

BEFORE THE HEARINGS COMMISSIONERS

UNDER THE

Resource Management Act 1991

AND

IN THE MATTER

of the Proposed Otago Regional Policy Statement
2021 ("PORPS") (Non-Freshwater Parts)

**MEMORANDUM FOR THE OTAGO REGIONAL COUNCIL ON THE
IMPLICATIONS OF THE NATIONAL POLICY STATEMENT FOR INDIGENOUS
BIODIVERSITY FOR NON-FRESHWATER ISSUES**

Dated 8 September 2023

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BIODIVERSITY FOR NON-FRESHWATER ISSUES**

May it Please the Commissioners:

1. In its Minute 15 dated 21 July 2023, the Panel directed that the Otago Regional Council (“ORC”) provide evidence and supporting submissions by 8 September 2023 on the implications of the National Policy Statement for Indigenous Biodiversity (“NPSIB”) for the non-freshwater parts of the proposed Otago Regional Policy Statement 2021 (“pORPS 21”).

Scope

2. The NPSIB was gazetted on 7 July 2023 and came into force on 4 August 2023.
3. The ORC must prepare its regional policy statement in accordance with the NPSIB¹ and give effect to it².
4. The jurisdiction of the non-freshwater hearing panel to give effect to the NPSIB is limited to making recommendations within the scope of submissions made on the non-freshwater parts of the proposed pORPS 21.
5. ORC received a number of submissions seeking alignment with the (then draft) NPSIB³. Some submitters also sought alignment with the NPSIB once gazetted:
 - 5.1. Forest & Bird submission⁴ sought amendment “*to the RPS to support the implementation of NPS-IB when it is released*”, anticipating “*the imminent release of the National Policy Statement on Indigenous Biodiversity NPS-IB*”.

¹ Section 61(1)(da) RMA

² Section 62(3) RMA

³ For example, PowerNet Ltd submission 00511.017, Contact Energy Limited submission 00318.019, Oceana Gold (New Zealand) Ltd submission 00115.023, Aurora Energy Limited submission 00315.084

⁴ Royal Forest and Bird Protection Society NZ submission dated 3 September 2021 at paragraph 15, page 3 and paragraph 17, page 4

- 5.2. DCC submission⁵ sought “*All relevant provisions under the ECO topic*” be amended “*so they are in accordance with NPS Indigenous Biodiversity (when gazetted)*”. DCC’s relief sought under other provisions outside of the ECO chapter included “*any amendments required to implement NPS Indigenous Biodiversity.*”
- 5.3. Beef and Lamb NZ submission⁶ sought the ECO chapter be deleted and redrafted when the NPSIB has been made operative, acknowledging that until it is made operative there is no certainty as to what it will contain.
6. The breadth of the submissions seeking alignment with the NPSIB once gazetted and any necessary amendments required to implement it means there are no scope impediments to giving effect to the NPSIB in the non-freshwater hearing process.
7. Accordingly, to the extent the NPSIB can be given effect to in the non-freshwater parts of the pORPS 21, it should be.

National Policy Statement for Indigenous Biodiversity

8. Clause 1.3 of the NPSIB is entitled “*Application*”, and provides:
- “(1) This National Policy Statement applies to indigenous biodiversity in the terrestrial environment throughout Aotearoa New Zealand”.*
9. Helpfully, “*terrestrial environment*” is defined in clause 1.6 of the NPSIB at page 12:

“terrestrial environment means land and associated natural and physical resources above mean high-water springs, excluding land covered by water, water bodies and freshwater ecosystems (as those terms are used in the National Policy Statement for Freshwater Management 2020) and the coastal marine area”.

Objective and Policies

10. The NPSIB contains a sole objective; to maintain indigenous biodiversity

⁵ 00139.129

⁶ 00237.049

across Aotearoa:

“2.1 Objective

- (1) *The objective of this National Policy Statement is:*
- (a) *to maintain indigenous biodiversity across Aotearoa New Zealand so that there is at least no overall loss in indigenous biodiversity after the commencement date; and*
 - (b) *to achieve this:*
 - (i) *through recognising the mana of tangata whenua as kaitiaki of indigenous biodiversity; and*
 - (ii) *by recognising people and communities, including landowners, as stewards of indigenous biodiversity; and*
 - (iii) *by protecting and restoring indigenous biodiversity as necessary to achieve the overall maintenance of indigenous biodiversity; and*
 - (iv) *while providing for the social, economic, and cultural wellbeing of people and communities now and in the future.”*

11. Clause 1.7 sets out what ‘*maintaining indigenous biodiversity*’ requires:

“1.7 Maintaining indigenous biodiversity

- (1) *Maintaining indigenous biodiversity requires:*
- (a) *the maintenance and at least no overall reduction of all the following:*
 - (i) *the size of populations of indigenous species:*
 - (ii) *indigenous species occupancy across their natural range:*
 - (iii) *the properties and function of ecosystems and habitats used or occupied by indigenous biodiversity:*
 - (iv) *the full range and extent of ecosystems and habitats used or occupied by indigenous*

biodiversity:

(v) *connectivity between, and buffering around, ecosystems used or occupied by indigenous biodiversity:*

(vi) *the resilience and adaptability of ecosystems;*
and

(b) *where necessary, the restoration and enhancement of ecosystems and habitats.”*

12. The NPSIB contains 17 policies to achieve the objective.

Application of the NPSIB to renewable electricity generation and electricity transmission networks

13. Clause 1.3(3) is explicit that nothing in the NPSIB applies to the development, operation, maintenance or upgrade of renewable electricity generation assets and activities and electricity transmission network assets and activities.

