

BEFORE THE HEARING COMMISSIONERS

UNDER

The Resource Management Act 1991

AND

IN THE MATTER

of the Proposed Otago Regional Policy Statement
2021

**ORC SUBMISSIONS FOR HEARING
EIT – Energy, infrastructure and transport**

Dated 13 March 2023

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**ORC SUBMISSIONS FOR HEARING
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May it Please the Commissioners:

Introduction

- 1 ORC functions include the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity, and the strategic integration of infrastructure with land use through objectives, policies, and methods¹.
- 2 Relevant to this, the PORPS must give effect to² the National Policy Statement on Electricity Transmission 2008 (“NPSET”), the New Zealand Coastal Policy Statement 2010 (“NZCPS”), the National Policy Statement for Renewable Energy Generation 2011 (“NPSREG”) and the National Policy Statement for Freshwater Management 2020 (“NPSFM”).
- 3 Broadly NPSET and NPSREG tend to be enabling, while the NZCPS and the NPSFM tend to be protective.
- 4 The policy statements are statements of how the purpose of the Resource Management Act 1991 (“the Act”) is to be achieved in the contexts they deal with.
- 5 Those contexts do not include all matters relevant to this chapter and so direct reference to the purpose and matters of national importance in sections 5 and 6 of the Act is also required.
- 6 These submissions deal with the extent to which the NPSET and the NPSREG are enabling, in context of the protective provisions in the NZCPS, the NPSFM, and the Act.
- 7 The key point is that while the national grid and renewable electricity generation must be provided for under the NPSET and NPSREG, that must occur while also giving effect to provisions of the NZCPS, the NPSFM, and the Act which require avoidance or protection.

¹ Section 30(1)(ga) and (gb) of the Resource Management Act 1991 (“the Act”)

² Section 62(3) of the Act.

Giving effect to (reconciling) the national level policy statements, and the Act

Principles

- 8 In giving effect to the four policy statements referenced above the principles in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593 are relevant.
- 9 The key principles are:
- 9.1 Policies are to be read and applied in accordance with their terms. The language used is significant³.
- 9.2 Some policies are more specific and directive, while others are less prescriptive⁴.
- 9.3 Policies in more directive terms carry greater weight than those in less directive terms. A policy may be in such directive terms that a decision-maker has no option but to implement it. While there may infrequently be instances where policies “*pull in different directions*”, it may be that that an apparent conflict will dissolve if close attention is paid to the way in which the policies are expressed.⁵
- 10 All bold and underlining in cited text below has been added by me, to highlight directive or other language used in the relevant objectives and policies, or the Act.

NPSET

- 11 The NPSET applies to the national grid and associated infrastructure used or owned by Transpower NZ Limited⁶.
- 12 Clause 5 of the NPSET sets out its objective:
- “To **recognise** the national significance of the electricity transmission network **by facilitating** the operation, maintenance and upgrade of the existing transmission network and the establishment of new transmission resources to meet the needs of present and future generations, **while**:*
- **managing** the adverse environmental effects of the network; and*

³ *King Salmon*, at [126]

⁴ *King Salmon*, at [127]

⁵ *King Salmon*, at [129]

⁶ Definitions in clause 3 of the NPSET.

• **managing** the adverse effects of other activities on the network.”

13 Policy 1 of the NPSET provides that decision-makers must “...**recognise** and **provide for**...” certain benefits of the national grid.

14 Policy 2 of the NPSET provides that:

*“In achieving the purpose of the Act, decision-makers must **recognise** and **provide for** the effective operation, maintenance, upgrading and development of the electricity transmission network.”*

15 Policy 5 of the NPSET provides that:

*“When considering the environmental effects of transmission activities associated with transmission assets, decision-makers **must enable** the reasonable operational, maintenance and minor upgrade requirements **of established electricity transmission assets.**”*

16 Policy 6 of the NPSET provides that:

*“Substantial upgrades of transmission infrastructure **should be used as an opportunity to reduce existing adverse effects** of transmission including such effects on sensitive activities where appropriate.”*

17 Policy 8 of the NPSET provides that:

*“In rural environments, planning and development of the transmission system **should seek to avoid adverse effects on** outstanding natural landscapes, areas of high natural character and areas of high recreation value and amenity and existing sensitive activities.”*

NZCPS

18 The NZCPS applies to the coastal environment.

19 Its objectives include:

“Objective 1

*To **safeguard** the integrity, form, functioning and resilience of the coastal environment and **sustain** its ecosystems, including marine and intertidal areas, estuaries, dunes and land, by:*

- **maintaining or enhancing** natural biological and physical processes in the coastal environment and recognising their dynamic, complex and interdependent nature;
- **protecting** representative or significant natural ecosystems and sites of biological importance and maintaining the diversity of New Zealand's indigenous coastal flora and fauna; and ...

