

**BEFORE THE RPS HEARINGS PANEL**

**IN THE MATTER** of the Resource Management Act 1991

**AND**

**IN THE MATTER** of submissions on the Proposed Otago Regional Policy Statement 2021 (excluding parts determined to be a freshwater planning instrument)

---

**OPENING SUBMISSIONS ON BEHALF OF OCEANA GOLD (NEW ZEALAND) LIMITED – SUBMITTER ID 0115**

**17 April 2023**

---

**Solicitor acting:**

Jackie St John  
In-house counsel  
22 Maclaggan St  
Dunedin 9016  
jackie.stjohn@oceanagold.com

**Counsel acting:**

Stephen Christensen  
Project Barrister  
421 Highgate, Dunedin 9010  
P 027 448 2325  
stephen@projectbarrister.nz



**MAY IT PLEASE THE PANEL:**

*Introduction and context for suggested changes to ECO provisions*

1. In January I presented opening legal submissions on behalf of OceanaGold (New Zealand) Limited (**OGNZL**)<sup>1</sup> which addressed the regional and national importance of the Macraes Mine and provided some background to the Mine's operations, as well as highlighting OGNZL's general concerns with the pORPS and the lack of response from the ORC to issues that had been raised through the submission and pre-hearing processes. You also heard from Ms Paul, OGNZL's General Manager Corporate and Legal Affairs, and economist Mr Eaqub.
2. Without doubt the Macraes Mine is a significant physical resource, providing important economic, employment and social benefits as assessed at local (district) regional and national scales. Without doubt the ongoing development and operation of the mine will have unavoidable effects on significant biodiversity values<sup>2,3</sup> that need to be carefully managed to achieve good outcomes that ensure biodiversity is protected and maintained, and without doubt the notified version of the pORPS fails to provide for this.
3. The outcome OGNZL seeks from this part of the hearing is the correction of this failure.
4. A theme of OGNZL's formal submission on the pORPS, and of my submissions to you in January, was the general failure of the notified pORPS to recognise and provide for the importance of the extractives sector in Otago and of the Macraes

---

<sup>1</sup> Opening submissions on behalf of Oceana Gold (New Zealand) Limited – Submitter ID0115 dated 25 January 2023.

<sup>2</sup> It is widely understood that the Macraes Ecological District contains a range of important biodiversity values

<sup>3</sup> Dr Thorsen describes the likelihood that areas identified for development at the Macraes Mine will be found to hold significant biodiversity values

Mine in particular. That failure was compounded by the ORC's refusal to address the deficiency through the pre-hearing process, leading, out of a sense of frustration, to OGNZL asking their planning consultant Ms Hunter to suggest how the deficiency might be remedied.

5. Since I last spoke to you there has been some work by the ORC and various submitters looking at how the wording of the notified version of the pORPS might be amended to address its failure to identify the importance of the extractives sector generally, and to deal with the intersection of important minerals and important biodiversity values specifically. There has also been caucusing of ecologists to discuss the criteria that should be used in the pORPS to identify areas that are to be categorised as significant for biodiversity values (i.e., the wording of APP2) resulting in the production of a joint witness statement dated 31 March 2023 (**JWS**).
6. A related topic is the content of APP3 and APP4 which contain provisions guiding biodiversity offsetting and biodiversity compensation that have effectively been carried over from the partially operative RPS and are significantly at odds with contemporary best practice. These appendices were not addressed in expert caucusing. They do not reflect the contents of the national instruments that deal with offsetting and compensation (NPSFM and Exposure draft NPSIB) and need substantial amendment so they are consistent with the direction of those instruments and are able to be worked with in a practical way by applicants (and their ecologists) and decision-makers.
7. The Hearings Panel directed<sup>4</sup> ORC to consider OGNZL's suggested amendments (as proposed by Ms Hunter) to better address mining. This includes changes or additions in various parts of the pORPS including in the ECO chapter. The ORC

---

<sup>4</sup> Hearing Panel Minute 5 dated 27 January 2023.

provided supplementary evidence<sup>5</sup> in response to that direction and OGNZL's consultant planner Ms Hunter has filed her own supplementary evidence<sup>6</sup>. An important and encouraging development from OGNZL's perspective is that ORC's planning team is now recommending an amendment to ECO-P4 which will provide a consenting pathway for mineral extraction activities.

