

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

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

CIV-2024-412-37

BETWEEN OTAGO FISH AND GAME COUNCIL
AND CENTRAL SOUTH ISLAND FISH
AND GAME COUNCIL
Appellants

AND OTAGO REGIONAL COUNCIL
Respondent

CIV-2024-412-41

BETWEEN OCEANA GOLD (NEW ZEALAND)
LIMITED
Appellant

AND OTAGO REGIONAL COUNCIL
Respondent

Hearing: On the papers

Counsel: M Baker-Galloway for Otago Fish and Game Council and Central
South Island Fish and Game Council (Appellants)
J St John and S Christensen for Oceana Gold (New Zealand)
Limited (Appellant)
S J Anderson and T M Sefton for Otago Regional Council
(Respondent)

Date of Minute: 26 November 2024

**MINUTE OF HARLAND J
(as to placing appeals on hold)**

[1] On 8 November 2024, counsel for the appellants filed a joint memorandum requesting that their appeals be placed on hold. I issued a minute on 12 November

2024 seeking a response from the respondent and the interested parties to each of the appeals. Any response was to be filed by 5.00 pm on 13 November 2024.

[2] The respondent, Manawa Energy Ltd and Royal Forest and Bird Protection Society of New Zealand Inc (Forest and Bird) have responded with memoranda. These parties oppose the request by the appellants. Other interested parties have not filed memoranda, so I proceed to determine the issue on the papers without their input.

Background

[3] On 22 April 2024, five separate appeals were filed against decisions of the respondent on the freshwater planning instrument parts of the proposed Otago Regional Policy Statement 2021 (proposed ORPS). There are various interested parties under s 301 of the Resource Management Act 1991 (RMA) (including these appellants and others) who have filed an interest in respect of each appeal.

[4] Prior to the first case management conference, scheduled to occur on 17 June 2024, counsel filed a joint memorandum requesting that the appeals be consolidated and heard together but it was also requested that, as some points on appeal appeared to be capable of early resolution and the parties agreed to participate in mediation, they requested that the consolidated proceeding be set down for a further case management conference on the first available date after 1 September 2024. Some directions under sch 6 of the High Court Rules 2016 (HCR) were made however matters, such as the timetabling of submissions, points on appeal, common bundles and the like, await the outcome of mediation.

[5] The Court agreed with the request and adjourned the first case management conference to a date in October 2024.

[6] Mediation occurred on various dates, facilitated by former Environment Court Judge Borthwick.

[7] Prior to the next scheduled case management conference, a joint memorandum of counsel dated 27 September 2024 seeking orders by consent was filed. A joint memorandum, also dated 27 September 2024, was filed for the first case management conference.

[8] In very general terms, the position after mediation is that three of the appeals have been resolved in their entirety however the two appeals listed above have not in relation to all of their points on appeal.

[9] In counsels' joint memorandum of 27 September 2024 for the first case management conference, they outlined the directions they were seeking, including those relating to timetable directions, the filing of a common bundle of documents, bundles of authorities and it was requested that a three day hearing be allocated. The timetable proposed expired on 21 February 2025, meaning that the hearing of the appeals could occur after this date. There was also an issue about Kāi Tahu joining the Oceana Gold appeal and timetable directions were made for this to occur. Counsel sought an adjournment of the case management conference because of these agreements.

[10] The application for adjournment of the conference was granted and a minute issued on 7 October 2024 endorsing and directing the timetable directions that had been sought by consent. A further minute was issued on 25 October 2024 providing timetable directions should Kāi Tahu wish to apply out of time to become a party to the Oceana Gold appeal, that having been mistakenly overlooked in the minute of 7 October 2024.

[11] I have now had the opportunity to consider the memorandum seeking orders by consent and have issued a judgment in respect of it.

[12] I now deal with the application by the appellants to place the remaining two appeals on hold.

