

**IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE**

CIV-2024-

UNDER the Resource Management Act 1991

IN THE MATTER of an appeal of the freshwater planning instrument parts of the Proposed Otago Regional Policy Statement pursuant to clause 56 of Schedule 1 and section 299 of the RMA

BETWEEN **OCEANA GOLD (NEW ZEALAND) LIMITED** a company having its registered office at 22 Maclaggan Street, Dunedin
Appellant

AND **OTAGO REGIONAL COUNCIL** a regional council under Schedule 2 of the Local Government Act 2002
Respondent

**NOTICE OF APPEAL BY OCEANA GOLD (NEW ZEALAND)
LIMITED
Dated 22 April 2024**

Next event date:

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To: The Registrar of the High Court at Dunedin

And to: Otago Regional Council

This document notifies you that –

Oceana Gold (New Zealand) Limited (**OGNZL** or **the Appellant**) will appeal to the High Court at Dunedin against some provisions of the freshwater planning instrument parts (**FPI**) of the Proposed Otago Regional Policy Statement (**PORPS**). OGNZL made submissions and further submissions on the FPI. The Freshwater Hearings Panel (**the Panel**) issued a Report and recommendations on the FPI, dated 21 March 2024¹. On 27 March 2024 the Otago Regional Council adopted each of the recommendations of the Panel as the Respondent's decision on the FPI (**the Decision**). The Appellant was notified of the Decision by email on the afternoon of 28 March 2024 and the Respondent published a public notice of the Decision on 30 March 2024.

ERRORS OF LAW

1. In the Decision, the Respondent adopted the following errors of law made by the Panel in its Report and recommendations:
 - a. The Panel has erred by failing to properly give effect to the National Policy Statement for Freshwater Management 2020 (**NPS-FM**) as required by sections 61 and 62 of the

¹ Proposed Otago Regional Policy Statement, Report and recommendations of the Non-Freshwater and Freshwater Hearings Panels to the Otago Regional Council, March 2024. Appendix Two: Report by the Freshwater Hearings Panel.

RMA. This had resulted in errors in the wording of the following provisions:

i. LF-WAI-O1;

ii. LF-WAI-P1;

iii. LF-FW-P10A;

iv. LF-LS-P21;

v. LF-FW-M6; and

vi. LF-FW-M7.

b. The Panel erred in failing to prepare the RPS in accordance with the Resource Management (National Environmental Standard for Freshwater) Regulations 2020 (**NES-FW**).

c. The Panel has erred in reaching conclusions on the provisions listed in paragraph 1(a)(i)-(vi) which are inconsistent with reasoning given in its Report and recommendations.

d. The Panel has erred in that the policies and methods do not achieve the objectives as required by section 32(1) and 62(1) of the RMA and does not give effect to Part 2 of the RMA.

e. The Panel has erred in that both the clean (Appendix 3 to the Decision) and track-change (Appendix 4 to the

Decisions) versions of the LF-LS-P21 RPS are inconsistent with the recommendation in paragraph 630 and 638 of the Report.

QUESTIONS OF LAW

2. The questions of law to be resolved are:

- a. Did the Panel properly give effect to the NPS-FM and was the FPI prepared in accordance with the NES-FW when making its recommendations on LF-WAI-O1, LF-WAI-P1, LF-FW-P10A, LF-LS-P21, LF-FW-M6 and LF-FW-M7?
- b. Was the wording of LF-WAI-O1, LF-WAI-P1, LF-FW-P10A, LF-LS-P21, LF-FW-M6 and LF-FW-M7 reasonably open to the Panel based on the NPS-FM, the evidence and the Panel's other findings?
- c. Do the policies and methods in the FPI achieve the objectives are required by section 32(1), 62(1), and does the FPI give effect to Part 2 of the RMA?

GROUNDS OF APPEAL

3. The Decision was made on the basis of the errors of law described above. These errors were material to the Decision. The appeal should be allowed on the grounds that the Decision was made on an incorrect legal basis.

NPS-FM and NES-FW

4. The Panel was required to give effect to the NPS-FM pursuant to section 62(3)(c) of the RMA which says:

A regional policy statement must not be inconsistent with any water conservation order and must give effect to a national policy statement, a New Zealand coastal policy statement, or a national planning standard.

5. A regional policy statement must also be prepared in accordance with the provisions of Part 2 (section 61(1)(b)), a national policy statement (section 61(1)(da)) and any regulations (section 61(1)(e)). The relevant regulations in this instance are the NES-FW.
6. The Panel erred in not properly giving effect to these mandatory requirements.
7. Policy 5 of the NPS-FM says:

Policy 5: Freshwater is managed (including through a National Objectives Framework) to ensure that the health and well-being of degraded water bodies and freshwater ecosystems is improved, and the health and well-being of all other water bodies and freshwater ecosystems is maintained and (if communities choose) improved.

