

BEFORE THE HEARING COMMISSIONERS

UNDER The Resource Management Act 1991

AND

IN THE MATTER of the Proposed Otago Regional Policy Statement
2021

**SUBMISSIONS FOR HEARING
ECO – ECOSYSTEMS AND INDIGENOUS BIODIVERSITY
CHAPTER 10**

Dated 17 April 2023

ROSS DOWLING MARQUET GRIFFIN
SOLICITORS
DUNEDIN

Telephone: (03) 477 8046
Facsimile: (03) 477 6998
PO Box 1144, DX YP80015

Solicitor: T M Sefton

**SUBMISSIONS FOR HEARING
ECO – ECOSYSTEMS AND INDIGENOUS BIODIVERSITY
CHAPTER 10**

May it Please the Commissioners:

Introduction

- 1 ECO – Ecosystems and Indigenous Biodiversity is Chapter 10 of the proposed Otago Regional Policy Statement 2021 (“pORPS 21”).
- 2 The Section 42A Report author is Melanie Hardiman, who produced her report on 4 May 2022. Ms Hardiman also produced a statement of supplementary evidence on this chapter dated 11 October 2022 and a second statement of supplementary evidence dated 24 February 2023.

Proposed Otago Regional Policy Statement

- 3 The pORPS seeks to maintain biodiversity by:
 - 3.1 Identifying and mapping SNAs and taoka in ECO-P2; and
 - 3.2 Avoiding adverse effects on SNAs and taoka in ECO-P3; and
 - 3.3 Applying the effects management hierarchy in ECO-P6; and
 - 3.4 Managing coastal indigenous biodiversity in ECP-P7; and
 - 3.5 Restoring and enhancing in ECO-P8; and
 - 3.6 Managing wilding conifers in ECO-P9; and
 - 3.7 Implementing a co-ordinated approach in ECO-P10.

Legal framework

Section 6

- 4 The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna is a matter of national importance¹. Unlike matters of national importance in section 6(a), (b) and (f), recognition of and provision for the protection of significant indigenous vegetation and significant habitats are not subject to any qualifiers.

1 Section 6(c) of the RMA

- 5 Under section 6(c) the ORC is required to recognise and make provision for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.
- 6 Section 6(c) is a matter which the authors of a regional policy statement must recognise and provide for to achieve the purpose of sustainable management².
- 7 While section 6 does not give primacy to preservation or protection within the concept of sustainable management, that does not mean that a particular planning document may not give primacy to preservation or protection in particular circumstances.³
- 8 Protecting what is significant can translate into a bottom line or limit.

Section 7

- 9 Section 7 is also relevant. In this case, the matters in Section 7 to which particular regard should be had include:

“(d) intrinsic values of ecosystems:”

“(f) maintenance and enhancement of the quality of the environment:”

“(g) any finite characteristic of natural and physical resource:”

- 10 Relevantly, the RMA defines, environment, intrinsic values and biological diversity:

“Environment includes—

(a) ecosystems and their constituent parts, including people and communities; and

(b) all natural and physical resources; and

(c) amenity values; and

(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters

...

² *Environmental Defence Society Incorporated v New Zealand King Salmon Limited* [2014] 1 NZLR 593 (“*King Salmon*”), paragraph [26]

³ *King Salmon* at paragraphs [148] to [149]

“Intrinsic values, in relation to ecosystems, means those aspects of ecosystems and their constituent parts which have value in their own right, including—

- (a) their biological and genetic diversity; and*
- (b) the essential characteristics that determine an ecosystem’s integrity, form, functioning, and resilience”*

...

Biological diversity means the variability among living organisms, and the ecological complexes of which they are a part, including diversity within species, between species, and of ecosystems.”⁴

Section 30

11 A regional council has a mandatory, statutory obligation to “maintain” indigenous biodiversity.

12 Section 30(1)(ga) provides:

(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

...

