

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 IN RESPONSE TO
SUBMITTERS ON THE IMPLICATIONS OF THE NATIONAL POLICY
STATEMENT FOR INDIGENOUS BIODIVERSITY FOR NON-FRESHWATER
ISSUES**

Dated 26 September 2023

ROSS DOWLING MARQUET GRIFFIN
SOLICITORS
DUNEDIN

Telephone: (03) 477 8046
Facsimile: (03) 477 6998
PO Box 1144, DX YP80015

Solicitor: S J Anderson

**MEMORANDUM FOR THE OTAGO REGIONAL COUNCIL ON THE
IMPLICATIONS OF THE NATIONAL POLICY STATEMENT FOR INDIGENOUS
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 on the implications of the National Policy Statement for Indigenous Biodiversity (“NPS-IB”) for non-freshwater issues by 8 September 2023.
2. In its Minute 19 dated 13 September 2023, the Panel directed that submitters have the right to respond solely on those aspects of the implications of the NPS-IB for non-freshwater issues by Tuesday 19 September 2023 and ORC to have the opportunity of final response to by Tuesday 26 September 2023.

Response to Parties

3. The following parties filed memoranda on the implications of the NPS-IB in response to ORC’s memoranda and evidence dated 8 September 2023:
 - 3.1. Meridian Energy Limited dated 18 September 2023;
 - 3.2. Oceana Gold New Zealand Limited dated 19 September 2023;
 - 3.3. Beef + Lamb New Zealand Limited and Deer Industry New Zealand dated 19 September 2023;
 - 3.4. Otago Water Resource Users Group dated 19 September 2023;
 - 3.5. Director-General of Conservation dated 19 September 2023; and
 - 3.6. Manawa Energy Limited dated 19 September 2023.
4. Most of the memoranda traverse matters already addressed or resolved:
 - 4.1. Meridian Energy Limited claims that ORC’s approach to managing nationally significant activities is resulting in inconsistencies with the National Policy Statement for

Renewable Energy Generation 2011¹.

- 4.2. Beef + Lamb New Zealand Limited and Deer Industry New Zealand's submissions appear to be concerned with the management of wetlands, which was traversed in the freshwater hearings.
- 4.3. OWRUG asserts that Mr Maclennan has mischaracterised the aim of the NPS-IB at his paragraph 140 of his evidence². The balance of OWRUG's submission deals with the differences of the effects management hierarchies as between the NPSFM and NPS-IB. Ms Boyd has addressed this in her supplementary evidence dated 26 September 2023. Following discussion at the FPI hearing, Ms Boyd agrees that the NPSFM effects management hierarchy should apply to indigenous biodiversity in wetlands.
- 4.4. Manawa Energy submits that the approach taken in NPS-IB is consistent with Manawa's position that a separate chapter is appropriate for renewable electricity generation activities.
5. The ORC does not further address these matters in this response.
6. This memorandum addresses:
 - 6.1. The legality of the proposed amendments to the proposed Otago Regional Policy Statement: and
 - 6.2. The approach to be taken to the management of the effects of renewable electricity generation and electricity transmission activities on indigenous biological diversity.

Oceana Gold New Zealand Limited

7. Oceana Gold New Zealand Limited submit that some of the suggested amendments proposed to the proposed Otago Regional Policy Statement do not give effect to the NPS-IB and are unlawful³. OGL particularly takes exception to the amendments/additions to APP2 – Criteria for identifying areas that qualify as significant natural areas (SNAs), APP3 – Principles

¹ Paragraph 3 of its Memorandum dated 18 September 2023.

² Paragraph 6 of its Memorandum dated 19 September 2023.

³ Paragraph 3 of its Memorandum dated 19 September 2023.

for biodiversity offsetting and APP4 – Principles for biodiversity compensation.

