

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE

NO. CIV-2024-412-42

UNDER	The Resource Management Act 1991
IN THE MATTER OF	An appeal under section 299 and clause 56 of Schedule 1 of the Act
BETWEEN	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED , an incorporated society having its registered office at 205 Victoria St, Te Aro, Wellington Appellant
AND	OTAGO REGIONAL COUNCIL , a regional authority under section 2 of the Local Government Act 2002 having its office at 70 Stafford Street, Dunedin Respondent

NOTICE OF APPEAL

22 April 2024

Royal Forest and Bird Protection Society of New Zealand Inc.
Solicitors acting: P Anderson / M Downing

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To: The Registrar of the High Court at Dunedin

And to: Otago Regional Council

This document notifies you that –

The Royal Forest and Bird Protection Society of New Zealand Incorporated (**the Appellant**) will appeal to the High Court against the decisions of the Otago Regional Council (**the Respondent**) on the Freshwater Planning Instrument parts of the Proposed Otago Regional Policy Statement (**PORPS**) dated 27 March 2024 (**decisions**), upon the grounds that the Respondent made errors of law in parts of the Decisions.

Decisions or parts of decisions appealed against

1. The Freshwater Planning Instrument parts of the PORPS concern the policy framework that is intended to address the maintenance or enhancement of freshwater quality and quantity in the Otago region.
2. The Decisions were adopted by the Respondent on recommendations made by a Freshwater Hearing Panel appointed by the Chief Freshwater Commissioner.
3. The Appellant appeals against parts of the Decisions.
4. The parts of the Decisions appealed specifically relate to:
 - (a) Objective LF-FW-09 “Wetlands.”
 - (b) Policy LF-FW-P10A “Managing wetlands.”
 - (c) Policy LF-LS-P21 “Land use and fresh water.”

First error of law – Failure to give effect to the National Policy Statement for Freshwater Management 2020

5. The Respondent is required to give effect of the National Policy Statement for Freshwater Management 2020 (**NPSFM**)¹ in its consideration and decision on Objective LF-FW-09 and Policy LF–LS–P21.

¹ Resource Management Act 1991, section 62(3): 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.

6. When making changes to Objective LF-FW-09 "Wetlands" the Respondent failed to correctly interpret and apply the NPSFM. The Respondent made changes to clause 2 of Objective LF-FW-09 to require "no net decrease" in wetland extent rather than "no decrease". The Respondent's changes do not reflect the direction in NPSFM, including Policy 6: "There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted."
7. The Respondent also failed to correctly apply the NPSFM when it did not retain direction in Policy LF-LS-P21 "Land use and fresh water" to implement the direction in NPSFM Policy 5 "to ensure that the health and well-being of degraded water bodies and freshwater ecosystems is improved."

Grounds of appeal

8. Objective LF-FW-09 and Policy LF-LS-P21 were respectively amended by the Responded as follows:

LF-FW-09 – Natural Wetlands

Otago's natural wetlands are protected from inappropriate subdivision, use and development and, where degraded, or restored restoration is promoted so that:

- (1) mahika kai and other mana whenua values are sustained and enhanced now and for future generations,
- (2) there is no net decrease, and preferably an increase, in the extent range and diversity of wetland indigenous ecosystem types and habitats, and ~~in natural wetlands~~
- (3) there is no reduction and, where degraded, there is an improvement in their wetland ecosystem health, hydrological functioning, amenity values, extent or water quality, and ~~if degraded they are improved, and~~
- (4) their flood attenuation and water storage capacity is maintained or improved.

...

LF-LS-P21 – Land use and fresh water

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.

