

**BEFORE INDEPENDENT HEARING COMMISSIONERS
AT DUNEDIN**

**MAI I KĀ KAIKŌMIHANA MOTUHAKE
KI ŌTEPOTI**

UNDER the Resource Management Act
1991 (“**RMA**”)

AND

IN THE MATTER OF the Proposed Otago Regional
Policy Statement 2021 (non-
freshwater parts) (“**PORPS**”)

AND the **EIT** – Energy, Infrastructure
and Transport provisions of the
PORPS

LEGAL SUBMISSIONS ON BEHALF OF KĀI TAHU

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LEGAL SUBMISSIONS ON BEHALF OF KĀI TAHU

May it please the Commissioners | Ki kā Kaikōmihana

Introduction and summary | Whakatakika

1. These submissions are filed in support of the Kāi Tahu position on the Energy, Infrastructure and Transport (“**EIT**”) provisions of the PORPS.
2. The development of infrastructure often carries with it the potential for adverse effects on takata whenua values, particularly in sensitive locations. Mr Ellison refers to the impact of the previous direct discharge of wastewater to the Otago Harbour, and the continued discharge of stormwater and wastewater overflows, on the ability of takata whenua to harvest kai.¹ Mr Flack refers to the location of wastewater treatment plants within the coastal takiwā, resulting in untreated sewage discharging into pātaka when they flood in extreme weather events.²
3. The submissions address the following issues arising out of the evidence:
 - (a) the differences in opinion between Kāi Tahu and Transpower Ltd (“**Transpower**”) regarding the management of potential reverse sensitivity effects on the National Grid and the intersection with Māori land;
 - (b) the proposed stand-alone provisions for renewable electricity generation sought by the “gentailers”;³ and
 - (c) the definition of regionally significant infrastructure, and the consequences that flow from the definition.
4. In summary, Kāi Tahu seeks the amendments to the EIT provisions that are set out in Ms McIntyre’s Appendix 1 and as discussed in her rebuttal evidence.
5. The relief sought by Kāi Tahu is the most appropriate, effective and efficient means of giving effect to the purpose of the RMA in relation to the interface between infrastructure and takata whenua values. It is consistent with the priority placed on the life-supporting capacity and mauri of ecosystems elsewhere in the PORPS; and better gives effect to the relevant higher-order national direction relating to freshwater management; renewable electricity generation and the National Grid.

¹ BoE of Edward Ellison at [55]. Other examples given by Mr Ellison at [56] include the construction of a landfill on the Kaikorai estuary; and the impact of overallocation on freshwater resources.

² BoE of Brendan Flack at [34].

³ Namely, Meridian Energy Ltd (“**Meridian**”), Contact Energy Ltd (“**Contact**”), and Manawa Energy Ltd (“**Manawa**”), formerly known as Trustpower.

Kāi Tahu submissions on the relief sought by Transpower

6. In submissions on the MW / RMA provisions of the PORPS, counsel drew attention to a difference in opinion between Kāi Tahu and Transpower in relation to the proposed definition of Māori land, and the consistency of proposed policy MW-P4 with the National Policy Statement for Electricity Transmission 2008 (“**NPSET**”).
7. Ms McLeod for Transpower recommended an amendment to EIT-INF-P15 to address what she saw as a gap in the PORPS in relation to the treatment of potential reverse sensitivity effects on the National Grid.⁴ That amendment would require decision-makers to:

protect nationally significant infrastructure and regionally significant infrastructure by avoiding:

- (1) activities and development, including the use of Māori land, that may give rise to an adverse effect, including reverse sensitivity effects, on of [sic] nationally significant infrastructure or regionally significant infrastructure.
- (2) activities and development that forecloses [sic] an opportunity to adapt, upgrade or develop nationally significant infrastructure or regionally significant infrastructure to meet future demand.