(ga) the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity:

13 “To maintain” means “to protect” which in turn means “to keep safe from harm or injury”.⁵

14 The High Court in Property Rights in New Zealand Inc v Manawatu-Wanganui Regional Council⁶ held that s 30(1)(ga) makes it “a mandatory function of every regional council to establish objectives, policies and methods for maintaining indigenous biodiversity”.

15 Similarly, in Attorney General v Trustees of the Motiti Rohe Moana Trust⁷ the High Court held “the RMA has made express provision for the maintenance of indigenous biodiversity as a core function of regional councils”.

⁴ Section 2 of the RMA

⁵ *Canyon Vineyard Ltd v Central Otago District Council* [2022] NZHC 2458 at [125]

⁶ [2012] NZHC 1272 at [31]

⁷ [2017] NZHC 1429 at [127]

- 16 In Oceana Gold (New Zealand) Ltd v Otago Regional Council⁸, Oceana Gold argued to the contrary. The Environment Court held (footnotes omitted):

“[65] In Property Rights in New Zealand Inc v Manawatu-Wanganui Regional Council⁸² the High Court held that section 30(1)(ga) “creates a mandatory obligation on ... regional councils to make objectives, policies and methods for the maintenance of indigenous [biodiversity]”. In Attorney General v Trustees of the Motiti Rohe Moana Trust⁸³ the High Court held that “the RMA has made express provision for the maintenance of indigenous biodiversity as a core function of regional councils”⁸⁴.

[66] Mr Christensen submitted⁸⁵ that “section 30(1)(ga) is a direction as to subject matter to be addressed, not as to a particular substantive outcome that is to be achieved”. That submission seems to imply that a regional council could choose not to maintain biodiversity so long as its plans cover the subject. Ms Gepp submitted⁸⁶ for the Societies that if the provision was merely directing the subject matter of a RPS then it could have omitted the words “for the maintenance” and simply specified that the function is establishment of provisions for indigenous biodiversity. In other words, the subsection requires particular emphasis on the maintenance of indigenous biodiversity. Applying the High Court authorities cited in the previous paragraph, we hold that the latter view is correct: there is a directive component to section 30(1)(ga) especially when it is read in the context of section 5(2)(b) and section 7(c) RMA.”

Section 5

- 17 The sustainable management purpose of the RMA in section 5 must also be borne in mind. The protection and maintenance of indigenous biodiversity is to occur in context of achieving the purpose of the RMA.⁹
- 18 Section 5(2) defines “sustainable management”. It must be read as an integrated whole. The use of “while” before subparagraphs (a), (b) and (c) means that those paragraphs must be observed in the course of the management referred to in the opening part of the definition. “While” means “at the same time as”.¹⁰

Policy Statement direction to protect indigenous biodiversity

⁸ [2019] NZEnvC 41

⁹ Sections 5, 6 and 30 of the RMA

¹⁰ *King Salmon* at [24](c)

- 19 The New Zealand Coastal Policy Statement 2010 (“NZCPS”) and the National Policy Statement for Freshwater Management 2020 (“NPSFM”) also contain direction on the management of biodiversity.
- 20 In the coastal environment the direction is to protect indigenous biodiversity.
- 21 To protect areas of indigenous biodiversity in the coastal environment, policy 11(a) requires decision-makers “*avoid*” adverse effects of activities on areas with certain biodiversity characteristics. However, the policy contains a hierarchy based on classification of both environment and environmental effect: policy 11(b) requires decision-makers “*avoid*” significant adverse effects on certain environments with specified biodiversity characteristics (for example, areas of predominantly indigenous vegetation in the coastal environment) and “*avoid, remedy or mitigate*” other (lesser) adverse effects of activities in areas with other specified biodiversity characteristics.¹¹
- 22 The proposed RPS gives effect to the NZCPS in the Coastal Environment chapter.
- 23 Similarly, in the NPSFM, Policy 9 directs that “*the habitats of indigenous freshwater species are protected*”.
- 24 Of note, the NPSFM uses an effects management hierarchy, including aquatic offsetting and compensation, with principles defining when offsetting and compensation will not be appropriate.¹²
- 25 The proposed RPS gives effect to the NPSFM in the Land and Freshwater chapter.

