BEFORE THE HEARINGS PANEL
APPOINTED BY THE OTAGO REGIONAL COUNCIL

UNDER THE	Resource Management Act 1991 (the **Act**)
IN THE MATTER	the Proposed Otago Regional Policy Statement 2021 (Non-freshwater parts)

LEGAL SUBMISSIONS ON BEHALF OF MANAWA ENERGY IN RELATION TO THE NON-FRESHWATER PARTS OF THE PROPOSED OTAGO REGIONAL POLICY STATEMENT 2021

The ECO Chapter

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MAY IT PLEASE THE PANEL

INTRODUCTION

1. These submissions address Manawa Energy Limited's (**Manawa**) position on the Ecosystems and indigenous biodiversity (**ECO**) chapter of the Proposed Otago Regional Policy Statement (**PRPS**). They are to be read alongside the legal submissions tabled at the hearing on the EIT chapter. Those submissions introduce Manawa and the reasons for its interests and involvement in the Otago region; and introduce Manawa's company and planning witnesses who also appear today.

2. In relation to the ECO topic, Manawa has collaborated with another renewable electricity generator, namely Contact Energy. Dr Vaughan Keesing has provided ecological assistance to, and evidence on behalf of, both generators. Dr Keesing has close to 30 years of experience as an ecologist and has worked in a variety of locations across NZ, including in Otago.

Scope of submissions

3. In these submissions I will:

   (a) Explain Manawa's overall position.

   (b) Identify the relief and remaining areas of disagreement following the joint conferencing.

   (c) Address legal issues arising, including:

      (i) The status and relevance of Draft National Policy Statement for Indigenous Biodiversity (**draft NPSIB**); and

      (ii) The section 32 analysis for APP 2 criteria.

OVERALL POSITION

4. Simply put, the position is that the ECO chapter is overly conservative. It sets too low a threshold for protection. It takes a "no effect" approach to ecological areas; an approach which appears to apply regardless of the level of significance or values of natural areas or the type of activity that is being considered. The criteria for determining Significant Natural Areas (**SNAs**) set a low threshold for significance

and their application is likely to result in large swathes of the region being identified as significant.

5. As Dr Keesing explains:

   (a) The assumption underlying the proposed approach to indigenous biodiversity; ie that it is rare or under imminent threat of loss in Otago; is not correct.[1]

   (b) Instead, the PRPS approach "*may prove obstructive to biological gains and put the future of biodiversity in the region outside of the conservation estate, and other large scale protection lands, significantly at risk*".[2] He explains that "*while it is desirable to continue to reduce indigenous biological diversity loss, it is not desirable to do so at any cost, especially by preventing options that may deliver biodiversity benefits. This is especially so when the proposed RPS also recognises that restoration and enhancement are required pathways to attaining more indigenous biodiversity*."[3]

   (c) Climate change will lead to a fundamental exacerbation of the current rate of loss of indigenous biodiversity and addressing this requires prioritisation of reduction of greenhouse gas emissions and enhancement of the resilience of our indigenous biodiversity.[4] However the PRPS works against this, by precluding REG projects that could deliver overall biodiversity outcomes for the region and country.[5]

6. If the proposed approach to managing effects on ecological areas is retained, the result is that it will be extremely difficult to maintain, upgrade, or establish new renewable electricity generation in Otago. This is inconsistent with the National Policy Statement for Renewable Electricity Generation (**NPSREG**).

7. Lastly, I note that the interaction of the ECO policies is not clear, and it needs to be. Sometimes explanatory text or more words are used to guide readers, which could assist here.

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[1] Evidence of Dr Keesing at paragraph 4.4.
[2] Evidence of Dr Keesing at paragraph 4.3.
[3] Evidence of Dr Keesing at paragraph 5.2.
[4] Evidence of Dr Keesing at paragraph 10.13.
[5] Evidence of Dr Keesing at paragraph 10.17.

RELIEF AND AREAS OF DISAGREEMENT

8. Manawa sought amendments to:[6]

(a) Policies:

ECO–P4 – Provision for new activities
ECO–P5 – Existing activities in significant natural areas
ECO–P6 – Maintaining indigenous biodiversity

(b) Methods:

ECO–M4 – Regional plans
ECO–M5 – District plans

(c) Appendices:

APP2 – Significance criteria for *indigenous biodiversity*
APP3 – Criteria for *biodiversity* offsetting
APP4 – Criteria for *biodiversity* compensation

9. The s42A report recommended that "operation and maintenance" be added to Policy ECO-P4. That resolves Manawa's submission point in respect of that policy.

ECO–P5 – Existing activities in significant natural areas

10. Policy ECO-P5 provides a pathway for existing lawfully established activities within SNAs that may adversely affect indigenous species and ecosystems that are taoka.

11. Manawa sought amendments to policy ECO-P5 that better provide for minor upgrades. The Officer recommended the acceptance of the submission seeking reference to "minor upgrades" as well as the continuation and maintenance of existing activities but considered it important that the parameters in clause (1) and (2) were still met.

