

BEFORE THE OTAGO REGIONAL COUNCIL

IN THE MATTER

of the Resource Management Act 1991

AND

of the proposed Otago Regional Policy Statement
2021 (Non-freshwater parts).

**Supplementary evidence of Murray John Brass on behalf of
the Director-General of Conservation / *Tumuaki Ahurei*
[NPSIB – Planning]
dated 19 September 2023.**

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Introduction

1. My full name is Murray John Brass.
2. I have been asked by the Director-General of Conservation / *Tumuaki Ahurei* ('the D-G') to provide planning evidence on the proposed Otago Regional Policy Statement 2021 ('pORPS 2021').
3. I have already provided evidence (dated 23 November 2022, referred to here as EiC) on the 'non-freshwater parts' of the pORPS 2021. I have also provided evidence on the Freshwater Planning Instrument parts (dated 28 June 2023) and on the implications of the recent gazettal of the National Policy Statement for Indigenous Biodiversity 2023 (NPSIB) on the Freshwater Planning Instrument parts (dated 18 August).
4. This evidence specifically addresses the implications of the recent gazettal of the NPSIB on the non-freshwater parts of the pORPS 2021.
5. My qualification and experience are as set out in paras 5-9 of my EiC.
6. I note if there are any areas where the Panel considers that further assessment or review would assist, I remain available.

Code of Conduct

7. Although it is not strictly required at a Council hearing, I confirm that I have read the code of conduct for expert witnesses as contained in the Environment Court Practice Note 2023. I have complied with the Practice Note when preparing this evidence.
8. The data, information, facts, and assumptions I have considered in forming my opinions are set out in my evidence to follow. The reasons for the opinions expressed are also set out in the evidence to follow.
9. Unless I state otherwise, this evidence is within my sphere of expertise, and I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express.

Material Considered

10. In addition to the material considered for my EiC, in preparing this supplementary evidence I have also considered:
 - The National Policy Statement for Indigenous Biodiversity 2023.

- The supplementary statement of evidence of Andrew Maclennan – Implications of the NPSIB dated 8 September 2023.
 - The statement of evidence of Kelvin Lloyd dated 8 September 2023.
 - The 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.
11. This supplementary evidence responds to the supplementary evidence of Mr Maclennan. In general I consider that his supplementary evidence provides an accurate assessment of the implications of the NPSIB, and appropriate recommendations. I therefore have only addressed areas where I have something different or additional to bring before the Panel:
- Application of the NPSIB
 - Exemption for specified Māori land
 - The terrestrial coastal environment
 - When offsetting and compensation are not appropriate
 - Renewable Electricity Generation and Electricity Transmission
 - ECO-P3 consistency with NPSIB 3.10(2)
 - ECO-P4 consistency with NPSIB 3.11(1)
 - Regional Biodiversity Strategy
12. Where I suggest changes to drafting, I have consolidated those changes in Appendix 1.

Overall response to Maclennan recommendations

13. Overall, I support most of Mr Maclennan's recommendations, and so do not provide specific evidence on those points. For clarification, this includes:
- addition and changes to definitions for consistency with the NPSIB;
 - revising the wording of provisions for consistency with the NPSIB;
 - addition of new provisions which directly flow from the NPSIB;
 - addition of new methods which set out an implementation process for elements of the NPSIB which cannot be given effect until those processes are undertaken;

14. I note that most of Mr MacLennan's recommendations follow directly from the NPSIB. I therefore consider that the Panel should take a positive approach to incorporating the recommended changes and addition as:
- they will apply to planning and consent processes anyway by virtue of the NPSIB's effect;
 - if the recommended changes are not brought into the RPS now, then they will need to be brought in through a future change process (which is less efficient than including them now);
 - incorporating the changes into the RPS now improves clarity and certainty for RPS users.