The PORPS approach to protecting indigenous biodiversity

Significant natural areas and taoka

- 26 For significant natural areas and taoka ECO-P3 provides:

“ECO-P3 – Protecting significant natural areas and taoka

Except as provided for by ECO-P4 and ECO-P5, protect significant natural areas and indigenous species and ecosystems that are taoka by:

¹¹ *Port Otago Ltd v Environmental Defence Society Inc* [2021] NZCA 638 at [26]

¹² NPSFM clauses 3.21, 3.22, 3.24 and Appendices 6 and 7

- (1) *first avoiding adverse effects that result in:*
 - (a) *any reduction of the area or indigenous biodiversity values identified and mapped under ECO-P2(1), (even if those values are not themselves significant but contribute to an area being identified as a significant natural area) and*
 - (b) *any loss of taoka values identified and mapped under ECO-P2(2), and*
- (2) *after (1), applying the effects management hierarchy (in relation to indigenous biodiversity) in ECO-P6, and*
- (3) *prior to significant natural areas and indigenous species and ecosystems that are taoka being identified and mapped in accordance with ECO-P2, adopt a precautionary approach towards activities in accordance with IM–P15IM-P6(2).¹³*

27 Adverse effects on significant natural areas that result in reduction of the SNA area or values identified and mapped under ECO-P2, are to be avoided. Other effects are then to be dealt with using the effects management hierarchy in ECO-P6.

Exceptions

- 28 ECO-P5 provides for the continuation of existing activities in SNAs that are lawfully established.
- 29 Under ECO-P4 all effects of listed activities are dealt with using the effects management hierarchy in ECO-P6, without first satisfying the avoidance requirement in ECO-P3. The activities are:
- 29.1 Nationally and regionally significant infrastructure¹⁴; and
 - 29.2 Mineral extraction activities¹⁵; and
 - 29.3 Aggregate extraction activities¹⁶; and
 - 29.4 Development of papakāika marae and ancillary facilities associated with customary activities¹⁷; and
 - 29.5 Use of mahika kai and kaimoana¹⁸; and

¹³ Proposed Amendments PORPS – S42A & Supplementary Evidence Version dated 24 February 2023. Note: I have used a “clean” version and omitted footnotes for ease of reference.

¹⁴ ECO-P4(1)

¹⁵ ECO-P4(1A)

¹⁶ ECO-P4(1B)

¹⁷ ECO-P4(2)

¹⁸ ECO-P4(2A)

- 29.6 The use of Māori land Native reserves and Māori land¹⁹; and
- 29.7 Protecting, restoring or enhancing a significant natural area or indigenous species or ecosystems that are taoka²⁰; and
- 29.8 Addressing a severe and or immediate risk to public health or safety²¹.
- 30 Access to the effects management hierarchy without satisfying ECO-P3 is generally in recognition of the activity's significance, together with the activity being functionally or locationally constrained.

The effects management hierarchy

- 31 ECO-P6 sets out the effects management hierarchy:

“ECO-P6 – Maintaining indigenous biodiversity

Maintain Otago’s indigenous biodiversity (excluding areas managed protected under ECO-P3) by applying the following effects management hierarchy (in relation to indigenous biodiversity) in decision-making on applications for resource consent and notices of requirement:

- (1) avoid adverse effects as the first priority,*
- (2) where adverse effects demonstrably cannot be completely avoided, they are remedied,*
- (3) where adverse effects demonstrably cannot be completely avoided or remedied, they are mitigated,*
- (4) where there are residual adverse effects after avoidance, remediation, and mitigation, then the residual adverse effects are offset in accordance with APP3, and*
- (5) if biodiversity offsetting of residual adverse effects is not possible, then:*
 - (a) the residual adverse effects are compensated for in accordance with APP3, and*

¹⁹ ECO-P4(3)

²⁰ ECO-P4(4)

²¹ ECO-P4(5)

(b) *if the residual adverse effects cannot be compensated for in accordance with APP4, the activity is avoided²².*

32 The hierarchy applies to all indigenous biodiversity, but its availability is limited as above for significant natural areas and taoka.

