

**BEFORE THE HEARING COMMISSIONERS**

---

**UNDER**

The Resource Management Act 1991

**AND**

**IN THE MATTER**

of the Proposed Otago Regional Policy Statement  
2021

---

**ORC SUBMISSIONS FOR HEARING  
HAZ – Hazards and Risks**

Dated 26 April 2023

---

ROSS DOWLING MARQUET GRIFFIN  
SOLICITORS  
DUNEDIN

Telephone: (03) 477 8046  
Facsimile: (03) 477 6998  
PO Box 1144, DX YP80015

Solicitor: A J Logan

---

**ORC SUBMISSIONS FOR HEARING  
HAZ – Hazards and Risks**

---

**May it Please the Commissioners:**

**Introduction**

1 This chapter is best introduced by SRMR-I1:

*“Otago is prone to a range of natural hazards that pose a risk to Otago communities, property, infrastructure, and the wider environment. A major event could cause severe damage and may isolate Otago communities for an extended time. Major events of concern include flooding, an earthquake on the Alpine fault, tsunami, coastal erosion, wildfires, and extreme weather events.”*

**Legal framework**

2 The sustainable management purpose of the Act<sup>1</sup> includes:

*“...managing the use, development, and protection of [resources] in a way ... which enables people and communities to provide for their ... health and safety...”*

3 In achieving the purpose of the Act, the ORC must as a matter of national importance recognise and provide for<sup>2</sup>:

*“(h) the management of significant risks from natural hazards.”*

4 Under section 2 of the Act “contaminated land” and “natural hazard” are defined:

*“**contaminated land** means land that has a hazardous substance in or on it that—*

*(a) has significant adverse effects on the environment; or*

*(b) is reasonably likely to have significant adverse effects on the environment”*

*“**natural hazard** means any atmospheric or earth or water related occurrence (including earthquake, tsunami, erosion, volcanic and geothermal activity, landslip, subsidence, sedimentation, wind, drought, fire, or flooding) the action of which adversely affects or may adversely affect human life, property, or other aspects of the environment”*

---

<sup>1</sup> Section 5

<sup>2</sup> Section 6

- 5 Under section 30(1) of the Act the functions of the ORC include:
- “(c) the control of the use of land for the purpose of—...*
  - (iv) the avoidance or mitigation of natural hazards:*
  - (ca) the investigation of land for the purposes of identifying and monitoring contaminated land:*
  - (d) in respect of any coastal marine area in the region, the control (in conjunction with the Minister of Conservation) of—...*
    - (iv) discharges of contaminants into or onto land, air, or water and discharges of water into water:*
    - (v) any actual or potential effects of the use, development, or protection of land, including the avoidance or mitigation of natural hazards:...*
  - (f) the control of discharges of contaminants into or onto land, air, or water and discharges of water into water:...*
  - (g) in relation to any bed of a water body, the control of the introduction or planting of any plant in, on, or under that land, for the purpose of—...*
    - (iv) the avoidance or mitigation of natural hazards:”*
- 6 Generally, adverse effects from contaminated land involve the discharge of a hazardous substance to land, air or water.
- 7 Under section 62(1) of the Act the PORPS must state:
- “(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...”*
- 8 Under section 62(3) of the Act the PORPS must give effect to the New Zealand Coastal Policy Statement 2010 (**NZCPS**).
- 9 Under section 61(2)(e) of the Act the ORC must have regard to the National Adaptation Plan 2022<sup>3</sup> (**NAP**) in preparing the PORPS.
- 10 Under section 61(1)(e) of the Act the PORPS must be prepared in accordance with the Resource Management (National Environmental

---

<sup>3</sup> Ministry for the Environment. 2022. Aotearoa New Zealand’s first national adaptation plan. Wellington. Ministry for the Environment; published by the Minister of Climate Change under section 5ZT of the Climate Change Response Act 2002.

## The NZCPS

11 The NZCPS provides strong direction on the management of coastal hazards in the coastal environment.

12 Objective 5 of the NZCPS is:

*“To ensure that coastal hazard risks taking account of climate change, are managed by:*

- *locating new development away from areas prone to such risks;*
- *considering responses, including managed retreat, for existing development in this situation; and*
- *protecting or restoring natural defences to coastal hazards.”*

13 Policy 1 of the NZCPS includes recognition that:

*“...the coastal environment includes:...*

*d. areas at risk from coastal hazards;...”*

14 Policy 24 of the NZCPS requires the identification of:

*“...areas in the coastal environment that are potentially affected by coastal hazards (including tsunami), giving priority to the identification of areas at high risk of being affected. ...”*

15 Policy 25 of the NZCPS provides:

*“In areas potentially affected by coastal hazards over at least the next 100 years:*

