

**In the Environment Court  
Christchurch Registry**

**ENV-2016-CHC**

Under the Resource Management Act 1991  
And in the matter of an appeal pursuant to Schedule 1, clause 14(1) of the Act

Between

**Transpower New Zealand Limited**

Appellant

and

**Otago Regional Council**

Respondent

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**Notice of Appeal on behalf of Transpower New Zealand  
Limited against decision on the Proposed Otago Regional  
Policy Statement**

**9 December 2016**

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**BELL GULLY**

BARRISTERS AND SOLICITORS  
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**To:** The Registrar  
Environment Court  
Christchurch

1. Transpower New Zealand Limited (**Transpower**) appeals against part of a decision of the Otago Regional Council (the **Council**) on the Proposed Regional Policy Statement for Otago (the **Proposed RPS**).
2. Transpower made a submission and further submission on the Proposed RPS.
3. Transpower is not a trade competitor for the purposes of section 308D of the Resource Management Act 1991 (**RMA**).
4. Transpower received notice of the decision on 1 October 2016.
5. The decision was made by the Council.
6. The parts of the decision that this appeal relates to are:
  - (a) Policy 1.1.2;
  - (b) Objective 3.2;
  - (c) Policies 3.2.2, 3.2.4, 3.2.9, 3.2.10 and 3.2.14;
  - (d) Policies 3.2.5 and 3.2.6;
  - (e) Policy 4.1.13;
  - (f) Policy 4.3.2;
  - (g) Policy 4.3.3;
  - (h) Policy 4.3.4;
  - (i) Policy 4.4.4;
  - (j) Policy 4.5.7;
  - (k) Policy 4.6.9; and

(l) The decision not to include a new objective and policy relating to the National Grid.

7. The reasons for the appeal and the relief sought from the Court are set out in detail below. Amendments sought by Transpower are underlined or ~~struck through~~.

### **Policy 1.1.2**

8. *Reasons for appeal:* The Hearing Panel has added a new policy on providing for economic wellbeing to enable the development and use of natural and physical resources subject to the adverse effects of that activity being appropriately managed. The Hearing Panel states that this addresses some of the submitter concerns about the values of resource use not being recognised enough.
9. Transpower considers the policy is too vague, and is counter to the purpose of the RMA, which is to enable use and development provided effects are managed appropriately. The proposed policy goes much further than this in only enabling development if adverse effects are managed to “give effect” to the Proposed RPS. The requirement to “give effect” to a policy instrument has been held by the Supreme Court to mean “implement”, and on the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it. Development may reflect the “sustainable management” purpose of the RMA even though not every provision in the Proposed RPS is given effect to.
10. Instead, Transpower considers the policy should be directed towards enabling the use and development of natural and physical resources, with other provisions addressing how adverse effects are to be managed in the specific context.
11. *Relief sought:* Amend Policy 1.1.2 as follows:

### **Policy 1.1.2 Economic wellbeing**

Provide for the economic wellbeing of Otago’s people and communities by enabling the use and development of natural and physical resources while avoiding, remedying or mitigating adverse effects of activities on the

~~environment only if the adverse effects of those activities on the environment can be managed to give effect to the objectives and policies of the Regional Policy Statement.~~

### **Objective 3.2**

12. *Reasons for appeal:* Transpower considers that this objective goes beyond what is necessary to achieve the purpose of the RMA. Transpower seeks to amend this objective to recognise the reality that some regionally or nationally significant infrastructure must be located in significant and highly-valued natural resources. Transpower is also concerned that a directive to 'enhance' a natural resource is too uncertain in scope and application. Transpower considers that natural resources should only be protected from inappropriate use and development. This enables a decision-maker to undertake an assessment as to what is inappropriate in the context of the attributes and values of a specific natural resource.

13. *Relief sought:* Amend Objective 3.2 as follows:

Otago's significant and highly-valued natural resources are identified, and protected ~~or enhanced~~ from inappropriate use or development.

