

BEFORE THE FRESHWATER HEARING PANEL

UNDER THE

Resource Management Act 1991

AND

IN THE MATTER

of the Proposed Otago Regional Policy Statement 2021:
Freshwater Planning Instrument

**SUBMISSIONS FOR THE OTAGO REGIONAL COUNCIL IN RESPONSE TO
SUBMITTERS ON THE IMPLICATIONS OF THE SUPREME COURT
JUDGMENT IN *PORT OTAGO LIMITED v ENVIRONMENTAL DEFENCE
SOCIETY INCORPORATED***

Dated 29 September 2023

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May it Please the Panel:

Introduction

1. In its Minute 9 dated 29 August 2023, the Panel directed that the Otago Regional Council (“the ORC”) reply to submissions by submitters on the implications of the Supreme Court judgment in *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 by 29 September 2023.

Submissions to Non-freshwater Panel adopted

2. A memorandum on the same subject matter has been filed with the Non-freshwater Panel. A copy is **attached**. The submissions therein are adopted.
3. Kai Tahu, OWRUG, Transpower, DOC and Meridian have filed the same submissions with both Panels, and no further response is required.

Forest & Bird Submission

4. The only other submission filed in response to Minute 9 is that of the Royal Forest and Bird Protection Society Incorporated.
5. Forest & Bird references its submissions at hearing. Those submissions do not require any response by the ORC.
6. Forest & Bird then goes on to respond to submissions concerning electricity transmission, renewable electricity generation and the concept of material harm.
7. A detailed analysis of relevant national policies is provided, generally supporting the proposition that there is no conflict analogous to that resolved in *POL v EDS*. No response by the ORC is required.
8. The submission on material harm deals with the specific context of

NPSFM policies which reference limits and bottom lines.

9. The point is that when avoidance relates to quantified and measurable limits on effects (harm), the limit itself dictates what level of harm is material. That is the purpose of a limit.

Submission and evidence at hearing

Beef & Lamb

10. Legal submissions at hearing for Beef & Lamb New Zealand Limited and Deer Industry New Zealand address the *POL v EDS* direction on the meaning and interpretation of avoidance policies.
11. It is correct that: “*avoidance policies must be interpreted in light of what is sought to be protected including the relevant values and areas and, when considering any development, whether measures can be put in place to avoid material harm to those values and areas.*”¹
12. It is not correct that: “*The Court considered that policies in the NZCPS containing inherent value conflicts should be addressed using a structured analysis in the RPS and plan rather than applying an overall judgment approach.*”
13. The Court’s direction was that a structured analysis is required only after having met the criteria of an activity being necessary and not merely desirable, other options having been evaluated and not being possible, and the activity being limited to the extent necessary. Only then is a structured analysis of all relevant factors undertaken with no presumption that the activity will be allowed.
14. This was in context of an activity required for the safe and efficient operation of an existing port and expressly did not deal with a new port or expanding port activity.
15. Beef & Lamb submits that these and related considerations cited may be relevant when considering NPSFM policies 11 and 15.
16. While it is correct that avoidance policies should be interpreted in light of what is sought to be protected, and whether measures can avoid material

¹ At paragraph 27

harm, it remains the case that avoidance policies should be applied in accordance with their terms, absent a conflict with another equally directive policy (which will be rare).

17. In NPSFM policy 11 “over-allocation” (which in future is to be avoided) is a term defined by reference to limits, flows and levels and degradation, which itself is defined by reference to bottom lines, target attribute states and values in the Appendix 1A or identified under the NOF.
18. In most, perhaps all circumstances, “over-allocation” is or will be measurable with little or no room for interpretation.
19. Policy 15 does not create any conflict with policy 11 or any other NPSFM policy.
20. Any potential conflict is resolved by the policy itself: “...*enabled...in a way that is consistent with this National Policy Statement.*” [Emphasis added.]
21. Policies 11 and 15 are simply to be applied in accordance with their terms.

DCC

22. DCC submits on *POL v EDS* that: “*From the DCC’s point of view this all means that the RPS should appropriately recognise that a mandatory policy obligation from the NPSUD for DCC to provide community water supply should be recognised as a tier two priority take, as has been sought.*”
23. It is accepted that drinking water is a health need of people in terms of the Te Mana o te Wai hierarchy of obligations. How the hierarchy operates is dealt with in the ORC’s closing submissions.
24. It does not follow that “Community Water Supply” must be defined and provided for as proposed by the DCC’s witness Mr Taylor, for reasons given by Ms Boyd during the hearing.
25. It is however agreed that drinking water is part of the second priority in the hierarchy of obligations, and it is recognised as such in both the pORPS and the NPSFM. No *POL v EDS* issue arises.
26. For completeness, nor does any conflict in the *POL v EDS* sense arises.
27. The NPSFM resolves any potential conflict in that it expressly provides for

drinking water both in the hierarchy of obligations and in the NOF process under which drinking water is expressly provided for as an Appendix 1B value that must be considered.

Manawa

28. Manawa submits that the preamble of NPSREG only refers to the allocation and priority of freshwater and does not solely resolve any conflict with the NPSFM in that a freshwater planning instrument does more than this. That is accepted as correct.
29. Manawa also submits that the NPSFM not only provides for larger hydro-electric generation schemes, but also provides a consenting pathway for specified infrastructure with a functional need to locate in water environments. That is also correct.
30. Any potential conflict is resolved by the NPSFM itself.
31. The short point is as stated at paragraph 51 of the Manawa submission: *"...instead of approaching it as a matter of conflicting direction, the pRPS needs to ensure that it gives effect to, ie implements, both sets of national direction as best it can."*
32. This is not an exercise for which *POL v EDS* has implications.



S J Anderson
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Dated: 29 September 2023