- a. avoid increasing the risk of social, environmental and economic harm from coastal hazards;*
- b. avoid redevelopment, or change in land use, that would increase the risk of adverse effects from coastal hazards;*
- c. encourage redevelopment, or change in land use, where that would reduce the risk of adverse effects from coastal hazards, including managed retreat by relocation or removal of existing structures or their abandonment in extreme circumstances, and designing for relocatability or recoverability from hazard events;*
- d. encourage the location of infrastructure away from areas of hazard risk where practicable;*
- e. discourage hard protection structures and promote the use of alternatives to them, including natural defences; and*

f. *consider the potential effects of tsunami and how to avoid or mitigate them.*"

16 Policy 26 of the NZCPS provides:

- "1. Provide where appropriate for the protection, restoration or enhancement of natural defences that protect coastal land uses, or sites of significant biodiversity, cultural or historic heritage or geological value, from coastal hazards.*
- 2. Recognise that such natural defences include beaches, estuaries, wetlands, intertidal areas, coastal vegetation, dunes and barrier islands."*

17 Policy 27 of the NZCPS provides:

- "1. In areas of significant existing development likely to be affected by coastal hazards, the range of options for reducing coastal hazard risk that should be assessed includes:*
  - a. promoting and identifying long-term sustainable risk reduction approaches including the relocation or removal of existing development or structures at risk;*
  - b. identifying the consequences of potential strategic options relative to the option of "do-nothing";*
  - c. recognising that hard protection structures may be the only practical means to protect existing infrastructure of national or regional importance, to sustain the potential of built physical resources to meet the reasonably foreseeable needs of future generations;*
  - d. recognising and considering the environmental and social costs of permitting hard protection structures to protect private property; and*
  - e. identifying and planning for transition mechanisms and timeframes for moving to more sustainable approaches.*
- 2. In evaluating options under (1):*
  - a. focus on approaches to risk management that reduce the need for hard protection structures and similar engineering interventions;*
  - b. take into account the nature of the coastal hazard risk and how it might change over at least a 100-year timeframe, including the expected effects of climate change; and*
  - c. evaluate the likely costs and benefits of any proposed coastal hazard risk reduction options.*
- 3. Where hard protection structures are considered to be necessary, ensure that the form and location of any structures are designed to minimise adverse effects on the coastal environment.*

4. *Hard protection structures, where considered necessary to protect private assets, should not be located on public land if there is no significant public or environmental benefit in doing so.*

## **The NAP**

18 The NAP provides:

*“The interim guidance is non-statutory. However, from 30 November 2022, councils will be required to ‘have regard to’ this plan when making or changing regional policy statements or regional or district plans. For that reason, this plan directs councils as follows.*

*When making or changing policy statements or plans under the RMA, including to give effect to the provisions of the NZCPS, councils should use the recommended climate change scenarios outlined below, as a minimum:*

- *to screen for hazards and risks in coastal areas, use the Shared Socioeconomic Pathway scenario for fossil fuel intensive development (SSP5-8.5) where available, or the Representative Concentration Pathway RCP8.5,<sup>2</sup> to 2130*
- *for detailed hazard and risk assessments in coastal and non-coastal areas, use both the middle-of-the-road scenario (SSP2-4.5) and the fossil fuel intensive development scenario (SSP5-8.5) where available, RCP4.5 and RCP8.5, to 2130, for areas at high risk of being affected, adding the relevant rate of vertical land movement locally. Where SSP2-4.5 and SSP5-8.5 are not available, use RCP4.5 and RCP8.5 to 2130, adding the relevant rate of vertical land movement locally*
- *for all other climate hazards and risks, use the most recent downscaled climate projections for Aotearoa.*

*In addition, councils should stress test plans, policies and strategies using a range of scenarios as recommended in the interim guidance and the National Climate Change Risk Assessment Framework, as relevant to the circumstance.*

*Footnote 2: Representative Concentration Pathways should be used only where climate data is otherwise not reported under Shared Socioeconomic Pathways – for example, downscaled regional climate projections reported in Climate Change Projections for New Zealand.”*

19 A NAP must be prepared in response to each national climate change risk assessment. National climate change risk assessments must be prepared at intervals not exceeding six years.<sup>4</sup>

## **The NESCS**

20 The NESCS provides a set of planning controls and soil contaminant values to ensure that contaminated land is appropriately identified and assessed

---

<sup>4</sup> Sections 5ZQ and 5ZS Climate Change Response Act 2002.

before it is developed, and where necessary remediated to make it safe for human use.

