

BEFORE THE 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 (non-freshwater parts)

SUMMARY STATEMENT OF EVIDENCE OF MARK CHRISTENSEN

FOR OCEANA GOLD NEW ZEALAND LIMITED

CHAPTER 10 – ECO AND APP 3 AND 4

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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

Introduction

1. My evidence comments on the suitability and utility of the biodiversity offsetting and compensation policies contained in the notified pORPS. It focusses on Policy ECO-P6 – Maintaining indigenous biodiversity, APP3 – Criteria for biodiversity offsetting, and APP4 – Criteria for biodiversity compensation.

The importance of the amended NPSFM 2020

2. Throughout my evidence, I compared the approach in the pORPS with other examples of the regulation of biodiversity offsets and compensation, including the (then) Exposure Draft of the amendments to the NPSFM 2020 and the Exposure Draft of the NPSIB.
3. My evidence set out why I consider it significant that both Exposure Drafts link biodiversity offset and compensation principles with the effects management hierarchy by providing that regional plans must add a provision that an application may not be granted unless “the council is satisfied that, if aquatic offsetting or aquatic compensation is applied, the applicant has had regard to the principles in Appendix 6 or 7, as appropriate”¹ or “the decision-maker is satisfied that the applicant has demonstrated how each step of the effects management hierarchy will be applied”.²
4. This approach can be contrasted with the approach in the pORPS which attempts to define offsets and compensation by reference to the principles, which are seen to be ‘criteria’ which must be ‘met’. As I discussed in my evidence this is inconsistent with best practice as I understand it and has led to difficulties in

¹ NPSFM Exposure Draft - Amendment to Clause 3.22(3)(b).

² NPSIB Exposure Draft – Clause 3.10(4)(a). I comment below on the reasons why I consider the NPSFM formulation to be preferable to the NPSIB formulation.

interpretation and application. I therefore disagree with Ms Mealey's statement (for the Director-General of Conservation) in her paragraph 33 that "In general, I support the approach taken by the Otago Regional Council (ORC) with the criteria for offsetting and compensation and acknowledge they largely follow good practice." I also disagree with Ms Mealey's assertion³ that the use of 'criteria' "has been done successfully in the West Coast RPS." As I set out in my evidence, my experience is that the West Coast RPS has introduced confusion and uncertainty by doing this, and that has resulted in significant additional costs and effort being expended on litigation.

5. The NPSFM has now been formally amended. While there are some minor changes from the Exposure Draft⁴, the approach to offsetting and compensation which I described in my evidence has been confirmed.
6. I understand that the Exposure Draft of the NPSIB has not yet been reported back to Cabinet following the submission process, and it may or may not be released prior to the election in October. My evidence described some major reservations I have with respect to the wording of the NPSIB Exposure Draft where it differed from the approach in the NPSFM. I also understand those reservations were included in various submissions made on the NPSIB Exposure draft (with which I was not involved).

³ Paragraph 36.

⁴ In this context, principally Clause 3.22(3)(a)(ii) which now provides "if aquatic offsetting or aquatic compensation is applied, the applicant has complied with principles 1 to 6 in Appendix 6 and 7, and has had regard to the remaining principles in Appendix 6 and 7, as appropriate." While this could be seen to have 'strengthened' the obligation, I consider it critical that compliance must be with principles (which are expressed as general principles) rather than 'criteria' which must be 'met'. I consider the difference to be substantive. Having said that, I am unclear what 'complying with' a principle means in this context, and what difference these words make compared to the exposure draft. Perhaps it is intended to be the same as the requirement to 'give effect to' compared with 'have regard to' (as per references to Te Tiriti in the Conservation Act and the Natural and Built Environments Bill). But if that's so, then why not use those same words?

7. Consequently, it is my opinion that the amended NPSFM 2020 now provides the most appropriate approach to regulating offsets and compensation. I therefore disagree with the evidence of Ms Mealey and Mr Brass on behalf of the Director-General in that regard⁵, As I stated in my evidence, I consider that the NPSFM also better reflects the BBOP guidance as summarised in the local government 2018 guidance document.
8. I am also of the view that the provisions in the pORPS about offsets and compensation for effects on terrestrial biodiversity should be consistent with the approach to aquatic offsets and compensation which is now mandated by the NPSFM 2020. The changes I suggested in my evidence, and as contained in the evidence and supplementary evidence of Ms Claire Hunter, set out how that can be achieved.