Objective LF-FW-09 "Wetlands"

9. The PORPS must give effect to the NPSFM under s 62(3) of the Resource Management Act 1991. The Supreme Court in *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited & Ors* held that "give effect to" simply means "implement."² On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it.³
10. The reference to "no net decrease" in Objective LF-FW-09 "Wetlands" does not accurately reflect Policy 6 which does not contain such qualification. The inclusion of the term "net" in LF-FW-09 does not give effect to the requirement in Policy 6 that "there is no further loss of extent of natural inland wetlands."
11. The Respondent's accepted change to LF-FW-09 mandates further loss of natural inland wetland extent in some places on the basis there is matching increase elsewhere. This approach is akin to an "overs and unders" approach which, in the context of region-wide water quality, has been identified as legally incorrect by the Environment Court.⁴

Policy LF-LS-P21 – "Land use and freshwater"

12. The Freshwater Hearing Panel recommended a change to Policy LF-LS-P21 that means that it no longer gives effect to the NPSFM Policy 5. Policy 5 directs:

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.
(Emphasis).

13. The notified version of the Policy LF-LS-P21 relating to land use effects on freshwater outcomes accurately reflected the direction to both "maintain" and "improve" that health and well-being of water bodies and freshwater

² *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited & Ors* [2014] NZSC 38 at [77].

³ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited & Ors* [2014] NZSC 38 at [77].

⁴ *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* (2015) 18 ELRNZ 565 at [56], [64].

ecosystems. The Freshwater Hearing Panel has recommended changes that remove the direction on “improving” freshwater quality (where degraded), which mean it no longer gives effect to NPSFM Policy 5.

14. Consequently, the Respondent failed to give effect to the NPSFM when making changes to both Objective LF-FW-09 and Policy LF-LS-P21.

Second error of law – failure to give effect to the New Zealand Coastal Policy Statement

15. The Respondent failed correctly interpret and apply key Objectives and Policies under the New Zealand Coastal Policy Statement (NZCPS) when accepting changes to:

- (a) the chapeau and clause (2) of Objective LF-FW-09 “Wetlands” which introduce qualification or dilute the specific and directive NZCPS policies that leave little or no flexibility in how they are implemented;
- (b) Clauses (1) and (2) of Policy LF-FW-P10A which, contrary to NZCPS Objectives and Policies, provide a consent pathway for infrastructure and any associated offsets and compensation to apply in the coastal environment; and
- (c) Clause (3)(d) of LF-FW-P10A which only directs the “promotion” of stock exclusion as opposed to “requiring” stock exclusion as directed under NZCPS Policy 21(d).

16. As a consequence, the Respondent has failed to give effect to the NZCPS.

Grounds of appeal

17. The Respondent has accepted amendments to key wetland provisions, Objective LF-FW-09 “Wetlands” and Policy LF-FW-P10A “Managing wetlands”, which do not give effect to policy direction in the NZCPS.

Objective LF-FW-09 “Wetlands”

18. The chapeau to Objective LF-FW-09 directs wetland protection from “inappropriate subdivision, use and development.”⁵ The Respondent has erred by failing to give effect to Policy 11 which does not contain parallel

⁵ Objective LF-FW-09, chapeau.

qualification. Objective LF-FW-O9 does not give effect to key direction under the NZCPS, including NZCPS Policy 11 which is to:

- (a) “avoid adverse of activities on” listed items concerning indigenous biodiversity which coastal wetlands may contain, or otherwise.⁶
- (b) “avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on” listed areas including “coastal wetlands”.⁷

19. Clause 2 of Objective LF-FW-O9 also directs “no net decrease” in the extent of wetlands. The Respondent’s approach of referring to “net decrease” would allow wetland extent to be lost in the coastal environment provided this loss is made up for somewhere else – potentially in the inland terrestrial environment. As canvassed in paragraph 11 above, an “unders and overs” approach of this nature has been identified as legally flawed.

20. The loss of wetland extent in the coastal environment does not implement NZCPS Objective 1 which is to both “maintain” natural biological and physical processes and “maintain” the diversity of New Zealand’s indigenous coastal flora and fauna.