8. Other aspects, such as a new Issue statement in SRMR as proposed by planning experts engaged by various parties, also need to be addressed so that the pORPS as a whole makes sense and reads as an integrated document. To put that matter in context, why does ECO-P4 need to be amended to provide a consenting pathway for mining and quarrying? Because they are regionally important activities, and providing for these sorts of activities is a significant issue for the region. Absent that recognition the recommendation now made by ORC in ECO-P4 doesn't appear to be properly supported within the document as a whole. Similarly, the clear identification of the regional significance of extractives is important to support other parts of the pORPS that need to recognise the locational and functional needs of important activities.<sup>7</sup> ORC has provided no indication of whether and how it proposes to deal with this, and it is not a topic for the ECO hearing. In accordance with Minute 13 OGNZL expects it will only find out whether the ORC grasps the issue when the ORC closes its case at the end of the hearing.
9. From the JWS it is clear that there are limited areas of agreement amongst all the ecologists on how the significance criteria in APP2 should be worded. Many aspects of the notified criteria are in dispute to one degree or another. There is

---

<sup>5</sup> From various ORC section 42A report writers dated 24 February 2023.

<sup>6</sup> Supplementary evidence of Claire Hunter dated 31 March 2023.

<sup>7</sup> Such as the intersections between mineral development and heritage values and highly productive land

agreement amongst all the ecologists, including the ORC's ecologist, that a guidance document for interpreting whatever criteria are included is essential. This document is entirely absent at present. I do not know if and how ORC intends address this.

10. The changes recommended by the ORC planning team to address the need to provide for locationally-constrained mineral development proposals to have access to the effects management hierarchy when development proposals intersect with significant biodiversity values are a useful start, but do not yet address the issue as well as they need to. It seems that the difficulty may stem from the fact that while Policy 5.3.4 of the Partially Operative Regional Policy Statement 2019 (**partially operative RPS 2019**) says "Recognise the functional needs of mineral exploration, extraction and processing activities to locate where the resource exists", an equivalent policy or recognition in the pORPS is missing, for reasons that are not explained in the ORC's supporting documentation. Compounding that difficulty so far as the Macraes Mine is concerned may be the fact that to my knowledge none of the ORC's planning team currently working on the pORPS has had any professional involvement with the Macraes Mine, and therefore there may be a lack of appreciation of the value of the Mine and the extent to which impacts on significant biodiversity and other values are unavoidable, but are able to be managed to produce positive outcomes.
11. To address this omission Ms Hunter had proposed a new objective to be included in LF-LS chapter "**LF-LS-013 – Resource Use and Development. To recognise the role of resource use and development within the Otago region and its contribution to enabling people and communities provide for their social, economic and cultural wellbeing**". After quoting from her previous

supplementary evidence, Ms Boyd says<sup>8</sup> “I continue to have the same concern about the appropriateness of this objective in the LF-LS section”. I confirm that OGNZL is not opposed to an objective facilitating mining and other important resource use being placed in a different chapter that Ms Boyd identifies as more appropriate. What is important is that such an objective is necessary somewhere – otherwise the exception ORC now recognises needs to be included in ECO-P4 appears “out of the blue”.

12. Ms Hunter had also suggested the inclusion of a policy, LF-LS-Px. Ms Boyd does not support a ‘blanket’ pathway for all types of mineral and aggregate extraction and considers that if the Hearings Panel was minded to adopt such a policy “its scope should be limited to activities with regionally or nationally significant benefits only”<sup>9</sup>. As Ms Hunter explains in her evidence<sup>10</sup> the suggestion she has made would align mineral development with the approach proposed for infrastructure, which encounters similar locational and functional constraints to mining.

13. At a practical level OGNZL would accept policy settings that provide for regionally or nationally significant mineral and aggregate extraction operations to have a consenting pathway, and this is what OGNZL promotes in the ECO Chapter where mineral development and significant biodiversity values overlap. I discuss this in more detail below.

#### *New Objective ECO-04*

14. Ms Hunter proposes a new Objective as follows:

---

<sup>8</sup> Supplementary evidence of Felicity Boyd dated 24 February 2023 at paragraph 21.

<sup>9</sup> Supplementary evidence of Felicity Boyd dated 24 February 2023 at paragraph 34.

