

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)

**Memorandum from the Director-General of Conservation *Tumuaki Ahurei*
Implications of the NPS IB, dated 19th September 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') in relation to the implications of the National Policy Statement for Indigenous Biodiversity (NPS IB) for the proposed Otago Regional Policy Statement (non-freshwater parts) ('pORPS'):

1. The Director General agrees with the legal conclusions in the Memorandum for the Otago Regional Council, dated 8th September 2023, and also agrees that there is scope in the submissions to implement the NPS IB.
2. These submissions are limited to addressing:
 - a. Whether the pORPS can be more stringent than the NPS IB;
 - b. How best to achieve integrated management;
 - c. Whether the additional offsetting and compensation principles are appropriate;
 - d. What approach should be taken to renewable energy generation and electricity transmission;
 - e. Does the NPS IB support the use of the word 'net' in ECO-O1;
 - f. Are ECO-P3 and ECO-P4 consistent with the NPS IB;
 - g. Have the NPS IB exceptions for Māori land been appropriately dealt with in the pORPS?

Can the pORPS can be more stringent than the NPS IB?

3. The NPS IB is both mandatory *and* permissive, and the pORPS can be more stringent than the NPS IB.
4. Clause 3.1 explains how the Objective and Policies of the NPS IB are to be implemented. The NPS IB sets out a bottom lines approach to implementation – i.e., certain forms of implementation *must* be employed by local authorities. But it is also permissive – i.e., local authorities *can* include additional objectives, policies and methods in policy statements and plans to: 1) give effect to the Objective and Policies of the NPS IB, and 2)

comply with their functions under the RMA in relation to indigenous biodiversity. In relation to the pORPS, those relevant statutory functions are contained in s 30(1)(ga) (*maintaining* biodiversity), and s 6(c) (*protecting* areas of significant indigenous vegetation and significant habitats of indigenous fauna).

5. Accordingly, cl 3.1 permits the inclusion of additional ways to give effect to the Objective and Policies of the NPS IB, the maintenance of indigenous biodiversity in general,¹ and the protection of significant indigenous biodiversity in particular.² To that extent, the NPS IB allows regional policy statements to be more stringent (but not less stringent) than the NPS IB, in order to respond to regional context. The Regional Council can set a higher bar for matters covered in the NPS IB and / or can include requirements that are additional to those included in the NPS IB.

How best to achieve integrated management?

6. ECO-P3 and ECO-P6 should also apply to areas within the *coastal environment*.
7. The NPS IB explicitly states that both the NPS IB and the NZCPS apply in the terrestrial coastal environment. This statement is a clear message to local authorities to ensure integrated management between domains.
8. In order to achieve integrated management – while ensuring that the pORPS ‘gives effect to’ and does not ‘conflict’ with the NZCPS – ECO-P3 and ECO-P6 should apply to areas within the *coastal environment*.³
9. Mr Brass has suggested new wording for ECO-P3 and ECO-P6 that references CE-P5, to ensure compatibility between the ECO policies and NZCPS Policy 11 (a) and (b) (the avoidance policies) (see Murray Brass’ evidence, dated 19th September 2023, (‘MB’), Appendix 1). Mr Brass’ proposal reconciles the NZCPS, the NPS IB, and the statutory

¹ NPS IB cl 2.1(1)(a).

² NPS IB cl 2.2, Policy 7.

³ Excluding the *coastal marine area* (‘cma’) as the NPS IB does not apply to the cma see NPS IB 1.6 definition of ‘terrestrial environment’ excludes cma.

mandate for integrated management; avoids ‘conflict’⁴ between the NZCPS and NPS IB; and ensures a ki uta ki tai approach. It ‘gives effect’ to the NPS IB, RMA s 30(1)(a) and s 59, by facilitating an integrated management approach to all parts of the terrestrial environment, including that in the coastal marine environment.

Are the additional offsetting and compensation principles appropriate?