Application of the NPSIB

15. I agree with the ORC Memorandum that ORC must give effect to the NPSIB in preparation of the pORPS 2021, and that there is scope in this hearing to do so.
16. However, I consider that the NPSIB does have further relevance beyond that outlined in the Memorandum and supplementary evidence. In my earlier evidence I have addressed the need for integrated management and a ki uta ki tai approach [see paras 46-52 of my EIC].
17. My view is that the NPSIB should not be viewed in a narrow way which limits its relevance to only where specific individual provisions apply. Rather, I consider that it should be viewed as part of a suite of national direction to be given effect in an integrated fashion across the pORPS 2021.
18. This is particularly the case for an RPS, which must operate effectively across the terrestrial, freshwater, marine and air domains. For example, as per the National Planning Standards, the ECO chapter applies in all domains, and similarly for many other chapters and provisions of the pORPS 2021. This means that provisions in those chapters (e.g. biodiversity significance criteria, offsetting and compensation principles) need to work as effectively in the freshwater and marine environments, and across domain boundaries, as they do in the terrestrial environment.
19. I would therefore encourage the Panel to take a broad view of implementing the NPSIB. In particular, where there is a specific requirement which applies to terrestrial biodiversity under the NPSIB, but the RPS also has to deal with the same issue across boundaries or in the freshwater and marine environments, I

would encourage the Panel to take a consistent and integrated approach across all of the domains.

Exemption for specified Māori land

20. The NPSIB provides exemptions for specified Māori land (as defined) from the standard requirements for managing effects on SNAs (clause 3.10) and managing indigenous biodiversity outside SNAs (clause 3.16). In place of those requirements, there is a specific clause (3.18) which sets out the approach to indigenous biodiversity on specified Māori land.
21. The pORPS 2021 (as at the 'Reply report' version dated 30 May 2023) includes a definition of 'Māori land' which contains a number of elements which are the same as those in the NPSIB definition, but also some additional elements (e.g. clause (8) is specific to persons with a Kāi Tahu whakapapa connection to the land). For further analysis see Maclennan [65].
22. In terms of indigenous biodiversity, the relevant pORPS 2021 policies would provide for development in accordance with mātauraka and tikaka (MW-P4); apply an effects management hierarchy to specified activities (ECO-P4(3)); and require that local authorities work with mana whenua (ECO-M7A(4)).
23. Mr Maclennan compares the NPSIB definition of 'specified Māori land' and the pORPS 2021 definition of 'Māori land', and recommends that no change is required and the pORPS 2021 retains the use of the term 'Māori land' as defined therein (Maclennan [67]). He also recommends that a new method (ECO-M4D) be added to reflect the requirements of NPSIB 3.18.
24. Having reviewed Mr Maclennan's recommendations, I am unclear whether they do give appropriate effect to the NPSIB, as:
 - The definition of 'Māori land' in the pORPS 2021 appears to have some elements which are broader than the definition of 'specified Māori land' in the NPSIB. While I have no issue with this in terms of the wider use of the phrase across the pORPS 2021, I am unclear how this impacts its use in implementing the relevant NPSIB provisions;
 - Māori land is still subject to the 'avoid' and 'effects management hierarchy' requirements of ECO-P3 and ECO-P4, whereas the NPSIB provides an exception from such requirements (for specified Māori land);

- Addressing the lack of exemptions by applying an NPSIB-based exception for ECO-P3 and ECO-P4 would appear to create a different conflict with the NPSIB, as the broader definition of ‘Māori land’ in the pORPS 2021 would extend the exception beyond what the NPSIB provides.
25. I consider that this is a matter which the Panel will need to give further thought, to ensure that the pORPS 2021 adequately gives effect to the NPSIB requirements in respect of both indigenous biodiversity *and* specified Māori land. In this regard, I have reviewed the supplementary evidence of Mr Bathgate on the NPSIB - he proposes the issue be addressed by strengthening ECO-M4D, and I would support such an approach for the reasons given in his evidence.

