

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
COASTAL ENVIRONMENT CHAPTER OF THE PROPOSED REGIONAL
POLICY STATEMENT**

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POLICY STATEMENT**

May it Please the Commissioners:

Introduction

1. The Coastal Environment Chapter must set out the approach to managing the coastal environment and giving effect to the New Zealand Coastal Policy Statement¹.

“Coastal Environment”

2. The coastal environment includes the Coastal Marine Area (“CMA”).
3. The CMA is the space between mean high water springs and the outer limits of the territorial sea (12 nautical miles)².
4. There is some complexity about the boundaries of the CMA at river mouths.
5. The mouth is either agreed between the Minister of Conservation, Regional Council and the relevant territorial authority in the preparation of a proposed Regional Coastal Plan, or determined by a declaration made by the Environment Court before the Regional Coastal Plan becomes operative. Once determined the mouth is fixed until the next review of the Regional Coastal Plan³.
6. At a river mouth the landward boundary of the CMA is the lesser of:
 - 6.1. 1 kilometre upstream from the mouth of the river; or
 - 6.2. The point upstream that is calculated by multiplying the width of the river by 5⁴.
7. *“Coastal environment”* has a broader spatial extent than the CMA.

¹ Clause 6, section 2 of the National Planning Standards, Regional Policy Statement Structure Standard

² Section 2 of the RMA and section 3 of the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977

³ Section 2 definition of *“mouth”* in the RMA

⁴ Section 2 of the RMA

8. It extends inland of mean high water springs.
9. In the Otago region the landward extent of the coastal environment has not been identified nor mapped.
10. The factors set out in Policy 1 of the New Zealand Coastal Policy Statement apply to the identification of the “*coastal environment*”.
11. Those matters are repeated in CE-P2(1) of the proposed RPS⁵. To give effect to CE-P2(1) local authorities in the region are to identify and map the landward boundary of the Coastal Marine Area⁶. I note that the 31 May 2023 date in method CE-M1 will need to be changed.
12. The RMA, including in particular Part 2, the New Zealand Coastal Policy and Regional Policy Statement apply to the whole of the coastal environment in the Otago region.
13. The Regional Coastal Plan regulates for RMA purposes activities in the Coastal Marine Area.
14. Regional and District Plans apply to the balance of the coastal environment.

Regional Council Functions

15. A Regional Policy Statement must be prepared in accordance with the Regional Council functions in section 30⁷. The relevant Regional Council functions for the coastal environment include:

“30 Functions of regional councils under this Act

(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

(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.⁸

...

⁵ Page 141 of the 31 October 2022 version. All references are to the 31 October Version

⁶ CE-M1, page 148

⁷ Section 61(1)(a)

⁸ “*Land*” includes land covered by water; water includes coastal water: section 2 of the RMA

- (c) *the control of the use of land for the purpose of—*
 - (i) *soil conservation:*
 - (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:*
 - (v) *[Repealed]*

...

- (d) *in respect of any coastal marine area in the region, the control (in conjunction with the Minister of Conservation) of—*
 - (i) *land and associated natural and physical resources:*
 - (ii) *the occupation of space in, and the extraction of sand, shingle, shell, or other natural material from, the coastal marine area, to the extent that it is within the common marine and coastal area:*
 - (iii) *the taking, use, damming, and diversion of water:*
 - (iv) *discharges of contaminants into or onto land, air, or water and discharges of water into water:*
 - (iva) *the dumping and incineration of waste or other matter and the dumping of ships, aircraft, and offshore installations:*
 - (v) *any actual or potential effects of the use, development, or protection of land, including the avoidance or mitigation of natural hazards:*
 - (vi) *the emission of noise and the mitigation of the effects of noise:*
 - (vii) *activities in relation to the surface of water:*

...

- (f) *the control of discharges of contaminants into or onto land, air, or water and discharges of water into water:*

...

- (ga) *the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity:*

...

- (2) *A regional council and the Minister of Conservation must not perform the functions specified in subsection (1)(d)(i), (ii), and (vii) to control the taking, allocation or enhancement of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act 1996.*
- (3) *However, a regional council and the Minister of Conservation may perform the functions specified in subsection (1)(d) to*

control aquaculture activities for the purpose of avoiding, remedying, or mitigating the effects of aquaculture activities on fishing and fisheries resources.

...”

16. Section 30(2) imposes a restriction on the ability of a Regional Council to control fishing and fishing resources in the Coastal Marine Area. The Fisheries Act 1996 applies to the management of fishing and the control of fishery resources.
17. Nonetheless, Regional Councils may control fishing and fishing resources other than for Fisheries Act purposes, including for the maintenance of indigenous biodiversity⁹.
18. Nothing in the Coastal Environment chapter trespasses into forbidden territory.

Part 2

19. Because of the diverse nature of the coastal environment, all the provisions of Part 2 (sections 5-8) apply to the Coastal Marine Area and must inform planning decisions.
20. The guiding principle is sustainable management of natural and physical resources.
21. Natural and physical resources include land, water, air, soil, minerals, energy, all forms of plants and animals (whether indigenous or exotic) and all structures¹⁰.
22. Sustainable management means providing for social, cultural and economic well-being of people and communities while, at the same time,¹¹
 - (a) sustaining the potential of natural and physical resources (other than minerals) to meet the reasonably foreseeable needs of future generations; and
 - (b) safeguarding the life-supporting capacity of air, water, soil and ecosystems; and

⁹ *Attorney-General v Trustees of Motiti Rohe Moana Trust* [2019] 3 NZLR 876

¹⁰ Section 2

¹¹ *King Salmon*, at paragraph [24](c)

- (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.
23. The words “*sustaining*” and “*safeguarding*” are words of ordinary usage.
24. To “*sustain*” simply means maintain or keep up.
25. “*Safeguard*” means keep safe or protect from harm.
26. In *King Salmon*¹², the Supreme Court describes section 5(2)(a) and (b) as protecting intergenerational interests which resonates with the Kāi Tahu evidence presented earlier during these hearings.
27. These intergenerational interests are in the nature of bottom lines.
28. The Supreme Court categorised section 5(2)(c) as being directed to environmental interests. It sets out the options of avoidance, remediation and mitigation.