10. APP3(2)(d)-(g) and APP4(2)(d)-(g) are appropriate additions to the pORPS.

11. APP3(2)(d)-(g) and APP4(2)(d)-(g) are additional ways to give effect to: 1) the NPS IB Objective and Policies, and 2) to address the Regional Council’s function under s 30(1)(ga) in the Otago context, and s 6(c). Accordingly, their inclusion does not breach or run counter to the provisions of the NPS IB. Nor do they breach cl 3.10(4)(b), directing how offsetting and compensation principles are to be applied.⁵ Clause 3.10(4)(b) does not prevent local authorities adding principles to the Appendices, on the proviso they meet the test set out in paragraph 4 above. The additional principles do not undermine or detract from the overall intent and efficacy of the NPS IB offsetting and compensation principles. Mr Brass considers that the additional principles are appropriate and justified in the Otago context (MB, para [34]).

What approach should be taken to renewable energy generation (‘REG’) and electricity transmission (‘ET’)?

12. The carve out in cl 1.3(3) does not permit adverse inferences to be drawn in relation to government policy aimed at maintaining and protecting indigenous biodiversity, where REG and ET is concerned.

⁴ NPS IB cl 1.4(2).

⁵ NPSIB cl 3.10(4)(b) states: ‘an applicant **must** be required to demonstrate: ... 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’.

13. The carve out for REG and ET in cl 1.3(3) simply means that nothing in the NPS IB applies to REG and ET. It permits regional policy statements to address the impacts of REG and ET on indigenous biodiversity in a regionally appropriate manner (and in accordance with RMA ss 61 and 62), while giving effect to the NPS REG 2011.
14. Sections 6(c) and 30(1)(ga) of the RMA continue to apply.
15. The NPS FM and NZCPS also continue to apply to REG and ET. Of note, the policies in the NPS REG 2011 are not as legally weighty as the 'avoid' policies in the NZCPS or NPS FM (as per *Port Otago Ltd v EDS* [2023] NZSC 112). The directive verbs in the NPS REG 2011 are to 'recognise and provide' for REG. However the NPS REG 2011 does not set any *standard* for 'recognising and providing' for REG – the management approach is left the relevant local authority. In sum, legally – at this point in time – the management of REG and ET must be provided for in a way that does not breach the weightier, directive 'avoid' policies in the NZCPS and NPS FM.
16. In paras [134-6] of his evidence,⁶ Mr MacLennan states that, given the NPS IB exclusion, Policy ECO-P4 would not apply to REG and ET. This is incorrect in law.⁷ Policies in a regional policy statement continue to apply to REG and ET. The introduction of the NPS IB has not altered that situation at all. In all the circumstances, the approach that the RPS took to REG and ET before the NPS IB was gazetted should pertain and there is no need for new policy ECO-P6A to be included in the pORPS as a response to the NPS IB.
17. For additional context: cl 1.3(3) is a *placeholder* for the proposed, updated NPS REG and NPS ET. Draft versions have been released for consultation.⁸ Both drafts seek to manage the impacts of REG and ET activities on indigenous biodiversity within SNAs by utilising an effects management hierarchy (albeit, a different one to the drafting adopted by Mr

⁶ Dated 8th September 2023

⁷ Perhaps, Mr MacLennan is conflating policies in the NPS IB - 'Nothing *in this Policy Statement* applies to [REG]' - with policies in the pORPS.

⁸ For the Draft NPS REG see <https://www.mbie.govt.nz/dmsdocument/26314-proposed-national-policy-statement-for-renewable-electricity-generation>. For the Draft NPS ET see <https://www.mbie.govt.nz/dmsdocument/26315-proposed-national-policy-statement-for-electricity-transmission>.

Maclennan in proposed ECO-P6A).⁹ The drafts provide for speedy implementation, i.e. the directive policies in the NPS REG must be inserted into regional policy statements and plans within *6 months* of gazettal. The period for submissions on the drafts closed on 1 June 2023. Exposure drafts have not yet been released.

Does the NPS IB support the use of the word ‘net’ in ECO O1?

18. Words in the NPS IB should not be taken out of context.

19. The original drafting of ECO-O1 was:

Otago’s indigenous biodiversity is healthy and thriving and any decline in condition, quantity, and diversity is halted ...

20. Some submitters advocated for ‘net’ to be included in ECO-O1 (‘net decline’). That proposal proved contentious. The Director-General opposed, and continues to oppose, ‘net’ being included in the objectives (ECO-O1) because it is inappropriate and problematic in planning terms (see Murray Brass, EIC, paras [140-148]) .