33 It requires an applicant to demonstrate that they have applied each step of the hierarchy before progressing through it.

34 The first three limbs of the hierarchy are unremarkable. They closely follow section 5(2)(c).

35 The fourth and fifth limbs of ECO-P6 are enabling of offsetting and compensation (in defined circumstances) for any remaining adverse effects.

36 They are to further enable activities, within the bounds of acceptable offsetting and compensation.

Limits on offsetting and compensation

37 APP3 and APP4 set out what is and is not acceptable offsetting and compensation.

38 Offsetting and compensation are not available in all circumstances. When available, offsetting and compensation proposals must achieve relevant outcomes.

39 Offsetting is not available for an activity that will result in:

“(a) *the loss from an ecological district of any individuals of Threatened taxa, other than kānuka (Kunzea robusta and Kunzea serotina), under the New Zealand Threat Classification System (Townsend et al, 2008); or*

(b) *measurable loss within an ecological district to an At Risk-Declining taxon, other than manuka (Leptospermum scoparium), under the New Zealand Threat Classification System (Townsend et al, 2008); or*

(c) *the worsening of the conservation status of any indigenous biodiversity as listed under the New Zealand Threat Classification System (Townsend et al.); or*

²² Proposed Amendments PORPS – S42A & Supplementary Evidence Version dated 24 February 2023. Note: I have used a “clean” version and omitted footnotes for ease of reference.

- (d) *the removal or loss of viability of a naturally uncommon ecosystem type that is associated with indigenous vegetation or habitat of indigenous fauna; or*
- (e) *the loss (including cumulative loss) of irreplaceable or vulnerable indigenous biodiversity²³*

40 The limits on the availability of compensation are similar. Compensation is not available for an activity that will result in:

- “(a) *the loss from an ecological district of an indigenous taxon (excluding freshwater fauna and flora) or of any ecosystem type,*
- (b) *removal or loss of viability of the habitat of a Threatened indigenous species of fauna or flora under the New Zealand Threat Classification System (Townsend et al, 2008),*
- (c) *removal or loss of health and resilience of a naturally uncommon ecosystem type that is associated with indigenous vegetation or habitat of indigenous fauna,*
- (d) *worsening of the conservation status of any Threatened or At Risk indigenous biodiversity listed under the New Zealand Threat Classification System (Townsend et al, 2008), or*
- (e) *the loss (including through cumulative loss) of irreplaceable or vulnerable indigenous biodiversity²⁴*

41 It must be kept in mind that that significant indigenous vegetation and significant habitat of indigenous fauna can also be locationally constrained. Naturally rare/uncommon ecosystems are an example of this due to environmental conditions, often they exist where they exist and cannot be recreated elsewhere²⁵.

42 Oceana Gold advocates for the criteria set out in APP3 and APP4 to be amended so they are no longer limits or criteria that need to be achieved, but principles for consideration.²⁶

43 This point has been thoroughly litigated in context of the Partially Operative Otago Regional Policy Statement 2019.

²³ Proposed Amendments PORPS – S42A & Supplementary Evidence Version dated 24 February 2023. Note: I have used a “clean” version and omitted footnotes for ease of reference.

²⁴ Proposed Amendments PORPS – S42A & Supplementary Evidence Version dated 24 February 2023. Note: I have used a “clean” version and omitted footnotes for ease of reference.

²⁵ <https://www.landcareresearch.co.nz/publications/naturally-uncommon-ecosystems/>

²⁶ Statement of Evidence of Mark Christensen dated 22 November 2022 at paragraphs 126 to 172 and 197, Statement of Evidence of Scott Hoosen dated 23 November 2022 at paragraphs 71 and 100