<sup>10</sup> Supplementary evidence of Claire Hunter dated 31 March 2023 at paragraph 2.7

ECO-O4 – Social, economic and cultural wellbeing

Manage indigenous biodiversity in such a way that also provides for the social, economic, and cultural wellbeing of people and communities now and in the future.

15. I submit this is a useful addition and do not agree with Ms Hardiman's view that it lacks consistency with what the ECO Chapter is trying to do.
16. I submit that resources, including indigenous biodiversity, need to be managed in an integrated way and for the purpose of the Act. The relationship of people and biodiversity is already provided for in Objective ECO-O3 which recognises that in the context of biodiversity mana whenua need to be able to exercise their role as kaitiaki, which includes providing for te hauora o te takata (the health of the people). Proposed Objective ECO-O4 is not inconsistent with that approach.
17. Objective ECO-O2 is about restoring and enhancing biodiversity and is entirely concerned with the relationship between people, biodiversity and the activities we undertake. Proposed Objective ECO-O4 is a reasonable extension to that and requires that biodiversity be managed in an integrated way that provides for social, economic and cultural wellbeing. I submit the proposed objective is not at odds with the direction of the other Objectives in the ECO Chapter.
18. When the policies that implement the objectives are considered it becomes clear why Objective ECO-O4 is needed. Policy ECO-P1(3) is about facilitating access to and use of biodiversity by Kāi Tahu associated with activities that support cultural wellbeing. Policy ECO-P4 is concerned with providing a pathway for important activities that unavoidably impact significant biodiversity values or indigenous species or ecosystems that are taoka. The point of these provisions is to ensure that biodiversity is managed in a way that also provides for the wellbeing of people and communities. Absent an appropriate objective these become orphan policies. Proposed Objective ECO-O4 provides the missing link.



*Policy ECO-P4 and the Consenting pathway – the ability to access the effects management hierarchy*

19. OGNZL supports the general intent of Ms Hardiman’s proposed changes to ECO-P4 to provide a consenting pathway for extractives where effects on significant biodiversity values are unavoidable. Ms Hunter proposes some further amendments to Ms Hardiman’s suggestions for new paragraphs (1A) and (1B)<sup>11</sup> which OGNZL supports:

(1A) the new use or development, operation and maintenance of mineral extraction and its ancillary activities that provide a significant national or regional benefit that could not otherwise be achieved within New Zealand and that have a functional need or operational need to locate within the relevant significant natural area(s) or where they may adversely affect indigenous species or ecosystems that are taoka.

(1B) the new use or development, operation and maintenance of aggregate extraction and its ancillary activities that provide a significant national or regional benefit that could not otherwise be achieved within New Zealand and that have a functional need or operational need to locate within the relevant significant natural area(s) or where they may adversely affect indigenous species or ecosystems that are taoka.

20. First, these amendments do not limit the policy to only new uses or developments, but also recognise that the ongoing operation of Macraes Mine (as the primary example) is just as important in retaining the workforce and delivering important economic and social benefits to the districts and the wider Otago region.

21. Secondly, consistent with Ms Boyd’s view<sup>12</sup> it is proposed that (1A) should include a reference to regional benefits, not just national benefits. While OGNZL submits that Macraes Mine has significant national benefits, the additional reference to regional benefits makes more sense. It aligns ECO-P4(1A) with ECO-P4(1B) where

---

<sup>11</sup> Supplementary evidence of Claire Hunter dated 31 March 2023 at paragraph 6.19

<sup>12</sup> Fn 6

aggregate extraction requires significant national or regional benefit<sup>13</sup>; it also follows the approach used in the National Policy Statement for Freshwater Management which Ms Hunter considers to be an appropriate guide to the management of effects on biodiversity values<sup>14</sup>; and it aligns with the actual benefits Ms Hardiman considers would be supported by the provision<sup>15</sup>.

22. Third, the amendments ensure that ancillary activities are also addressed in the policy to avoid any unintended consequences where a necessary ancillary activity to facilitate an extractive activity (such as a road or storage area) cannot avoid a significant area of biodiversity.

*ECO-P6 and definitions*

23. Ms Hunter proposes (relying in part on the evidence of Mr M Christensen) that the effects management hierarchy be moved to the definitions. I support this approach as it avoids the 'clutter' the notified policy suffers from. Importantly, Ms Hunter and Mr Christensen also propose that the definition of the effects management hierarchy should be consistent across terrestrial and wetland environments. I agree. Frankly, the idea that the effects management hierarchy means something different in the wetland context than it means elsewhere is an unsupportable fiction. Further, as Ms Hunter will explain in her summary, wetland environments often contain indigenous biodiversity values. Applicants and decision makers would be put in a difficult position if they are asked to apply two different effects management hierarchies in the same space.