21. The word ‘net’ is used in both the NPS IB and the NPS FM however, it is important to note the context within which it is used. In both cases, it is only used in respect of specific proposals going through a careful calculation process to evaluate offsetting / compensation. Net means ‘what is left when there is nothing left to take away’ or ‘free from all charges and deductions’ and so its use in a quantitative evaluation is clearly appropriate. Net is not used to create a break on or limit to objectives or policies in the NPS IB or NPS FM, nor is it used to constrain councils functions.

22. However, the objective of the NPS IB is to ‘maintain indigenous biodiversity across Aotearoa New Zealand so that there is at least no *overall* loss in indigenous biodiversity’ (cl 2.1(1)(a), (emphasis added)). Clearly, the NPS IB has used ‘overall’ deliberately in this context rather than using ‘net’. The word ‘overall’ means ‘taking everything into account’ and so, arguably, it is a more suitable word to be used in an objective, given

⁹ See e.g., cl 3.8 in the Draft NPS ET and cl 3.6 in the Draft NPS REG.

objectives set wide-ranging and ambitious aims,¹⁰ that may be achieved collectively by many different people, using a myriad of methods.

23. The Director-General continues to oppose any amendment to ECO-O1 as it was originally drafted, for the reasons expressed by Mr Brass in his EIC. The NPS IB Objective is concerned with Aotearoa as a whole, whereas the pORPS has to take into account the regionally-specific context and can be more stringent or ambitious than the NPS IB. However, in the event that the Panel is persuaded by other submitters to amend ECO-O1, the word 'overall' should be used rather than 'net'.

Are ECO-P3 and ECO-P4 consistent with the NPS IB?

24. ECO-P3 is not consistent with NPS IB cl 3.10(2) and ECO-P4 is not consistent with NPS IB cl 3.11(1), and they should be amended to ensure they are giving effect to the NPS IB.

25. Clause 3.10(2) and cl 3.11(1) are directive and mandatory. They must be implemented by the pORPS. ECO-P3 and ECO-P4, as drafted by Mr MacLennan, set lower standards than the minimum standards required by the NPS IB and should be re-drafted. Mr Brass has proposed wording that gives effect to the NPS IB (MB, Appendix 1).

Have the NPS IB exceptions for Māori land been appropriately dealt with in the pORPS?

26. This matter is unclear.

27. Exceptions to managing adverse effects on SNAs on 'specified Māori land' are set out in cl 3.12 and 3.18. These exceptions are carefully conscribed, i.e., the definition of 'specified Māori land' in the NPS IB contains areas that are clearly identifiable by virtue of the legal status of the land.¹¹ Other possible categories of Māori land, that do not fall within these specified definitions, are not exempt from the SNA provisions in cl 3.10.

¹⁰ *Ngati Kahungunu Iwi Inc v Hawke's Bay RC* [2015] NZEnvC 50 at [42].

¹¹ NPS IB cl 1.6

28. Māori land is defined in the pORPS but, as Mr MacLennan accepts,¹² it is a wider definition than ‘specified Māori land’ in the NPS IB. In particular, cl 8 includes land owned by a person or persons with documentary evidence of Kāi Tahu whakapapa connection to the *land*, where that evidence is provided by either the Māori Land Court or the Te Rūnanga o Ngāi Tahu Whakapapa Unit.
29. The NPS IB does not allow for widening the exceptions to cl. 3.10 because that would dilute the mandatory, minimum standards required by the NPS IB.¹³
30. The manner in which Mr MacLennan has approached the ECO provisions to address the principles of Te Tiriti o Waitangi, the NPSIB Objective 2.1(1)(b)(i) and Policy 2, whilst attempting to maintain and protect indigenous biodiversity, is highly complex. As a result, Mr Brass is ‘unclear’ as to the impact of the current proposals (MB, para [25]).
31. In all the circumstances, this may be a matter that the Panel would wish to give additional consideration to – including giving due weight to Kāi Tahu evidence and submissions – in order to test the implications of Mr MacLennan’s current proposals on both indigenous biodiversity *and* mana whenua.



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¹² Evidence dated 8th September 2023, at paras [65-66]).

¹³ Note, the relevant wording in cl 3.10(1) is ‘except as provided in ...’ and note that cl 3.10 is a mandatory and directive provision.