8. In Ms McLeod’s opinion, the proposed amendments to EIT-INF-P15 are required to give effect to Policies 10 and 11 of the NPSET.
9. Ms McIntyre disagrees with Ms McLeod, for the reasons set out in her rebuttal evidence.⁵

Relationship between takata whenua values and the NPSET

10. In my submission, the proposed amendments are neither necessary to give effect to those policies, and nor are they the most appropriate, effective and efficient means of achieving the purpose of the RMA under s 32.
11. The High Court has held that the NPSET is not as “all embracing” of the RMA’s purpose as is the New Zealand Coastal Policy Statement 2010 (“**NZCPS**”).⁶ That is derived from the different purposes of the NPSET, as a national policy statement promulgated under s 45, directed at the management of a particular matter of national importance; and the NZCPS under s 56, which is to achieve the purpose of the RMA in relation to the coastal environment as a whole.⁷

⁴ BoE of Ainsley McLeod at [8.62].

⁵ Rebuttal evidence of Sandra McIntyre at [10]-[11].

⁶ *Transpower Ltd v Auckland Council* [2017] NZHC 281 at [84]. See also *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201, [2021] 3 NZLR 882 at [125].

⁷ *Transpower*, above n 6 at [83].

12. A decision-maker is entitled to properly consider the RMA's purpose, and other Part 2 matters, as well as the NPSET, when exercising functions and powers under the RMA.⁸ They must consider the NPSET and give it such weight as they think necessary.⁹
13. However, the NPSET should not be read as a complete statement on the purpose of the RMA as it relates to the management of land. It does not "cover the field".¹⁰ That is particularly the case in relation to Māori land within the Otago region, where Kāi Tahu's relationship with its whenua is separately recognised as a matter of national importance under s 6(e), and which must also be taken into account under s 8 of the RMA. In that context, Policies 10 and 11 of the NPSET may carry less weight than the need to ensure that Māori land can be developed effectively and efficiently.

The definition of reverse sensitivity

14. The second point is that Policies 10 and 11 of the NPSET are principally directed at sensitive activities, ie those that are likely to be sensitive to the National Grid. By recommending that EIT-INF-P15 be extended to require the avoidance of all adverse effects on nationally and regionally significant infrastructure, Ms McLeod has incorrectly applied both Policies 10 and 11 and the concept of reverse sensitivity.
15. The accepted definition of reverse sensitivity is:¹¹

The legal vulnerability of an established activity to complaint from a new land use. It arises when an established land use is causing adverse environmental impact to nearby land, and a new, benign activity is proposed for the land. The "sensitivity" is this: if the new use is permitted, the established use may be required to restrict its operations or mitigate its effects so as not to adversely affect the new activity.

16. An activity on Māori land may have an effect on the National Grid which:
- (a) does not expose Transpower to the risk that it may be required to restrict their operations or mitigate its effects; and/or
 - (b) will not "compromise" the operation, maintenance, upgrading and development of the National Grid.¹²

⁸ *Transpower*, above n 6 at [84].

⁹ *Ibid.*

¹⁰ To use the language of the majority in *Environmental Defence Society Inc v The New Zealand King Salmon Company* [2014] NZSC 38, [2014] 1 NZLR 593 at [88].

¹¹ Nolan (ed) *Environmental and Resource Management Law* (7th ed, Lexis Nexis, Wellington, 2020) at [13.31], citing *Affco New Zealand v Napier City Council* EnvC Wellington W082/2004, 4 November 2004 at [29].

¹² To adopt the slightly broader wording in the second half of Policy 10. Counsel submits that "not compromis[e]" is a very high threshold, amounting to the need to expose one to risk or danger, to imperil, or to involve one in a hazardous course: Oxford English Dictionary (online ed).

17. For example, limited commercial activities may be undertaken as part of a papakāika development as currently proposed. However:
- (a) commercial activities are not generally considered to be “sensitive”, and certainly not as sensitive as other types of activity;
 - (b) therefore, it is unlikely that Transpower would be required to restrict its operations in response to the use of that part of the site for limited commercial activities; and
 - (c) those activities will not “compromise” the National Grid.
18. In fact, commercial activities are often used to provide a “buffer” between National Grid (or other) infrastructure and sensitive activities.
19. There is no policy support at the national level for such a constraint on Māori land. Accordingly, there is no need to include one to give effect to the NPSET.
20. Counsel submit that, by viewing a broad policy applying to all regionally and nationally significant infrastructure through the narrow lens of the NPSET, Ms McLeod has failed to consider the wider implications of her proposed drafting, where there is no potential for conflict with the National Grid.