The Law

8. Part 3 of the NPS-IB “sets out a non-exhaustive list of things that must be done to give effect to the Objective and Policies in Part 2 of this National Policy Statement, but nothing in this Part limits the general obligation under the Act to give effect to that Objective and those Policies”⁴.
9. Further, it provides that “Nothing in this Part limits a local authority’s functions and duties under the Act in relation to indigenous biodiversity”⁵.
10. As noted by the Director-General of Conservation⁶, clause 3.1 of the NPS-IB permits inclusions of additional measures to:
 - 10.1. give effect to the NPS-IB; and
 - 10.2. achieve the maintenance of indigenous biodiversity generally; and
 - 10.3. protect significant indigenous biodiversity.
11. This is particularly pertinent in responding to regional context.
12. The sole objective of the NPS-IB is to maintain biodiversity across Aotearoa New Zealand, including by protecting and restoring indigenous biodiversity as necessary to achieve overall maintenance of indigenous biodiversity.
13. Providing an additional habitat criterion in APP2 gives effect to sections 6(c) and 30(1)(ga) of the RMA, and clauses 1.5 and 1.7, Objective 1 and policies 3, 6 and 7 of the NPS-IB.
14. Providing additional examples of where offsetting and compensation will not be appropriate in APP3 and APP4 gives effect to section 30(1)(ga) of the RMA, and clauses 1.5 and 1.7, Objective 1 and policies 3 and 8 of the NPS-IB.
15. The proposed amendments are lawful.

⁴ Clause 3.1(1), NPS-IB.

⁵ Clause 3.1(2), NPS-IB.

⁶ Paragraph 5 of its Memorandum dated 19 September 2023.

Ecological Justification

16. The additions to APP2, APP3 and APP4 are supported by the evidence of Dr Kelvin Lloyd⁷.

Significance Criteria – APP2

17. At expert conferencing, the experts agreed wording for fauna habitat criterion⁸.
18. Dr Lloyd recommends this be retained and included as an attribute for in the criteria for identifying areas that qualify as SNA⁹.
19. Dr Lloyd noted the additional criterion was “*particularly important criterion in Otago, which has so many endemic or national stronghold populations of indigenous fauna.*”¹⁰

Offsetting and Compensation Principles – APP3 and APP4

20. APP3(2) and APP4(2) provide examples of where offsetting and compensation will not be appropriate respectively.
21. Mr Maclennan recommended 3 additional examples for APP3¹¹ and 4 additional examples for APP4. The additional examples are taken from the “*bottom lines*” in the Reply Version of the PORPS dated 30 May 2023.
22. Dr Lloyd’s analysis of the additional examples concluded that allowing those effects to occur:
 - 22.1. Would not maintain indigenous biological diversity¹²; or
 - 22.2. Could not be offset or compensated¹³; for
 - 22.3. Either would not¹⁴, or be difficult to achieve a net gain¹⁵; or
 - 22.4. Would result in a net loss outcome¹⁶.

⁷ Statement of Evidence of Dr Kelvin Lloyd dated 8 September 2023.

⁸ Joint Witness Statement – Ecologists dated 31 March 2023 at page 10.

⁹ Dr Lloyd’s evidence at paragraphs [28] to [30].

¹⁰ Ibid at [29].

¹¹ Noting that the inclusion of (g) was in error as this limb is captured by (a).

¹² Dr Lloyd’s evidence at: [34], [37], [49] and [51].

¹³ Ibid at [35].

¹⁴ Ibid at [36] and [37].

¹⁵ Ibid at [48], [49], [50] and [51].

¹⁶ Ibid at [36].

23. The sole objective of the NPSIB is to maintain indigenous biodiversity across Aotearoa.
24. Policy 3 of the NPSIB requires a precautionary approach be adopted when considering adverse effects on biodiversity.
25. Other relevant policies are:
 - 25.1. Policy 7: SNAs are protected by avoiding or managing adverse effects from new subdivision, use and development.
 - 25.2. Policy 8: The importance of maintaining biodiversity outside SNA is recognised and provided for.
 - 25.3. Policy 13 requires the restoration of indigenous biodiversity as promoted and provided for.
26. Allowing the types of adverse effects Mr MacLennan has included in APP3(2) and APP4(2) to occur would:
 - 26.1. not give effect to the NPSIB¹⁷; and
 - 26.2. be contrary to ORC's functions under ss 6(c) and 30(1)(ga) of the RMA.
27. Accordingly, the limited additions proposed by Mr MacLennan are both lawful and justified from an ecological perspective.

