

**BEFORE THE COMMISSIONERS APPOINTED ON BEHALF
OF THE OTAGO REGIONAL COUNCIL**

Under The Resource Management Act 1991
(**Act/RMA**)

In the Matter of submissions on the Proposed
Otago Regional Policy Statement
2021 (non-freshwater parts) (**PRPS**)

On behalf of **OTAGO WATER RESOURCE USER
GROUP (OWRUG)**

Submitter OS00235 and FS00235

**FEDERATED FARMERS OF NEW
ZEALAND**

Submitter OS00239 and FS00239

DAIRYNZ LIMITED

Submitter FS00601

**SUPPLEMENTARY SUBMISSIONS OF COUNSEL REGARDING THE
PORT OTAGO CASE**

DATED 15 SEPTEMBER 2023



GALLAWAY COOK ALLAN LAWYERS
Phil Page/Gus Griffin
Phil.Page@gallowaycookallan.co.nz
Gus.Griffin@gallowaycookallan.co.nz

PO Box 143
Dunedin 9054
Ph: +64 (3) 477 7312
Fax: (03) 477 5564

SUPPLEMENTARY LEGAL SUBMISSIONS OF COUNSEL

Background

1. On 24 August 2023 the Supreme Court issued its judgement in *Port Otago v Environmental Defence Society & Ors* [2023] NZSC 112 (***Port Otago***). In response, Minute 18 of the Non-Freshwater Hearing Panel¹ directed that any party wishing to make submissions on the implication of this decision should do so by 15 September 2023.
2. These supplementary legal submissions respond to those directions.

Possible implications of *Port Otago*

3. *Port Otago* was an appeal regarding the validity of a policy relating to ports contained in the proposed Otago Regional Policy Statement as notified in 2015 (proposed regional ports policy) and the suggested modification by the Environment Court.²
4. The appeal dealt with the following issues:
 - (a) the relationship between policy 9 of the NZCPS relating to ports (the NZCPS ports policy) and a number of other policies that require adverse effects of activities to be avoided (the NZCPS avoidance policies);
 - (b) whether any potential conflicts between the NZCPS ports policy and the NZCPS avoidance policies should be addressed in regional policy statements and plans or at the consent level under ss 104 or 104D of the RMA; and
 - (c) how any conflicts between those policies should be addressed.

¹ Dated 29 August 2023.

² *Port Otago*, at [2].

5. Although *Port Otago* only engages with NZCPS policies, in our submission the rationale that underpins the decision applies to all national policy statements and subordinate documents. This is particularly so when such policies are directive and conflicting, as in *Port Otago*.
6. The Court in *Port Otago* held that the language in which policies are expressed is significant, particularly in determining how directive they are intended to be and thus how much or how little flexibility a subordinate decision-maker might have.³ Some give decision-makers more flexibility or are less prescriptive than others. Others are expressed in more specific and directive terms. These differences in expression matter.⁴
7. Conflicting policies are widespread both within and between national policy statements. For example, in the National Policy Statement for Freshwater Management 2020 (**NPSFM**):

Policy 9: The habitats of indigenous freshwater species are protected.

Policy 10: The habitat of trout and salmon is protected, insofar as this is consistent with Policy 9.
8. Here the method of reconciliation between the two policies is clear and explicit – the habitat of trout and salmon is protected only insofar as that protection is consistent with the protection of the habitat of indigenous freshwater species.
9. But other policies may not contain this clear reconciliation. Therefore, a decisionmaker must look elsewhere. This can be seen in the recently promulgated NPSIB:

³ *Port Otago*, at [61].

⁴ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [King Salmon], at [127].

Policy 10: Activities that contribute to New Zealand’s social, economic, cultural, and environmental wellbeing are recognised and provided for as set out in this National Policy Statement.

Policy 11: Geothermal SNAs are protected at a level that reflects their vulnerability, or in accordance with any pre-existing underlying geothermal system classification.

10. Here we have two directive policies. One that states that activities that contribute to New Zealand’s wellbeing are recognised and **provided for**. On the other hand, we are told that Geothermal SNAs are protected at a level that reflects their vulnerability.
11. These are both mandatory directions. Looking elsewhere brings you to clause 3.13 of the NPSIB, ‘Geothermal SNAs’, which also does not assist in resolving this conflict.
12. How then, would a decisionmaker in Rotorua rectify this conflict, when a resource consent application is lodged for a large-scale tourism operation (that will inject significant income into the local economy), in a geothermal SNA?⁵
13. *Port Otago* answers this question by saying that the reconciliation of any conflict between policies should be dealt with at the regional policy statement and plan level as far as possible. The Court’s reasoning for this is as follows:⁶

[72] ...This means those considering particular projects will have as much information as possible to allow them to assess whether it may be worth applying for consent and, if so, what matters should be the subject of focus in any application. Equally, decision-makers at the consent level will have as much guidance as possible on methods for addressing conflicts between policies.