Policy LF-FW-P10A “Managing Wetlands”

21. The Respondent has included new LF-FW-P10A in the PORPS as follows:

LF-FW-P10A – Managing wetlands

Otago’s wetlands are managed:

- (1) in the coastal environment, in accordance with the NZCPS in addition to (2) and (3) below,
- (2) by applying clause 3.22(1) to (3) of the NPSFM to all wetlands, and
- (3) to improve the ecosystem health, hydrological functioning and extent of wetlands that have been degraded or lost by promoting:
 - (a) an increase in the extent and condition of habitat for indigenous species, (b) the restoration of hydrological processes,
 - (c) control of pest species and vegetation clearance, and
 - (d) the exclusion of stock, except where stock grazing is used to enhance wetland values.

22. Clauses (1) and (2) of LF-FW-P10A extends the application of clause 3.22(1) and (3) of the NPSFM, which provide a consent pathway for various

⁶ New Zealand Coastal Policy Statement, Policy 11(a).

⁷ New Zealand Coastal Policy Statement, Policy 11(b).

infrastructure activities to occur in natural inland wetlands, to wetlands in the coastal environment.⁸

23. Clause 3.22(1) and (3) of the NPSFM contains a consent pathway for various infrastructure activities to occur in natural inland wetlands, subjecting them to the effects management hierarchy which allows for offsetting and compensation. The NZCPS does not contain equivalent direction.

24. The extension of Clause 3.22(1) and (3) of the NPSFM to wetlands in the coastal environment amounts to an error of law because:

(a) The PORPS must give effect to the NZCPS.⁹

(b) The scope of the NPSFM is confined to “natural inland wetlands”.

“Natural inland wetlands” are defined in the NPSFM as natural wetlands that are not in the coastal marine area.¹⁰ In other words, the NPSFM does not address wetlands below mean high water springs.

(c) The NZCPS applies to wetlands in the coastal environment, which also includes the coastal marine area.¹¹ Wetlands in the coastal environment are subject to following direction:

(i) Objective 1 “maintaining or enhancing natural biological and physical processes in the coastal environment and recognising their dynamic, complex and interdependent nature” and “protecting representative or significant natural ecosystems and sites of biological importance and maintaining the diversity of New Zealand’s indigenous coastal flora and fauna”;

(ii) Policy 11(a) “avoid adverse effect of activities on” specific listed items concerning indigenous biodiversity;

⁸ Policy LF-FW-P10A(2).

⁹ Resource Management Act 1991, section 62(3): 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.

¹⁰ Resource Management Act, section 2: **coastal marine area** means the foreshore, seabed, and coastal water, and the air space above the water—

(a) of which the seaward boundary is the outer limits of the territorial sea:

(b) of which the landward boundary is the line of mean high water springs, except that where that line crosses a river, the landward boundary at that point shall be whichever is the lesser of—

(i) 1 kilometre upstream from the mouth of the river; or

(ii) the point upstream that is calculated by multiplying the width of the river mouth by 5

¹¹ NZCPS, Policy 1: “Recognise that the coastal environment includes... the coastal marine area... areas where coastal processes influences or qualities are significant, including coastal lakes, lagoons, tidal estuaries, saltmarshes, coastal wetlands, and the margins of these.”

- (iii) Policy 11(b)(iii) “avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on...coastal wetlands.”
- (iv) Under Policy 13(1)(a), adverse effects of activities on areas of “outstanding” natural character in the coastal environment are to be “avoided”.
- (v) Under Policy 13(1)(b), in all other areas “significant adverse” effects on natural character are to be “avoided” and other effects are to be “avoided, remedies or mitigated.”
- (vi) Policy 13(2)(c) “recognise that natural character is not the same as natural features and landscapes or amenity values and may include matters such as... wetlands”.

25. Extending Clause 3.22(1) and (3) of the NPSFM to wetlands in the coastal environment conflicts with key NZCPS directives outlined above. The NZCPS does not provide the same latitude for offsets and compensation as the NPSFM to occur within wetlands in the coastal environment, particularly in sites that meet NZCPS Policy 11. The approach of offering unrelated environmental benefits to avoid other adverse environmental effects has been found by the Supreme Court as “plainly not correct”.¹²

26. Clause 3 of Policy LF-FW-P10A also fails to apply the NZCPS, by recommending changes which state:

improve the ecosystem health, hydrological functioning, and extent of wetlands that have been degraded or lost by promoting the exclusion of stock, except where stock grazing is used to enhance wetland values.