The terrestrial coastal environment

26. The ‘Reply report’ version of the pORPS 2021 as at 30 May 2023 limits the provisions for protecting SNAs (ECO-P3 and ECO-P4) and applying an effects management hierarchy for indigenous biodiversity (ECO-P6) to “outside the coastal environment”, with indigenous biodiversity in the coastal environment managed separately by CE-P5.
27. Mr Maclennan does not recommend any changes to this approach, and states at [98] that “*ECO-P6 applies to all indigenous biodiversity (with some exceptions to give effect to the NZCPS)...*”
28. However, I do not consider that excluding the terrestrial coastal environment from the protection of SNAs and the effects management hierarchy is required to give effect to the NZCPS. The NPSIB is explicit that both the NZCPS and the NPSIB apply in the terrestrial coastal environment (NPSIB 1.4(1)), and it is only if there is a “*conflict*” that the NZCPS prevails (NPSIB1.4(2)).
29. I consider that protecting SNAs and applying the effects management hierarchy within the terrestrial coastal environment would not conflict with the NZCPS, provided that it would only apply after the ‘avoid’ requirements of NZCPS Policy 11(a) and (b) have been met. I consider that this approach would provide further specificity for how other effects are to be dealt with, would not conflict with the NZCPS, and would give effect to the NPSIB.

When offsetting and compensation are not appropriate

30. The NPSIB includes Appendices 3 and 4, setting out principles for biodiversity offsetting and compensation. Mr Maclennan recommends that the content of these Appendices be adopted into the pORPS 2021 APP3 Criteria for biodiversity offsetting and APP4 Criteria for biodiversity compensation.
31. The D-G's submission sought various changes to APP3 and APP4. These are generally consistent with what is now set out in the NPSIB, and I consider it would be preferable to adopt the NPSIB drafting rather than that in the D-G's submission or different iterations of the s42A recommendations. Doing so would better give effect to the NPSIB, would improve consistency of implementation, and would avoid a need for further adjustments to drafting in the future.
32. Mr Maclennan has also considered ecological evidence provided by Mr Lloyd, which recommends that some additional 'bottom lines' be retained from the s42A versions of APP3 and APP4. Mr Maclennan recommends that they be incorporated into the new drafting, as examples of when offsetting or compensation are not appropriate.
33. I consider that including these additions is appropriate and justified on the basis of the information on Otago's biodiversity values and threats provided in the s32 Report, Dr Lloyd's evidence, and the D-G's experts' ecological evidence. I also consider that Mr Maclennan's approach to drafting is appropriate, in that it achieves the intent set out by Dr Lloyd, in a manner which integrates with the NPSIB drafting.

Renewable Electricity Generation and Electricity Transmission

34. The NPSIB expressly does not apply to "*the development operation, maintenance or upgrade of renewable electricity generation assets and activities and electricity transmission network assets and activities*" (NPSIB 1.3(3)). Note that although Renewable Electricity Generation (REG) is broadly defined in the NPSIB, Electricity Transmission (ET) is limited to the National Grid.
35. Based on that exclusion, Mr Maclennan recommends that REG and ET be excluded from the effects management hierarchy requirement in ECO-P4, and instead proposes a new policy ECO-P6A to specifically address REG and ET. Policy ECO-P6A would apply a form of hierarchy, but much less certain or

clearly defined than ECO-P4, and would set a lower standard of protection for indigenous biodiversity.

36. I disagree with the reasoning for this approach. In his paragraph [136] Mr Maclennan states that, given the NPSIB exclusion, Policy ECO-P4 would not apply to REG and ET. I consider this is incorrect – ECO-P4 is expressed in its own terms and refers to the effects management hierarchy as defined in the pORPS 2021, so it is not dependent on the NPSIB. Accordingly, there would be no structural issue with applying ECO-P4, and the definition of effects management hierarchy as proposed, to REG and ET.
37. In terms of justification for applying the effects management hierarchy to REG and ET, I simply note that the 'Reply report' version of the pORPS 2021 as at 30 May 2023 applies an effects management hierarchy approach to REG and ET, on the basis of the s32 Report, s42A Report, and evidence presented at the hearing, all of which was in the absence of an NPSIB. The fact that there is now an NPSIB which does not apply to REG or ET does not in any way change the assessments on how to manage REG and ET previously undertaken – it has gone from a situation in which there is no NPSIB applying to the assessments to a situation in which there is still no NPSIB applying to the assessments.
38. As per those previous assessments, I consider that applying an effects management hierarchy to REG and ET is justified in terms of Otago's biodiversity values and threats, and under sections 6(c) and 30(1)(ga) of the Act.
39. Applying the specific drafting of the effects management hierarchy as now proposed would be a slight change from the 'Reply report' drafting, but I consider this is well within the scope of evidence presented on the effects management hierarchy generally. Applying the same approach and drafting to REG and ET as for other activities would provide more clarity and certainty in respect of the provisions, and more consistency and integration in terms of how the effects of activities on indigenous biodiversity are managed.