Objective 2

To **preserve** the natural character of the coastal environment and **protect** natural features and landscape values through:

- **recognising** the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;
- **identifying** those areas where various forms of subdivision, use, and development would be inappropriate and **protecting** them from such activities; and
- **encouraging** restoration of the coastal environment.

Objective 6

To **enable** people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, **recognising** that:

- the **protection** of the values of the coastal environment does not preclude use and development in appropriate places and forms, and **within appropriate limits**;
- some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;
- functionally some uses and developments can only be located on the coast or in the coastal marine area;
- the coastal environment contains renewable energy resources of significant value;

• the **protection** of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;...”

20 Policy 6 of the NZCPS deals with activities in the coastal environment. It provides:

“(1) *In relation to the coastal environment:*

(a) **recognise** that the provision of infrastructure, the supply and transport of energy including the generation and transmission of electricity, and the extraction of minerals are activities important to the social, economic and cultural well-being of people and communities;

...

(g) **take into account** the potential of renewable resources in the coastal environment, such as energy from wind, waves, currents and tides, to meet the reasonably foreseeable needs of future generations;

(2) *Additionally, in relation to the coastal marine area:*

(a) **recognise** potential contributions to the social, economic and cultural wellbeing of people and communities from use and development of the coastal marine area, including the potential for renewable marine energy to contribute to meeting the energy needs of future generations:

(b) ...

(c) **recognise** that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places;

(d) **recognise** that activities that do not have a functional need for location in the coastal marine area generally should not be located there; and...”

21 Policy 8 of the NZCPS was at issue in *King Salmon*. It provides:

“**Recognise** the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:

(a) including in regional policy statements and regional coastal plans **provision for** aquaculture activities in appropriate places in the coastal environment, **recognising** that relevant considerations may include:

(i) the need for high water quality for aquaculture activities; and

(ii) the need for land-based facilities associated with marine farming;

(b) taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and

(c) ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.”

22 Policy 11 of the NZCPS provides:

“To protect indigenous biological diversity in the coastal environment:

*(a) **avoid** adverse effects of activities on:*

[specified threatened species, habitats and vegetation]; and

*(b) **avoid significant** adverse effects and **avoid, remedy or mitigate other** adverse effects of activities on:*

[other specified species, habitats and vegetation]”

23 Policy 13 of the NZCPS provides:

“(1) To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:

*(a) **avoid adverse effects** of activities on natural character in areas of the coastal environment with outstanding natural character; and*

*(b) **avoid significant** adverse effects and **avoid, remedy or mitigate other** adverse effects of activities on natural character in all other areas of the coastal environment;”*

24 Policy 15 of the NZCPS provides:

“To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:

*(a) **avoid** adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and*

(b) **avoid significant** adverse effects and **avoid, remedy, or mitigate other** adverse effects of activities on other natural features and natural landscapes in the coastal environment;”

NPSREG

25 The NPSREG applies to renewable electricity generation.

26 The objective of the NPSREG is:

*“To **recognise** the national significance of renewable electricity generation activities **by providing for** the development, operation, maintenance and upgrading of new and existing renewable electricity generation activities, such that the proportion of New Zealand’s electricity generated from renewable energy sources increases to a level that meets or exceeds the New Zealand Government’s national target for renewable electricity generation.”*

27 Policy A of the NPSREG provides:

*“Decision-makers shall **recognise and provide for** the national significance of renewable electricity generation activities, including the national, regional and local benefits relevant to renewable electricity generation activities....”*

28 Policies B and C1 of the NPSREG require decision-makers to “... **have particular regard to**...” certain matters regarding the needs and importance of renewable electricity generation.

29 Policy C2 of the NPSREG provides:

*“When considering any residual environmental effects of renewable electricity generation activities that cannot be avoided, remedied or mitigated, decision-makers shall **have regard to** offsetting measures or environmental compensation including measures or compensation which benefit the local environment and community affected.”*

30 Policies E1 to E4 of the NPSREG require that regional policy statements include objectives, policies and methods to “...**provide for** the development, operation, maintenance and upgrading of ...” new and existing electricity generation from solar, biomass, tidal, wave and ocean current energy resources, hydro-electricity generation activities, wind energy generation activities, and geothermal resources.