14. The NPSREG and NPSET apply to the extent they cover the subject matter, and where they do not, Part 2 RMA must apply.

15. This appears to create a policy gap at the regional level. While renewable electricity generation and electricity transmission activities are still subject to the statutory regime under the RMA, Mr MacLennan has recommended a new bespoke policy 6A to manage the effects of renewable electricity generation and electricity transmission networks in the terrestrial environment in the Otago region.

16. In drafting Policy 6A, Mr MacLennan has sought to give effect to NPSREG and NPSET and use the approach taken in Policy EIT-INF-P13.

Relationship with other national direction

17. Clause 1.4 sets out the NPSIB's relationship with other national direction and provides:

“1.4 Relationship with other national directions and iwi participation legislation

- (1) *Both the New Zealand Coastal Policy Statement and this National Policy Statement apply in the terrestrial coastal environment.*
 - (2) *If there is a conflict between the provisions of this National Policy Statement and the New Zealand Coastal Policy Statement 2010 (or any later New Zealand Coastal Policy Statement issued under the Act), the New Zealand Coastal Policy Statement prevails.*
 - (3) *If there is a conflict between the provisions of this National Policy Statement and the National Policy Statement for Freshwater Management 2020 or the Resource Management (National Environmental Standards for Freshwater) Regulations 2020, the latter prevail.*
- ...

18. In summary, in situations of conflict between the NPSIB and either the NPSFM or NZCPS, the latter prevail.

Implementation

19. Part 3 of the NPSIB contains the implementation provisions. They are extremely directive and provide “a *non-exhaustive list*” of what regional councils “*must*” do.
20. Unlike the NPSFM, the NPSIB does not contain a specific provision allowing a local authority to adopt more stringent measures⁷.
21. In implementing the NPSIB, there is little scope for choice.
22. Accordingly, the ORC’s approach has been to carry over a great number of provisions from the NPSIB into pORPS 21. This has largely occurred in two ways:
 - 22.1. Whole provisions have been incorporated into the pORPS 21 in their entirety; or
 - 22.2. Amendments to existing provisions have been made to better reflect the relevant direction of the NPSIB.

⁷ NPSFM at Clause 3.1(2)(a)

23. This approach has been to ensure the subject matter is fully covered.

Scope for 'additions'

24. Clause 3.1(2) provides that “*Nothing in this Part limits a local authority’s functions and duties under the Act in relation to indigenous biodiversity*”.

25. For the ORC functions and duties include:

25.1. safeguarding the life-supporting capacity of air, water, soil, and ecosystems⁸; and

25.2. the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna⁹; and

25.3. having particular regard to the maintenance and enhancement of the quality of the environment¹⁰ and the intrinsic values of ecosystems¹¹; and

25.4. taking into account the principles of Te Tiriti o Waitangi¹²; and

25.5. the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity¹³.

26. The pORPS 21 can include additions to NPSIB provisions to give substance to the NPSIB at a regional level and achieve the purpose of sustainable management and carry out the relevant duties of a regional council under the Act if justified by ecological evidence.

27. Mr Andrew Maclellan has recommended a limited number of additions in the following appendices:

27.1. APP2 – Significance criteria for indigenous biodiversity.

27.2. APP3 – Criteria for biodiversity offsetting.

27.3. APP4 – Criteria for biodiversity compensation.

⁸ Section 5(2)(b)

⁹ Section 6(c)

¹⁰ Section 7(f)

¹¹ Section 7(d)

¹² Section 8

¹³ Section 30(1)(ga)

28. The amendments to APP2 are founded on sections 6(c) and 30(1)(ga) RMA and Clauses 1.5 and 1.7, Objective 1 and policies 3, 6 and 7 of the NPSIB.
29. The amendments to APP3 and APP4 are founded on section 30(1)(ga) RMA and Clauses 1.5 and 1.7, Objective 1 and policies 3 and 8 of the NPSIB.
30. An analysis of these recommended changes is set out in the supplementary evidence of Mr Andrew MacLennan filed together with this memorandum and supported by the further evidence of Dr Kelvin Lloyd dated 8 September 2023.

Conclusion

31. The NPSIB has wide ranging application to the non-freshwater parts of the pORPS because of the NPSIB application to indigenous biodiversity in the terrestrial environment¹⁴.
32. ORC must give effect to the NPSIB in its preparation of the pORPS.
33. There is scope to do so.
34. The NPSIB is extremely directive. There is little room for choice or to incorporate a "*regional flavour*". Giving effect to the NPSIB in this process largely involves incorporating provisions directly from the NPSIB.
35. Where additions have been made which are specific to the pORPS 21, the ecological justifications for those are provided in the further evidence of Dr Lloyd.



T M Sefton
Counsel for the Otago Regional Council

Dated: 8 September 2023

¹⁴ But for the exceptions at Clause 1.3(2)