---

<sup>13</sup> It would be possible to consolidate (1A) and (1B) into a single paragraph that simply addresses all mineral extraction. OGNZL would not oppose that approach if the Panel was so minded

<sup>14</sup> Contra the approach in the NPSHPL which is not concerned with biodiversity management

<sup>15</sup> Supplementary evidence of Claire Hunter dated 31 March 2023 at paragraph 6.11 and 6.13-6.16

*ECO-M4 and M5*

24. Ms Hunter proposes consequential amendments to the requirements on regional and district plans to account for the changes suggested to ECO-P4. I submit these changes are necessary and are not controversial.

*APP 3 and 4*

25. Appendices APP3 and APP4 address the requirements for biodiversity offsetting and compensation. They are of considerable importance in guiding both applicants and decision-makers in the appropriate design of measures to address residual adverse effects on biodiversity values after actions to avoid, minimise and remediate effects are exhausted, and they are fundamentally flawed in the notified version of the pORPS. As far as I am aware these Appendices have not yet been the subject of any proposed amendments by ORC's planning team. They have not been the subject of caucusing between relevant experts. Supported by the expert evidence of Mr Christensen and Mr Hooson, Ms Hunter has proposed significant revisions to both appendices to bring them into line with contemporary best practice.
26. In the notified version of the pORPS these policies are effectively a 'roll-over' of the provisions in the partially operative RPS 2019. OGNZL has direct experience (as does ORC) in the application of these provisions. They were considered in the context of OGNZL's Deepdell North resource consent application, and in granting consent for a suite of actions that the ecologists agreed would result in a good outcome for biodiversity where gains would exceed losses the Commissioners had to look past the policies and focus on the effects of what was being proposed. Notably, in that example ORC was not only a consent authority in relation to the water and discharge permits applied for, but was also (through its planning

directorate) a submitter on the application. Given that history it is surprising the ORC appears to have made no effort to address the problems it must know the appendices create. Perhaps the explanation is found in the fact that none of the planners working on the pORPS for ORC were involved in the Deepdell North resource consent application process.

27. The fundamental flaw in APP3 and 4 is that the matters that are addressed in the context of both biodiversity offsets and biodiversity compensation are expressed as conditions to be met before any proposed action ‘qualifies’ for consideration (i.e., they are expressed as presumptive limits), rather than as principles to be considered when assessing the appropriateness and quality of the outcomes proposed. This means that according to the appendices as worded in the notified pORPS a biodiversity offsetting or compensation proposal cannot be put on the table for consideration if it fails to satisfy one of the criteria, even if that proposal would lead to positive biodiversity outcomes. I submit that is both incorrect as a matter of law, and inappropriate as a matter of good (or even sensible) biodiversity effects management.

28. In their evidence for OGNZL, both Mr Christensen and Mr Hooson express concern with the way APP3 and 4 are specified as ‘criteria’. Mr Hooson suggests a better approach would be “to amend APP3 and APP4 so they set out the principles or framework for considering the adequacy and appropriateness of offsetting and compensation proposal at the consenting stage”<sup>16</sup>. Mr Christensen also has concerns with the way the offsetting criteria in APP3 are criteria that must be met in order to qualify as offsetting<sup>17</sup>. Instead he favours the approach used in BBOP

---

<sup>16</sup> Evidence of Scott Hooson dated 23 November 2022 at paragraph [15].

<sup>17</sup> Evidence of Mark Christensen dated 22 November 2023 at paragraphs [49] and [50] to [53] and [90].

and the 2018 guidance which requires regard to be had to the principles, leaving the decision maker to decide on the evidence and in accordance with the other principles if something can be offset<sup>18</sup>. Mr Christensen has similar concerns with APP4 and considers that it is more useful to define biodiversity compensation in terms of its purpose and provide a framework of principles against which the appropriateness of a proposal can be assessed<sup>19</sup>.

29. Mr Christensen suggests amending the appendices to set out a framework for considering an offset and to link this to the effects management hierarchy. His recommended changes are set out in his Appendix 4.

