

BEFORE THE HEARING COMMISSIONERS

UNDER THE

Resource Management Act 1991

AND

IN THE MATTER

of the Proposed Otago Regional Policy Statement 2021

**OPENING SUBMISSIONS FOR THE OTAGO REGIONAL COUNCIL ON THE
NON-FRESHWATER PARTS OF THE PROPOSED REGIONAL POLICY
STATEMENT 2021**

Dated 23 January 2023

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**OPENING SUBMISSIONS FOR THE OTAGO REGIONAL COUNCIL ON THE
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May it Please the Commissioners:

Introduction

1. The Otago Regional Council (“ORC”) must have a Regional Policy Statement for the Otago region¹.

Statutory Framework

2. A Regional Policy Statement (“RPS”) must achieve the purpose of the Act, that is sustainable management as defined in section 5, by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of its natural and physical resources².
3. ORC must prepare a RPS in accordance with:
 - 3.1. its functions under section 30;
 - 3.2. Part 2;
 - 3.3. its obligation to prepare an evaluation report in accordance with section 32;
 - 3.4. its obligation to have particular regard to the evaluation report prepared in accordance with section 32;
 - 3.5. any National Policy Statement;
 - 3.6. the New Zealand Coastal Policy Statement;
 - 3.7. the National Planning Standards; and
 - 3.8. any relevant regulations³.

¹ Section 60(1) of the Resource Management Act 1991 (“RMA”).

² Section 59 of the RMA.

³ Section 61(1) of the RMA.

4. ORC must have regard to⁴:
- (a) (i) any management plans and strategies prepared under other Acts;
 - (ii) any relevant entry on the Heritage List/Rārangi Kōrero required by the Heritage New Zealand Pouhere Taonga Act;
 - (iii) regulations relating to ensuring sustainability, or the conservation, management or sustainability of fisheries resources (including regulations or bylaws relating to taiapure, mahinga mataitai, or other, non-commercial Maori customary fishing);
- to the extent that their contents have a bearing on the resource management issues of the region;
- (b) the extent to which the RPS needs to be consistent with the policy statements and plans of adjacent regional councils;
 - (c) the extent to which the RPS needs to be consistent with regulations made under the Exclusive Economic Zone and Continental Shelf (Environment Effects) Act 2012;
 - (d) any emissions reduction plan made in accordance with section 5Z1 of the Climate Change Response Act 2002; and
 - (e) any national adaption plan made in accordance with section 5ZS of the Climate Change Response Act 2002.
5. In addition, the Council must, to the extent their contents have a bearing on the resource management issues of the region⁵:
- 5.1. take into account any relevant planning document recognised by an iwi authority⁶;
 - 5.2. in relation to a planning document prepared by a customary marine title group⁷;

⁴ Section 61(2) of the RMA.

⁵ Section 61(2A) of the RMA.

⁶ There are 4 iwi management plans that have been taken into account.

⁷ There are no relevant documents.

- 5.2.1. recognise and provide for matters in that document to the extent that they relate to the relevant customary marine title area; and
 - 5.2.2. take into account, the matters in that document to the extent that they relate to part of the common marine and coastal area outside the coastal marine title area of the relevant group.
6. A Regional Council must not have regard to trade competition or the effects of trade competition⁸.
7. Section 62 stipulates what an RPS must contain:
- “(1) *A regional policy statement must state—*
- (a) *the significant resource management issues for the region; and*
 - (b) *the resource management issues of significance to iwi authorities in the region; and*
 - (c) *the objectives sought to be achieved by the statement; and*
 - (d) *the policies for those issues and objectives and an explanation of those policies; and*
 - (e) *the methods (excluding rules) used, or to be used, to implement the policies; and*
 - (f) *the principal reasons for adopting the objectives, policies, and methods of implementation set out in the statement; and*
 - (g) *the environmental results anticipated from implementation of those policies and methods; and*
 - (h) *the processes to be used to deal with issues that cross local authority boundaries, and issues between territorial authorities or between regions; and*
 - (i) *the local authority responsible in the whole or any part of the region for specifying the objectives, policies, and methods for the control of the use of land—*
 - (i) *to avoid or mitigate natural hazards or any group of hazards; and*
 - (ii) *[Repealed]*
 - (iii) *to maintain indigenous biological diversity; and*
 - (j) *the procedures used to monitor the efficiency and effectiveness of the policies or methods contained in the statement; and*

⁸ Section 61(3) of the RMA.