- 21 The NESCS applies to certain activities on land that is either on the Hazardous Activities and Industries List (**HAIL**) or more likely than not to have had a HAIL activity undertaken on it, and which has not had a detailed site investigation undertaken showing the absence of relevant contamination<sup>5</sup>.
- 22 Generally, the following activities are regulated<sup>6</sup>:
- 22.1 Removing or replacing a fuel storage system;
  - 22.2 Sampling the soil;
  - 22.3 Disturbing the soil;
  - 22.4 Subdivision; and
  - 22.5 Change of use.
- 23 The NESCS prescribes whether activities are permitted, controlled, restricted discretionary or discretionary.
- 24 Because the NESCS does not state that a rule or consent may be more stringent or more lenient than it, the effect is that the same rules must be applied by all territorial authorities for activities within scope of the NESCS<sup>7</sup>.
- 25 The NESCS is not directly relevant to the PORPS. It expressly relates to territorial authority functions and not regional council functions<sup>8</sup>.
- 26 However, the PORPS should not include policy direction that requires a district plan rule in conflict with the NESCS.

## **Legal framework summary**

### *Hazards*

- 27 The PORPS should achieve the purpose of the Act by recognising and managing significant risks from natural hazards as a matter of national

---

<sup>5</sup> Regulation 5(7) to (9)

<sup>6</sup> Regulation 5(2) to (6)

<sup>7</sup> Sections 43B and 44A of the Act

<sup>8</sup> Regulation 4

importance, and more generally by the avoidance or mitigation of natural hazards.

28 The NZCPS gives specific direction in connection with coastal hazards and must be given effect to.

29 Regard must be had to the NAP, which gives specific direction as to the minimum climate change scenarios to be used. It is preferable not to replicate the standards in the current NAP, because the NAP will change within six years.

30 Otherwise, there is no specific direction for non-coastal hazards.

#### *Contaminated land*

31 The investigation and monitoring of contaminated land are ORC functions.

32 By definition, contaminated land involves a hazardous substance which has or is reasonably likely to have significant adverse effects on the environment.

33 Generally, those effects are due to discharge of the contaminant to land, air or water.

34 It is a function of the ORC to control those discharges.

35 The NESCS regulates some activity status in the district plan context. The PORPS should not give policy direction requiring a district plan rule inconsistent with the NESCS.

#### **The effect of the legal framework on natural hazard policies in the PORPS**

36 Coastal hazards are dealt with in a way that gives effect to the NZCPS.

37 As a result, some policies apply only to coastal hazards and some apply only to non-coastal hazards.

38 Other policies apply to all hazards.

#### *Policies applying to all hazards*

39 Policies HAZ-NH-P5, P6, P7, P8 and P9 apply to all hazards whether coastal or not.



*Policies specific to coastal hazards*

- 40 HAZ-NH-P1A and P10 apply only to coastal hazards
- 41 HAZ-NH-P1A gives effect to NZCPS policy 24.
- 42 HAZ-NH-P10(1), (2) and (3) give effect to NZCPS policies 25(a), (b) and (c).
- 43 In the NZCPS:
- 43.1 policy 25(a) requires the avoidance of increasing the risk of social, environmental and economic harm from coastal hazards; and
- 43.2 policy 25(b) requires the avoidance of redevelopment or change in land use which would increase the risk of adverse effects from coastal hazards.

*Policies specific to non-coastal hazards*

- 44 Policies HAZ-NH-P1, P2, P3 and P4 apply only to non-coastal hazards.
- 45 There is a different policy set because the approach differs from the mandatory requirements of the NZCPS.
- 46 HAZ-NH-P2 introduces a risk assessment applying criteria set out in APP6.
- 47 After applying APP6 a risk will be either acceptable, tolerable or significant.
- 48 For new activities, it is only when the risk is significant that the activity is to be avoided.
- 49 A tolerable or acceptable level of risk is permissible.
- 50 This also informs the reduction of natural hazard risk under HAZ-NH-P4.
- 51 This contrasts with the NZCPS which for coastal hazards requires the avoidance of increased coastal hazard risk.
- 52 Because the NZCPS sets an avoidance standard, which is at odds with the approach of assessing risk, and the extent to which it can be tolerated, coastal and non-coastal hazards are treated differently in the PORPS.

## Contaminated land

### *HAZ-CL-P15 – replacement provision - vires*

53 In context of HAZ-CL-P15 Mr McCullagh proposes a new policy<sup>9</sup> in replacement of HAZ-CL-P15:

*“Manage the use and development of land for hazardous facilities where analysis demonstrates adequate controls are not provided by other legislation.”*

54 This policy constrains local authorities in the exercise of their functions under the Act and is ultra vires.

55 It is implicit in the policy that the management of use and development of land for hazardous facilities is not to occur unless other relevant legislation is shown to have inadequate controls.