- 44 In an appeal to the Environment Court by Oceana Gold²⁷ the issues for the Court to determine were whether there should be limits on the availability of compensation and if so, what they should be, or whether there should only be a list of matters for consideration²⁸.
- 45 ORC, Forest & Bird, and the Environmental Defence Society (“EDS”) argued for limits, although they disagreed on their number and content²⁹.
- 46 Oceana Gold, the Minister of Energy and Resources, and the Queenstown Lakes District Council opposed limits, although they accepted the matters proposed by the other parties as limits could be considerations or criteria for assessing the acceptability of compensation proposed by an applicant for resource consent³⁰.
- 47 The Court undertook an extensive consideration of the limits to compensation³¹. It reviewed the ecological and planning evidence adduced by the parties and their legal submissions.
- 48 It adopted with some amendments, the limits on compensation proposed by Forest & Bird and EDS³². The limits that were the subject of the Environment Court’s determination are largely replicated in the proposed RPS.
- 49 For offsetting:

“...The offset ensures there is no loss of individuals of Threatened taxa other than kānuka (Kunzea robusta and Kunzea serotina), and no reasonably measurable loss within the ecological district to an At Risk-Declining taxon, other than mānuka (Leptospermum scoparium), under the New Zealand Threat Classification System (“NZTCS”);...”³³

- 50 For compensation:

“...The residual adverse effects will not result in

²⁷ *Oceana Gold (New Zealand) Limited v Otago Regional Council* [2019] NZ EnvC41 and [2020] NZ EnvC 137

²⁸ *Oceana Gold (New Zealand) Limited v Otago Regional Council* [2019] NZ EnvC41, at [55].

²⁹ Op cit, at [50], [53], [96] and [97].

³⁰ Op cit, at [53].

³¹ Op cit, at [96]-[188] and [191]-[200].

³² Op cit, at [161] and [199]-[200].

³³ Policy 5.4.6(c) of the Partially Operative Otago Regional Policy Statement 2019

1. *The loss of an indigenous taxon (excluding freshwater fauna and flora) or of any ecosystem type from an ecological district or coastal marine biogeographic region;*

2. *Removal or loss of viability of habitat of a threatened or at risk indigenous species of fauna or flora under the New Zealand Threat Classification System (“NZTCS”);*

3. *Removal or loss of viability of an originally rare or uncommon ecosystem type that is associated with indigenous vegetation or habitat of indigenous fauna;*

4. *Worsening of the NZTCS conservation status of any threatened or at risk indigenous freshwater fauna....*³⁴

51 An appeal to the High Court by Oceana Gold alleging errors of law in the Environment Court’s determination failed.³⁵

Avoidance if there are residual effects

52 A key part of the hierarchy is that if residual adverse effects remain after all steps have been completed, then the activity must be avoided.

53 It goes without saying (but can be added to the proposed RPS to avoid any doubt) that the remaining adverse effects must be more than minor.³⁶ The policy is not intended to require avoidance if only minor adverse effects remain.

54 The final avoidance limb is necessary, because otherwise the effects management hierarchy would not be protective of, and would not maintain, indigenous biodiversity.

55 Without the final consequence of avoiding the activity, the result of the effects management hierarchy failing to address adverse effects in a satisfactory way could be to “do it any way”.

Conclusion on the proposed RPS approach

56 Where this leaves us is that it is only in limited circumstances that the proposed RPS gives primacy to the protection of indigenous biodiversity by requiring the avoidance of an activity. Those limited circumstances are:

34 Policy 5.4.6A(a)(iii) of the Partially Operative Otago Regional Policy Statement 2019

35 *Oceana Gold (New Zealand) Ltd v Otago Regional Council* [2020] NZHC 436

36 *King Salmon* at [145]

56.1 indigenous biodiversity is still subject to more than minor adverse effects affected after avoidance, remedy, mitigation, offsetting and compensation; and

56.2 there would be a reduction in area or values of a significant natural area or taoka and the ECO-P4 and ECO-P5 exceptions do not apply.

57 This is in accord with King Salmon.

58 It is necessary to achieve protection in terms of section 6(c).

59 It is necessary to achieve the maintenance of indigenous biodiversity in terms of section 30(1)(ga).

60 There can be no doubt that this is an appropriate framework for the proposed RPS to achieve the purpose of the RMA in Otago, and to meet the requirements of sections 6(c) and 30(1)(ga).