NPSFM

- 31 The NPSFM provides for the freshwater management regime.
- 32 It includes provisions which will be relevant to energy, infrastructure and transport.
- 33 Clause 3.22 of the NPSFM provides that every regional council must include the following policy in its regional plan⁷:

*“The loss of extent of natural inland wetlands is **avoided**, their values are **protected**, and their restoration is **promoted**, except where:*

(a) the loss of extent or values arises from any of the following:

(i) ...

(vi) the maintenance or operation of specified infrastructure, or other infrastructure (as defined in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020

(vii) ...; or

(b) the regional council is satisfied that:

(i) the activity is necessary for the purpose of the construction or upgrade of specified infrastructure; and

(ii) the specified infrastructure will provide significant national or regional benefits; and

(iii) there is a functional need for the specified infrastructure in that location; and

(iv) the effects of the activity are managed through applying the effects management hierarchy; or

(c)...”

- 34 “Specified infrastructure” is defined in clause 3.21(1) to include, among other things:

⁷ Although the policy is for inclusion in a regional plan, the regional policy statement cannot be contrary to this.

“(b) regionally significant infrastructure identified as such in a regional policy statement or regional plan”

35 In the PORPS the definition of “*regionally significant infrastructure*” includes nationally significant infrastructure.

36 Clause 3.22 of the NPSFM provides that every regional council must include the following policy in its regional plan:

*“The loss of river extent and values is **avoided**, unless the council is satisfied that:*

(a) there is a functional need for the activity in that location; and

(b) the effects of the activity are managed by applying the effects management hierarchy.”

37 In clause 3.21(1) “*effects management hierarchy*” is defined:

*“**effects management hierarchy**, in relation to natural inland wetlands and rivers, means an approach to managing the adverse effects of an activity on the extent or values of a wetland or river (including cumulative effects and loss of potential value) that requires that:*

(a) adverse effects are avoided where practicable; then

(b) where adverse effects cannot be avoided, they are minimised where practicable; then

(c) where adverse effects cannot be minimised, they are remedied where practicable; then

(d) where more than minor residual adverse effects cannot be avoided, minimised, or remedied, aquatic offsetting is provided where possible; then

(e) if aquatic offsetting of more than minor residual adverse effects is not possible, aquatic compensation is provided; then

(f) if aquatic compensation is not appropriate, the activity itself is avoided”

38 “*Aquatic offsetting*” and “*aquatic compensation*” are defined in clause 3.21(2). They are to address “*more than minor residual adverse effects*” after all avoidance, minimisation and remediation has occurred.

- 39 Clauses 3.22(3)(a)(ii) and 3.22(3)(a)(ii) of the NPSFM require that principles 1 to 6 in Appendices 6 and 7 be complied with for any aquatic offsetting or compensation.
- 40 Essentially the new NPSFM provisions sets an avoid standard for the loss of extent and values, but for certain activities provides a pathway to an effects management hierarchy including offsetting and compensation.
- 41 The pathway provided is directed towards ensuring that the environmental result is neutral or positive. It is far from an avoid, remedy or mitigate standard.
- 42 For completeness, note that the NPSFM provisions above are given effect to in the PORPS by reference to the National Environmental Standard for Freshwater 2020 (“NESF”) (which contains provisions to the same effect⁸) in EIT-INF-P13(2)(a)(ii) and in LF-FW-P13.

Section 6 of the Act

- 43 Under section 6 of the Act there must be recognition and provision for (among other things):

“(a)...

*(b) the **protection** of outstanding natural features and landscapes **from inappropriate** subdivision, use, and development:*

*(c) the **protection** of areas of significant indigenous vegetation and significant habitats of indigenous fauna:*

(d)...

(f) the protection of historic heritage from inappropriate subdivision, use, and development:

(g) the protection of protected customary rights:”

- 44 In subclauses (b) and (f) “*inappropriate*” is to be assessed against that which is to be protected. Uses which do not protect the outstanding nature of the feature or landscape or the historic heritage will not be appropriate.⁹

⁸ Under section 62(3) of the Act it is the NPSFM which must be given effect to; under section 61(1) policy statements must be prepared in accordance with any regulations; national environmental standards are promulgated as regulations.

⁹ See *King Salmon* at [47], [55] and [101] to [105].

45 Subclauses (c) and (g) are not qualified in this way. Significant indigenous vegetation, significant habitats of indigenous fauna, and Protected customary rights are simply to be “*protected*”.