30. In his evidence Mr Christensen says<sup>20</sup>:

*Rather, the matters set out in APP3 (and APP4) should be expressed as issues which must be considered (where relevant) and not as criteria which must be 'complied with'. This would allow case by case normative decision making based on the evidence before a decision maker. What is, or is not, appropriate as offsets or compensation requires such a case by case assessment, and to try to do that in advance in the abstract in the RPS provisions is, in my opinion, fraught with uncertainty, and therefore not the most effective and efficient policy outcome.*

31. Mr Christensen then goes on to make the important point that while criteria to be applied with in the form of a 'bright line test' may seem an attractive proposition,

---

<sup>18</sup> Evidence of Mark Christensen dated 22 November 2022 at paragraph [53].

<sup>19</sup> Evidence of Mark Christensen dated 22 November 2022 at paragraphs [55], [90] and [170].

<sup>20</sup> Evidence of Mark Christensen dated 22 November 2022 at paragraph [90].

such bright line tests do not work effectively when the criteria are not certain. In his evidence he says<sup>21</sup>:

*While having a 'bright line test' may seem an attractive proposition to some who are tasked with applying the pORPS in deciding consent applications, in my opinion bright line tests only work effectively and efficiently when the criteria are very clear for all interested parties and supported by the weight of expert opinion. Based on my experience, the criteria in the pORPS are neither agreed upon nor clear, and rather than simplifying the application of the pORPS, these 'tests' will instead result in continuing disagreement between ecologists as to both what the criteria mean and whether they are met.*

32. In addition to this over-arching concern, OGNZL seeks specific amendments to various criteria so that they are more realistic and workable. For example:

- a. APP 3(1)(a) in the notified wording says that biodiversity offsetting is not available for an activity that will result in the loss of any individuals of Threatened taxa from an ecological district.<sup>22</sup> Mr Hooson considers the reference to the loss of any individuals is “very stringent”<sup>23</sup> and Mr Christensen considers it “novel”.<sup>24</sup>
- b. APP3(1)(b) says offsetting would not be available if the activity results in “measurable loss within an ecological district to an At Risk-Declining taxon”.

---

<sup>21</sup> Summary Statement of Evidence of Mark Christensen dated 13 April 2023 at paragraph [15].

<sup>22</sup> Other than kanuka (*Kunzea robusta* and *Kunzea serotina*).

<sup>23</sup> Evidence of Scott Hooson dated 22 November 2022 at paragraph [75].

<sup>24</sup> Evidence of Mark Christensen dated 22 November 2022 at paragraph [162].

Mr Hooson considers that the meaning of “measurable loss” is unclear and problematic as even the loss of one individual would be measurable.<sup>25</sup>

- c. Mr Christensen also has concerns with the wording in APP3(2)(b) which suggests, by using the words ‘measured’ and ‘calculated’ that biodiversity modelling is required in all situations<sup>26</sup>. As he points out in his evidence, there can be constraints and disagreements over which models should be used in different situations<sup>27</sup>. He suggests amending APP3(2)(b) as follows “the offset achieves no net loss and preferably a measurable net gain in indigenous biodiversity, (having regard to ~~as measured by~~ type, amount and condition) at both the impact and offset sites using an explicit loss and gain ~~calculation~~ evaluation.”
- d. Clause 2(h) requires the “outcome of the outset is achieved within the duration of the resource consent”. As Mr Hooson explains in his evidence this could preclude longer-term offsets which may achieve better biodiversity outcomes<sup>28</sup>. He suggests using the wording in Appendix 3 of the NPS-IB, “Biodiversity offsets are managed to secure outcomes of the activity that last at least as long as the impacts, and preferably in perpetuity”.<sup>29</sup>

33. In relation to APP4, both Mr Christensen and Mr Hooson share similar concerns as with APP3, in that APP4 is written as criteria to be met rather than principles to guide decision making.

---

<sup>25</sup> Evidence of Scott Hooson dated 22 November 2022 at paragraph [79].

<sup>26</sup> Evidence of Mark Christensen dated 22 November 2022 at paragraph [177].

<sup>27</sup> Evidence of Mark Christensen dated 22 November 2022 at paragraph [178].

<sup>28</sup> Evidence of Scott Hooson dated 22 November 2022 at paragraph [85].