Definitions

9. There is not (yet) a national regulatory definition of 'biodiversity offset' as it applies to terrestrial biodiversity. In contrast, the NPSFM 2020 contains definitions for 'aquatic offset', 'aquatic compensation', and 'effects management hierarchy' which are required to be inserted into regional plans. The NPSIB Exposure Draft proposes that similar definitions relating to terrestrial biodiversity be inserted into regional policy statements and regional plans.

⁵ Ms Mealey evidence dated 23 November 2022 paragraphs 31 and 32; Mr Brass evidence dated 23 November paragraph 117. Nor do I agree with the statement (Ms Mealey paragraph 31) that "a working group of the country's leading biodiversity offsetting and compensation experts developed the offsetting and compensation frameworks in the exposure draft". I am aware that experts with experience in the practical application of offsets and compensation (not myself) were not included in the development of either the original or exposure drafts of the proposed NPSIB. Indeed, I understand that in submissions on both the original and exposure drafts those experts have expressed similar concerns about the NPSIB to those I set out in my evidence.

10. The definitions about terrestrial biodiversity offsets in the pORPS are inconsistent with the definitions in these national documents. I cannot see any policy or legal justification for the pORPS defining and dealing with offsets and compensation differently depending on whether they apply to terrestrial biodiversity or wetlands and riverbeds. In my opinion, additional definitions should be added which provide for terrestrial 'biodiversity offsets' and 'biodiversity compensation', the wording of which is aligned with the definitions of aquatic offset and aquatic compensation in the NPSFM. I also consider that the existing definition of the 'effects management hierarchy' in the pORPS should be amended so that it applies to both terrestrial and aquatic offsets and compensation.

Application of the effects management hierarchy

11. My evidence describes the justification for preferring the NPSFM 2020 approach to the effects management hierarchy over Policy ECO-P6 in the pORPS. The effects management hierarchy is already present in the pORPS and the Otago Regional Plan: Water as it relates to wetlands and riverbeds. There is, in my view, no policy justification for the pORPS applying the effects management hierarchy in relation to effects on terrestrial indigenous biodiversity differently to how the NPSFM and pORPS apply the hierarchy in relation to effects on wetlands and riverbeds.

12. I consider the way the obligations are expressed at each step of the hierarchy, to be better expressed in the NPSFM and more appropriate than ECO-P6. It is my opinion that taking that same approach for effects on terrestrial biodiversity is reinforced by the 2022 NPSIB Exposure Draft. In my opinion, the revised wording for ECO-P6 recommended by Ms Hardiman in her second supplementary evidence of 24 February 2023 is an improvement over the notified wording. However, I agree with Ms Hunter's supplementary evidence of 31 March 2023 that it does not go far enough. I consider Ms Hunter's proposed wording to be preferable as it would make that policy consistent with the NPSFM 2020 approach.

Offsets and compensation – ‘criteria’ or ‘principles’?

13. My primary concern with the pORPS is that ECO-P6, APP3, and APP4 in the pORPS are inconsistent with the way offset principles have been developed because they refer to them as ‘criteria’ that ‘must be met’ in order to ‘qualify’ as an offset. In contrast, the NPSFM 2020 (correctly in my opinion) treats the principles as matters which must be considered, and the appropriateness of a particular proposed offset is assessed considering the evidence on each of those considerations.
14. That is, the pORPS attempts to provide an *a priori* ‘bright line’ test for what can be considered an offset. This sets up applicants, submitters, and the council for extended arguments about what the definitions mean and how they should be applied. In contrast, when the offset principles are used as they were intended – as assessment matters and guidance about how to assess appropriateness - the emphasis can be on the cogency of the evidence presented in support of a specific proposed offset to address a specific proposed residual effect.
15. 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.
16. In contrast, the NPSFM 2020 definition of offset relates to the purpose for which the offset is being proposed , rather than attempting to combine that definition with limits about what can and cannot ‘qualify’ as an offset. As I noted above, the NPSFM 2020 links the principles with the effects management hierarchy. I consider

this approach to better reflect best practice because it is more consistent with the BBOP approach as described in the 2018 Guidance.