Response to the reporting officer’s version of EIT-INF-P15

21. The same submissions apply to the recommended changes proposed by the reporting officer to EIT-INF-P15 in his s 42A report, in response to a submission by Queenstown Airport Corporation.

Proposed stand-alone provisions for renewable electricity generation

22. In her rebuttal evidence, Ms McIntyre addresses the new set of stand-alone provisions for renewable electricity generation sought by the “gentailers” Meridian, Contact and Manawa Energy.¹³ The intent of these new stand-alone provisions is to replace the existing EIT-EN provisions in the PORPS and supersede the provisions of the EIT-INF section that would otherwise apply to these activities.

Lack of distinction regarding scale of renewable electricity generation activities

23. Ms McIntyre is concerned that the proposed stand-alone provisions do not distinguish between regionally or nationally significant infrastructure and other infrastructure; and that the provisions treat all renewable electricity generation equally, regardless of scale or significance.¹⁴

¹³ Rebuttal evidence of Sandra McIntyre at [33]-[39].

¹⁴ Rebuttal evidence of Sandra McIntyre at [34]-[37].

24. In particular, she relies on the distinction between small and community scale renewable electricity generation (“**REG**”) activities in Policy F of the National Policy Statement for Renewable Electricity Generation (“**NPSREG**”) and more significant schemes, such as the Clutha and Waitaki schemes. In my submission, if all REG activities were to be treated alike, there would be no need for separate provision for small and community scale REG activities in the NPSREG.
25. As the preamble to the NPSREG notes, development that increases REG capacity can have environmental effects that span local, regional and national scales, often with adverse effects manifesting locally and positive effects manifesting nationally.¹⁵ Small and community scale REG activities, by definition, may not provide the same degree of national benefits as large-scale projects, and so in my submission it is appropriate that the PORPS distinguishes between them.
26. Ms McIntyre also notes that such a distinction is consistent with how schemes are differentiated under the National Policy Statement for Freshwater Management 2020 (“**NPSFM**”).¹⁶
27. The same submissions apply to the distinction between nationally and regionally significant infrastructure, and other forms of infrastructure, as identified by Ms McIntyre in her primary evidence.¹⁷

Priority for renewable electricity under EIT-EN-P1

28. Proposed Policy EIT-EN-P1 promoted by the gentailers requires that decisions on the allocation and use of natural and physical resources, including the use of fresh water and land, recognise and provide for the national significance of REG activities and the national, regional and local benefits of those activities. In her rebuttal evidence, Ms McIntyre expresses concern that, in the absence of a clear link to the LF provisions, EIT-EN-P1 as proposed could be interpreted as affording priority to REG activities for allocation-related decisions in a manner that is inconsistent with the NPSFM.¹⁸
29. If that is what is intended, then in my submission there is no higher-order policy support for the approach. The NPSREG does not support the prioritisation of REG activities in all circumstances. As the Environment Court held in *Re Otago Regional Council*,¹⁹ recognising the functional needs of REG activities “does not suggest that the environment would *always* give way to hydro-electricity generation” (my emphasis).²⁰ To do so would be inconsistent with the direction in the NPSFM and the priorities of Te Mana o te Wai, which require

¹⁵ NPSREG, Preamble at p 3.

¹⁶ Rebuttal evidence of Sandra McIntyre at [37].

¹⁷ BoE of Sandra McIntyre at [120].

¹⁸ Rebuttal evidence of Sandra McIntyre at [38].

¹⁹ *Re Otago Regional Council* [2021] NZEnvC 164.

