BEFORE THE OTAGO REGIONAL COUNCIL

AT DUNEDIN

KI ŌTEPOTI

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of the proposed Otago Regional Policy Statement 2021 (excluding those parts determined to be a Freshwater Planning Instrument)

Supplementary Legal Submissions for the Director-General of Conservation *Tumuaki Ahurei*

Ecosystems and Indigenous Biodiversity (ECO) Chapter

dated 9th May 2023

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MAY IT PLEASE THE HEARING PANEL

The following matters are submitted on behalf of the Director-General of Conservation, Tumuaki Ahurei ('Director-General'):

Questions from the Panel in relation to the Ecosystems and Indigenous Biodiversity Chapter (ECO)

1. At the hearing on the ECO Chapter, Council for the Director-General was asked to consider and address two substantive questions at the LF-FW Chapter hearing.

The first question:

2. What is the difference between 'protection' in s 6(c) of the Resource Management Act 1991 ('RMA') and 'maintaining' in s 30(1)(ga) RMA, if any, and how should that difference manifest in the proposed Otago Regional Policy Statement ('pORPS')?

3. This question naturally leads to other questions:

    i. Does the effects management hierarchy in ECO-P6 constitute 'protection' or 'maintaining'?
    ii. Is the ECO Chapter too stringent (i.e., have the policies in the ECO Chapter effectively elevated all ecosystems and indigenous biodiversity in Otago to protected status)?
    iii. And as a result of inquiring into those questions, is ECO-P3 sufficiently protective?

4. The Director-General submits that the core difference between 'protection' and 'maintaining' is that: 'protection' of specific areas in s 6(c) of necessity, requires *ex ante* or pro-active measures to be taken before harm occurs, whereas, 'maintaining' indigenous biodiversity in s 30(1)(ga) is at the region-wide level and can be achieved

using a range of measures, including *ex post facto* actions of a remedial nature. The reasoning behind this submission is set out in detail below.

What is the difference between 'protection' in s 6(c) RMA and 'maintaining' in s 30(1)(ga) RMA? [1]

5. Section 6(c) has been present in the RMA since first enactment. However, section 30(1)(ga) was inserted into the RMA in 2003 to implement New Zealand's international law obligations under Article 8 of the Convention of Biological Diversity, and clauses (c) and (d) of Article 8 in particular:[2]

> **Article 8. In-situ Conservation**
> Each Contracting Party shall, as far as possible and as appropriate:
> (a) Establish a system of protected areas or areas where special measures need to be taken to **conserve** biological diversity:
> (b) Develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to **conserve** biological diversity:
> (c) **Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use**:
> (d) **Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings** ... (emphasis added)

6. In *Canyon Vineyard Ltd v Central Otago District Council* [2022] NZHC 2458 [101-125], the High Court opined that 'protection' is different to '<u>maintain</u>'. It is important to note that this case concerned the interpretation of words in a District Plan rather than interpreting the statutory words in the RMA (and so may be of limited use).[3] Nevertheless, the

[1] Note, these submissions do not address the sustainable management-decision making framework, and the role of 'protection' in that framework. The Panel are referred to Legal Submissions for the Council on the ECO Chapter for that matter.

[2] Convention on Biological Diversity 1760 UNTS 79 (opened for signature 5 June 1992, entered into force 29 December 1993) ['CBD']. See also *Property Rights in New Zealand Inc v Manawatu-Wanganui Regional Council* [2012] NZHC [7]-[9] for a historical account of the inclusion of s 30(1)(ga) RMA.

[3] See similar reasoning in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [96].

Director-General agrees that 'protection' is different to 'maintaining', for the reasons set out below.

The meaning of protection in s 6(c)

7. Protection is not defined in the RMA. It has been interpreted as meaning 'keep safe from harm, injury or damage'.[4]

8. Protection is a noun. Therefore, it suggests a standard to be achieved.

9. The standard to be achieved is that *protective action* is actually taken.[5] This understanding accords with the management philosophy of the RMA and the wording in s 6 that all persons shall 'recognise and provide for' matters of national importance.

