

Before the Freshwater Hearings Panel

Under the Resource Management Act 1991

In the matter of submissions on the proposed Otago Regional Policy Statement
2021 (parts determined to be a freshwater planning instrument)

**LEGAL SUBMISSIONS ON BEHALF OF TRANSPower NEW ZEALAND LIMITED
(FPI013 AND FSFPI013)**

proposed Otago Regional Policy Statement (freshwater)

1 September 2023



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May it please the Panel

1. Introduction

1.1 These submissions are filed on behalf of Transpower New Zealand Limited (**Transpower**) in advance of hearings on the parts of the proposed Otago Regional Policy Statement determined to be a freshwater planning instrument (**pORPS (freshwater)**).

1.2 As set out in legal submissions on the pORPS (non-freshwater)¹, Transpower is the state-owned enterprise that plans, builds, maintains, owns and operates New Zealand's high voltage electricity transmission network, known as the **National Grid**. Transpower, whose main role is to ensure the transmission of a reliable and secure supply of electricity to New Zealand, has a fundamental role in the industry and in New Zealand's economy.

1.3 Transpower is generally supportive of the pORPS (freshwater), and is mindful of ORC's obligations to give effect to national policy statements, including the National Policy Statement for Freshwater Management 2020 (**NPSFM**).

1.4 However, it is essential for Transpower to have a clear consenting pathway for its activities, including those in proximity to freshwater bodies. This outcome is expressly provided for in the National Policy Statement for Electricity Transmission (**NPSET**), which the pORPS (freshwater) must give effect to.

1.5 Transpower accordingly seeks certain amendments to the pORPS (freshwater). The relief sought would ensure that those aspects of the pORPS (freshwater) give effect to the NPSFM and the NPSET.

1.6 Against this background, these legal submissions:

- (a) outline the basis for Transpower's interest in the pORPS (freshwater);

1 Refer to our legal submissions filed in advance of the non-freshwater hearings dated 24 January 2023 (Hearing weeks 1 and 2) and 13 March 2023 (Energy, Infrastructure and Transport).

- (b) address the requirement for the pORPS (freshwater) to give effect to the NPSET and NPSFM, including how potential conflicts are to be reconciled;
- (c) addresses proposed amendments by ORC following the NPSIB's promulgation.

2. Transpower's interest in the pORPS (freshwater)

2.1 Transpower is concerned with ensuring that it can carry out its core functions, to ensure a reliable and secure supply of electricity, now and in the future. This interest is consistent across both the freshwater and non-freshwater parts of the pORPS.

2.2 The evidence of Ms Kennedy sets out the activities that Transpower undertakes in proximity to freshwater bodies.² Many of Transpower's assets are currently located near freshwater bodies and Transpower needs to be able to operate, maintain and upgrade these assets. Further, future development of the National Grid may need to occur near freshwater bodies. This development may be required to support the Government's renewable energy generation goals, particularly if the Lake Onslow hydro scheme proceeds.³ It may also be required to support increased demand.⁴

2.3 Ms McLeod's evidence-in-chief⁵ and supplementary evidence⁶ set out the amendments to the pORPS (freshwater) that Transpower seeks. That relief should be placed in the context of the relief that Transpower seeks in the non-freshwater parts.⁷ In summary:

- (a) Transpower seeks a carve-out policy, so that the provisions regarding effects of electricity transmission activities are aligned with the direction given in the NPSET.

² Julia Kennedy evidence-in-chief dated 28 June 2023 (**Kennedy EIC**) at [4].

³ Kennedy EIC at [4.5].

⁴ Statement of evidence of Roy Noble dated 23 November 2022 (filed in support of submissions on the pORPS (non-freshwater) at [4.6]-[4.9].

⁵ Dated 28 June 2023 (**McLeod EIC**).

⁶ Dated 18 August 2023 (**McLeod supplementary statement**).

⁷ Transpower submission on pORPS (non-freshwater) dated 3 September 2021, pages 6 and 7.

- (b) If a carve-out policy is not provided, the provisions in the pORPS that regulate environmental effects need to provide an efficient consenting pathway for electricity transmission activities, consistent with the direction in the NPSET.
- (c) The pORPS needs to appropriately enable the operation, maintenance and minor upgrading of the National Grid.
- (d) The pORPS should require the avoidance of direct effects of activities on the National Grid, in addition to reverse sensitivity effects.