- (k) *any other information required for the purpose of the regional council's functions, powers, and duties under this Act.*
- (2) *If no responsibilities are specified in the regional policy statement for functions described in subsection (1)(i)(i) or (ii), the regional council retains primary responsibility for the function in subsection (1)(i)(i) and the territorial authorities of the region retain primary responsibility for the function in subsection (1)(i)(ii).*
- (3) *A regional policy statement must not be inconsistent with any water conservation order and must give effect to a national policy statement, a New Zealand coastal policy statement, or a national planning standard."*
8. Section 62(3) is important. It sets out the position of a RPS in the hierarchy of planning instruments made under the RMA.
9. The RPS must give effect to the New Zealand Coastal Policy Statement 2010, the National Planning Standards 2019 and the following National Policy Statements:
- 9.1. National Policy Statement for Freshwater Management 2020 ("NPSFM");
- 9.2. National Policy Statement on Electricity Transmission 2008 ("NPSET");
- 9.3. National Policy Statement for Renewable Electricity Generation 2011 ("NPSREG");
- 9.4. National Policy Statement on Urban Development 2020 ("NPSUD"); and
- 9.5. National Policy Statement for Highly Productive Land 2022 ("NPSHPL").
10. The NPSUD was updated on 11 May 2022.
11. The NPSHPL was gazetted on 19 September 2022 and came into effect on 17 October 2022. Ms Boyd has addressed the effect of the NPSHPL on submissions in supplementary evidence dated 21 October 2022.
12. The NPSFM 2020 was updated on 8 December 2022 and the amendments came into effect on 5 January 2023. The amendments broadly:

- 12.1. address the management of wetlands;
 - 12.2. clarify the scope of “*take limits*” as defined by the NPSFM;
 - 12.3. make provision for attributes affected by nutrients;
 - 12.4. introduce new principles for aquatic offsetting and aquatic compensation;
 - 12.5. make minor drafting changes.
13. For the purpose of this hearing the most significant amendments relate to wetlands and include:
- 13.1. removal of the definition of “*natural wetland*”;
 - 13.2. replacing the definition of “*natural inland wetland*”;
 - 13.3. additional exceptions to the requirements to avoid the loss of extent and values of river and wetlands in Clause 3.22 of the NPSFM; and
 - 13.4. new principles for aquatic offsetting and aquatic compensation.
14. These matters and their implication for the Panel in making recommendations on submissions will be covered by Ms Boyd in additional supplementary evidence. That evidence will be relevant for the Land and Freshwater section of this hearing. The Panel may wish to timetable the lodging of Ms Boyd’s further evidence and any further evidence from submitters on these amendments to the NPSFM.
15. The proposed Otago RPS was notified on 26 June 2021. Submissions closed on 3 September 2021.
16. Changes can be made to the proposed RPS to give effect to the amendments to the NPSUD and NPSFM and give effect to the NPSHPL, only to the extent that the amendments are within the scope of submissions received on the proposed RPS.
17. There is a proposed National Policy Statement for Indigenous Biodiversity. An exposure draft was released for public comment in June 2022. The Ministry for the Environment’s website anticipated a National Policy Statement for Indigenous Biodiversity would be gazetted in

December 2022. It was not. The webpage now predicts gazettal during 2023. The proposed National Policy Statement for Indigenous Biodiversity has no legal standing. There is no statutory direction to give effect to it. A National Policy Statement for Indigenous Biodiversity may not be issued, or may not be issued in terms of the exposure draft (or any earlier iteration). It would be wrong to make amendments to the proposed RPS on the assumption that a National Policy Statement will be issued, at all, or without amendment to the exposure draft.