10. Protective action is pro-active i.e., taken before the 'harm, injury or damage' occurs. By way of analogy, protection would include building the predator proof fence *before* the habitat was destroyed.

11. This understanding aligns with s 6 (c) in that the areas to be protected are areas of significant indigenous biodiversity that may be irreplaceable if lost.

12. The meaning of protection should not be considered in isolation. Rather, you achieve protection of *something* (e.g., particular values) ***from*** *something else* (e.g., inappropriate uses, adverse effects).[6] Hence in the RMA context, protection inevitably encompasses considering the subject of protection and the activity you are protecting that subject from.

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[4] E.g., *Royal Forest and Bird Protection Soc of New Zealand Inc v New Plymouth District Council* [2015] NZEnvC 219, [63].

[5] The alternative standard is that actual protection is achieved but this meaning does not tend to accord with the general management philosophy of the RMA or the use of 'promote' in s 5.

[6] Note: the Supreme Court suggested that 'protection', when juxtaposed with 'avoid' in s 5(2) RMA stands in opposition to 'use and development' (*Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [24(d)]).

13. Protection is addressed in different ways in the RMA. Sometimes the specific activity you are protecting the object from is explicitly stated. (For example, s 6(a) RMA requires the protection of the natural character of wetlands from direct human-induced activities deemed inappropriate i.e. inappropriate subdivision, use and development). However, in s 6(c) RMA there is no activity qualifier to protection.[7] This suggests, decision-makers must provide for the 'protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna' **from *all* threats** i.e., **direct** human-made threats (subdivision, use and development), **indirect** human-made threats (for example, diffuse pollution) and **naturally occurring threats** (for example, the incursion of pests).[8]

14. Accordingly, in recognising and providing for the protection of s 6(c) areas, the pORPS must set objectives and policies that pro-actively address each of those threats – i.e., direct, indirect and naturally occurring threats.

15. Given these relatively comprehensive duties, objectives in the pORPS should be sufficiently detailed so as to give clear policy direction, hence why the Director-General recommends the addition of more specific objectives in the ECO (and LF-LS) chapter(s).

16. In relation to the risk from **direct** human-made threats (subdivisions, use and development), case law states that protection is not metonymic with 'prevention' or 'prohibition' of all activities.[9] However, in a planning sense, protection is commonly achieved by 'avoid adverse effects' policies (see MB, Speaking Notes, 9th May 2023, [3]).

The meaning of 'maintaining' in s 30(1)(ga) RMA

17. Maintaining is not defined in the RMA.

[7] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [28].
[8] Albeit, I accept that *most* pest threats in New Zealand have been introduced by man – but not all.
[9] *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 at 262.

18. In terms of statutory interpretation, the meaning of the contentious word (i.e., 'maintaining') 'must be ascertained from its text and in the light of its purpose and its context.'[10]

19. For 'maintaining', the immediate statutory context is s 30(1) RMA. This section is an empowering section, concerned with the broad *functions* of regional councils. It makes sense therefore, that the word used in s 30(1)(ga) 'maintaining' is a verb, suggesting action or measures.[11]

20. However, importantly, the Environment Court has found that 'maintaining' in s 30(1)(ga) is not value-neutral it ***also* contains a substantive outcome to be achieved**. In *Oceana Gold (New Zealand) Ltd v Otago Regional Council* [2019] NZEnvC 41 the Court stated that s 30(1)(ga) (and s 30(1)(c)(iiia)) required '**the maintenance of an existing level or quality**' of biological diversity.[12] It reached this decision by considering the wider statutory context, particularly, ss 5(2)(b) and 7(c) RMA.[13] It also reasoned that if the legislature had not required a substantive standard to be met, s 30(1)(ga) would simply have contained a neutral verb, such as 'managing' rather than 'maintaining' indigenous biodiversity.[14]

[10] Legislation Act 2019, s 10(1).

[11] C.f. 'maintenance' in s 6(d) RMA which is a noun. Note also s 30(1)(c) which empowers regional councils to 'control the use of land' (i.e., the activity) 'for the purpose of ...' (i.e., achieving various standards) e.g., s 30(1)(c)(iiia) 'the maintenance and enhancement of ecosystems in water bodies and coastal water'.