ECO-P3 consistency with NPSIB 3.10(2)

40. The NPSIB in clause 3.10(2) sets out five adverse effects on SNAs which must be avoided (other than where specific exceptions apply).

41. Mr Maclennan has reviewed those five requirements, and concluded that no changes to the pORPS 2021 were required on the basis that they were already covered by policy ECO-P3 (Maclennan [184]).
42. In comparing the two sets of provisions, ECO-P3(1) requires avoidance of:
“any reduction of the area or indigenous biodiversity values identified and mapped under ECO-P2(1), (even if those values are not themselves significant but contribute to an area being identified as a significant natural area)”
43. In contrast, NPSIB 3.10(2) require avoidance of
*“(a) loss of ecosystem representation and extent:
 (b) disruption to sequences, mosaics, or ecosystem function:
 (c) fragmentation of SNAs or the loss of buffers or connections within an SNA:
 (d) a reduction in the function of the SNA as a buffer or connection to other important habitats or ecosystems:
 (e) a reduction in the population size or occupancy of Threatened or At Risk (declining) species that use an SNA for any part of their life cycle.”*
44. While the overall intents are broadly similar, I consider that the NPSIB provisions are more specific and contain more prescriptive ecological criteria than ECO-P3(1). My reading is also that while that ECO-P3(1) focusses on the values contained *within* the SNA, NPSIB 3.10(2) also addresses effects on how the SNA relates to other important habitats or ecosystems, and on species that use the SNA. So the NPSIB drafting is both more specific, and applies in more circumstances, than ECO-P3(1).
45. I therefore consider that ECO-P3(1) should be redrafted to give effect to the NPSIB by replacing the current clause (a) with clauses (a) to (e) from NPSIB 3.10(2).

ECO-P4 consistency with NPSIB 3.11(1)

46. NPSIB clause 3.11(1) provides an exception from the ‘avoid’ requirements of 3.10(2) for certain activities within SNAs. Mr Maclennan recommends consequential changes to Policy ECO-P4 to align with that clause, i.e. expanding the infrastructure exemption to all “specified infrastructure”, retaining the exemptions for mineral extraction and aggregate extraction, and adding a new exemption for existing coal mines.

47. However, Mr Maclennan's drafting does not bring through all of the requirements under NPSIB 3.11(1) relating to national and regional benefit, functional or operation need, and alternative locations.
48. I therefore recommend additions to Mr McLennan's drafting to ensure that all applicable requirements are included (see Appendix 1).

Regional Biodiversity Strategy

49. The NPSIB requires regional councils to prepare regional biodiversity strategies (clause 3.22), and sets out requirements for their contents (Appendix 5) and timing (clause 4.3).
50. Mr Maclennan does not recommend any change to the pORPS 2021 to reflect this, on the basis that the strategy will be developed outside the RPS.
51. Although I agree that the Otago regional biodiversity strategy will be developed separately to the RPS, I see no reason why this should not be reflected in a method in the RPS. Doing so would give express effect to the NPSIB, and would be consistent with the approach Mr Maclennan has taken elsewhere in recommending additional methods.
52. I note that there is an 'Otago Regional Council's Biodiversity Strategy 2018'¹ in place. Although this is a useful document, it does not appear to fully meet the requirements of NPSIB Appendix 5, mainly as it focusses on actions that the Regional Council itself will take, rather than being a 'regional' strategy covering actions of central and local government, communities and tangata whenua.
53. I therefore recommend adding a new method, as shown in Appendix 1.