### **Policies 3.2.2, 3.2.4, 3.2.9, 3.2.10 and 3.2.14**

14. *Reasons for appeal:* All adverse effects on the values which contribute to the significance of outstanding natural features, landscapes and seascapes, significant indigenous vegetation and habitats of significant fauna, outstanding and high natural character, and outstanding freshwater bodies cannot always be avoided. Some activities, such as a new electricity substation or line, often have a functional, operational and/or locational need to be located in particular areas where adverse effects are unavoidable. This is recognised by policies 3 and 8 of the National Policy Statement on Electricity Transmission 2008 (**NPSET**).

15. Transpower considers that the unqualified use of the word "avoid" should be carefully used by Councils in policy and plan documents due to the recent *King Salmon* decision. In that case, the Court stated that the word "avoid" means "not allowing" or "preventing the occurrence of". Therefore,

if a proposed activity (such as a new electricity substation or line) had a functional, operational and/or locational need to be located within an area identified as an outstanding natural landscape, it would likely have unavoidable adverse effects and therefore could potentially be declined statutory approval under the current policy framework. Such a prohibitive approach would not give effect to NPSET.

16. Instead Transpower considers the policy framework should provide that where avoidance is not practicable, adverse effects should be remedied or mitigated, or alternatively that there is a separate policy framework for the National Grid in light of the requirement to give effect to the NPSET. For example, policy 4 of the NPSET provides that when considering the environmental effects of new transmission infrastructure or major upgrades of existing transmission infrastructure, decision-makers must have regard to the extent to which any adverse effects have been avoided, remedied or mitigated by the route, site and method selection.
17. *Relief sought:* Amend policies 3.2.2, 3.2.4, 3.2.9, 3.2.10 and 3.2.14 as follows:

Policy 3.2.2

Protect and enhance areas of significant indigenous vegetation and significant habitats of indigenous fauna, by all of the following:

- (a) Avoiding, or where this is not practicable, remedying or mitigating adverse effects on those values which contribute to the area or habitat being significant;
- (b) ~~Avoiding significant adverse effects on other values of the area or habitat;~~
- (c) ~~Remedying when other adverse effects cannot be avoided;~~
- (d) ~~Mitigating when other adverse effects cannot be avoided or remedied;~~

...

Policy 3.2.4

Protect, enhance and restore outstanding natural features, landscapes and seascapes, by all of the following:

(a) Avoiding, or where this is not practicable, remedying or mitigating adverse effects on those values which contribute to the significance of the natural feature, landscape or seascape;

(b) ~~Avoiding, remedying or mitigating other adverse effects;~~

...

Policy 3.2.9

Preserve or enhance the outstanding natural character of the coastal environment, by all of the following:

(a) Avoiding, or where this is not practicable, remedying or mitigating adverse effects on those values which contribute to the outstanding natural character of an area;

(b) ~~Avoiding, remedying or mitigating other adverse effects;~~

...

Policy 3.2.10

Preserve or enhance the high natural character of the coastal environment, by all of the following:

(a) Avoiding, or where this is not practicable, remedying or mitigating significant adverse effects on those values which contribute to the high natural character of an area;

(b) ~~Avoiding, remedying or mitigating other adverse effects;~~

...

Policy 3.2.14

Protect outstanding freshwater bodies by all of the following:

- (a) ~~Avoiding, or where this is not practicable, remedying or mitigating~~ significant adverse effects on those values which contribute to the water body being outstanding;
- (b) ~~Avoiding, remedying or mitigating other adverse effects on the water~~ body;

...

18. In the alternative to the above relief, include a new policy as follows:

In rural environments, new development of the National Grid should seek to avoid adverse effects on characteristics and qualities of outstanding natural features, landscapes, seascapes, areas of outstanding and high natural character, outstanding freshwater bodies, significant indigenous vegetation and habitats of significant fauna.