Reconciling these provisions

46 It is clear from *King Salmon* that where clear directive language is used such as “*avoid*” or “*protect*”, avoidance or protection must be achieved, even when an activity is to be provided for, and its benefits recognised.

47 It is not a question of whether “*avoid*” prevails over “*provide for*” or vice versa.

48 Both limbs must be given effect to.

49 The activity must be provided for in a way that achieves avoidance or protection of the relevant effects or values.

The national grid

50 With respect to the national grid, under the NPSET the effective operation, maintenance upgrade and development must be provided for and the reasonable operational, maintenance and minor upgrade requirements of established assets must be enabled.

51 But this must be done in such a manner that adverse effects are avoided to the extent required by the NZCPS and the NPSFM, and protection is achieved in terms of section 6 of the Act.

52 In the context of the NPSFM and rivers or natural inland wetlands, if the activity concerned has access to the prescribed effects management hierarchy, then that will be part of the manner in which the activity is provided for, albeit it will not always be possible to meet the requirements of the effects management hierarchy.

Renewable electricity generation

53 The position is the same for renewable electricity generation.

54 Policy C2 in the NPSREG is a point of difference. It provides that when considering any residual environmental effects of renewable electricity generation that cannot be avoided, remedied or mitigated, regard is to be had to offsetting measures or environmental compensation including

measures or compensation which benefit the local environment and community affected.

- 55 The residual environmental effects to which this policy applies cannot be effects which other more directive provisions say must be avoided (eg under the NZCPS). “*Have regard to*” is less directive than “*avoid*”. Policy C2 will apply to other residual effects.
- 56 Nor can policy C2 apply to defeat the more specific effects management hierarchy in the NPSFM. The provisions in the NPSFM are more directive and specific in their terms and culminate with a direction that if none of the hierarchy elements can be satisfied, then the activity itself is avoided.

The overarching position

- 57 Energy, infrastructure and transport are elements of enabling people and communities to provide for their social, economic, and cultural well-being and for their health and safety, and need to be provided for under section 5 of the Act and the NPSET and the NPSREG.
- 58 Under the NPSET and the NPSREG there is specific requirement that the benefits of the national grid and renewable electricity generation are to be recognised and those activities provided for.
- 59 However, for all energy, infrastructure and transport provision, this must occur in a way that avoids certain adverse effects, and manages others, in terms of the NZCPS, the NPSFM, and section 6 of the Act.

Implications for this chapter

- 60 The key point is that in considering any proposed amendment to the EIT chapter the position outlined above must not be departed from or watered down.
- 61 As a matter of law when faced with both a recognise/provide for provision and an avoid/protect provision both must be given effect to.
- 62 In this chapter EIT-INF-P13 is the primary provisions dealing with the avoid/protect side of the equation in connection with new infrastructure outside the coastal environment.
- 63 EIT-INF-P13 provides:
- 63.1 for the avoidance of certain areas as the first priority; and then

- 63.2 if avoidance is not demonstrably practicable due to functional or operational needs, then
- 63.2.1 the effects of nationally significant infrastructure or regionally significant infrastructure are directed to the appropriate part of the PORPS, or external instrument, with a fallback requirement to minimise adverse effects on the value of the relevant area; or
- 63.2.2 for other infrastructure adverse effects on the values that make the area important must be avoided.
- 64 For the coastal environment this dealt with EIT-INF-P13A which provides that all effects are to be managed by the CE – Coastal environment chapter.
- 65 It is important that this referencing to other places for effects management survives. Each referenced provision deals with protection/avoidance in a manner specific to its subject matter.
- 66 If any of the links is severed, then the applicable avoid/protect side of the equation is lost.
- 67 Similarly, there is danger in a stand-alone chapter.
- 68 For example, if the separate energy sub-chapter proposed by Ms Hunter (Contact Energy witness) were to be adopted the effects management hierarchy in ECO-P6 (among other things) is side stepped.
- 69 While the proposed replacement (EIT-EN-P5) in appendix 2 to her evidence provides a replacement regime it is significantly watered down.
- 70 Considering this in context of section 6(c) of the Act:
- 70.1 The new provision applies only to scheduled natural areas;
- 70.2 “*not demonstrably practicable to avoid*” a location becomes “*avoid, where practicable*” with no link to functional or operational need;
- 70.3 Stepping down the avoid, remedy, mitigate hierarchy has the same change of standard;
- 70.4 Importantly, offsetting and compensation become matters to consider rather than requirements with the end consequence of avoidance if those requirements cannot be met.