27. The verb “promote” and the qualification “except where stock grazing is used to enhance wetland values” is inconsistent with NZCPS Policy 21(d), which prescribes that where the quality of water in the coastal environment is deteriorated:

give priority to improving that quality by ... **requiring** that stock are excluded from the coastal marine area, adjoining intertidal areas and other water bodies and riparian margins in the coastal environment, within a prescribed time frame;

¹² *Royal Forest & Bird Protection Society of NZ Inc v NZTA* [2024] NZSC 26 at [178].

28. The Supreme Court has found NZCPS Policy 21(d) is “very specific as to subject matter and concrete as to intended effect”¹³ leaving “not much wriggle room.”¹⁴

Third alleged error of law – scope

29. The third alleged error of law is that the Respondent has accepted changes to Objective LF-FW-O9 “Wetlands” and Policy LF-FW-P10A “Managing wetlands” which go beyond the scope of what may be included in a Freshwater Planning Instrument, as determined by the High Court in *Otago Regional Council v Royal Forest & Bird Protection Society Inc.*¹⁵

30. The Respondent erred when it accepted changes to these respective provisions that went beyond direction concerning solely freshwater and natural inland wetlands, as covered by the NPSFM, to wetlands in the coastal environment which are the domain of the NZCPS. The Respondent wrongly concluded that it was empowered to accept changes to these provisions without considering the constraints of a Freshwater Planning Instrument.

Grounds of appeal

31. The High Court in *Otago Regional Council v Royal Forest & Bird Protection Society Inc* required that the Respondent identify the Freshwater Planning Instrument parts of the PORPS and re-notify those provisions as a Freshwater Planning Instrument.¹⁶ When delineating between freshwater and non-freshwater, the High Court found that¹⁷

... parts of a regional policy statement will qualify to be part of a freshwater planning instrument pursuant to either s 80A(2)(a) or (b) if they **directly relate to the maintenance or enhancement of the quality or quantity of freshwater.**

¹³ *Royal Forest & Bird Protection Society of NZ Inc v NZTA* [2024] NZSC 26 at [103].

¹⁴ *Royal Forest & Bird Protection Society of NZ Inc v NZTA* [2024] NZSC 26 at [104].

¹⁵ *Otago Regional Council v Royal Forest & Bird Protection Society of New Zealand Inc* [2022] NZHC 1777.

¹⁶ *Otago Regional Council v Royal Forest & Bird Protection Society of New Zealand Inc* [2022] NZHC 1777 at [231].

¹⁷ *Otago Regional Council v Royal Forest & Bird Protection Society of New Zealand Inc* [2022] NZHC 1777 at [192].

32. Notably, the High Court found that the jurisdiction of a Freshwater Planning Instrument is narrower than what is encapsulated under the NPSFM, and is not concerned with “seawater”:¹⁸

[200] ... It will be only to the extent parts of the proposed regional statement **regulate activities in the catchment or receiving environment, because of their effect on the quality or quantity of freshwater**, that policies or objectives for the catchment or receiving environment will relate to freshwater for the purposes of s 80A.

...

[202] In accordance with s 80A(2)(b), there may potentially be other ways in which provisions in the proposed regional statement can qualify to be part of a freshwater planning instrument. For that to be so, the ORC will have to satisfy itself that those parts relate directly to matters that will impact on the quality and quantity of freshwater, including groundwater, lakes, rivers and wetlands. **The ORC will also have to satisfy itself that the parts are not concerned with sea water** or are part of a proposed regional coastal plan or a change or variation to that plan.