18. If a National Policy Statement for Indigenous Biodiversity is issued before the Panel reports to Council with its recommendations, then it will be necessary for the Panel to consider how to respond. Provision will need to be made for additional legal submissions and further evidence, in particular from ecological and planning witnesses.
19. Port Otago Limited has already alerted the Commissioners to the consideration by the Supreme Court of port-related issues arising out of the partially operative RPS 2019. That hearing was consolidated, in part with the hearing of submissions from parties engaged in litigation arising out of resource consent applications and notices of requirements for designations sought by Waka Kotahi (New Zealand Transport Agency) for the proposed East-West Link in Auckland. The hearing concluded in May 2022. Judgment was reserved. The Court has not given any indication when a decision will be released. The judgment will necessarily have implications for Port Otago Limited's submissions on this proposed RPS. It may have wider implications impacting on other matters which the Panel has to consider. If a decision is released before the Commissioners conclude their task then it will be necessary to take stock of how to give effect to that decision. Input will need to be sought from participants in this process on the procedure which should be followed. It is likely that legal submissions from interested parties should be sought. It may also be necessary to allow parties to present additional evidence. At this stage, the possibility of the decision intervening in the process can only be noted.
20. A RPS forms part of the cascade of planning instruments from the national to the local. It sits at an intermediate level. Regional and District Plans are subordinate and must give effect to the RPS⁹. Rules allowing,

⁹ Section 67(3) and 75(5) of the RMA.

controlling or prohibiting activities are found in plans. A RPS may nonetheless contain policies which in practical terms have the effect of rules¹⁰. The significance of an RPS is not confined to the contents of subordinate planning instruments. A proposed or operative RPS is a relevant consideration in determining a resource consent application¹¹ or a requirement for a designation¹².

Non-Freshwater Provisions

21. This process is confined to hearing and making recommendations on submissions relating to the non-freshwater components of the proposed RPS.
22. Despite the statutory requirement for a RPS to provide for the integrated management of the region's natural and physical resources, the proposed RPS has been divided into freshwater and non-freshwater parts.
23. The proposed RPS was originally notified as a single document constituting a freshwater planning instrument under section 80A of the RMA.
24. The classification of the whole document as a freshwater planning instrument was challenged. In light of those challenges, ORC instituted proceedings for declarations in the High Court to determine whether the notified proposed RPS was, as a matter of law, a freshwater planning instrument in its entirety. The High Court held that it is not¹³. The Court made three declarations¹⁴:

- “(a) the Otago Regional Council’s determination, that the whole of its proposed regional policy statement was a freshwater planning instrument, was in error;*
- (b) the Otago Regional Council must now reconsider the proposed regional policy statement and decide which parts of it do relate to freshwater in the way the legislation requires for those parts to be subject to the freshwater planning process; and*

¹⁰ *Environmental Defence Society Inc v The New Zealand King Salmon Company Limited* [2014] 1 NZLR 593, paragraphs [10], [116] and [182].

¹¹ Section 104 of the RMA.

¹² Section 171 of the RMA.

¹³ *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Incorporated* [2022] NZHC 1777 (“ORC v RFBPS”).

¹⁴ ORC v RFBPS, paragraphs [231] and [238].

(c) *the Otago Regional Council will then have to notify those parts of the proposed regional statement which are to be treated as a freshwater planning instrument and begin again the freshwater planning process as to those parts.*"