[12] *Oceana Gold (New Zealand) Ltd v Otago Regional Council* [2019] NZEnvC 41, [63]. For a full discussion, see [61-76].

[13] Ibid, [66].

[14] Ibid, [66].

21. This interpretation means that the range of permissible actions in maintaining biological diversity –and the definition of biological diversity is important–[15] must be directed at ensuring the quality of biodiversity *on a region-wide basis*[16] does 'not get worse'.[17]

22. Accordingly, in the context of regional council functions, 'maintaining' biodiversity encompasses a broad range of actions, across temporal dimensions, that includes, for example: maintaining as far as possible at present level, restoring to some previous level,[18] repairing, enhancing, improving, expanding etc.[19]

23. In contrast to 'protection', 'maintaining' indigenous biodiversity can be achieved by *ex post facto* actions that may be remedial in nature. By way of analogy, the habitat could be replanted and restored after being harmed, or, (as we are concerned with 'maintaining' on a region-wide basis) could result in offsetting, enhancement or restoration elsewhere within the region.

24. Section 30(1)(ga) includes *all* indigenous biodiversity and so encompasses significant areas of biodiversity (i.e., s 6 (c) matters).

25. Accordingly, 'maintaining' indigenous biodiversity is not metonymic for protection but it can include protection, i.e., protection is a subset of maintenance.[20]

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[15] Section 2(1) RMA: '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'.

[16] Kós J explained why regional councils assume the primary governance role in indigenous biodiversity in *Property Rights in New Zealand Inc v Manawatu-Wanganui Regional Council* [2012] NZHC, [9]: i.e., because ecological 'boundaries' do not fit neatly within territorial boundaries.

[17] *Ngāti Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50 (referenced in *Oceana Gold (New Zealand) Ltd v Otago Regional Council* [2019] NZEnvC 41, [63]), wherein the Court understood 'maintain' to mean 'it's quality ... will not get worse' [74].

[18] Restoration is not defined in the RMA, but the NPSFM defines it in relation to wetlands as 'active intervention and management ...' (cl 3.21).

[19] By way of analogy, in maintaining my house, I weed the garden, paint the barge boards, repair the cracked window broken by my son's rugby ball and forbid my son from playing rugby near to the stained glass window. All of these activities –including the rugby embargo– are directed towards maintaining my house.

[20] *Port Otago Ltd v Dunedin City Council* ENC Christchurch C4/2002 (unreported), [42]: 'We accept ... that the word maintain includes the meaning of protect'. Also see the discussion and approach taken on this issue in the *Motiti Rohe Moana* line of cases (*Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2018] NZEnvC 67, e.g., [132-141]; *Attorney-General v Trustees of Motiti Rohe Moana Trust* [2019] NZCA 532, [40-42] and [52-55]), albeit in the context of the coastal marine area. Note also, a policy choice *could* be taken in the RPS to require protection of indigenous biodiversity if that was demonstrated to promote the sustainable

26. In 'maintaining' indigenous biodiversity, use and development leading to negative change will be tolerated if that change can be ameliorated in some way, minimised, remedied, offset or compensated, and actions can be quite interventionist in this sense.

27. Mr Brass gave examples of the range of legitimate methods that the Regional Council could undertake in 'maintaining' biodiversity, in his answer to the Panel's questions at the ECO hearing.

28. In summary therefore, the core difference between 'protection' and 'maintaining' is that 'protection' of specific areas in s 6(c) is, of necessity, *ex ante* or pro-active. Whereas, 'maintaining' in s 30(1) (ga) is at the region-wide level and can be achieved using a range of actions, including *ex post facto* actions.

Does the effects management hierarchy in ECO-P6 constitute 'protection' or 'maintaining'?

29. The Director-General submits that ECO-P6 constitutes a legitimate mechanism for 'maintaining' indigenous biodiversity. This is because, 1) it accords with the reasoning above, and 2) in all relevant NPS, management through an effects management hierarchy is set in opposition to 'protection'.