12. Manawa sought changes to clause (2) to require that effects be "*the same or similar in character, spatial extent, intensity or scale*" rather than effects being "*no greater*". While in the s42A report the Officer referred to Manawa's relief in

[6] The s42A report refers to "Trustpower" mistakenly in the section on policy ECO-P7. For completeness, Manawa (then Trustpower) did not submit on that policy.

respect of clause (2) she did not respond to it. However, now in her opening statement she considers that the change "*could result in existing activities within SNAs having potentially greater adverse effects.* The Officer reasons that "*If an activity does not meet the parameters set out in clauses (1) and (2) of ECO-P5 then it falls under ECO-P3 which has an extra test, provided it does not trigger ECO-P3(1). This extra test requires applications to show they have stepped through the effects management hierarchy, which ECO-P5 does not"*.

13. With respect, I find this reasoning hard to follow. If the proposed activity is not considered a minor upgrade, then, in the case of Manawa, it will likely to be dealt with as a "new activity" under ECO-P4 as regionally significant infrastructure to which ECO-P3 does not apply (rather the effects management hierarchy provided for by ECO-P6).

14. In terms of the relief sought, Ms Styles' opinion is that "same or similar" is a more generally understood resource management term and is more appropriate than "no greater". The effects cannot be more significant, because to fall within the application of the policy they must be the *same or similar*.

15. In my submission, it is preferrable to adopt understood and oft applied concepts rather than introducing ones that are not frequently applied and so are not supported by a body of case law. Simply as a matter of sense, it is difficult to see how effects can be "no greater in character". Using "same or similar" makes sense in the clause and provides for a comparative assessment of the nature of effects as well as their magnitude.

ECO–P6 – Maintaining indigenous biodiversity

16. Policy ECO-P6 requires the application of an effects management hierarchy for indigenous biodiversity. It requires the avoidance of effects on all indigenous biodiversity as the first priority, and then to remedy, mitigation, offset or compensation for any residual effects. In other words, all effects on biodiversity must be addressed. This applies regardless of the significance of the biodiversity; so equally to a high value area of native trees as to a low value area.

17. As Ms Styles explains in her evidence *"[t]he way the policy is currently worded means that it leads to a no adverse effects expectation, as it requires applications to avoid, remedy, mitigate, offset, and compensate effects, and if all effects cannot be managed through this hierarchy, then it defaults back to avoid*". Read alongside

the offsetting and compensation appendices (APP 3 and APP 4), which say that these are not management options for "vulnerable" biodiversity, if a project would have any residual adverse effects on vulnerable biodiversity, it cannot proceed. This exclusion is strongly opposed for the reasons outlined in the evidence. In my submission the approach, which is essentially to stop in its tracks any proposal that might affect biodiversity that is considered "vulnerable", and where that is not even defined let alone identified and mapped, is entirely inappropriate.

18. An approach, of having a specific provision which provides a little more flexibility for important types of activities that need to be better enabled, is entirely appropriate and consistent with other policy direction at both a national and regional level. The National Policy Statement for Freshwater Management (**NPSFM**) and the draft NPSIB, for example, both take this approach. In fact, the NPSFM was only recently amended to provide even greater flexibility after the significant implications of its approach became apparent. This highlights the need to take utmost care to ensure that the implications of conservative and directive policies are properly understood and evaluated before including them in the RPS.

19. The Officer in the s42A report acknowledges that the biodiversity effects management hierarchy is more stringent than the effects management hierarchy contained in the LF chapter (s42A report). The application of an effects management hierarchy to indigenous biodiversity is not directed by any operative National Policy Statement. Notwithstanding this, it appears as though the Officer is recommending the rejection of submission points based on it being a policy that "*stands on its own*", and so a deviation from it is not possible.

20. With respect, the blanket application of the effects management hierarchy in the way proposed is simply a policy decision of the regional council. Given how restrictive it is, in my submission a careful analysis of the approach under s32 is required and this has not been sufficiently done. The implications are likely to be significant and, in some instances, inconsistent with what is national direction under the NPSREG.

21. One way of addressing this is as Manawa has suggested, being the limitation of the effects management hierarchy for indigenous biodiversity to significant adverse effects. Per the evidence of Dr Keesing, minor and less than minor adverse effects

should not necessitate management.[7] Notably, counsel for the regional council agrees with Dr Keesing, supporting an amendment "to avoid any doubt".

22. I understand that counsel for the mining companies yesterday raised an interesting point in relation to 104(1)(ab) of the RMA. I agree that on its face that sub-section appears to limit the ability for plans to remove from consideration offsets and compensation entirely. In saying that I also recognise that in many situations throughout the country, policy direction (including at a national level) does appear to conflict with this requirement. For example, where a policy directs the avoidance of effects and leaves no room for anything else, then offsetting and compensation are not available considerations. Section 104(1)(ab) would still however apply to any other positive effects of the activity.

Methods ECO-M4 and ECO-M5

23. Methods ECO-M4 and ECO-M5 direct regional and district plans to require that no resource consents be granted unless the sequential steps in policy ECO-P6 have been followed.