²⁰ In relation to consenting on the facts of that particular case: at [287].

regional councils to put the health and wellbeing of water-bodies and freshwater eco-systems first.²¹

30. Such an interpretation would also be inconsistent with the established approach to interpretation of the NPSREG in relation to allocation. As the Environment Court held in *Carter Holt Harvey Ltd v Waikato Regional Council*:²²

the [NPSREG] should not be used to justify *always* giving hydro-electricity generation priority when making freshwater allocation decisions. It envisages that there may be circumstances where this will not be appropriate and should not occur.

(my emphasis)

31. The drafting proposed by the gentailers, if left open to the interpretation in Ms McIntyre's evidence, would be contrary to the NPSFM, the less directive nature of the NPSREG, and case law. The Kāi Tahu submitters oppose its inclusion as currently drafted.

Definition of regionally significant infrastructure

32. A number of submitters seek recognition within the definition of regionally significant infrastructure, or seek an inclusive definition, leaving the classes of infrastructure open and allowing scope for them to argue for their inclusion at a later date.²³
33. Those submissions are opposed by Kāi Tahu.
34. The definitions of regionally and nationally significant infrastructure carry particular significance. They enable access to the more permissive framework for development in EIT-INF-P13, where there is a functional or operational need to locate in a particular area. They also have broader significance in relation to the application of the NPSFM and the National Environmental Standards for Freshwater 2020 ("**NESFW**"), as a result of the definition of "specified infrastructure".
35. "Specified infrastructure", as that term is defined in the NPSFM, includes "*regionally significant infrastructure identified as such in a regional policy statement or regional plan*". The NESFW provides narrow exemptions from rules applying to works in and around natural inland wetlands for specified infrastructure, so the outcome of any definition in an RPS will have consequences for the application of those standards. Given the requirement to prioritise the health and

²¹ Ibid.

²² *Carter Holt Harvey Ltd v Waikato Regional Council* [2011] NZEnvC 380 at [58]-[59].

²³ See, for example, QLDC (00138.106) and DCC (00139.007) in relation to landfills; Trojan and Wayfare (00206.015 and 00411.022) in relation to ski area infrastructure; Waitaki Irrigatora (00213.002) in relation to community-scale irrigation and stockwater infrastructure. See also CIAL (00307.001) re "includes".

well-being of waterbodies and freshwater ecosystems, it is important that any exemptions are narrow and focussed.

36. Two recent decisions of Expert Consenting Panels demonstrate the risks associated with an inclusive definition. In the *Kōpū Marine Precinct* decision, a question was raised as to whether a recreational boat ramp and associated parking could be considered “regionally significant”, and therefore subject to the exemptions in the NESFW, with the Panel ultimately finding that it was.²⁴ In *Otawere*, an irrigation scheme was found to be regionally significant, in light of the scale and size of the project and the projected economic benefits.²⁵ In both cases, the relevant regional policy statements adopted an inclusive definition (ie “regionally significant infrastructure includes...”).
37. The potential for all infrastructure associated with irrigation schemes to be identified as regionally significant, and therefore subject to the “specified infrastructure” exemptions in the NPSFM and NESFW (as well as the more permissive framework in EIT-INF-P13) is of real concern to Kāi Tahu. Mr Ellison’s evidence details the impact that irrigation schemes have had on the mauri of freshwater bodies within the takiwā, with particular impacts on the harvesting of mahika kai.²⁶
38. The Kāi Tahu submitters therefore support the definition of “regionally significant infrastructure” in the s 42A report, subject to minor refinements addressed in the evidence of Ms McIntyre.

Conclusion

39. In conclusion, Kāi Tahu seeks the amendment to the EIT provisions set out in Appendix 1 to Ms McIntyre’s evidence.

Dated 13 March 2023

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²⁴ Decision of the Fast-Track Consenting Panel on the Kōpū Marine Precinct, 9 March 2022.

²⁵ Decision of the Fast-Track Consenting Panel on the Otawere Water Storage Reservoir, 18 July 2022.

²⁶ BoE of Edward Ellison at [56].