56 If hazardous facilities have effects on the environment which it is relevant for a local authority to manage in a plan or policy statement, or in considering a resource consent application, under the Act, then the local authority must do so, regardless of whether those facilities are otherwise regulated.

57 For example, the storage, transport and use of a hazardous substance may be regulated under the Hazardous Substances and New Organisms Act 1996 (**HSNO**), but it does not follow that the use and development of land for those activities may only be regulated in the resource management context if there is some demonstrated inadequacy in the HSNO controls.

58 When dealing with circumstances where an activity is regulated by legislation other than the Resource Management Act that other legislation does not limit the application of the Resource Management Act.

59 Any Resource Management Act jurisdiction issue is to be determined by reference to the scope of the local authority’s functions to give effect to the purpose of the Act, not whether other legislation provides adequate controls or not.

60 The Resource Management Act applies in accordance with its terms. Any PORPS provision limiting this is ultra vires.

### *HAZ-CL-P15 – criticism – legal aspects*

---

<sup>9</sup> At paragraph 36

61 Mr McCullagh criticises<sup>10</sup> the requirement in HAZ-CL-P15 to:

*“Avoid the creation of new contaminated land or, where this is not practicable, minimise to the smallest extent practicable adverse effects on the environment and mana whenua values.”*

for reasons including that it is unduly onerous, that hazardous substances are widely used by the community, that this is a legacy issue and that given the definition of contaminated land he<sup>11</sup>:

*“...cannot foresee a situation whereby Council would grant a consent to contaminate land.”*

62 If that is so, then the policy ought not be objectionable.

63 More importantly, consents for discharges of contaminants onto land can be issued<sup>12</sup> and it is a function of the ORC to control such discharges<sup>13</sup>.

64 This policy is simply saying that where practicable the creation of new contaminated land should be avoided. So far as possible contaminated sites should, as Mr McCullagh says, be a legacy issue.

65 The DCC’s witness Mr Taylor also criticises<sup>14</sup> this policy as being inconsistent with LF-FW-P15 which prefers discharge of wastewater to land over discharges to water.

66 He notes that policy 23 of the NZCPS is more permissive than HAZ-PL-P15 and suggests<sup>15</sup>:

*“On this basis the pORPS would appear to prefer coastal discharge of treated wastewater over discharges of treated wastewater to land contrary to the direction of proposed policy LF-FW-P15(1).”*

67 LF-FW-P15 is concerned with fresh water, not coastal water.

68 HAZ-CL-P15 is to do with the avoidance, where practicable, of creating contaminated land.

69 Contaminated land is land where the contaminant is a hazardous substance which is or is likely to have significant adverse effects on the environment.

---

<sup>10</sup> Paragraphs 35 and 36

<sup>11</sup> Paragraph 35

<sup>12</sup> Section 87(e) of the Act

<sup>13</sup> Section 30(1)(d)(iv) and (f).

<sup>14</sup> Paragraphs 86 to 90

<sup>15</sup> Paragraph 88

- 70 The preference in LF-FW-P15 for discharge of wastewater to land does not mean that the policy is intended to result in the discharge of hazardous substances having or reasonably likely to have significant adverse effects on the environment.
- 71 There is no inconsistency.

*The meaning of contaminated land*

- 72 When considering the provisions in HAZ-CL it is important to keep in mind the definition of “*contaminated land*” (see paragraph 4 above).
- 73 By definition, these provisions deal with a hazardous substance which is or is reasonably likely to have significant adverse effects on the environment.
- 74 Consider, for example, HAZ-CL-P14, which provides:

*“Manage contaminated or potentially contaminated land so that it does not pose an unacceptable risk to people and the environment, by:...*  
*(3) avoiding, as the first priority, and only where avoidance is not practicable, mitigating or remediating, adverse effects of the contaminants on the environment,...*”

- 75 This means that the effects of the contaminant on the environment must be avoided unless this is impracticable.
- 76 For this policy to apply there must (or must potentially) be a hazardous substance which has or is reasonably likely to have significant adverse effects on the environment.
- 77 The policy is merely saying that significant adverse effects on the environment are not acceptable if they can practicably be avoided.

**ORC expert evidence**

- 78 Two subject matter experts are in attendance for the ORC:
- 78.1 Andrew Maclennan; and
- 78.2 Scott Kelly.
- 79 Mr Maclennan prepared the section 42A report for the HAZ chapter.
- 80 Mr Kelly provided expert advice to the ORC for the purposes of the section 42A report (appendix A to that report) and has provided written evidence to the Panel in a statement dated 3 October 2022.

81 Each has prepared an opening statement dealing with the key matters at issue in the HAZ chapter within their respective areas of expertise.

82 The ORC calls Mr Maclennan.

Dated this 26th day of April 2023



**Simon Anderson**  
Otago Regional Council