8. Under the Decision LF-WAI-O1 requires restoration of degraded water bodies, which is a different standard than that required by policy 5 of the NPS-FM which refers to “improvement”.
9. A regional council may impose measures which are more stringent than the NPS-FM (clause 3.1(2)(a)), however the Panel’s recommendations are inconsistent with its reasoning and findings elsewhere in its Report.
10. For example, in paragraphs 11 and 12 of the Report, the Panel recognises that restoration and protection of water is not an absolute requirement and notes that aquatic off-setting and aquatic compensation provisions in Appendices 6 and 7 of the NPS-FM mitigate the effects of certain activities.
11. The recommendations on LF-WAI-P1 are inconsistent with the findings of the Panel and are not a conclusion which could be reasonably reached based on the evidence discussed and the reasoning given in the Report. After discussing the different arguments raised, the Report says at paragraph 80:

In summary then we agree with the approach advanced by ORC that the intent of priority two is only to capture that limited amount of water involved in contact usages which can directly affect human health needs, i.e. the taking of freshwater solely for drinking water purposes or other direct engagement activities. That should leave reasonable quantities available in most situations, short of drought conditions, for use by priority

three users. The detailed methods of allocation amongst those users will then be able to be informed during the NOF process - where the national significance aspect to give effect to the NPS REG can be considered.

12. However, by adding the words “*and the contribution of this to the health and wellbeing of the environment (te hauora o te taiao)*” into LF-WAI-P1(1) the Report broadens the first priority to include communities, due to the definition of environment in section 2 of the RMA.

13. Therefore the Decision does not give effect to the NPS-FM.

14. LF-FW-M6 and M7 do not recognise and provide for the consenting pathways provided for certain activities set out in the NPS-FM and NES-FW, and are inconsistent with the prior reasoning and recommendations given in the Report as:

- a. LF-FW-M6 (7) fails to refer to the new LF-FW-P10A recommended by the Panel.
- b. New LF-FW-M7(1A) says “*include provisions to preserve the natural character of lakes and rivers and their margins from the adverse effects of land use and development and activities on the surface of water*”. This fails to recognise the management of activities and consenting pathways provided in the NPS-FM and NES-FW. This is also inconsistent with LF-FW-M6 which does reference the NES-FW.

Wetlands

15. The 2020 versions of the NPS-FM and NES-FW created a new definition of “natural wetland” (a sub-set of the wetland definition in the RMA) and “natural inland wetland” (a natural wetland that is not in the coastal marine area). Policies and regulations in the NPS-FM and NES-FW restricted activities, including prohibiting some activities, that could occur in and around natural inland wetlands, however the same restrictions do not apply to wetlands that fail to meet the definition of natural inland wetland.

16. The NPS-FM and NES-FW were amended in December 2022 to include a revised definition of natural inland wetland and to provide a consenting pathway for (amongst other activities) minerals extraction which had a functional need to locate within or near a natural inland wetland. This requires a resource consent applicant to satisfy the regional council that (clause 3.22(1) NPS-FM):

(i) the activity is necessary for the purpose of:

(A) the extraction of minerals (other than coal) and ancillary activities; or

(B) the extraction of coal and ancillary activities as part of the operation or extension of an existing coal mine;
and

(ii) the extraction of the mineral will provide significant national or regional benefits; and

(iii) there is a functional need for the activity to be done in that location; and

(iv) the effects of the activity will be managed through applying the effects management hierarchy.

17. The Panel recommended the deletion of LF-FW-P9 and LF-FW-P10 and insertion of a new LF-FW-P10A which applies the consenting pathway in NPS-FM clauses 3.22(1) to (3) to all wetlands, not just natural inland wetlands.

18. This adoption of more stringent measures has no evidential basis. The Panel acknowledged the Appellant's concerns that LF-FW-P9 was stricter for wetlands that are not natural inland wetlands (paragraph 433 of the Report). However the Panel has failed to consider the more onerous obligations on an applicant to prove and establish the criteria in clause 3.22 of the NPS-FM for wetlands which are not natural inland wetlands, and has not assessed the more onerous obligation to provide offsetting or compensation as part of the effects management hierarchy, and whether such a departure from the intent of the NPS-FM is warranted.

19. The application of clause 3.22 of the NPS-FM to all wetlands is also inconsistent with the Panel's findings that a "wetland" not falling within the definition of "natural inland wetland" would still

be subject to provisions of the RMA and protective policies in the NPS-FM (paragraph 419 of the Report). Therefore the Panel's recommendation to make all wetlands subject to clause 3.22 of the NPS-FM is not a recommended decision which was reasonably open to it or consistent with its other findings.