The request to place the appeals on hold

[13] The appellants refer to an update provided to them by the Minister responsible for resource management reform on 10 October 2024 advising that a new or revised National Policy Statement for Freshwater (NPS-FM) will be consulted on early in 2025 and is expected to be passed into law in mid-2025. Counsel for the appellants submit that, depending on the nature of the changes to the NPS-FM, some or all of the errors of law pleaded by them could be rendered moot. In these circumstances, they submit it is inefficient and unnecessary to continue preparing for a hearing until more is known about the nature and scale of the likely changes and their relevance to the appeals.

[14] But as well, counsel for the appellants refer to the Resource Management (Freshwater and Other Matters) Amendment Act passed on 24 October 2024 specifically directing that no freshwater planning instrument that has the purpose of giving effect to the NPS-FM current in force may be notified before the sooner of either the date on which a new NPS-FM is published under s 54 of the RMA or 31 December 2025.¹

[15] Further, the appellants refer to the fact that the respondent had been due to vote to notify its proposed Otago Land and Water Plan (proposed OLWP) on 24 October 2024 but, because of the Amendment Act, it was not notified.

[16] The appellants submit that, had the proposed OLWP been notified as it progressed through the submissions and hearings process outlined in sch 1 of the RMA, one of the matters for determination would have been whether it had appropriate regard to the proposed ORPS² and whether it gave effect to the RPS currently in force.³ Therefore, it would have been important for the appeals on the proposed ORPS to be resolved as soon as practicable so that, as the proposed OLWP progressed, the proposed ORPS could have progressed to its final form and influenced the proposed OLWP process. But, because of the Amendment Act, the appellants submit that this time-related imperative is no longer present.

¹ Amendment cl 21A of the first schedule to the Resource Management Act 1991.

² RMA, s 66(2).

³ RMA, s 67(3).

[17] Finally, the appellants refer to the time, energy and cost involved in progressing with the timetable and any potential hearing (noting that no fixture date has currently been allocated) and they noted that the Court should take into account that the costs incurred by the respondent and Fish and Game in opposing these appeals, was effectively "public money".

[18] The appellants request that the proceedings be placed on hold with a report back in four months' time. As an alternative, they request that the Court confirm a fixture date and have the case management timetable backdated from that date.

Grounds for opposition

[19] The respondent, Manawa Energy Ltd and Royal Forest and Bird oppose the request. The latter two parties also adopt the fuller submissions made by the respondent.

[20] Counsel for the respondent referred to the parts of the NPS-FM that are relevant to the appeals, being policy 5 (regarding the improvement of degraded water bodies), policy 10 (concerning the protection of habitat of trout and salmon, and cl 3.3 (dealing with the development of long-term visions for freshwater). However, the respondent submits that the Fish and Game appeal also pleads errors of law that do not relate to the NPS-FM, including that the respondent applied the wrong legal test under ss 7(c) and (h) of the RMA, and failed to have regard to management plans prepared under the Conservation Act 1987 as required by s 61(2)(a)(i) of the RMA.

[21] It is submitted that, whatever the eventual content of the new or amended NPS-FM is, it will be irrelevant to the questions of law pleaded by the appellants as a new NPS-FM cannot result in the appeals being decided differently from how they would be decided today. Rather, the responding parties submit that the content of the new NPS-FM may prompt the appellants to determine that continuing with these appeals is no longer necessary. But as well and if a new NPS-FM changes the policy direction that applies to the provisions under appeal, the responding parties submit the questions of law in the appeals may remain relevant to the proposed ORPS during any transitional period.

[22] Although accepting that a stay would save the appellants the time and cost of preparing to argue the questions of law they have raised, the responding parties submit that, in the meantime, the proposed ORPS and its users suffer the uncertainty of those questions of law remaining undecided. As the proposed ORPS is an important document in the RMA planning hierarchy, it is submitted there is significant public interest in resolving the appeals regardless. And, as well, there is a concern that if the appeals are placed on hold this would have a precedent effect for any Environment Court appeals on the proposed ORPS in respect of which mediations have recently commenced.