24. Manawa's submission was that it is inappropriate for a regional policy statement to state circumstances in which a consent application must be declined, with that being a matter that should be determined through the appropriate RMA process.

25. Ms Styles provides expert evidence that in her opinion the implementation of the methods will require decline or prohibited activity status where the effects management hierarchy is not followed. This, in her view, is not something the PRPS should direct, rather there should be more flexibility provided for lower order planning documents. This is particularly so given the application of the effects management hierarchy as a means of achieving the objectives and policies may well be too simplistic an approach. In her opinion, this directive aspect of the method should be deleted.

26. The Officer does not recommend accepting the submission to delete clause (2)(b) "*because it does not 'make the decision' on resource consent applications, it provides a policy framework for lower order plans*", and it is for the decision-maker to decide what weight to give a policy.

[7] Evidence of Dr Keesing at 9.5.

27. The degree of flexibility to be provided by a provision in a regional policy statement must be a matter considered at the stage at which it is proposed. While these methods do not "make the decision" on consent applications, which they cannot as a matter of law do, the method of implementing them is clear – direction in regional and district plans to decline and/or prohibited activity status.

28. In my submission the Panel needs to consider and decide first, as to whether that is an appropriate approach for this RPS to take and secondly, whether it is the most appropriate way to achieve the objectives, having regard to the matters set out in s32 RMA. In light of Dr Keesing's evidence that a linear hierarchy of sequential steps for the entire system can reduce or limit the potential for ecological benefits,[8] such an inflexible and directive approach should be avoided.

Appendices APP2, APP3 and APP4

29. Appendices APP2, APP3 and APP4 set out, respectively, the criteria for determining significant natural areas, applying biodiversity offsetting, and applying biodiversity compensation.

APP2

30. The ecological experts have participated in joint witness conferencing which has helpfully narrowed the issues and identified the outstanding areas of disagreement in relation to APP2.

31. Following that caucusing, the areas of disagreement in relation to the criteria (as relevant to Manawa's case) are:

(a) The number of criteria that need to be met before an area is considered to be a significant natural area - whether only one criterion needs to be met, or as Dr Keesing suggests, whether the more appropriate approach is to categorise biodiversity as significant where it meets the Rarity criterion, or two or more of the other criteria. Several of the experts acknowledge that meeting only one of the criteria is a low threshold for significance.

(b) Whether the Rarity criterion should have a regional or national focus.

[8] Evidence of Dr Keesing at paragraph 9.2.

(c) Whether the criterion for Diversity is required or is, as Dr Keesing opines, redundant.

(d) Whether distribution limits are relevant or a reasonable ecological consideration in Distinctiveness.

(e) The role of wetlands playing an important hydrological or ecological role in the Ecological context criterion.

32. All experts have agreed that the vulnerability criterion should be deleted.

33. Dr Keesing yesterday took the Panel through the key outcomes of the JWS, with a focus on the remaining areas of disagreement as between the experts. He is available today in the event further questions arise.

APP3 and APP4

34. Dr Keesing raises a number of concerns with the clauses in these appendices for the Panel's consideration. These appendices were not the subject of conferencing.

35. The primary concern with the appendices that define the approach to offsetting and compensation is the clause that says offsetting / compensation is not available for irreplaceable or vulnerable biodiversity. That term is not defined. This approach is different to that taken in the exposure draft of the NPSIB with vulnerability as an example rather than a test. As discussed above, this is a potentially significant impediment to activities in the region and needs to be very carefully evaluated.

LEGAL ISSUES

36. There are two legal matters that I wish to briefly address:

(a) The relevance of the Exposure Draft National Policy Statement for Indigenous Biodiversity (**draft NPSIB**); and

(b) Whether or not the implications of implementing the criteria are relevant under s32.

Draft NPSIB

37. The Council's legal counsel's submission that the draft NPSIB has no legal standing is supported. There is no statutory direction to give effect to it.

38. In my submission the Panel can take the draft NPSIB into account but will need to exercise some real care in doing so. It is still going through its process. The draft NPSIB may be relevant to the Panel's consideration to the extent that it reflects or is consistent with the ecological evidence from experts before this Panel and so reflects best practice in the assessment and management of effects on indigenous biodiversity.

Section 32 analysis

39. I note the statement under "general matters" in the joint witness statement at 4 that the implications of implementing the criteria have not been analysed as part of the section 32 or 42A reports. Several of the experts have noted that they do not consider it relevant.

40. For completeness, I note that the proposed criteria are "provisions" in the PRPS and so are to be subject to a s32 analysis as a legal requirement.

41. There are a range of expert opinions on the criteria and so it is not a case of adopting an industry-wide or generally accepted technical approach to determining significance. Nor is the approach to significance and the policy framework that applies alongside it, the subject of operative national direction that must be given effect to. The potential implications of the criteria and the framework in which APP2 sits, must be fully assessed under s32.

DATED 18 APRIL 2023

Lara Burkhardt
Counsel for Manawa Energy Limited