Discharges

20. The section 42A report suggested a new policy, LF-FW-P16 "Discharges containing animal effluent, sewage, greywater and industrial and trade waste" to be included. As drafted in the section 42A report, this policy said:

LF-FW-P16 – Discharges containing animal effluent, sewage, and industrial and trade waste

Minimise the adverse effects of direct and indirect discharges containing animal effluent, sewage, and industrial and trade waste to fresh water by:

(1) phasing out existing discharges containing sewage or industrial and trade waste directly to water to the greatest extent possible,

(2) requiring:

(a) new discharges containing sewage or industrial and trade waste to be to land, unless adverse effects associated with a discharge to land are demonstrably greater than a discharge to fresh water,

(b) discharges containing animal effluent to be to land,

(c) that all discharges containing sewage or industrial and trade waste are discharged into a reticulated wastewater system, where one is made available by its owner, unless alternative treatment and disposal methods will result in improved outcomes for fresh water,

(d) implementation of methods to progressively reduce the frequency and volume of wet weather overflows and minimise the likelihood of dry weather overflows occurring into reticulated wastewater systems,

(e) on-site wastewater systems and animal effluent systems to be designed and operated in accordance with best practice standards,

(f) that any discharges do not prevent water bodies from meeting any applicable water quality standards set for FMUs and/or rohe,

(3) to the greatest extent practicable, requiring the reticulation of wastewater in urban areas, and

(4) promoting source control as a method for reducing contaminants in discharges.

21. The Appellant provided evidence that industrial discharges may be via an artificial water course, i.e. not direct to a natural water body; that phasing out direct discharges to natural waterbodies may not improve discharge quality, and that decision makers should have the ability to consider when a discharge to land or water is appropriate². This evidence is not referred to in the Report, and the recommended decision to require all new discharges to be to land is not a decision which could reasonably be made based on the evidence presented.

LF-LS-P21

22. Section 9.8 of the Report discusses LF-LS-P21 – “Land use and fresh water”. At paragraph 638 of the Report the Panel recommends that the policy be amended as follows:

~~*Achieve the improvement or maintenance of fresh water quantity, or quality*~~ *The health and well-being of water bodies and freshwater ecosystems is maintained* to meet environmental outcomes set for Freshwater Management Units and/or rohe by:

(1) ~~*reducing*~~ *or otherwise managing the adverse effects of direct and indirect discharges of contaminants to water from the use and development of land, and*

² Evidence of Claire Hunter, dated 28 June 2023.

(2) managing land uses that may have adverse effects on the flow of water in surface water bodies or the recharge of groundwater., and

(2A) recognising the drylands nature of some of Otago's catchments and the resulting low water availability, and

(3) maintaining or, where degraded, enhancing the values of riparian margins.

23. However, in Appendix 4 of the Report LF-LS-P21(3) includes a new reference to enhancing the “habitat and biodiversity values” and says:

The health and well-being of water bodies and freshwater ecosystems is maintained ~~Achieve the improvement or maintenance of fresh water quantity or quality to meet environmental outcomes set for Freshwater Management Units and/or rohe by:~~

(1) reducing or otherwise maintaining the adverse effects of direct and indirect discharges of contaminants to water from the use and development of land, and

(2) managing land uses that may have adverse effects on the flow of water in surface water bodies or the recharge of groundwater,

(3) recognising the drylands nature of some of Otago and the resulting low water availability, and

(4) maintaining or, where degraded, enhancing the habitat and biodiversity values of riparian margins.

24. The version in Appendix 4 is not consistent with the evidence, reasoning and recommendation given in the Report.
25. Even adopting the wording at paragraph 638 of the Report, there is a failure to recognise that there may be effects on riparian margins as a result of activities carried out in accordance with the provisions of the NPS-FM and NES-FW.

Scheme of the FPI

26. Under section 62(1) of the RMA, a regional policy statement must state the significant resource management issues for the region, the resource management issues of significance to iwi authorities in the region, the objectives sought to be achieved by the statement, the policies for those issues and objectives and an explanation of those policies, the methods (excluding rules) used or to be used to implement the policies, the principal reasons for adopting the objectives, policies and methods of implementation and the environmental results anticipated from implementation of these policies and methods. In this way a vertical structure is created by which the provisions above must be given effect to - for example the methods must implement the policies and the policies must give effect to the objectives which have been set.
27. The policies in the FPI do not adhere to the required structure set by section 62. For example, as referred to in paragraph 14 above,

LF-FW-M6 and M7 do not reflect the addition of new LW-FW-P10A. Failure to follow the required structure of issues, objectives, policies and methods means the objectives will not be achieved. It also means the provisions of the RPS do not achieve the purpose of a RPS which is integrated management of the region's natural and physical resources (section 59 of the RMA). This is an error of law.

RELIEF SOUGHT

28. The Appellant seeks the following relief:

- a. That the freshwater planning instrument parts of the PORPS are amended as set out in this Appeal, including any necessary consequential amendments to other provisions;
- b. Such further or other relief as may be appropriate; and
- c. Costs of and incidental to this appeal, including disbursements.

DATED this 22nd day of April 2024



Stephen Christensen/Jackie St John

Counsel for Oceana Gold (New Zealand) Limited

This document is filed by the appellant in person. The address for service of the appellant is 22 Maclaggan Street, Dunedin 9016.

Documents for service on the filing party may be left at that address for service or may be—

(a) posted to the party at PO Box 5442, Dunedin 9058; or

(b) emailed to the party at jackie.stjohn@oceanagold.com