Decision

[23] I am not persuaded that it is appropriate to place the appeals on hold. The appeals can be allocated as a back up commencing 10 March 2025 with a confirmed hearing date commencing 13 October 2025.

[24] What might happen with a new or amended NPS-FM is unknown at this point. But as well, the Amendment Act does not prevent existing freshwater planning instruments, such as the freshwater parts of the proposed ORPS subject to the appeals, progressing through the process and becoming operative. And even though the proposed OLWP is not currently able to proceed so far as it relates to freshwater, there is the prospect of a ministerial exemption for those provisions. It should also be noted that non-freshwater provisions in a proposed OLWP may be separately notified as they are not covered by the Amendment Act.

[25] This means that, as matters currently stand, the proposed ORPS is relevant to plan preparation and consenting processes in Otago, including potentially any future proposed OLWP.

[26] The appeals are confined to questions of law. The decisions appealed against are not reviewed de novo.⁴ Accordingly, the degree of preparation involved, as the timetable directions note, relate to the filing of submissions and a common bundle of

⁴ RMA, s 290.

documents. There will be time and cost involved in continuing with the appeals but the appellants have a choice and can withdraw their appeals if they wish to do so.

[27] I am therefore not persuaded to stay the progression of the appeals. At this time however, given the time it has taken for me to be able to address this issue, some extension of the timetable is, in my view, warranted.

Directions

[28] I make the following directions:

- (a) the appeals are to be allocated as a back up hearing for three days commencing 10 March 2025. If the back up hearing is unable to proceed, I allocate a confirmed hearing date for the appeals commencing 13 October 2025;
- (b) the current timetable directions will remain in place, except for the filing of the common bundle by the appellants, which is to be extended by 10 working days. To be clear, the amended timetable directions are as follows:
 - (i) the appellants must file and serve a common bundle of documents no later than **6 December 2024**;
 - (ii) the appellants must file and serve a chronology (if relevant) and legal submissions no later than **18 December 2024**;
 - (iii) the respondent must file and serve its legal submissions no later than **31 January 2025**;
 - (iv) the other parties must file and serve their legal submissions no later than **14 February 2025**; and
 - (v) the appellants must file and serve a right of reply no later than **21 February 2025**.

[29] So far as the common bundle of documents is concerned, the Court will not be referring to any documents included in a common bundle that are not directly referred to in counsels' submissions. Should, for some reason, a document not included in the bundle be required to be referred to during the appeal hearing, counsel can at that point seek leave for it to be admitted in evidence.

Harland J

Counsel:

M Baker-Galloway, Anderson Lloyd for Otago Fish and Game Council and Central South Island Fish and Game Council

J St John and S Christensen for Oceana Gold (New Zealand) Ltd

S J Anderson and T M Sefton, Ross Dowling Marquet Griffin for Otago Regional Council.

Interested Parties in proceeding CIV-2024-412-37:

J St John and S Christensen for Oceana Gold (New Zealand) Ltd

M Downing and P Anderson for Royal Forest & Bird Protection Society Inc

L Burkhardt for Manawa Energy Limited

C Ford and A Cameron for Kāi Tahu

C Thomsen and K Simonsen, Fletcher Vautier Moore for Beef and Lamb New Zealand Ltd

B Irving and P Page, Gallaway Cook Allan for Dairy NZ Ltd and Otago Water Resource User Group Inc.

Interested Parties in proceeding CIV-2024-412-41:

M Downing and P Anderson for Royal Forest & Bird Protection Society Inc

J Campbell and B Watts, Meredith Connell for Queenstown Lakes District Council

L Burkhardt for Manawa Energy Limited

C Thomsen and K Simonsen, Fletcher Vautier Moore for Beef and Lamb New Zealand Ltd

B Irving and P Page, Gallaway Cook Allan for Otago Water Resource User Group Inc.

H Jopp for Federated Farmers of New Zealand Incorporated

M Baker-Galloway and L McLaughlan, Anderson Lloyd for NZSki Limited and Real Group Limited.