

BEFORE THE RPS HEARINGS PANEL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of submissions on the Proposed Otago Regional Policy Statement 2021 (excluding parts determined to be a freshwater planning instrument)

**SUBMISSIONS ON BEHALF OF OCEANA GOLD (NEW ZEALAND)
LIMITED ON THE NATIONAL POLICY STATEMENT FOR
INDIGENOUS BIODIVERISTY**

19 SEPTEMBER 2023

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MAY IT PLEASE THE PANEL:

1. In its 7th Minute¹ the Hearings Panel gave submitters the opportunity to file submissions on the National Policy Statement for Indigenous Biodiversity (**NPSIB**), which came into force on 4 August 2023. Submitters can also respond to ORC's evidence and memorandum on the NPSIB².
2. OceanaGold's originating submissions on the PORPS sought that the PORPS be amended to reflect the national direction which had been signalled by the Government in the Exposure Draft of the NPSIB³. OceanaGold is relieved that, after a considerable gestation period, the NPSIB has now come into force and must be given effect to in the PORPS. The ability for the ORC to refuse to acknowledge the changes that the NPSIB makes to the way biodiversity and activities that impact it are to be managed is now at an end.
3. The ORC memorandum summarises the key elements of the NPSIB⁴ and I do not propose to reiterate those. OceanaGold agrees with the majority of the amendments which the ORC proposes as these give effect to and implement the NPSIB. However the ORC proposes some additions to the PORPS which OceanaGold considers are inappropriate and which reflect an approach to biodiversity management that has been overtaken by the NPSIB. These changes concern biodiversity offsets and biodiversity compensation. They do not give effect

¹ 7th Minute dated 21 July 2023.

² 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.

³ See for example OceanaGold's submissions (dated 3 September 2021) on ECO-P4 provision for new activities, APP2 – Significance criteria, APP3 – Criteria for biodiversity offsetting and APP4 – Criteria for Biodiversity compensation.

⁴ 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 at paragraphs [8] to [26].

to the NPSIB and are unlawful. In these submissions OceanaGold proposes amendments to ensure the NPSIB is given effect to. For convenience these amendments are collated in Appendix A.

“COMPLYING WITH” AND “HAVING REGARD TO” OFFSETTING AND COMPENSATION PRINCIPLES

4. Not all of the principles in APPs 3 and 4 must be complied with when proposing biodiversity offsetting or biodiversity compensation. Clause 3.10(4)(b) of the NPSIB says:

(4) Where adverse effects on an SNA are required to be managed pursuant to subclause (3) by applying the effects management hierarchy, an applicant must be required to demonstrate:

(a) how each step of the effects management hierarchy will be applied; and

(b) if biodiversity offsetting or biodiversity compensation is applied, the applicant has **complied with principles 1 to 6** in Appendix 3 and 4 and has **had regard to the remaining principles** in Appendix 3 and 4, as appropriate (emphasis added).

5. The ORC proposes that all principles must be complied with when offsetting or compensation proposals are advanced. That is simply not what the NPSIB requires. The distinction is important. “Complying with” a principle indicates that a proposal needs to comply with the intent of the principle. In comparison it is submitted that where a principle must be “had regard to”, a different and lesser standard of consideration is required. As a matter of law a principle that must be had regard to need not necessarily be complied with. In *Progressive Enterprises v*

North Shore City Council, the High Court considered the phrase “have regard to” in the context of section 104 RMA and said ⁵:

The requirement for the Environment Court to have regard to the relevant provision is a requirement to give **genuine attention and thought** to the matters identified in s 104, **but it need not necessarily accept those provisions**. To “have regard to” does not require the Court to “give effect to”: *Foodstuffs (South Island) Limited v Christchurch City Council* [1999] NZRMA 481, 487. (emphasis added)

6. Therefore in order to fully give effect to the NPSIB and clause 3.10(4)(b) in particular, APP 3 and 4 should be amended by making the following changes (please note that for all suggested amendments in this Memorandum, Mr McLennan’s 8 September changes are shown as plain text with the OceanaGold deletions and additions shown in the usual way):

APP 3 “These principles apply to the use of *biodiversity offsets* for adverse effects on *indigenous biodiversity*. An applicant is to comply with principles 1 to 6 and have regard to the remaining principles as appropriate”.

...

APP4 “These principles apply to the use of *biodiversity compensation* for adverse effects on *indigenous biodiversity*. An applicant is to comply with principles 1 to 6 and have regard to the remaining principles as appropriate”.

...