Murray Brass

DATED this 19th day of September 2023

¹ https://www.orc.govt.nz/media/5798/orc_biodiversitystrategy_document-final-web.pdf

Appendix 1: Summary of proposed changes

(changes tracked against Maclennan supplementary evidence drafting)

ECO-P3 – Protecting *significant natural areas* and taoka

Outside the coastal environment marine area, subject to CE-P5, and except as provided for by ECO-P4 and ~~ECO-P6A~~, protect *significant natural areas* and *indigenous species* and ecosystems that are taoka by:

(1) first avoiding adverse *effects* that result in:

~~(a) any reduction of the area or *indigenous biodiversity* values identified and mapped under ECO-P2(1), (even if those values are not themselves significant but contribute to an area being identified as a *significant natural area*) and~~

(a) loss of ecosystem representation and extent:

(b) disruption to sequences, mosaics, or ecosystem function;

(c) fragmentation of SNAs or the loss of buffers or connections within an SNA:

(d) a reduction in the function of the SNA as a buffer or connection to other important habitats or ecosystems:

(e) a reduction in the population size or occupancy of Threatened or At Risk (declining) species that use an SNA for any part of their life cycle

~~(b)~~ (f) any loss of Kāi Tahu taoka values identified by *mana whenua* as requiring protection under ECO-P2(2), and

(2) after (1), applying the *effects management hierarchy (in relation to indigenous biodiversity)* to areas and values other than those covered by ECO-P3(1), and

(3) prior to *significant natural areas* and *indigenous species* and ecosystems that are taoka being identified and mapped in accordance with ECO-P2, adopt a precautionary approach towards activities in accordance with IM-P6(2).

ECO-P4 – Provision for new activities

Outside the coastal environment marine area, and subject to CE-P5, ~~except as provided for by ECO-P6A~~, maintain Otago's indigenous biodiversity by following the sequential steps in the effects management hierarchy (in relation to indigenous biodiversity) when making decisions on plans, applications for resource consent or notices of requirement for the following activities in significant natural areas or where they may adversely affect indigenous species and ecosystems that are taoka that have been identified by mana whenua as requiring protection:

(1) the development, operation, maintenance or upgrade of specified infrastructure that provides significant national or regional public benefit

(excluding infrastructure for renewable electricity generation and electricity transmission networks) that has a functional need or operational need to locate within the relevant significant natural area(s) or where they may adversely affect indigenous species or ecosystems that are taoka, and there are no practicable alternative locations,

(1A) the development, operation and maintenance of mineral extraction activities that provide a significant national public benefit that could not otherwise be achieved within New Zealand and that have a functional need or operational need to locate within the relevant significant natural area(s) or where they may adversely affect indigenous species or ecosystems that are taoka, and there are no practicable alternative locations,

(1B) the development, operation and maintenance of aggregate extraction activities that provide a significant national or regional public benefit that could not otherwise be achieved within New Zealand and that have a functional need or operational need to locate within the relevant significant natural area(s) or where they may adversely affect indigenous species or ecosystems that are taoka, and there are no practicable alternative locations,

(1C) the operation or expansion of any coal mine that was lawfully established before August 2023 that has a functional need or operational need to locate within the relevant significant natural area(s) or where they may adversely affect indigenous species or ecosystems that are taoka, and there are no practicable alternative locations; except that, after 31 December 2030, this exception applies only to such coal mines that extract coking coal,

(2)

ECO-P6 – Maintaining *indigenous biodiversity*

Outside the coastal ~~environment~~ marine area, and subject to CE-P5, maintain Otago's *indigenous biodiversity* (excluding areas protected under ECO-P3, ~~and activities managed under ECOP6A(1))~~ by:

- (1) applying the *biodiversity effects management hierarchy (in relation to indigenous biodiversity)* to manage significant adverse *effects* on *indigenous biodiversity*, and
- (2) avoiding, remedying, or mitigating all other adverse *effects* on *indigenous biodiversity*.

~~ECO-P6A — Renewable electricity generation and electricity transmission networks~~ *(Delete in its entirety)*

ECO-MX Regional Biodiversity Strategy

The Regional Council must initiate preparation of a regional biodiversity strategy that complies with Appendix 5 of the National Policy Statement for Indigenous Biodiversity 2023 no later than 7 July 2026, and complete the strategy no later than 7 July 2033.