NZCPS

29. There must be a New Zealand Coastal Policy Statement.
30. It must contain objectives and policies to achieve the purpose of the RMA in the coastal environment¹³.
31. Choices have been made to protect some resources, in preference to provide for their use and development.
32. Avoidance of adverse effects has been preferred in some instances to remediation and mitigation.
33. The NZCPS is a set of binding national policy choices. The NZCPS reflects priorities in the use, development and protection of natural and physical resources in the coastal environment.
34. The RPS must give effect to, or implement those policy decisions.
35. Like National Policy Statements, the NZCPS is recognised as secondary legislation.

¹² *King Salmon*, at paragraph [24](c)

¹³ Section 56

36. Its meaning must be ascertained from its text in light of its purpose and context¹⁴.
37. The recent application of the principles of interpretation in the Legislation Act 2019 does not displace the approach of the Supreme Court in *King Salmon* to the internal relationships of the provisions of the NZCPS to one another.
38. What is clear from the Supreme Court decision is that the objectives and policies of the NZCPS must be read as a whole. Provisions or part of a provision should not be taken in isolation.
39. The Court emphasised the importance of the way in which individual provisions are expressed. Close attention must be paid to the words chosen. Objectives and policies are to be read and applied in their terms. More directive provisions prevail over the less prescriptive.
40. In particular the avoidance policies (policies 11, biodiversity, 13, natural character, 15, outstanding natural features and landscapes, and 16, surf breaks of national importance) take precedence over policies “to provide for”, “consider”, or “recognise”.
41. This way the policies work together.
42. Activities in the coastal environment must take place within the envelope set by the avoidance policies¹⁵.
43. That does not mean that the avoidance policies require prohibited activities status. The avoidance policies proscribe specific adverse effects, not activities.
44. Activity status is set in Regional and District Plans, not a Regional Policy Statement. Activity status should not be prejudged at the Regional Policy Statement level¹⁶.
45. Whether an activity has an adverse effect, whether that effect must be avoided, and how it can be avoided depends on the specific proposals and their locations. The inquiry is fact-specific and requires detailed evaluation of the activity in its environment.

¹⁴ Section 10 of the Legislation Act 2019

¹⁵ Subject to the Supreme Court decision in the *Port Otago* and *East-West Link* cases

¹⁶ *Port Otago Limited v Otago Regional Council* [2021] NZCA 638, paragraphs [84] and [85]

46. That is far from saying that existing and even new activities are necessarily precluded by the avoidance policies. An assessment of the effects on the environment must take into account the state of the environment, including existing modifications to that environment by human intervention.
47. The duration and degree of adverse effects is also material. The Supreme Court noted that it may not be necessary to avoid minor or transitory effects.
48. The availability of methods to avoid adverse effects, including adaptive management, is part of the plan-making or consenting evaluation.
49. When all these matters are brought into account, it is hard to see how continuation of an existing activity, or the replacement of an existing facility can be precluded by the NZCPS, or by provisions in the RPS which faithfully give effect to the NZCPS¹⁷.
50. Submissions which seek to dilute the NZCPS must be resisted.
51. The NZCPS does not foreclose more rigorous provisions in the RPS.
52. There is nothing in either the RMA, nor the NZCPS which prevents greater stringency or stops a RPS dealing with matters not covered by the NZCPS.
53. In this case, based on section 6(c) of the RMA additional provisions are proposed for indigenous biodiversity in CE-P5(2)(h) and (i)¹⁸ – to protect SNAs, and taoka species and ecosystems not caught by Policy 11 of the NZCPS. .

Māori Commercial Aquaculture Claims Settlement Act

54. This Act was discussed in evidence and submissions early in the hearings.
55. Section 12 of the Act enables space in the Coastal Marine Area to be gazetted as an aquaculture settlement area to ensure space is available for meeting the Crown's obligations to provide aquaculture areas for iwi.

¹⁷ *Port Otago Ltd v Otago Regional Council* [2021] NZCA 638, at paragraphs [61] and [78]-[86]; subject to appeal to the Supreme Court

¹⁸ 24 February 2023 Version circulated by Andrew MacLennan

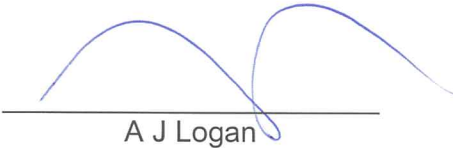
56. Kāi Tahu wants any areas gazetted be recognised in regional planning instruments to try to ensure that the space is in fact available.
57. It is recommended that CE-P2(3) and CE-M3 be amended to identify any such aquaculture settlement areas in the Regional Coastal Plan.

RPS Structure

58. Many submitters raise issues about the relationship of the coastal environment chapter to the rest of the proposed RPS.
59. There are overarching provisions in the Mana Whenua and Integrated Management chapters which apply.
60. The Coastal Environment chapter is not intended to be a complete code.
61. The National Planning Standards provide that if specific provisions relating to the coastal environment are located in other chapters, they must be cross-referenced to the coastal environment chapter¹⁹.
62. Accordingly, these links have been set out in CE-P1.

Conclusion

63. Andrew MacLennan is the ORC planning witness. He has circulated an opening statement together with further tentative revisions to the Coastal Environment chapter.


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¹⁹ Clause 7 of the National Planning Standards