25. The judgment held that parts of the proposed RPS would only form part of a freshwater planning instrument under section 80A of the RMA if they "*directly relate to the maintenance or enhancement of the quality or quantity of freshwater*"¹⁵.
26. The Court found there are two ways which provisions might qualify as being part of a freshwater planning instrument. They may give effect to provisions in the National Policy Statement for Freshwater Management which directly relate to the maintenance or enhancement of freshwater quality or quantity. Or provisions in the proposed RPS might otherwise directly relate to the maintenance or enhancement of freshwater quality or quantity¹⁶.
27. An evaluation was carried out by the Council. Provisions constituting a freshwater planning instrument were identified. In accordance with the High Court judgment those provisions were re-notified as forming a freshwater planning instrument. The freshwater part of the proposed RPS will progress through a separate freshwater planning process.
28. Because the present process is confined to hearing submissions on the non-freshwater part of the proposed RPS, the Council can only grant relief founded on a submission within the scope created by the original submission and the non-freshwater provision (or provisions) to which the submission relates.
29. If the original submission relates to a provision which is now in the freshwater planning instrument then it is outside the scope of this hearing.
30. Dual processes are not ideal. The goal of integrated management is at risk.
31. There are connections between and overlaps in subject matter, evidence and no doubt legal submissions.

¹⁵ ORC v RFBPS, paragraph [192].

¹⁶ ORC v RFBPS, paragraph [193].

32. It is therefore important that at a practical level the two processes unfold in parallel and “*talk to one another*”. Otherwise, there is a risk of inconsistent and conflicting outcomes. Each panel should be able to keep an eye on what the other is doing.
33. A suggestion is that after the programmed hearing is finished for this process, the panel may adjourn the hearing and delay its recommendations to Council until the Freshwater Panel has completed its hearings and made its recommendations. In that way, the two separate parts of the RPS might be brought seamlessly together.

The New RPS

34. Otago has a partially Operative RPS. It was made partially operative in 2019. As already noted the only outstanding issue is the provision for port activities in and around Otago harbour.
35. It might seem surprising that with the ink “*barely dry*” ORC is embarking on the adoption of a new RPS. There are several reasons.
36. In 2019 and since, several things have occurred to warrant replacement of the 2019 RPS.
37. The Minister for the Environment appointed Professor Skelton, a former Environment Court Judge, to investigate whether the ORC was adequately carrying out its functions under section 30(1) of the RMA in relation to freshwater management and the allocation of water resources.
38. In his report, Professor Skelton proposed that ORC take all necessary steps to develop a fit for purpose freshwater management planning regime that gives effect to the relevant national instruments and sets a coherent framework for assessing all water consent applications¹⁷. Professor Skelton recommended ORC begin with a complete review of the RPS 2019.
39. The Minister for the Environment adopted Professor Skelton’s report and duly made that recommendation to ORC. ORC accepted the recommendation and has proceeded accordingly.
40. In addition, new national directions have come into force.

¹⁷ Recommendation 2, Report dated 1 October 2019.

41. These included the National Planning Standards which require RPSs to be in a form that complies with the standards, initially by 2022, later extended to 2024. It is extremely difficult to rework an existing planning instrument into the mould specified by the National Planning Standards.
42. After Professor Skelton's report, the National Policy Statement for Freshwater Management was replaced in 2020.
43. A new National Policy Statement for Urban Development was issued in 2020.
44. Both of these new national directions were materially different from their predecessors.
45. The 2019 RPS could not and did not give effect to them.
46. For all these reasons, ORC has developed and is promoting a new RPS.
47. The review was commenced by ORC's elected members identifying nine relevant regional issues. They were:
 - 47.1. Natural hazards;
 - 47.2. Climate change and its impacts on the economy and the environment;
 - 47.3. Pest species threatening indigenous biodiversity, economic activities and landscapes;
 - 47.4. The impact of urban growth on productive land, natural assets, infrastructure and community wellbeing;
 - 47.5. Water demand exceeding capacity in some places;
 - 47.6. Otago's coast being a rich natural, cultural and economic resource but facing threats from a range of terrestrial and marine activities;
 - 47.7. Lakes Wānaka, Whakatipu, Hāwea and Dunstan attracting visitors and new residents, putting pressure on their unique environment;

