that any person may make a submission on the proposed policy statement or plan; and*
 - (c) *the process for public participation in the consideration of the proposed policy statement or plan; and*
 - (d) *the closing date for submissions; and*
 - (e) *the address for service of the local authority.*
7. The notification of the PORPS sets out the process as follows:

The process for public participation in the consideration of the PORPS 2021 under the Resource Management Act 1991 is:

 - *After submissions close, Council prepares a summary of decisions requested and publicly notifies the availability of that summary*
 - *Certain persons may make a further submission supporting or opposing submissions already made*
 - *At the hearing of submissions by the Freshwater Hearing Panel you may speak in support of your submission*
 - *The Council gives notice of its decision on the recommendations of the Freshwater Hearing Panel*
 - *There are limited rights of appeal to the Environment Court*
8. This is inaccurate if parts of the PORPS are considered under Part 1 of Schedule 1.
9. In the absence of a High Court declaration that such an approach is valid, proceeding to hear and decide submissions is risky. The risk is that a party unsatisfied with the Council's decision could raise the issue of improper notification on appeal, potentially requiring the process to be started again.
10. There is also the prospect of an appeal of the High Court declaration. His Honour Justice Naitanu referred to this possibility in his minute of 15 March 2022. Forest & Bird and EDS think it would be difficult for the hearing of submissions on the PORPS to occur in the face of such an appeal. Any evidence filed in May 2022 would likely be out of date by the time of any hearing and associated costs incurred wasted.
11. Finally, the High Court may decide that there are provisions, including under the Freshwater and Land Domain Chapter, that cannot easily be split and will require redrafting to proceed through either the freshwater planning process or the standard Schedule 1 process. This issue is compounded by the fact that some submitters may have drafted their submissions on the premise that the

Proposed Otago Regional Policy Statement is a freshwater planning instrument in its entirety.

12. If changes are made to the part of the Proposed Otago Regional Policy Statement that is a “freshwater planning instrument” then it must be publicly notified in accordance with s 80A(4)(a) RMA. If no changes are made to those parts then then it has been publicly notified and does not need to be re-notified.
13. Similarly, if changes are made to the part of the Proposed Otago Regional Policy Statement that is not a “freshwater planning instrument” then it must be publicly notified in accordance with Clause 6, Schedule 1 of the RMA. If no changes are made to those parts then the issue related to notification above remains live.
14. Forest & Bird and EDS acknowledge the time constraints inherent in the freshwater planning process. The risks outlined above are less severe with respect to the Land and Freshwater Domain Chapter, given the strong links to freshwater in this chapter. Accordingly, both parties consider:
 - a. proceeding with the Land and Freshwater Domain Chapter, including evidence exchange timetable and hearing only, may offer a pragmatic approach that Forest & Bird [and EDS] would not oppose.
 - b. Having members in common for freshwater hearings panels and panels dealing with wider standard Schedule 1 process has merit.
15. However, this memorandum highlights the serious practical issues with advancing timetabling matters prior to the High Court’s decision. Both parties consider that there are still risks with hearing the Land and Freshwater Domain Chapter, but these risks may be less severe given this is a narrower portion of the entire Proposed Otago Regional Policy Statement.

Dated this 13th day of April 2022



P Anderson/M Downing
Counsel for the Royal Forest & Bird Protection Society of NZ



C Woodhouse
Counsel for Environmental Defence Society Inc