30. For examples, see:

    i. NPSFM 3.22 'protect <u>except where</u> (loss arises, for example, through customary harvest of food in accordance with tikanga)... <u>and [then]</u> "the effects of the activity will be managed through applying the effects management hierarchy".
    ii. The exposure draft of the *National Policy Statement for Indigenous Biodiversity* ('draft NPSIB') contains policy 8 whereby 'the importance of **maintaining indigenous biodiversity outside SNAs** is recognised and provided for' by using the effects management hierarchy in clause 3.10, and that clause is drafted in a

management of natural and physical resources: *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38.

similar way to ECO-P6. (Clause 3.10 of the draft NPSIB provides a similar formula to the NPSFM – i.e., cl. 3.10 (2) protects particular values in SNAs by requiring adverse effects on them be avoided, **and all other effects are then managed through the effects management hierarchy**.)

iii. The effects management hierarchies in both the NPSFM (cl 3.21(1)) and the draft NPSIB (cl 1.5(4)) are similar to ECO-P6 and conclude (after all other management mechanisms have been exhausted) with a requirement to avoid the activity.

Is the ECO Chapter too stringent?

31. Much of the discussion about the 'onerous nature' of the ECO chapter has been predicated on the draft pORPS in the s42A report.

32. However, if the Panel were to accept the Director-General's submissions on the ECO Chapter, the pORPS would contain a more practical framework for three reasons:

i. It would contain **more focused objectives**. More focused objectives lead to more focused policy direction and greater focus in the application of technical standards (note, many ecologists work within the specific policy framework that technical standards sit within - they do not consider the technical provisions in complete isolation);[21]

ii. **APP3 and APP4 would be amended** to remove the gateway criteria in parts (a) and (b) that refer to 'the loss of individuals'. This would facilitate offsetting and would avoid the 'single matagouri preventing farming-problem' identified by Commissioner Cubitt;

iii. **Work would continue on testing APP2** to ensure that it is fit for purpose across domains, or it would be replaced with Appendix 1 of the draft NPSIB to ensure national consistency in the identification of SNAs.

[21] See e.g. 'Joint Witness Statement – Ecologists, 31st March 2023', General Matters, 1.

33. Further, as Mr Brass said in evidence at the ECO hearing, and repeated in his speaking notes dated 9th May 2023, the implicit notion that the effects management hierarchy applies to more than minor effects should be made explicit in the drafting of ECO-P6. Accordingly, ECO-P6 should be amended as follows:

> **ECO–P6 – Maintaining indigenous *biodiversity***
>
> Maintain Otago's indigenous *biodiversity* (excluding the coastal environment and areas managed under ECO–P3) by applying the following *biodiversity* effects management hierarchy in ***plans and*** 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 ***minimised*** ~~remedied~~,
> (3) where adverse effects demonstrably cannot be completely avoided or *minimised* ~~remedied~~, they are ***remedied*** ~~mitigated~~,
> (4) where there are ***more than minor*** residual adverse effects after avoidance, minimisation, and 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 APP4, and (b) if the residual adverse effects cannot be compensated for in accordance with APP4, the activity is avoided.

Is ECO-P3 sufficiently protective?

34. As discussed above in paragraph [30], relevant NPS require adverse effects *on certain values* to be avoided, full stop. They do not suggest that effects are avoided, and if that is not possible, the effects management hierarchy is then applied.

35. The way that ECO-P3 is currently drafted[22] creates confusion. It could be read in two ways. Does it mean: avoid and if you cannot avoid, then apply an effects management hierarchy; or does it mean absolutely protect the values in (1) and for effects *on all other values*, utilise the effects management hierarchy?

[22] I.e., following submissions and the s 42A report response.

36. In *Royal Forest and Bird Protection Soc of New Zealand Inc v New Plymouth District Council* [2015] NZEnvC 219, the Court stated, 's 6(c) imposes a duty on the Council to protect SNAs' and 'it is implicit in protection that adequate protection is required'.[23]

37. ECO-P3 is concerned with s 6(c) matters. Accordingly, it should be amended to clarify that ECO-P3 (2) means the effect management hierarchy is applied to any remaining residual effects, once effects on the values in part (1) are avoided. Mr Brass suggests the following drafting:

> '*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*'

38. This approach aligns with the wording in ECO-P6 that excludes 'areas protected under ECO-P3' from the effects management hierarchy in ECO-P6.[24]

39. If these submissions are accepted, LF-FW-P13(1) also requires amending, which utilises ECO-P3 and ECO-P6 (and possibly other policies in the pORPS).