Matters raised by submitters

Inconsistency with s 104(1)(ab)

61 Ms Hunter for OGL considers “*limits*” are problematic and are at odds with higher order planning documents, the Exposure Draft of the National Policy Statement for Indigenous Biodiversity and section 104(1)(ab) of the RMA³⁷.

62 For Contact Energy Limited, Ms Hunter considers APP3 and APP4 creates an inconsistency with section 104(1)(ab)³⁸. Ms Hunter considers the limits “*unreasonable*” and seeks their removal³⁹.

63 Mr Tuck for Silver Fern Farms Limited⁴⁰ seeks the removal of limits on the availability of biodiversity offsetting to ensure alignment with section 104(1)(ab).

64 If these are a submission that limits on the availability of offsetting and compensation are unlawful, then the submission must be rejected.

³⁷ Supplementary Statement of Evidence of Claire Elizabeth Hunter dated 31 March 2023 at paragraph 6.22

³⁸ Statement of Evidence of Claire Elizabeth Hunter dated 23 November 2022 at paragraph 10.7

³⁹ Statement of Evidence of Claire Elizabeth Hunter dated 23 November 2022 at paragraph 10.12

⁴⁰ Statement of Evidence of Steve Tuck dated 23 November 2022 at paragraph 8.12.3

- 65 As noted above, limits to offsetting and compensation is a point which has already been litigated in context of the Partially Operative Otago Regional Policy Statement 2019.
- 66 Section 104(1)(ab) does not preclude a planning instrument from including provisions as to offsetting and compensation in specific contexts.
- 67 Applying that logic, all manner of policy statement and plan provisions which regulate activity status (for example, prohibited activity status) could be struck down on the basis that they are inconsistent with section 104(1)(ab), or section 104(1)(a) or (c).
- 68 The correct view is that a consent authority must consider all of the matters listed in section 104(1), including any standard, regulation, policy statement regulating offsetting and compensation. Such as the NPSFM, which includes limits on offsetting and compensation.
- 69 There is nothing inconsistent or unusual about this.

Draft NPSIB

- 70 Relevant to the discussion on the proposed RPS's use of limits, various submitters seek alignment of the proposed RPS with the proposed National Policy Statement for Indigenous Biodiversity ("Draft NPSIB").
- 71 An exposure draft was released for public comment in June 2022. The Ministry for the Environment's website anticipated a National Policy Statement for Indigenous Biodiversity would be gazetted in December 2022. It was not. The webpage now predicts gazettal during 2023.
- 72 ORC's position with respect to the Draft NPSIB remains unchanged. The proposed National Policy Statement for Indigenous Biodiversity has no legal standing. There is no statutory direction to give effect to it.
- 73 Caution must be exercised. A National Policy Statement for Indigenous Biodiversity may not be issued or may not be issued in terms of the exposure draft (or any earlier iteration). It would be wrong to make amendments to the proposed RPS on the assumption that a National Policy Statement will be issued, at all, or without amendment to the exposure draft.
- 74 It is worth noting however that the Draft NPSIB also contains limits as to when biodiversity offsetting and compensation will not be appropriate.

75 Examples of when offsets would be inappropriate include where:

- “(a) residual adverse effects cannot be offset because of the irreplaceability or vulnerability of the indigenous biodiversity affected:*
- (b) effects on indigenous biodiversity are uncertain, unknown, or little understood, but potential effects are significantly adverse:*
- (c) there are no technically feasible options by which to secure gains within acceptable timeframe.”*

76 Examples of when compensation would be inappropriate include where:

- “(a) the indigenous biodiversity affected is irreplaceable or vulnerable; or*
- (b) effects on indigenous biodiversity are uncertain, unknown, or little understood, but potential effects are significantly adverse; or*
- (c) there are no technically feasible options by which to secure proposed gains within acceptable timeframes”.*

77 As noted by Dr Lloyd⁴¹ *“The exposure draft of the NPSIB goes further and places limits in relation to effects being uncertain but potentially significantly adverse, or where there are no feasible options to secure gains by offsetting.”*

78 It has also been consistently raised by some submitters that following the hierarchy in sequence, and/or requiring applicants to demonstrate the hierarchy has been followed may not achieve the best outcomes for biodiversity⁴².