7. Instead of amending APP3 and APP4, an alternative solution is to amend ECO-P4(1) by including a reference to complying with principles (1) to (6) and having regard to the remaining principles. OceanaGold has considered both options but prefers the amendments to APP3 and APP4 proposed above. ECO-P4(1) is already a long sub-clause and the inclusion of additional words could overly complicate this sub-clause. In OceanaGold’s opinion including “complying” and

⁵ *Progressive Enterprises v North Shore City Council*, HC Auckland CIV-2008-485-2584, 25 February 2009, Venning J at paragraph [15].

“having regard to” in the appendices seems a simpler, more direct approach. Ultimately OceanaGold will abide by the preference of the Hearings Panel, so long as the intent of clause 3.10(4)(b) of the NPSIB and the clear distinction made in the clause is given effect to in the PORPS.

8. ECO-P6A – “Renewable electricity generation and electric transmission networks” will also need to be amended for consistency to clarify that principles 1 to 6 are to be complied with and that the remaining principles are to be had regard to. OceanaGold suggests amending ECO-P6A as follows:

In all areas ~~comply with have regard to the offsetting~~ principles 1 to 6 set out within APP3 or the compensation principles set out in APP4, and have regard to the remaining principles within APP3 or APP4 for any residual adverse effects; and

GIVING EFFECT TO THE NPSIB

9. Section 62(2) requires the RPS to “*give effect to*” a “*national policy statement*”. In *Environmental Defence Society v New Zealand King Salmon Co Inc*⁶ (King Salmon) the Supreme Court was considering the requirement for a plan change to the regional plan, and this needed to give effect to the New Zealand Coastal Policy Statement (NZCPS). The applicable RPS had been prepared before the new NZCPS, and therefore little mention is made of the regional policy statement in the decision. Because the same terminology of “give effect to” was considered, it is still relevant to the present scenario. In *King Salmon* the Supreme Court said⁷ :

“Give effect to” simply means “implement”. On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it.

⁶ [2014] NZSC 38.

⁷ [2014] NZSC 38 at paragraph [77].

10. When the Court summarised its findings on “give effect to” it said⁸ :

We acknowledge that the scheme of the RMA does give subordinate decision-makers considerable flexibility and scope for choice. This is reflected in the NZCPS, which is formulated in a way that allows regional councils flexibility in implementing its objectives and policies in their regional coastal policy statements and plans. Many of the policies are framed in terms that provide flexibility and, apart from that, the specific methods and rules to implement the objectives and policies of the NZCPS in particular regions must be determined by regional councils. **But the fact that the RMA and the NZCPS allow regional and district councils scope for choice does not mean, of course, that the scope is infinite. The requirement to “give effect to” the NZCPS is intended to constrain decision-makers.** (emphasis added)

11. Under section 293(4) RMA, on a hearing into a RPS, the Environment Court may permit a departure from a NPS where “*it is of minor significance and does not affect the general intent and purpose of the proposed policy statement or plan.*” In *King Salmon* the Supreme Court said that the section 293 powers “... *underscores the strength of the “give effect to” direction*”⁹. In my submission, the findings of *King Salmon* and section 293(4) RMA tell us that in giving effect to the NPSIB, the ORC must implement what is contained in the NPS. Wording changes which are of minor significance but do not detract from the intent of the NPSIB will be permissible, but that significant changes which fundamentally alter the intent of the NPSIB are not permissible.

12. In proposing that additional principles are added to APP3 and APP4, the ORC has focused on clause 3.1(2) “*Nothing in this Part limits a local authority’s functions and duties under the Act in relation to indigenous biodiversity*”. OceanaGold submits that this does not give the ORC the ability to include additional principles for biodiversity compensation and offsetting. Clause 3.1(2) of the NPSIB can be

⁸ [2014] NZSC 38 at paragraph [91].

⁹ [2014] NZSC 38 at paragraph [78].

contrasted with the clearer wording in the National Policy Statement for Freshwater Management 2020 (**NPS-FM**) which says in clause 3.1(2):

(2) Nothing in this Part:

(a) **prevents a local authority adopting more stringent measures** than required by this National Policy Statement; or

(b) limits a local authority's functions and duties under the Act in relation to freshwater. (emphasis added)

13. The Government chose not to adopt the wording of the NPS-FM in the NPSIB. As the Supreme Court in *Port Otago v Environmental Defence Society Incorporated* said, "*These differences in expression matter*"¹⁰.
14. Put simply, clause 3.1(2) of the NPSIB does not allow a local authority to include more stringent matters in a RPS or plan, and cannot override a statutory requirement in the RMA to "*give effect to*" the NPS. Accordingly, any additional matters cannot be inconsistent with the NPSIB.
15. APP3(2)(d) to (g) and APP4(2)(d) to (g) and (14) must therefore be deleted. These are the additional matters which Dr Lloyd has suggested inserting¹¹. Dr Lloyd proposes inserting additional principles which act as "presumptive limits" to describe circumstances where biodiversity compensation or offsetting proposals should not even be considered by decision makers, regardless of the quality of the proposal on offer. These types of presumptive limits are more stringent than the principles in the NPSIB. They are reflective of the approach taken in the partially operative Otago RPS. That approach has been overtaken by the NPSIB's directive approach, and presumptive limits are no longer appropriate. The NPSIB directs a clear and unequivocal move away from these types of limits to biodiversity

¹⁰ [2023] NZSC 112 at para [61] quoting from *King Salmon* at para [127].