<sup>29</sup> See evidence of Scott Hooson dated 22 November 2022 at paragraph [85].

34. Mr Hooson is also concerned with APP4(1)(b) and (c) which talks about “removal or loss of viability of habitat” and “loss of health and resilience” respectively. In his opinion both of these matters will require an ecologist to assess and make a determination, and therefore the answers to these questions are likely to be subjective<sup>30</sup>.

*Relevance of Section 104(1)(ab)*

35. In ‘rolling over’ the offsetting and compensation provisions of the partially operative RPS 2019 the ORC has failed to account for the relevance of section 104(1)(ab) RMA. The relevant provisions of the partially operative RPS 2019 were required to be determined as if the amendments to the RMA made by the Resource Legislation Amendment Act 2017 (**RLAA**) had not occurred<sup>31</sup>.

36. One of the provisions inserted into the RMA by the RLAA is section 104(1)(ab). Section 104(1) sets out the matters a consent authority must have regard to when considering a resource consent application. Section 104(1)(ab) reads:

*(ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity;*

---

<sup>30</sup> See evidence of Scott Hooson dated 22 November 2022 at paragraphs [93] and [94].

<sup>31</sup> Schedule 2 clause 13 of the Resource Legislation Amendment Act 2017 as discussed in *Oceana Gold (New Zealand) Limited v Otago Regional Council* [2019] NZEnvC 41 at [56] – [57]



37. Unlike the position that applied at law when the provisions of the partially operative RPS 2019 were considered, section 104(1)(ab) is now a mandatory consideration when deciding on a resource consent application. It unequivocally requires a decision maker to have regard to *any* measure an applicant proposes or agrees to that is designed to offset or compensate for an adverse effect. There is nothing in the provision to suggest that biodiversity offsets and compensation are able to be dealt with differently from other types of offset and compensation for the purposes of this requirement. The position at law in 2023 is that a decision-maker needs to turn their mind to the outcomes of actions that are proposed, and cannot rule out any proposed actions because they fail to meet a presumptive limit in a regional policy.
38. The biodiversity and offsetting provisions in the partially operative RPS 2019 are not alive to section 104(1)(ab) (and as a matter of law could not be) and sit uncomfortably when viewed in light of that requirement which is now firmly “in play”. The problem is that on their face the notified versions of APP3 and 4 establish presumptive limits. That is, they purport to constrain the circumstances when offset and compensation proposals can be considered. That approach is simply not available as a matter of law in the context of the pORPS.
39. While in the determination of the existing partially operative RPS 2019 provisions section 104(1)(ab) could not be considered, that is not the case with the pORPS. The notified pORPS curiously largely repeats the partially operative RPS 2019 provisions regarding biodiversity offsets and compensation - with their presumptive limits - without recognising the change in the statutory context as a result of the enactment of the RLAA and the inclusion of section 104(1)(ab), and without recognising that in the development of national policy in the form of the Exposure

Draft NPSIB (as I discuss below) a deliberate choice has been made not to adopt the approach that was taken in the partially operative RPS 2019<sup>32</sup>.

40. Subordinate national instruments addressing biodiversity that have been developed since the enactment of section 104(1)(ab) - the NPSFM and the exposure draft of the NPSIB - are alive to the requirement of section 104(1)(ab) and set limits on the use of biodiversity offsets and compensation in outcome terms. That is, they set out principles as to what it is that biodiversity offsets and compensation proposals should achieve (or should avoid). In so doing they provide more detailed guidance to decision makers to assist them as they discharge their duty under section 104(1)(ab) to evaluate whatever proposals an applicant might advance or agree to.

41. The ORC's own evidence is alive to the problem. I note that the author of the section 42A report says<sup>33</sup> (emphasis added):

*I disagree with Queenstown Airport and Contact that APP3 is inconsistent with s104(1)(ab) because a pathway has been provided for offsetting. An applicant may propose something else, and it will be tested against what is in the pORPS or lower order plans, and a*

---

<sup>32</sup> See *He Kura Koiora i hokia. A discussion document on a proposed National Policy Statement for Indigenous Biodiversity* pages 63 – 67 ( <https://environment.govt.nz/assets/Publications/Files/he-kura-koiora-i-hokia-discussion-document.pdf> ). This is the discussion document that accompanied the release of the draft NPSIB for consultation. See also *He Kura Koiora i hokia: A proposed National Policy Statement for Indigenous Biodiversity: Summary of submissions* pages 124 - 129 ( <https://environment.govt.nz/assets/Publications/Files/npsib-summary-of-submissions.pdf> ). This is the Ministry's summary of submissions on the draft NPSIB.