2.4 The first three outcomes listed above, but not the fourth, are relevant to these hearings on the pORPS (non-freshwater).

2.5 Transpower’s relief sought concerns the following provisions of the pORPS (freshwater) that relate to the protection of freshwater bodies, and management of potential effects:

- (a) Objective LF-FW-O8 – Fresh water⁸ (the s42A report proposes that this provision be deleted as much of the content has been subsumed into LF-FW-O1A⁹);
- (b) Objective LF-FW-O9 – Natural Wetlands;¹⁰
- (c) Policy LF-FW-P7 – Fresh water;¹¹
- (d) Policy LF-FW-P9 – Protecting natural wetlands;¹²
- (e) Policy LF-FW-P15 – Stormwater discharges;¹³
- (f) Method LF-FW-M7 – District plans;¹⁴
- (g) Policy LF-LS-P21 – Land use and fresh water.¹⁵

8 McLeod EiC at [8.9]

9 Section 42A report 2 June 2023 at [960].

10 McLeod EiC at [8.13]–[8.19].

11 McLeod EiC at [8.20]–[8.24].

12 McLeod EiC at [8.25]–[8.36], and supplementary statement at [5.7]–[5.11].

13 McLeod EiC at [8.37]–[8.45].

14 McLeod EiC at [8.46]–[8.50].

15 McLeod EiC at [8.51]–[8.55].

- 2.6** Transpower’s proposed carve-out policy¹⁶ is relevant to the amendments that Transpower seeks to these provisions. It provides for a bespoke effects management regime that would apply instead of specific provisions in the pORPS (freshwater). It has also been drafted to give effect to the NPSFM, and relevantly requires that effects on the values or extent of natural wetlands be managed in accordance with LF-FW-P9.
- 2.7** Our legal submissions filed in advance of the ‘Energy, Infrastructure and Transport’ hearing address the need for a bespoke policy in more detail.¹⁷ We attach those submissions at **Appendix A**.
- 2.8** While Transpower’s submission point seeking a carve-out policy has been allocated to the pORPS (non-freshwater) hearing, it applies to the pORPS generally, including to the pORPS (freshwater), and is therefore relevant to this hearing. This approach accords with the purpose of an RPS to achieve integrated management of the region’s natural and physical resources.¹⁸

3. How to reconcile conflicts between the NPSET and NPSFM

- 3.1** The RPS must give effect to both the NPSFM and the NPSET.¹⁹ The term ‘give effect’ is a strong statutory directive. It places a firm obligation on ORC in respect of the content of the pORPS.
- 3.2** Our previous legal submissions addressed the requirement to give effect to the NPSET.²⁰ Those submissions conclude:²¹

To summarise the legal position, the Panel is required to give effect to the NPSET and give it due consideration alongside other Part 2 matters (to the extent they are not already addressed in the NPSET). It must consider the NPSET’s provisions at an individual level, and determine what it must do to give effect to each provision.

16 pORPS non-freshwater submission 00314.038.

17 Dated 13 March 2023 at [5].

18 RMA, s 59.

19 RMA, s 62(3).

20 **Appendix A** at [3.1]–[3.16].

21 **Appendix A** at [3.16].

- 3.3** The NPSET’s policies vary in how prescriptive they are.²² Some policies prescribe, in strong terms, how this panel should undertake its role. Such policies include:
- (a) Policy 1 (decision-makers must recognise and provide for the benefits of sustainable, secure and efficient electricity transmission);
 - (b) Policy 2 (decision-makers must recognise and provide for the effective operation, maintenance, upgrading and development of the National Grid);
 - (c) Policy 5 (decision-makers must enable reasonable operational, maintenance and minor upgrade requirements); and
 - (d) Policy 10 (to the extent reasonably necessary, decision-makers must avoid reverse sensitivity effects on the National Grid).
- 3.4** It is also acknowledged that some of the NPSFM’s provisions are highly directive, such as Policies 6, 8, 9 and 10, and the requirement in clause 3.22.
- 3.5** Our previous legal submissions set out why the Panel should give significant weight to the NPSET, and we repeat those submissions here.²³ It is submitted that in this context, giving significant weight to the NPSET means providing for the outcomes expressed in each policy to the extent possible.
- 3.6** The recent Supreme Court decision of *Port Otago Limited v Environment Defence Society*²⁴ provides further guidance on addressing conflicts between competing directive policies in national policy statements.
- 3.7** Minute 9 directed that submitters may make submissions on the possible implications of the *Port Otago* decision by 15 September, and Transpower intends to take that opportunity. In the meantime, we submit that the *Port Otago* decision reinforces the correctness of the approach sought by Transpower.
- 3.8** In particular, the Supreme Court has confirmed that there may be circumstances where directive enabling policies mean that a breach of strong “avoid” policies is

²² Appendix A at [2.3].