- 47.8. Economic and domestic activities are using natural resources but not always properly accounting for environmental stresses and future effects; and
- 47.9. The environmental costs of activities are “*stacking up*” and may soon reach a “*tipping point*”.
48. Public consultation confirmed the importance of these issues to the regional community¹⁸.
49. As a result of feedback during the consultation exercise, two more issues were added:
- 49.1. Improving water quality; and
- 49.2. Protecting biodiversity.
50. A broad section of people contributed to development of the RPS issues through a variety of means, including in-person public workshops and online surveys.
51. The issues having been defined, 11 reference groups were established to assist in developing policy addressing each of the issues.
52. A draft RPS was prepared. It was distributed to stakeholders and reference group members, including Kāi Tahu. Feedback from 42 persons was received and taken into account in revisions to the draft RPS.
53. The Otago region is within the Ngāi Tahu Whānui takiwā. ORC has actively engaged with iwi in developing the proposed RPS. This engagement has principally been through Aukaha representing the four papatipu Rūnaka of Kāi Tahu ki Otago and Te Ao Marama representing the four papatipu Rūnanga of Murihiku.
54. Kai Tahu involvement has included:
- 54.1. reviewing and providing advice on the draft policy direction papers prepared for the reference groups;

¹⁸ The consultation processes are described in detail in Section 2 and Appendices 3 and 4 of the Section 32 Report.

- 54.2. participation in drafting and revising the resource management issues of significance for iwi ("RMIA"), the Mana Whenua chapter and the Historical and Cultural Values chapter;
 - 54.3. engagement in the statutory consultation on the whole of the proposed RPS required by clauses 3 and 4A of Schedule 1 of the RMA; and
 - 54.4. taking into account the relevant Kai Tahu resource management plans.
55. Resource management in partnership with Kai Tahu is fundamental to the proposed RPS¹⁹:

"MW-O1 – Principles of Te Tiriti o Waitangi

*The principles of Te Tiriti o Waitangi are given effect in resource management processes and decisions, utilising a partnership approach between councils and ~~Papatipu Rūnaka~~ papatipu rūnaka to ensure that what is valued by mana whenua in relation to their taoka tuku iho is actively protected in the region."*²⁰

- 56. Kāi Tahu's participation in the preparation of the proposed policy statement does not of course limit its ability to make submissions and seek revisions to the proposed document.
- 57. The key feature that emerged through the various consultation exercises was a desire by the participants to protect the environment and if possible, remedy environmental harm where that has occurred.
- 58. The essence of community sentiment is captured in the long term vision:

*~~"The management of natural and physical resources in Otago, by and for the people of Otago, including in partnership with Kāi Tahu, and as expressed in all resource management plans and decision making, achieves a healthy, and resilient, and safeguarded natural systems environment, and including the ecosystem services they offer it provides, and supports the well-being of present and future generations; (mō 13atou, ā, mō kā uri ā muri ake nei)."~~*²¹

which is also the first objective (IM-01) in the Integrated Management chapter.

¹⁹ proposed RPS extracts are from the 31 October 2022 version – which represents ORC's present position.

²⁰ PORPS, pages 75-76.

²¹ PORPS, page 4.

59. The Foreword explains:
- “This statement reflects that a healthy, flourishing environment is fundamental to our well-being. Integration is the central tenet, seeing the environment as a single connected system, ki uta ki tai, and weaving this in to the RPS fabric.”²²*
60. Those aspirations underpin the proposed RPS.
61. A “*healthy environment*” is fundamental to provide for social, economic and cultural well-being of people and communities.
62. Activities can occur but within the constraints set by the proposed RPS.
63. In other words, people are free to undertake activities which yield social, cultural and economic benefits but not at any cost. The proposed RPS is directive and restrictive, where it is necessary to protect the environment and restorative, where damage has occurred. As examples, the region’s outstanding landscapes, natural features and waterbodies are to be protected; steps are to be taken to improve air quality in polluted airsheds; biodiversity losses are to be prevented and significant areas protected.
64. This underlying philosophy is the touchstone for the Panel in considering submissions and making recommendations.
65. The proposed RPS has not singled out, as a general rule, and made distinct provisions for particular activities, except where required by a National Policy Statement²³. So, for example, there are not distinct provisions for mining and other extractive industries, nor for food and fibre production. A policy statement structured on an activity-by-activity basis is difficult to reconcile with the National Planning Standards, would be unduly complex, lose integration, and dilute the core principles which the RPS seeks to establish uniformly across the region.
66. As noted, the purpose of an RPS is to achieve integrated management of natural and physical resources across the region.
67. A RPS must cover a diverse range of domains and topics. Further, the RPS must comply with the National Planning Standards. The standards tend to force provisions into silos.

