

**BEFORE THE OTAGO REGIONAL COUNCIL**

**AT DUNEDIN**

**KI ŌTEPOTI**

**IN THE MATTER**

of the Resource Management Act 1991

**AND**

**IN THE MATTER**

of the proposed Otago Regional Policy Statement  
2021 (excluding those parts determined to be a  
Freshwater Planning Instrument)

---

**Legal Submissions for the Director-General of Conservation *Tumuaki Ahurei*  
Coastal Environment Chapter  
dated 2 March 2023**

---

---

**Department of Conservation Te Papa Atawhai**  
RMA Shared Services  
Private Bag 4715  
Christchurch 8140  
Solicitor Rōia: Pene Williams  
Phone Waea: 027 408 3324  
Email Īmēra: pwilliams@doc.govt.nz

## **MAY IT PLEASE THE HEARING PANEL**

The following matters are submitted on behalf of the Director-General of Conservation Tumuaki Ahurei (Director-General):

### *Introduction*

1. I refer to the Opening Submissions for the Otago Regional Council (ORC, Council) dated 28 February 2023.<sup>1</sup> I generally agree with and adopt those submissions.
2. Below I discuss:
  - (a) The New Zealand Coastal Policy Statement 2010
  - (b) The intersection between the Resource Management Act 1991 and the Fisheries Act 1996
  - (c) Some additional comments and updates.

*The Coastal Environment Chapter is where the pORPS most obviously gives effect to the New Zealand Coastal Policy Statement (NZCPS)*

3. When preparing the proposed Otago Regional Policy Statement (pORPS) the Council must do so in accordance with the NZCPS and give effect to it – along with other national policy statements.<sup>2</sup>
4. As noted by Mr Logan for the Council, the coastal environment is the one aspect of the environment which must always have a national policy statement in place.<sup>3</sup> This recognises the importance of achieving the sustainable purpose of the Resource Management Act 1991 (RMA) in an integrated way across all regions for the coastal environment.
5. This is consistent with the requirement for regional policy statements to state processes to deal with issues between territorial authorities and regions.<sup>4</sup> The

---

<sup>1</sup> Opening Submissions for the Otago Regional Council on the Coastal Environment Chapter of the proposed Otago Regional Policy Statement dated 28 February 2022

<sup>2</sup> Section 61(1)(da) and 62(3) RMA

<sup>3</sup> Section 57(1) RMA.

<sup>4</sup> Section 62(1)(h) RMA

somewhat arbitrary nature of coastal regional boundaries calls out for integration of management between adjacent regions.

6. I consider this also comes back to the purpose of a regional policy statement, being to achieve integrated management of natural and physical resources across the whole region – including the coastal marine area out to the limit of the territorial sea.<sup>5</sup>
7. I agree with Mr Logan for the Council, referring to *King Salmon*,<sup>6</sup> that the objectives and policies of the NZCPS must be read together and as a whole. I also agree with his submission it is important to consider the particular words used in each NZCPS objective and policy.<sup>7</sup>
8. In the coastal environment we are dealing with many unknowns. We are still developing our understanding of this space at the same time as new technologies and activities are being proposed which may have potentially significant adverse effects. This is why the NZCPS policy 3 provides for a precautionary approach – in particular where coastal resources may be vulnerable to effects of climate change.
9. In the coastal environment the ‘avoidance’ policies (11 indigenous biodiversity, 13(1) preservation of natural character, 15 natural features and natural landscapes, and 16 surf breaks of national importance) prescribe effects of activities where these effects will adversely affect outstanding values.
10. The Supreme Court held “*avoid*” in the context of these policies has its ordinary meaning of “*not allow*” or “*prevent the occurrence of*”.<sup>8</sup>
11. When considering how to apply these policies, they are to be assessed against the characteristics or ‘values’ of the environment which the policies seek to protect (policies 11, 15 and 16) or preserve (policy 13).<sup>9</sup> They do not

---

<sup>5</sup> Section 59 RMA

<sup>6</sup> *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593

<sup>7</sup> Opening Submissions for ORC on Coastal Environment Chapter at 38 – 39.

<sup>8</sup> *Supra King Salmon* at [62], [96]

<sup>9</sup> *Supra King Salmon* at [126]

prescribe activities in and of themselves – although the application of the policies may result in some activities not being permitted in some areas.<sup>10</sup>

12. The focus of Dr Hendrik Schultz’s evidence for the Director-General<sup>11</sup> is on the indigenous biodiversity values in the coastal environment which are to be protected: policy 11.
13. I want to stress that Dr Schultz’s evidence is intended to provide an overview of these values in the Otago region, supported by examples. Dr Schultz has not attempted to provide a comprehensive assessment – in part because in the context of a regional policy statement that would become too detailed, and in part because there are knowledge gaps about the extent of some of these values in Otago’s coastal environment.
14. In relation to the other NZCPS ‘avoidance policies’, the Director-General has not called evidence on natural character values (policy 13), or natural features and natural landscapes (policy 15), as these are not matters in which the Department has expertise. I note Otago is blessed by having four surf breaks of national importance – more than any other region.<sup>12</sup>
15. I do want to distinguish these policies which require avoidance of adverse effects with the one policy in the NZCPS which requires a particular activity be avoided as a general rule in the coastal marine area: policy 10 reclamation. This shows the careful wording used in the NZCPS where for this activity the directive is to *avoid unless*, and should the activity proceed have particular regard to certain matters.
16. Finally on the NZCPS, I agree with Mr Logan that, in the same way the NZCPS may be more rigorous for particular values in the coastal environment while still being consistent with the sustainable management purpose of the RMA similarly, the pORPS may impose more stringent provisions where this