¹¹ See Statement of evidence of Kelvin Michael Lloyd dated 8 September 2023

offsetting and compensation. This is also consistent with the evidence of Mark Christensen that principles to be considered, instead of criteria which must be met “reflect best practice because it is more consistent with both the BBOP approach as reflected in the 2018 Guidance than the approach in the pORPS”¹².

16. The suggested inclusion of APP4(2)(d) to (g) is contrary to APP4(9) which specifically has loss of values to Threatened or At Risk (declining) species or to species considered vulnerable or irreplaceable, as a matter to be had regard to, not a matter which must be complied with.
17. Even if the Hearings Panel did agree with Dr Lloyd that the additional matters should be included, they should not be inserted in principle 2 (as principles to be “complied with”), but should be inserted after principle 6 so that they are principles to be “had regard to”.
18. Based on Dr Lloyd’s evidence, the ORC considers there is ecological justification for including these additional matters. In summary Dr Lloyd says¹³:

This multitude of significant terrestrial and wetland indigenous biodiversity values in [the] Otago Region warrant strong policy direction to protect and maintain them.

19. OceanaGold agrees that the Otago regional is special. However, on this same basis every region in New Zealand is special. In formulating the NPSIB, the Government has evaluated and weighed a multitude of considerations. It has decided that the protection offered by the NPSIB is warranted. It has not provided for more stringent measures to be adopted by a local authority, and has deliberately moved away from the presumptive limit approach to the use of biodiversity offsetting and compensation favoured in the partially operative RPS, preferring

¹² Evidence of Mark Christensen dated 22 November 2022 at para [49].

¹³ Statement of evidence of Kelvin Michael Lloyd dated 8 September 2023 at para [23].

instead to adopt the approach that is in line with international best practise and which allows for proposals to be considered on their merits. A local authority must implement the measures prescribed in the NPSIB.

APP2

20. The amendments to APP2 refer to Appendix 1 (as this is what the wording in clause 3.8 of the NPSIB says), however in APP2 of the PORPS these references should be changed to read "in this Appendix".

21. For the reasons given above that additional principles should not be included in APP3 and 4 as this makes it more stringent, OceanaGold suggests deleting APP2

D(3)(e):

~~(e) an area that is important for a population of indigenous fauna during a critical part of their life cycle, either seasonally or permanently, e.g. for feeding, resting, nesting, breeding, spawning or refuges from predation.~~

Dated this 19th day of September 2023



S Christensen/J St John

Counsel for Oceana Gold (New Zealand) Limited

APPENDIX A - PROPOSED AMENDMENTS TO PORPS

ECO-P6A – Renewable electricity generation and electricity generation networks

...

- (1) (d) In all areas comply with ~~have regard to the offsetting~~ principles 1 to 6 set out within APP3 or ~~the compensation principles set out in APP4, and have regard to the remaining principles within APP3 or APP4~~ for any residual adverse effects; and

...

APP 2 Criteria for identifying areas that qualify as *significant natural areas (SNAs)*

This appendix sets out the criteria for identifying significant indigenous vegetation or significant habitats of indigenous fauna in a specific area, so that the area qualifies as an SNA.

The assessment must be done using the assessment criteria in this Appendix 4 and in accordance with the following principles:

...

- (e) consistency: the criteria in this Appendix 4 are applied consistently, regardless of who owns the land:

...

D Ecological context criterion

...

- ~~(e) an area that is important for a population of indigenous fauna during a critical part of their life cycle, either seasonally or permanently, e.g. for feeding, resting, nesting, breeding, spawning or refuges from predation.~~

APP 3 Principles for *biodiversity offsetting*

These principles apply to the use of *biodiversity offsets* for adverse effects on *indigenous biodiversity*. An applicant is to comply with principles 1 to 6 and have regard to the remaining principles as appropriate.

...

APP4 Principles for *biodiversity offsetting*

These principles apply to the use of *biodiversity compensation* for adverse effects on *indigenous biodiversity*. An applicant is to comply with principles 1 to 6 and have regard to the remaining principles as appropriate.

...