- 71 In essence, the test becomes if practicable avoid, remedy or mitigate.
- 72 A similar concern applies with respect to the electricity distribution provision proposed by Ms Justice in the appendix to her evidence. For significant natural areas, offsetting and compensation become matters to consider rather than requirements with the end consequence of avoidance if those requirements cannot be met.
- 73 This cannot satisfy the section 6(c) requirement to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna.
- 74 Caution is needed in considering any proposed amendment.
- 75 The avoid/protect requirements of the Act and national policy documents must be given effect to. Exceptions and standalone provisions risk failing to do so and need careful consideration.

Do NPSET and NPSREG manage all adverse effects?

- 76 In her evidence at paragraph 8.29 Ms McLeod (Transpower witness) expresses the view that:

“My understanding of the NPSET is that the NPSET is intended to address the management of all adverse effects of the National Grid on the environment, but this management does not occur in a vacuum. Rather, the NPSET provision must be reconciled or balanced alongside other matters of national significance and matters of national importance in section 6 of the RMA.”

- 77 With respect, this is only partially correct. As is noted by the High Court elsewhere in the case cited by Ms McLeod¹⁰ the NPSET is promulgated under section 45(1) of the Act whereas the NZCPS is promulgated under section 56. The NPSET purpose is to state objectives and policies that are relevant to achieving the purpose of the Act, whereas the NZCPS purpose is to state objectives and policies to achieve the purpose of the Act in relation to the coastal environment.
- 78 It is not a balancing exercise. It is a reconciliation exercise, applying the principles in *King Salmon*. *King Salmon* was a departure from conducting a balancing exercise.

¹⁰ *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [83].

- 79 Applying the *King Salmon* principles avoid/protect provisions in the NZCPS, NPSFM and section 6 of the Act must be given effect to.
- 80 The obvious reconciliation is that the PORPS must both recognise and provide for the national grid, and also give effect to the avoid/protect provisions.
- 81 The amendments proposed by Ms McLeod at paragraph 8.37 delete all of the avoid/protect provisions and replace them with a list of matters which the NPSET requires having regard to or consideration of.
- 82 Of note, the matters listed are all matters which can and would be required to be taken into account in the existing PORPS framework.
- 83 For example, “*the operational needs or functional needs of the National Grid and the extent to which those requirements constrain measures to avoid, remedy or mitigate adverse effects*” go to both it being demonstrably impracticable to avoid locating in a particular area and/or being able to avoid remedy or mitigate a particular effect.
- 84 The changes proposed are not necessary for the NPSET to be given effect, but they do prevent the avoid/protect provisions of the NZCPS, NPSFM and section 6 of the Act from having effect.
- 85 This is especially so given the suggestion at paragraphs 8.40 and 8.41 of Ms McLeod’s evidence that within the coastal environment EIT-INF-P13 will apply to new nationally significant infrastructure, albeit with recognition that there will be some areas where avoidance of adverse effects will be required.

Referring to environmental limits

- 86 As a matter of law there are environmental limits as submitted above.
- 87 It is appropriate, and accurate, to refer to activities operating or being provided for within limits, and to use the word “*limits*” alone having its plain and ordinary meaning.
- 88 Doing so simply indicates that a provision providing for an activity is not without limits.
- 89 It is a useful aid to understanding, especially for lay readers.

ORC expert evidence

- 90 Two subject matter experts are in attendance for the ORC:
- 90.1 Marcus Langman; and
- 90.2 Peter Stafford.
- 91 Mr Stafford prepared the section 42A report for the EIT chapter. At the time he was an ORC employee. He has since moved to other employment.
- 92 Mr Langman was then engaged by the ORC as a consultant to undertake subsequent work on the EIT chapter. Mr Langman has prepared the supplementary evidence on the chapter.
- 93 Mr Langman has prepared an opening statement identifying the key matters he considers to be at issue in the EIT chapter after review of the evidence.
- 94 I will call Mr Langman to present that statement and answer the Panel's questions on those issues and such other matters as the Panel wishes to explore. Mr Langman is the ORC's present subject matter expert for the EIT chapter.
- 95 As the author of the original section 42A report Mr Stafford is also in attendance and available to answer any questions the Panel might have concerning his opinions in the original s42A report or otherwise.
- 96 If the Panel wishes, then I will call Mr Stafford after Mr Langman.
- 97 The ORC calls Mr Langman.

Dated this 13th day of March 2023



Simon Anderson
Otago Regional Council