---

<sup>10</sup> An example of this is *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 where the proposed activity would result in unavoidable adverse effects on the habitat of threatened New Zealand King Shag

<sup>11</sup> Expert Evidence of Dr Hendrik Schultz (Coastal Environment) for the Director-General of Conservation Tumuaki Ahurei, dated 28 November 2022

<sup>12</sup> Schedule 1 NZCPS

is appropriate and recognises and protects particular values of Otago's coastal environment.

17. Policy 11 of the NZCPS does not refer to "significant natural areas". I submit this reflects the evolution of our understanding of how best to protect section 6(c) RMA significant indigenous vegetation and significant habitats of indigenous fauna. This protection under section 6(c) is absolute and not qualified by references to inappropriate use or development.
18. I submit it is appropriate for the pORPS to apply an avoidance approach to protecting these values, consistent with policy 11 of the NZCPS and to be in accordance with Part 2 of the RMA, especially section 6(c). As set out above, it is the adverse effects on the values which are to be avoided rather than particular activities.

*The pORPS may include controls on fishing and fisheries resources where this is for resource management purposes, including maintaining indigenous biodiversity*

19. In *Motiti*<sup>13</sup> the Supreme Court considered the overlap between a regional council's functions under section 30 RMA and management of fisheries resources under the Fisheries Act 1996.
20. The Court stated the objective of the Fisheries Act 1996 is to provide for utilisation of fisheries resources while ensuring their sustainability. In essence, the Fisheries Act regulates and manages fisheries<sup>14</sup> as a potential stock to ensure it continues to be able to be used sustainably. This Act balances maintenance of biological diversity against other matters including setting the total allowable catch for a particular fisheries resource at a level to produce a maximum sustainable yield.<sup>15</sup>

---

<sup>13</sup> *Attorney-General v Trustees of Motiti Rohe Moana Trust* [2019] NZCA 532, [2019] 3 NZLR 876

<sup>14</sup> The section 2 RMA definitions of "fish", "fishing" and "fisheries resource" all refer to the Fisheries Act 1996 section 2(1) definitions with a "fisheries resource" defined as "any 1 or more stocks or species of fish, aquatic life, or seaweed". By contrast, in the Conservation Act 1987 section 2 defines a "fishery" as: "1 or more stocks or parts of stocks or 1 or more species of freshwater fish or aquatic life that can be treated as a unit for the purposes of conservation or management".

<sup>15</sup> *Motiti* at [43] – [44], [50]

21. By contrast, the RMA section 30(1)(d) and 30(1)(ga) functions of regional councils are broader. The Supreme Court stated in the coastal marine area section 30(1)(ga) is: “... *an important part of a legislative scheme that reflects the objectives and policies of the NZCPS*”.<sup>16</sup>
22. The Supreme Court recognised there are constraints in section 30(2) RMA which limit what regional councils may do in the context of fishing and fisheries resources. The *Motiti* decision confirms it is the *purpose or intent* of the proposed actions that determines whether a proposed control is appropriate or not – a RMA control cannot be intended to manage fishing or fisheries resources for Fisheries Act purposes.<sup>17</sup>

*Additional matters – update on South East Marine Protection Process, Māori Commercial Aquaculture Claims Settlement Act*

23. In my opening legal submissions<sup>18</sup> I mentioned the continuing South East Marine Protection (SEMP) process. I understand Mr Ellison for Kai Tāhu made some comments to the hearing panel yesterday on this process.
24. I advise the Department has drafted advice for the Minister of Conservation which is close to final and expected to go to the Minister shortly. Given the reprioritisation of government priorities and following Cyclone Gabrielle it is unclear when this may progress.
25. The Māori Commercial Claims Settlement Act 2004 may result in gazetted spaces in the coastal marine area to meet the Crown’s obligation to provide iwi with aquaculture settlement areas. I agree it would be appropriate to make provision in the pORPS to recognise such spaces once gazetted.

---

<sup>16</sup> *Motiti* at [55]

<sup>17</sup> *Motiti* at [67]

<sup>18</sup> Opening Legal Submissions on the Non-Freshwater Parts of the Proposed Otago Regional Policy Statement on behalf of the Director-General of Conservation/ Tumuaki Ahurei dated 25 January 2023, at 18 – 20

*Coastal Environment Chapter evidence for the Director-General*

26. I am calling the following witnesses for the Director-General today:
- Dr Hendrik Schultz – coastal environment
  - Bruce McKinlay – terrestrial ecology
  - Dr Marine Richardson – freshwater ecology
  - Murray Brass - planning
27. As this hearing is on his primary evidence topic, Dr Schultz will present a summary. Mr Brass also has some notes he will speak to. The remaining witnesses are here to answer the Panel's questions on their expert evidence as it relates to the Coastal Environment Chapter.



Pene Williams

Counsel Rōia for the Director-General