33. Despite this, the Freshwater Hearing Panel has recommended changes as part of the renotified Freshwater Planning Instrument parts of the PORPS that are outside the scope of “freshwater” as contemplated by section 80A(2) of the Resource Management Act.
34. Wetlands in the coastal environment, which naturally concern seawater, are beyond the scope of a Freshwater Planning Instrument. NZCPS Policy 1(2) is that the “coastal environment” includes, inter alia:
- (a) “the coastal marine area;”¹⁹
 - (b) “areas where coastal processes, influences or qualities are significant, including coastal lakes, lagoons, tidal estuaries, saltmarshes, **coastal wetlands**, and the margins of these;”
 - (c) “inter-related coastal marine and terrestrial systems, including the intertidal zone.”

¹⁸ *Otago Regional Council v Royal Forest & Bird Protection Society of New Zealand Inc* [2022] NZHC 1777 at [200], [202].

¹⁹ Resource Management Act, section 2, **coastal marine area** means the foreshore, seabed, and coastal water, and the air space above the water—

(a) of which the seaward boundary is the outer limits of the territorial sea:

(b) of which the landward boundary is the line of mean high water springs, except that where that line crosses a river, the landward boundary at that point shall be whichever is the lesser of—

(i) 1 kilometre upstream from the mouth of the river; or

(ii) the point upstream that is calculated by multiplying the width of the river mouth by 5

35. Under the Resource Management Act 1991:²⁰

- (a) "Wetlands" are defined to include "permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions."
- (b) "Water" means "water in all its physical forms whether flowing or not and whether over or under the ground", and includes "fresh water, coastal water, and geothermal water".
- (c) "coastal water" means "seawater within the outer limits of the territorial sea and includes... (a) seawater with a substantial freshwater component".
- (d) "Freshwater" means "all water except coastal water and geothermal water."

36. The narrower definition "natural inland wetlands" is employed in the NPSFM. It is defined as a wetland that is not in the coastal marine area.²¹

37. Accordingly, any recommended changes that extend beyond "natural inland wetlands" were required to be processed as part of the "non-freshwater planning instrument" parts of the Proposed Otago Regional Policy Statement.

Questions of law

38. The Appellants allege the errors set out give rise to the following questions of law.

First alleged error of law - Failure to give effect to the National Policy Statement for Freshwater Management 2020

39. Do Objective LF-FW-O9 "Wetlands" and Policy LF-LS-P21 "Land use and fresh water" give effect to the NPSFM?

Second error of law – failure to give effect to the New Zealand Coastal Policy Statement

²⁰ Resource Management Act 1991, section 2.

²¹ NPSFM, clause 3.21(1).

40. Do Objective LF-FW-09 "Wetlands" and Policy LF-FW-P10A "Managing Wetlands" give effect to the NZCPS?

Third alleged error of law – scope

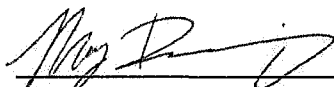
41. Are the changes that the Respondent made to Objective LF-FW-09 "Wetlands" and Policy LF-FW-P10A "Managing Wetlands" within scope of the Freshwater Planning Instrument?

Relief sought

42. The Appellant seeks:

- (a) That the appeal be allowed;
- (b) That the matter be referred back to the Respondent for reconsideration in light of this Honourable Court;
- (c) Such further or other relief, including consequential relief, as may be appropriate;
- (d) The costs of and incidental to these proceedings.

DATED this 22nd day of April 2024.



Peter Anderson / May Downing

Counsel for the Royal Forest and Bird Protection Society of New Zealand Inc

This document is filed by May Downing, solicitor for the Royal Forest and Bird Protection Society of New Zealand Inc. The address for service of the Appellant is at the offices of Royal Forest and Bird Protection Society being 205 Victoria St, Te Aro, Wellington 6011, provided that any document service is also effected by e-mail as set out below.

Documents for service may be posted or delivered to the address for service provided that e-mail copies are also provided as set out below.

Documents may also be served by e-mail to:

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