APP3 – Limits to offsets

17. In considering this issue, my evidence first described the development of this principle from BBOP, then as expressed in the 2018 guidance. I then considered how the principle is given effect to in the West Coast Regional Policy Statement 2020, the NPSFM 2020, the 2022 NPSFM Exposure Draft and the 2022 NPSIB Exposure Draft, as the most recent examples of other policy formulations in New Zealand and compare that with the approach in the pORPS. I concluded by setting out my opinion why I believe the notified wording of the pORPS is inconsistent with best practice.

18. I then discussed several amendments to APP3 which I consider should be made to align it with the approach set out in the NPSFM 2020.

19. In my opinion, the setting of a 'limit to offsets' in APP3 by reference to the loss of individuals was novel when it was introduced into the operative RPS in 2019, and it remains so. This can be contrasted with the later West Coast RPS which places the limit not at the loss of an individual specimen of a Threatened species, but at the species or community level. In my opinion, the reference to individuals is also inconsistent with the NPSIB Exposure Draft.

20. I note that in *Oceana Gold (New Zealand) Limited v Otago Regional Council*⁶ the Court refers to and quotes from a 2010 paper I authored which included comments about limits to offsets⁷. While I continue to hold the views expressed in that extract

⁶ [2019] NZEnvC 41.

⁷ Christensen, M. *Biodiversity offsets - a suggested way forward*. Resource Management Journal, Resource Management Law Association NZ, 2010.

from the paper, it is my respectful opinion that those comments do not themselves provide a justification for setting limits on offsets 'upfront' or provide a justification for the specific limits set by the Court in that decision.

21. Having considered the evidence of Mike Thorsen, I consider APP3(1) to be unreasonably restrictive, to the point that it potentially undermines the whole objective of proposing a biodiversity offset. It may be that a decision-maker decides on the evidence before them that even the loss of individuals of certain species is unacceptable and cannot be appropriately offset. But, in my opinion, that is a decision which should be made on the evidence and in accordance with the other principles set out in the relevant policy, not decided *a priori* by way of the policy in its current form.

APP 4 – limits to compensation

22. Like APP3 for offsets, APP4 currently provides limits for the use of biodiversity compensation, both directly in APP4(1) and indirectly as 'criteria' in APP4(2).

23. In my opinion, a provision in a statutory planning document which directs that a decision-maker can only consider biodiversity compensation which is defined by way of specific criteria (as the pORPS purports to do) is not as useful as a provision which defines biodiversity compensation in terms of its purpose and then provides a framework of principles against which the appropriateness of any proposed compensation can be assessed.

24. Amending APP4 to take the latter approach would also make it consistent with the way in which the NPSFM 2020 and the Regional Plan; Water for Otago address offsets and compensation for effects on wetlands and rivers.

Section 42A report

25. Paragraph 58 of the report refers to section 10.4.3 of the Biodiversity chapter and states that the rationale for adopting a 'more stringent approach' than national

direction is set out in that section. I have read section 10.4.3 and in my opinion there is no demonstrated link between the discussion/rationale in that section and taking a 'more stringent' approach than national direction as set out in ECO-P6. The NPSFM 2020 provides a consenting pathway for mineral related activities in relation to rivers and wetlands. The NPSIB Exposure Draft does the same for mineral related activities having effects on SNAs. I do not see the s42A report as providing any justification for the pORPS not following the same approach.

26. Appendix 10c to the s42A report is an April 2022 report by Wildlands. That report is critical about existing practice of biodiversity offsetting. Undoubtedly, there has been some poor practice in the design, assessment and implementation of offsets, but the April 2022 Wildlands report does provide any further details of the basis for these criticisms, nor explain what the 'poor practice' is, and why the notified pORPS needs to be strengthened beyond that provided in national direction to avoid such 'poor practice.'

27. In his 29 September 2022 statement of evidence, the author of Appendix 10c, Dr Kelvin Lloyd, discusses what he considers to be shortcomings of previous practice by Oceana Gold in terms of offsets and compensation. However, rather than providing justification for the pORPS 'going it alone' in terms of setting bespoke limits on offsets and compensation, to the extent that Dr Lloyd's criticisms are valid, in my opinion they simply point to the need for better and more informed and consistent policy, better planning, improved biodiversity impact assessments, more comprehensive monitoring, and greater enforcement, at all levels and across all regions of the country.

Mark Christensen

13 April 2023