⁵ <https://www.beehive.govt.nz/release/investment-natural-hot-pools-economic-boost-rotorua>

⁶ *Port Otago*, at [72].

[73] Leaving resolution of all possible conflicts to the consent stage would be unsatisfactory, given the large degree of uncertainty (and possible inconsistencies of methodology and results) that would ensue.

...

14. In our submission that rationale clearly applies beyond the NZCPS, to all national directions that contain conflicting and directive policies. It is also applicable where different national directions conflict with each other. For example, where there is national direction in respect of natural inland wetlands from both the NPSFM and NPSIB. The appropriate forum for reconciliation of such issues is in the regional policy statement and plan as far as possible.
15. *Port Otago* acknowledges that where measures are needed for the safe and efficient operation of a port then there is potential for the NZCPS ports policy to conflict with the avoidance policies.
16. Equally, in Otago, communities are enabled to provide for their social, economic, and cultural wellbeing⁷ and activities that contribute to New Zealand's social, economic, cultural and environmental wellbeing are recognised and provided for.⁸ Where directive policies conflict the Supreme Court has confirmed that lower order documents need to provide direction about how those conflicts are to be reconciled. Effectively, that is the role of a Regional Policy Statement.
17. The Farming Submitters interest in this is two-fold:
 - (a) As has previously been submitted the proposed RPS does not cover the field in addressing the full suite of resource management issues for the Region. It is substantively deficient with respect to activities reliant on resources that support the social, cultural and economic wellbeing of communities. This is a failure to respond to policy direction in the various National Policy Statements (and indeed, the purpose of the Act). But it also

⁷ NPSFM, at Policy 15

⁸ NPSIB, at Policy 10.

means that the reconciliation function that the RPS is supposed to perform, can't be.

- (b) The repeated rhetoric throughout these hearings of “this can be dealt with in the land and water regional plan”. *Port Otago* is clear, that is not acceptable. It is the function of the pRPS to take the first step in providing direction on how policies in conflict need to be reconciled at a regional level.
18. We acknowledge that during this process the regional council may not have enough information regarding some of these conflicting issues. In such situations, *Port Otago* suggests that the minimum that a regional planning instrument should do is:
- [73] ... identify, where it can, the location and activities that may generate conflicts in the region and set out general principles for addressing the conflict, leaving particular cases to be dealt with at resource consent level.
19. That is effectively what the Farming Submitters are asking this Panel to do.
20. As previously submitted, section 59 sets out the purpose of a regional policy statement, being to achieve integrated management of natural and physical resources in the Region. By contrast, National Policy Statements state objectives and policies for matters of national significance. NPS's are focussed on individual topics, they are not intended to bring together the range of matters required to achieve the purpose of the Act in an integrated way. That function sits with the RPS and highlights the importance they play in beginning to reconcile conflicting factors. If a policy statement does not provide at least a framework for reconciling conflicting policies, then drafters of the regional plan are left to second guess how to do this. There is nothing for them to give effect to.

21. We draw the Panel's attention to this issue because the Farming Submitters interests, as part of the community, are recognised in various policies that may lead to conflicts with other provisions⁹. The requirement set out in *Port Otago* is consistent with the position that has been advanced by the Submitters – that it is not appropriate for an RPS to simply 'protect the environment and let the rest follow'. This RPS needs to recognise the conflicts that exist, or are likely to arise and either reconcile them, or at least provide a framework for doing so which is to be applied through the lower order documents.
22. It is submitted that the provisions sought by the Farming Submitters and discussed by Ms Perkins assist in this exercise by:
- (a) Providing a framework for transition that can be sustained by communities to meet new environmental limits; and
 - (b) Providing direction around the application of regulatory tools to manage regulatory burden while ensuring the environmental limits are achieved.
23. It is submitted that these provisions assist by helping to manage the tension between the policy directives allowing the environmental limits to be achieved, in a way that can be sustained by the community.

Signed:



B Irving

Counsel for the Farming Submitters.

Date: 15 September 2023

⁹ For example Policy 15 of the NPSFM, Policy 10 NPSIB.