

## Proposed Otago Regional Policy Statement Hearing – ECO Chapter

### Supplementary speaking notes of Murray Brass for the Director-General of Conservation Tumuaki Ahurei

1. These notes are intended to assist the Panel by providing written comments covering some key matters I addressed orally at the ECO Chapter hearing on 19 April 2023, and responding to questions to DOC from the Panel at that hearing.
2. The difference between maintenance and protection: In summary, I consider that protection is a narrow and strict defensive action which sits within a broader range of actions that make up maintenance.
3. I understand protection to involve defending a value from loss, where the value has significance that warrants such an approach (eg matters under s6(c) of the Act, or Policy 11(a) of the NZCPS 2010). In my experience protection is implemented through RPS and plan provisions (especially ‘avoid’ policies and prohibited activity rules) and through consent decisions which do not allow loss of those values.
4. In contrast, I consider that maintenance of indigenous biodiversity under s30(1)(ga) of the RMA applies to all biodiversity values generally throughout the region, and has more options for implementation - including a broad range of RPS and plan provisions, consents decisions which manage biodiversity in some way, and non-regulatory measures. I see maintenance of indigenous biodiversity as incorporating:
  - a. Protection where this is warranted, as discussed in para 3;
  - b. Actions which are neutral to biodiversity values, such as policies or consent decisions relating to offsetting;
  - c. Actions which entail some loss of biodiversity values which has been considered and accepted, such as permitted activity rules for indigenous vegetation clearance, or granting of consents which allow some habitat loss;
  - d. Actions which promote or restore biodiversity values, such as permitted activity rules for conservation activities, granting of consents which involve increased protection or habitat enhancement (common in voluntary measures as part of rural and lifestyle subdivisions), or funding for biodiversity initiatives.

5. The relative proportions or make-up of the different elements will depend on the region, the values involved, the risks involved, and the relevant assessment matters under s32.
6. For the pORPS I consider there are a number of provisions which would already implement maintenance as opposed to protection, including Objectives ECO-O2 and ECO-O3, Policies ECO-P1, ECO-P6, ECO-P8, ECO-P9, ECO-P10 and Methods ECO-M6, ECO-M7 and ECO-M8.
7. In support of my view that protection is a subset of maintenance, I also note that maintenance in terms of s30(1)(ga) is at the level of a regional function, whereas protection in terms of s6(c) or NZCPS Policy 11(a) is much more focussed on specific sites or values.
8. Protection of tussock: I confirm that I consider that the pORPS would allow for different levels of protection for different plant species, and that I am comfortable with such an approach. In particular, this could lead to regional or district plans allowing larger areas of clearance for relatively common species such as silver tussock, compared to rarer species.
9. For example, the Dunedin City Second Generation District Plan ('2GP') permits clearance of up to 10,000m<sup>2</sup> of tussock species in general areas of the High Country Rural Zone, compared to 1,000m<sup>2</sup> for other indigenous species (Rule 16.3.4.23 and Performance Standard 10.3.2.1(c)(iii)). I consider that such an approach is consistent with the pORPS provisions as currently drafted, and would not lead to absolute protection of tussock or the prevention of higher altitude farming in Otago.
10. Policy ECO-P6: I do not consider that ECO-P6 as currently drafted is overly restrictive, but I also consider that it could be modified to make this more certain.
11. In practice, I consider that ECO-P6 will be able to be complied with by most activities in Otago, as:
  - a. The hierarchy set out in ECO-P6 includes compensation, which allows a much broader range of responses than offsetting. I consider this is an important distinction. Offsetting requires that a residual effect is fully negated, and that this is done in a measurable way and with high confidence, which is a high standard. Compensation, in comparison, is much broader, allowing for a residual effect to be only partly negated, for there to be an element of uncertainty, or for the compensation to apply to different values than those directly affected;
  - b. In terms of 'limits', where there are limits to offsetting, compensation is still available. Where there are limits to compensation, I consider that the appropriate

limits (as set out in Ms Mealey's evidence and in my updated drafting below), would only act as an outright bar to rare applications with very significant effects;

- c. I also note that the amendments to APP4 proposed by Ms Mealey would be less restrictive than the notified version, in that she recommends removing some circumstances where compensation would not be available, and instead adding some requirements around how compensation is implemented;
  - d. Where ECO-P6 is applied for biodiversity values which do not trigger significance criteria, the relatively lower values involved mean that it will also be easier to offset or compensate for residual effects.
12. At the hearing I also suggested that wording could be added so that the offsetting and compensation requirements do not apply where effects are "minor or transitory". Having now had time to consider this further, I would suggest that the wording align with the definition of Effects Management Hierarchy in the NPSFM 2020 (amended 2023) and the Exposure Draft NPSIB, ie
- "...(4) where there are more than minor residual adverse effects after avoidance, remediation, and mitigation, then..."*
13. This would ensure that the lower levels of the cascade are not triggered where the effects do not warrant it. I note that transitory effects would normally not be more than minor, so this wording covers both the terms I suggested orally.
14. In response to questions and comments of the Panel, I have also turned my mind to how ECO-P6 would apply in practice to some example activities:
- a. Removal of a single matagouri (or other small/low value biodiversity) – if a farming activity was going to destroy a single matagouri, then Clauses (1) to (3) would apply, so that effects should be avoided, remedied or mitigated if possible (or "avoided, minimised or remedied", if the standard effects management hierarchy wording is adopted). Put another way, s5(2)(c) would continue to apply. However, if the farming activity would inevitably require loss of the matagouri, then the limitation of Clauses (4) and (5) to "more than minor" residual adverse effects would mean there would be no barrier to granting consent subject to the usual s104 considerations.
  - b. A large mining development – When developing the proposal, the mining company would need to firstly apply ECO-P3 to avoid the specified effects on SNAs and taoka