<sup>33</sup> <https://www.orc.govt.nz/media/12208/10-eco-s42a-report-website.pdf> at para 574

decisionmaker may prefer what the applicant has proposed in a particular case.

42. The position in the notified pORPS is therefore in error:

- a. Section 104(1)(ab) is clear that all offset and compensation proposals are to be had regard to.
- b. The biodiversity and compensation principles in the NPSFM and exposure draft NPSIB post-date the enactment of section 104(1)(ab) and do not conflict with it by providing principles as to what proposals should and should not achieve that are able to be applied to guide the assessment of any proposal an applicant advances.
- c. The partially operative RPS 2019 provisions regarding biodiversity offsetting and compensation could not consider section 104(1)(ab) and are in conflict with it by purporting to proscribe the circumstances when decision makers can consider a biodiversity offsetting and compensation proposals.
- d. The PORPS largely repeats the provisions of the partially operative RPS 2019 as if section 104(1)(ab) does not exist, but the Otago Regional Council's own evidence on the matter acknowledges section 104(1)(ab) and notes that proposals that do not confirm to the PORPS 2021 will still be considered and may be accepted.

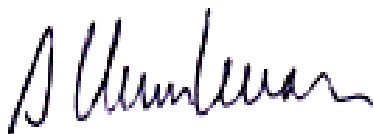
43. The result is that the provisions of APP3 and 4 as notified must be changed to read as considerations and not as presumptive limits. The revisions recommended by OceanaGold's experts express matters as they must be expressed and should be adopted.

*App2 significance criteria*

44. I am supportive of the approach the Panel took in asking the ecologists to work together on the significance criteria. Unfortunately, the JWS that resulted from the process leaves the Panel in a difficult position. None of the ecologists, including the ORC's own expert Dr Lloyd, support the notified provisions of APP2, but they are not agreed on what changes should be made.
45. It appears that the ecologists are agreed on changes that should be made to the representativeness criterion, and in my opinion you should adopt their suggested amendments to that criterion.
46. As to the other criteria I do not express a view on behalf of OGNZL. I have asked Dr Thorsen and Mr Hooson to clearly set out their preferences, but what you do with that, and with the views of the various ecologists engaged by the other submitters and by the ORC, I express no particular view about.
47. I confine myself to the following observations:
  - a. It helps nobody for the exposure draft NPSIB to continue to languish unimplemented. As soon as there is an operative national policy statement that establishes indigenous biodiversity significance criteria that apply nationally and must be given to at regional and district levels the intractable lack of resolution between ecologists on what significance means can (hopefully) be put to rest. There is nothing the Panel, the ORC, or any submitter can do about that. We are all at the mercy of Wellington in that regard;
  - b. The JWS records that all ecologists (including the ORC's ecologist) agree a guidance document on how to apply whatever significance criteria are included in APP2 is essential, presumably to facilitate consistent and reliable application of the criteria. To my knowledge no appropriate

guidance document exists and I have no knowledge what the ORC is proposing to address this deficiency. I submit you should insist that such a document is developed and included in the pORPS as an Appendix before the instrument is made operative;

- c. There is a relationship between the policy choice that is made about where the 'bar' for significance is set, and the policy implications that flow from the determination that an area's biodiversity is 'significant'. You must not ignore that relationship and you must be deliberate in the choices you make in the absence of national direction that takes the choice out of your hands. The way the pORPS is drafted means the default position<sup>34</sup> is that activities that have adverse effects on significant biodiversity values must be avoided. That is a strong direction and, assuming you maintain that approach in your recommendation to the ORC, I submit you should favour significance criteria that set the significance 'bar' at a high (as opposed to low) level. The evidence from most of the ecologists as expressed in the JWS is that at present the 'bar' in the notified APP2 provisions is set low. If you accept that evidence it leads to the logical conclusion that either the 'bar' should be raised or the default 'avoid' approach should be reconsidered.



---

S Christensen/J St John  
Counsel for Oceana Gold (New Zealand) Limited

---

<sup>34</sup> Subject to the exceptions set out in Policy ECO-P4

17 April 2023