The Effects of Renewable Electricity Generation and Electricity Transmission Activities on Indigenous Biodiversity

28. Under clause 1.3(3), the NPS-IB does not apply to the development, operation, maintenance or upgrade of renewable electricity generation assets and activities and electricity transmission network assets and activities.
29. The recommendations and decisions report on the National Policy Statement for Indigenous Biodiversity¹⁸ flagged that REG and ETN assets and activities and their interactions with SNA's and biodiversity will be

¹⁷ In particular: Objective 1 and policies 3, 6, 7, 8 and 13 and Appendix 3: Principles for biodiversity offsetting, Appendix 4: Principles of biodiversity compensation and the definition of biodiversity offset.

¹⁸ Ministry for the Environment, July 2023, Publication number: ME 1709.

managed through the amendments to NPS-REG and NPS-ET proposed in the consultation on renewable electricity generation and transmission¹⁹.

30. The report acknowledged that:

“This will leave all REG/ETN applications for new developments, upgrades, maintenance and operation to be dealt with directly by the RMA, and associated RMA plans and policy statements, until such time as the amendments to the NPS-REG and associated documents are finalised and come into effect...this approach could ultimately provide a simpler, more consistent consent pathway for REG/ETN developments adversely affecting any of the significant environmental values identified as matters of national importance in section 6 of the RMA...and would also provide greater certainty to REG/ETN development in the longer term.”²⁰

31. In short, the Ministry for the Environment turned its mind to the potential gap that clause 1.3 of the NPSIB was creating, leaving management of those REG/ETN effects on biodiversity to the RMA and policy statements and plans in the interim.

32. The pORPS was notified on 26 June 2021 and included provisions which manage the effects of REG and ETN on indigenous biodiversity, including the effects management hierarchy in ECO-P6.

33. While the ECO chapter has been amended to bring it into line with the NPS-IB, there has been no change to the effects management hierarchy or otherwise that is material to REG or ETN activities.

34. REG and ETN are left unaffected by the pORPS's implementation of the NPS-IB.

35. However, the exclusion of REG and ETN under clause 1.3(3) of the NPS-IB does indicate policy direction at a national level that REG and ETN are to be treated differently to the NPS-IB regime.

36. The use of an effects management hierarchy ought not in itself be contentious as a tool to manage the effects of activities such as REG and ETN.

¹⁹ Ibid at page 94.

²⁰ Ibid at page 98.

37. The aspect where different treatment is required is the consequence of residual adverse effects remaining after the effects management hierarchy has been implemented.
38. Given the signaled policy direction the consequence should not necessarily be avoidance of the activity.
39. The exposure drafts of the proposed NPS-ET and NPS-REG utilise a significance threshold. If significant residual adverse effects remain after the application of the effects management hierarchy, this results in the avoidance of the activity. Otherwise, the benefits of the activity may be weighed against the residual adverse effects.
40. While the exposure drafts do not have standing as national policy statements which must be given effect to under section 61 of the RMA, it is open to the ORC to adopt a similar policy response to ensure that ETN and REG activities may be enabled where residual adverse effects in SNAs are not significant.
41. That is what Mr Maclennan proposes in his evidence. For REG and ETN residual adverse effects after implementing the effects management hierarchy will not necessarily mean that the activity must be avoided. Adverse effects of REG and ETN activities on indigenous biodiversity outside of SNAs are to be avoided, remedied, or mitigated to the extent practicable.



T M Sefton
Counsel for the Otago Regional Council

Dated: 26 September 2023