The second question asked by the Panel at the ECO hearing:

40. Do the offsetting / compensation gateways in APP3(1) and APP4(1) flout s 104(1)(ab) RMA? The premise is that the gateway will prevent certain forms of offsetting / compensation from ever being put before the substantive decision-maker determining resource consent, i.e., the proposal would be stopped at the technical officer-stage in Council. That premise requires unpacking.

41. Section 104(1) lists matters that decision-makers must have regard to and is framed in a permissive way. It allows any relevant information to be put before the decision-maker.

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[23] *Royal Forest and Bird Protection Soc of New Zealand Inc v New Plymouth District Council* [2015] NZEnvC 219, [63-64].

[24] The issue of taoka species may be need to be addressed separately, utilising an approach similar to cl 3.22(1)(a)(i) NPSFM, for example.

This permissive approach is demonstrated by the 'belts and braces approach' shown by s 104(1)(c) – i.e. the decision-maker can take into account **any other matter** considered relevant and reasonably necessary to determine the application. Section 104(2) specifies particular effects that the decision-maker may or must disregard, and s 104(3) addresses effects that must be disregarded. None of these prohibited matters include 'measures that do not accord with the policies in an RPS / Plan'.

42. An applicant for resource consent can still offer measures that they say amount to offsetting / compensation **regardless of the policies in the RPS or plan**. It is incorrect to say this information about positive effects 'would never get before the decision-maker'. Upon receipt of the application, the Council Officer may determine that the measure does not equate to offsetting / compensation in accordance with the RPS / plan policies, and this determination may impact a notification decision under s 95A(8)(b). However, it would not stop the applicant offering the measure and it being considered in the substantive decision. Policies in an RPS / plan could not prevent an applicant from putting forward all relevant information, as this would be contrary to the Act.

43. In terms of *determining* the resource consent, **the issue is one of weight**.

44. APP3 and APP4 support (or are part of) policies and so sit alongside any other number of policies that may or may not support the proposal. If the proposed measure does not accord with APP3 and APP4, it may not be considered under s 104(1)(b), and so will not attract the extra weight in the decision-making process that would attach if it did comply with specific policies in the RPS / plan.

45. However, s 104(1)(b) could still be relevant for a proposed offset / compensation that does not meet the RPS / plan gateway if there are more general provisions in the RPS / plan that apply in the circumstances (e.g., if there are other objectives and policies to maintain etc.), with the caveat that in general planning terms complying with the specific provisions would carry more weight than general provisions.[25]

[25] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38.

46. Regardless, the measure can still be offered and would be taken into account under s 104(1)(ab). An example is provided by *Royal Forest and Bird Protection Soc NZ Inc v West Coast Regional Council* [2023] NZEnvC 68 (the *Te Kuha* mine case) where the Court stated that while compensation proposals did not meet the stringent test in the plan's policy (and in this case, were contrary to the NPSFM), they could be taken into account under s 104(1)(a) (or presumably, s 104(1)(c)).[26] The issue then became one of weight for the decision-maker.

47. The weight to be given will be fact specific. If for example, the offsetting / compensation meets another s 6 value (for example, enhancing public access to waterways or protecting against the risks from natural hazards) it will attract greater weight in the s 104 evaluation.

48. Accordingly, the premise that the decision-maker would *never* get to consider the applicant's offsetting / compensation proposals and take them into account *in some way* is incorrect as a matter of law and planning practice. Mr Brass can speak to this assertion in planning terms.

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[26] *Royal Forest and Bird Protection Soc NZ Inc v West Coast Regional Council* [2023] NZEnvC 68, [131-132] and [398-399]. Note that s 104(1) (ab) was introduced to the RMA as the caselaw on offsetting had become 'unclear': see comment in *Oceana Gold (New Zealand) Ltd v Otago Regional Council* [2019] NZEnvC 41, [80].