

Before the Otago Regional Council

Under the Resource Management Act 1991 (**RMA**)

In the matter of The Otago Regional Policy Statement - Freshwater Parts

Dunedin City Council

Submitter

Memorandum of Counsel for Dunedin City Council - Urban Watercourses

13th September 2023

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May it please the Hearing Panel:

1 Counsel appeared on behalf of Dunedin City Council on 4 September 2023. At the hearing the Chairperson asked Counsel to research by 13th September 2023 whether the Environment Court has considered if an urban watercourse is a river for the purposes of the RMA. This was referred to in paragraph 28 of Mr Taylor's brief of evidence dated 28th of June 2023.

2 The issue arises where there are watercourses in urban parts of Dunedin City conveying stormwater. Where consent may be sought to realign, or increase the current capacity of such a watercourse, the question is whether this is a "river" bringing in the relevant provisions of the RPS.

3 River is defined in section 2 RMA as follows:

River means a continually or intermittently flowing body of freshwater; and includes a stream and modified watercourse; but does not include any artificial watercourse (including an irrigation canal, water supply race, canal for the supply of water for electricity power generation, and farm drainage canal).

4 If a stream or modified watercourse is involved that carries stormwater, this would qualify as a river. The definition of river does not include any artificial watercourse. Therefore, it is a question of whether a watercourse is a stream, a modified watercourse, or an artificial watercourse. These terms are not further defined in the Act.

5 It was Mr Taylor's evidence that open watercourses, including parts contained in a pipe have been treated as a "river". This is presumably on the basis that a watercourse is modified, rather than being considered artificial.

6 It is also worth noting that water is defined in the Act to exclude water in any pipe. This definition in section 2 RMA is as follows:

water—

(a) means water in all its physical forms whether flowing or not and whether over or under the ground:

(b) includes fresh water, coastal water, and geothermal water:

(c) does not include water in any form while in any pipe, tank, or cistern

Environment Court decisions

- 7 *Warburton v Porirua City Council*¹, sets out that there is no over-arching test derived from the cases which determines whether or not any particular watercourse is modified or artificial. Ultimately that will be determined by facts and context in any particular case. The appropriate approach to interpreting the relevant provisions of the RMA is a purposive approach.
- 8 One relevant case that discussed this concept was *Johnston v Dunedin City Council*.² The case involved an appeal against reserves contributions imposed by Council as conditions of sub-division consent. One issue the appellant argued was that the Silverstream is an artificial watercourse and not a river. The question that was before the Planning Tribunal was whether the Silverstream was an artificial or modified watercourse.
- 9 The Tribunal concluded at page 16 that:

"We agree with Mr Churchman's submission that all that has occurred is that the original Silverstream has been diverted through an artificial channel. It is as he submitted, a common practice to divert rivers for drainage purposes but that does not mean that they cease to be rivers or that the course that they then follow, becomes an artificial watercourse. The waters within that channel or diversion remain part of the continually or intermittently flowing body of fresh water..."

- 10 Therefore, in this case it was found that the diversion of the river constitutes a modified watercourse rather than an artificial one. Had it been artificial then presumably it would not have been a river.

Answers to questions by Zoe Moffat

- 11 The panel also posed three questions to Ms Moffat which she has responded to in writing below and asked Counsel to include these answers in this memorandum. The below answers are from Ms Moffat.

¹ *Warburton v Porirua City Council*, [2013] NZEnvC 179.

² *Johnston v Dunedin City Council*, PT Dunedin Decision C64/94, 6 July 1994.

Question 1

Paragraph 40 of Zoe Moffat’s evidence states that “DCC staff currently estimate that approximately 95% of water produced by the DCC for community water supply is provided for urban land uses.” The Panel asked Ms Moffat to explain what the remaining 5% is used for.

- 12 The 95% figure referenced in Ms Moffat’s evidence reflects district plan zoning. Expressed in another way, paragraph 40 means to say that DCC staff estimate that 95% of the volume of water produced by the DCC for community water supply is supplied to consumers within areas of the city that have ‘urban’ zoning (for example, residential, commercial and industrial zones). The remaining approximately 5% of the water produced is provided to areas of the city with ‘rural’ zoning. The rural-zoned areas supplied include the West Taieri, East Taieri, North Taieri and Merton rural water supply areas defined in Appendix B of the DCC Water Bylaw 2011. Water supplied to rural water supply areas is treated for human consumption (in accordance with all relevant drinking water regulatory requirements), and consumer water use in areas with rural zoning includes use for drinking, cooking, washing and other human health needs.

Question 2

The Panel noted that resource consents for water takes and discharges held by DCC expire at different times within a 10-15 year period. The Panel asked Ms Moffat to consider whether it would be beneficial for the pORPS to suggest greater alignment of consent expiries across three waters activities.

- 13 While this is an interesting idea, it would put a substantial administrative burden on staff to prepare for and apply for all significant consents relating to three waters activities at once. I consider that a better approach would be for the pORPS to reference DCC’s coordinated strategy which will prioritise investment holistically to achieve a range of objectives (including those in the RPS). This strategy would include an approach to consenting, which may include ‘bundling’ consents / consent terms where this would be relevant. The strategy could also provide for upgrades where they are beneficial before the expiry of a consent term if that is overall the most efficient approach to spending public money.

Question 3

In relation to water takes and security of future water supply, the Panel asked Ms Moffat to clarify whether the geographic scope of the DCC’s investigation of alternate water sources (undertaken as part of the holistic,

system-wide strategic planning exercise referenced in the DCC's evidence) extends as far south as the Tokomairiro and Clutha River catchments.

- 14 The DCC's strategic planning work is considering potential freshwater sources as far south as the Clutha River and as far north as the Shag River. However, sources closer to Dunedin (including existing sources) are preferable for a number of reasons, and are far more likely to be included as preferred options in DCC's future strategy.

Dated this 13th day of September 2023



Michael Garbett
Counsel for the Dunedin City Council