values (I address this further below), and then apply the effects management hierarchy outlined in ECO-P6 to other effects on biodiversity values. The only circumstance where the development would be outright barred by ECO-P6 would be for more than minor residual effects which cannot be offset or compensated for. Other effects would fall to be considered on their merits. Subject to the changes to APP3 and APP4 that I have recommended previously, I do not consider this would be an unreasonably high bar. For example, I consider it likely that the Oceana Gold developments which I have been involved in would be able to achieve consent under such provisions, predominantly through the use of good quality compensation.

- c. Renewable electricity infrastructure within an SNA – For the proposal to be consented it would need to firstly pass the functional need / operational need test set out in ECO-P4. Subject to that, it would need to ensure that any residual adverse effects which are more than minor are offset or compensated for in accordance with APP3 and APP4. Subject to the changes to APP3 and APP4 that I have recommended previously, I do not consider that this would be an unreasonably high bar – compensation at least should be achievable in most or all circumstances.

15. My consideration of this is subject to uncertainty about ECO-P3(1). The s42A report recommends adding the word “first avoiding adverse effects that result in...”, based on a submission by Ngāi Tahu ki Murihiku (s42A report para 169). The original drafting was clear that this clause operated as a strict ‘avoid’ policy. With the addition of the word “first” I am unclear whether it is intended to operate as:

- a. A strict ‘avoid’ policy, which must be met first before going on to other considerations; or
- b. A first step in a hierarchy, where if the policy cannot be met an applicant is then directed by (2) to apply the hierarchy in ECO-P6.

16. While this is a matter for Ngāi Tahu ki Murihiku to respond to in terms of its submission, I consider that the significant natural areas and taoka covered by ECO-P3(1) are appropriate for an ‘avoid’ policy, as they are squarely matters covered by s6 of the RMA. An ‘avoid’ policy interpretation would also be consistent with the current drafting of ECO-P6, which specifically excludes “*areas protected under ECO-P3*”, so would make a hierarchy approach difficult to implement.

17. If the Panel agrees with that interpretation, I consider it would be clearer to either remove the word “first”, or make an addition to clause (2) along the lines:
- “after (1), applying the biodiversity effects management hierarchy (in relation to indigenous biodiversity) in ECO-P6 to effects other than those described in (1)(a) and (b), and”*
18. Relocating ‘drafting gates’ from APP3 and APP4 to policy: In my EIC (paras 189-190) I agreed with Ms Mealey that some elements of APP3 and APP4 would be better placed within a separate bottom lines policy. I suggested that they would best be located as additional clauses in Policy ECO-P6, but did not proffer drafting at that stage.
19. In response to a question on this from the Panel, I have now prepared potential drafting. I still consider that these elements sit best under ECO-P6, as they relate to maintaining biodiversity, rather than to protecting specific areas or taoka as covered by ECO-P3. My reasoning is that, in order to maintain biodiversity within the Otago region, there are some things which cannot be remedied, mitigated, offset or compensated under the effects management hierarchy, nor can they be otherwise balanced out through enabling provisions, voluntary measures, non-statutory methods etc.
20. I have included potential drafting as Appendix 1.
21. The effect of s104(1)(ab): I have reviewed the legal submissions of Ms Warnock on this matter, and confirm that I agree with her reasoning. I do not consider that the proposed APP3 and APP4 would act as a barrier to other offsetting or compensation measures being proposed by an applicant and considered by a decision-maker. Rather, there are a number of policies which point to those Appendices (IM-P12, ECO-P3 and ECO-P6) and would need to be considered, but this would occur alongside consideration of other policies relevant to the application. The specific nature of policies IM-P12, ECO-P3 and ECO-P6 would mean that they would likely be accorded significant weight, but the degree of weight applied to other policies, and the ultimate outcome, would depend on the specific circumstances of the application.

Murray Brass

8 May 2023

**APPENDIX 1: ECO-P6 – Maintaining indigenous biodiversity** *(updated following hearing 9/5/23)*

Maintain Otago’s indigenous biodiversity (excluding areas protected under ECO-P3) in decision-making on applications for resource consent and notices of requirement by

(1) avoiding activities that will result in:

(a) the worsening of the conservation status of any indigenous biodiversity as listed under the New Zealand Threat Classification System (Townsend et al, 2008), or

(b) the loss of an indigenous taxon or any ecosystem type from an ecological district, or

(c) the removal or loss of viability of a naturally uncommon ecosystem type that is associated with indigenous vegetation or habitat of indigenous fauna; and

(2) subject to (1) above, applying the following effects management hierarchy (in relation to indigenous biodiversity):

(a) avoid adverse effects as the first priority,

(b) where adverse effects demonstrably cannot be completely avoided, they are remedied,

(c) where adverse effects demonstrably cannot be completely avoided or remedied, they are mitigated,

(d) where there are more than minor residual adverse effects after avoidance, remediation, and mitigation, then the residual adverse effects are offset in accordance with APP3, and

(e) if biodiversity offsetting of residual adverse effects is not possible, then:

(i) the residual adverse effects are compensated for in accordance with APP4, and

(ii) if the residual adverse effects cannot be compensated for in accordance with APP4, the activity is avoided.