⁴¹ In his written response dated 12 April 2023 to the Panel’s Minute 12

⁴² For example: For Oceana Gold Limited see the Statement of Evidence of Claire Elizabeth Hunter dated 23 November 2022 at paragraph 11.31, for Contact Energy Limited see the Statement of Evidence of Dr Vaughan Keesing dated 23 November 2022 at paragraphs 9.1 and 10.2, for Manawa Energy Limited see the Statement of Evidence of Dr Vaughan Keesing dated 23 November 2022 at paragraphs 8.1 and 8.5 and for Meridian Energy Limited see the Statement of Evidence of Susan Ruston dated 23 November 2022 at paragraph 117

79 Those submitters also seek the proposed RPS's alignment with the Draft NPSIB or submit that the proposed RPS is inconsistent with it.⁴³

80 Principle 1 of the Draft NPSIB for biodiversity offsetting is: *Adherence to effects management hierarchy*: A biodiversity offset is a commitment to redress any more than minor residual adverse effects and should be contemplated **only after** steps to avoid, minimise, and remedy adverse effects are demonstrated to have been sequentially exhausted.

81 Similarly, Principle 1 for biodiversity compensation in the Draft NPSIB is: *Adherence to effects management hierarchy*: Biodiversity compensation is a commitment to redress more than minor residual adverse impacts, and should be contemplated **only after** steps to avoid, minimise, remedy, and offset adverse effects are demonstrated to have been sequentially exhausted.

Giving effect to NPSREG and NPSET

82 It has been submitted that the proposed RPS fails to give effect to the NPSREG and NPSET⁴⁴.

83 Generally, this was dealt with in the EIT hearing.

84 In the specific context of this chapter nationally significant infrastructure and regionally significant infrastructure with a functional or operational need to locate in a significant natural area or to affect taoka are exempted from avoiding adverse effects under ECO-P3, with their effects to be addressed under the effects management hierarchy.

Conclusion

85 The ORC has a mandatory, statutory obligation to maintain indigenous biodiversity.

86 The ORC must protect significant indigenous biodiversity as a matter of national importance.

⁴³ For Oceana Gold Limited see the Statement of Evidence of Claire Elizabeth Hunter dated 23 November 2022 at paragraphs 11.12 and 11.17 and the Statement of Evidence of Mark Christensen dated 23 November 2022 at paragraph 171 and the Statement of Evidence of Scott Hoonson dated 23 November 2022 at paragraph 171, for Contact Energy see Statement of Evidence of Claire Elizabeth Hunter dated 23 November 2022 at paragraphs 10.7 and 10.12, and for Manawa Energy see Statement of Evidence of Stephanie Styles dated 23 November 2022 at paragraph 10.8

⁴⁴ See for example the legal submissions on behalf of Manawa Energy dated 14 March 2023 at paragraph [22], Submissions of Meridian Energy Limited dated 3 September 2021, Transpower New Zealand Limited dated 3 September 2021

- 87 The proposed RPS provides an appropriate framework to do so in a way that achieves the sustainable management purpose of the Act. The policy framework recognises and provides for significant activities that are functionally or locationally constrained, but not at any environmental cost.
- 88 Accordingly, the proposed RPS gives primacy to the protection of indigenous biodiversity by requiring the avoidance of an activity only in the limited circumstances where:
- 89 indigenous biodiversity would remain subject to more than minor adverse effects after avoidance, remedy, mitigation, offsetting and compensation have occurred via the effects management hierarchy in ECO-P6; or
- 90 there would be a reduction in area or values of a significant natural area or taoka and the ECO-P4 and ECO-P5 exceptions do not apply.

ORC's ECO – Ecosystems and indigenous biodiversity witness

- 91 The ORC calls the Section 42A Report writer, Ms Melanie Hardiman.

Dated this 17th day of April 2023



.....
T M Sefton
Otago Regional Council