²² PORPS, page 5.

²³ Electricity Transmission (the National Grid), Renewable Electricity Generation, and Urban Development.

68. Accordingly, in this proposed RPS, the Integrated Management chapter performs an important function. It brings the threads together.
69. Its objectives set out the outcomes sought by the RPS²⁴.

“IM-O1 – Long term vision

The management of natural and physical resources in Otago, by and for the people of Otago, including in partnership with Kāi Tahu, and as expressed in all resource management plans and decision making, achieves a healthy, and resilient, and safeguarded natural systems environment, and including the ecosystem services they offer it provides, and supports the well-being of present and future generations, (mō tātou, ā, mō kā uri ā muri ake nei).

IM-O2 – Ki uta ki tai

The management of Natural and physical resources management and decision making in Otago embraces ki uta ki tai, recognising that the environment is an interconnected system, which depends on its connections to flourish, and must be considered managed as an interdependent whole.

IM-O3 – Environmentally Sustainable impact

Otago’s communities carry out their activities in a way provide for their social, economic, and cultural well-being in ways that support or restore preserves environmental integrity, form, function, and resilience, so that the life-supporting capacities of air, water, soil, and ecosystems are safeguarded, and indigenous biodiversity endure for future generations.”

70. Further, how the proposed RPS “works” is described in IM-P1²⁵:

“IM-P1 – Integrated approach to decision-making

Giving effect to the integrated package of objectives and policies in this RPS requires decision-makers to consider all provisions relevant to an issue or decision and apply them according to the terms in which they are expressed, and if there is a conflict between provisions that cannot be resolved by the application of higher order documents, prioritise:

(1) the life-supporting capacity and mauri of the natural environment and the health needs of people, and then

(2) the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

The objectives and policies in this RPS form an integrated package, in which:

(1) all activities are carried out within the environmental constraints of this RPS,

(2) all provisions relevant to an issue or decision must be considered,

(3) if multiple provisions are relevant, they must be considered together and applied according to the terms in which they are expressed, and

²⁴ PORPS, page 121.

²⁵ PORPS, page 122.

~~(4) notwithstanding the above, all provisions must be interpreted and applied to achieve the integrated management objectives IM-O1 to IM-O4.”~~

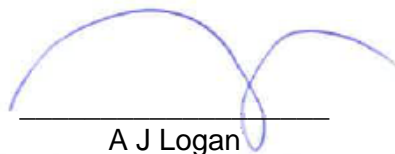
71. This interpretation provision reflects the environmental philosophy that underpins the proposed RPS.
72. The objectives are to be achieved by policies which require a holistic approach to the use and development of resources²⁶ and limits human impacts on the environment²⁷.

Issues

73. Ms Boyd will present an outline of the unresolved planning issues on Wednesday.

Conclusion

74. These submissions are an introduction to the RPS, and the position in which ORC has adopted in the proposed instrument. They are an overview of the legal matters relevant to the Panel's task. Counsel will present more detailed submissions, when necessary, in the opening for each topic.
75. They do not address in detail the extensive written submissions nor the written evidence which has been lodged by submitters.
76. That is a matter for reply, once the submitters have presented, and their cases have been brought into focus with the assistance of legal submissions.



A J Logan
Counsel for the Otago Regional Council
Dated: 23 January 2023

²⁶ IM-P5.

²⁷ IM-P14.