²³ Appendix A at [4.1]-[4.9].

²⁴ [2023] NZSC 112.

necessary, albeit that efforts should be made to avert or narrow such a breach.²⁵ The directiveness of the enabling policies in the NPSET is evident in the examples noted in paragraph 3.3 above.

- 3.9** Transpower's submission has sought to appropriately recognise both the enabling and protective policies in relevant national policy statements. In particular, it supported Policy LF-FW-P9²⁶ (as it was drafted then), which gave effect to clause 3.22 of the NPSFM. Further, Transpower's proposed carve-out policy provides that where applicable, Policy LF-FW-P9 should apply.
- 3.10** However, while the pORPS must appropriately give effect to the NPSFM's directive provisions, it is essential that a consent pathway can still exist for electricity transmission activities, even where they may have effects on freshwater bodies. Transpower's preference is to avoid adverse environmental effects; but due to technical, operational and security requirements it is not always feasible to do so. Where avoidance or mitigation is not practicable, there must be certainty that Transpower can nonetheless operate, maintain, upgrade and develop the Grid.²⁷
- 3.11** Transpower therefore continues to seek a bespoke carve-out policy that clearly identifies the effects management regime for electricity transmission activities.
- 3.12** A section 32 analysis supports this approach in terms of efficiency. Ms McLeod's non-freshwater evidence sets out that in her experience a carve-out policy is a more efficient way to give effect to the NPSET.²⁸ A carve-out policy would provide clear guidance for lower order planning documents, so that there is a clear consenting pathway for Transpower's activities. This in turn would achieve the NPSET's objective more effectively than if decision-makers were required to comb through the provisions of the RPS when determining planning provisions for the National Grid.

25 At [76](c).

26 FPI013.002.

27 Noble non-freshwater EiC dated 23 November 2022 at [9.4]–[9.7].

28 McLeod non-freshwater EiC dated 24 November 2022 at [8.25].

4. Proposed amendments by ORC following the NPSIB's promulgation

4.1 Following the NPSIB being promulgated, the Panel allowed for ORC and submitters to file evidence addressing the NPSIB's implications for the pORPS (freshwater).²⁹

4.2 Clause 1.3(3) of the NPSIB provides that the NPSIB does not apply to renewable electricity generation and electricity transmission activities. As a result, any proposed amendments by ORC (at this late stage in the hearings process) should ensure that the effect of the amendments on these activities is neutral.

4.3 ORC's evidence³⁰ proposes amendments to Policy LF-FW-P9, which would restrict electricity transmission activities, as explained in Ms McLeod's evidence.³¹ The provisions accordingly go further than what is anticipated under the NPSIB.

4.4 While Transpower accepts that it may be appropriate to amend Policy LF-FW-P9 in light of the NPSIB, this should be achieved in a manner that does not restrict electricity generation and electricity transmission activities.

5. Other relief and witnesses to be called

5.1 Transpower seeks other associated relief for the reasons set out in its submissions and Ms McLeod's evidence in chief dated 28 June 2023.

5.2 Transpower will call the following witnesses:

- (a) **Ms Julia Kennedy** to give evidence on the activities that Transpower carries out that may affect freshwater bodies, and barriers that Transpower faces when undertaking activities that may have effects on freshwater bodies. Ms Kennedy is the Environmental Consents and Compliance Team Leader with 23 years' experience in planning and environmental management

29 Minute 7 (freshwater) dated 21 July 2023.

30 Statement of Felicity Boyd dated 11 August 2023.

31 McLeod supplementary statement dated 18 August 2023 at [5.7]–[5.10].

- (b) **Ms Ainsley McLeod** to give planning evidence. Ms McLeod has over 20 years' planning experience in infrastructure and network utilities, and has been engaged by Transpower since 2001 to assist in planning matters.

Dated: 1 September 2023

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