**Policies 3.2.5 and 3.2.6**

19. *Reasons for appeal:* Policies 3.2.5 and 3.2.6 seek to identify and manage “highly valued natural features, landscapes and seascapes” which are not outstanding. These terms are not defined in the RMA, and there is no statutory basis for protecting these areas by avoiding significant adverse effects on them.
20. Section 7(c) of the RMA is often used to justify a second landscape classification based on ‘amenity values’. However, this section does not include any reference to ‘landscape’. Instead it requires that decision makers must have particular regard to “the maintenance and enhancement of amenity values”. Most plans already provide for controls over activities that could affect amenity values and have amenity values as a matter requiring explicit consideration. The additional layers of assessment and control for “highly valued natural features, landscapes and seascapes” are therefore generally superfluous.

21. *Relief sought:* Delete policies 3.2.5 and 3.2.6.

#### **Policy 4.1.13**

22. *Reasons for appeal:* Transpower considers that minor amendments should be made to this policy. The policy as it is currently worded does not require the avoidance of all reverse sensitivity effects, as is required by Policy 10 of the NPSET.
23. *Relief sought:* Amend Policy 4.1.13 as follows:

Protect the functional and operational requirements of hazard mitigation measures, lifeline utilities, and essential or emergency services, including by all of the following:

- (a) Restricting the establishment of those activities that may result in reverse sensitivity effects;
- (b) Avoiding significant adverse effects on the operation, maintenance development, and upgrading of those measures, utilities or services;
- (c) Avoiding, remedying or mitigating other adverse effects on the operation, maintenance, development, and upgrading of those measures, utilities or services;
- (d) Maintaining access to those measures, utilities or services for maintenance and operational purposes; and
- (e) Managing other activities in a way that does not restrict the ability of those mitigation measures, utilities or services to continue functioning.

#### **Policy 4.3.2**

24. *Reasons for appeal:* Transpower is concerned that this policy does not include the amendments supported in its evidence that set out how nationally and regionally significant infrastructure is to be recognised. As such, Transpower considers that the policies do not “provide for” or “enable” infrastructure directly. This policy fails to give effect to policies 1, 2 and 5 of the NPSET.



25. *Relief sought:* Amend Policy 4.3.2 as follows:

Recognise the national and regional significance of all of the following infrastructure by facilitating the operation, maintenance, upgrade, and development of existing facilities and the establishment of new resources to meet the needs of present and future generations:

...

b) The National Grid Electricity transmission infrastructure;

...

### **Policy 4.3.3**

26. *Reasons for appeal:* Transpower considers that Policy 4.3.3 does not give effect to the NPSET. In particular, policies 1, 3, and 4 of the NPSET require decision-makers to (in summary):

- (a) recognise and provide for the national, regional and local benefits of sustainable, secure and efficient electricity transmission (Policy 1);
- (b) consider the constraints imposed on achieving measures to avoid, remedy, or mitigate adverse effects by the technical and operational requirements of the network (Policy 3); and
- (c) have regard to the extent to which any adverse effects have been avoided, remedied or mitigated by the route, site and method selection (Policy 4).

27. In addition, Transpower is concerned with the terminology of policy 4.3.3, requiring that significant adverse effects on specified areas and places be avoided. If the National Grid cannot avoid locating in a specified area such as an outstanding natural landscape then it is likely to have significant adverse visual effects on that landscape which cannot be avoided. This is recognised in the NPSET. In particular, Policy 8 of the NPSET requires that 'in rural environments, planning and development of the transmission system should seek to avoid adverse effects on outstanding natural landscapes, and areas of high natural character',

rather than outright avoidance. This should be recognised and given effect to in this policy.

28. *Relief sought:* Amend Policy 4.3.3 as follows:

In managing the effects ~~Minimise adverse effects~~ from infrastructure that has national or regional significance, local authorities shall take into account ~~by all of~~ the following:

- (a) The constraints imposed by the technical, operational, and locational requirements of the infrastructure when considering ~~Giving preference to avoiding~~ their location in all of the following:
  - (i) Areas of significant indigenous vegetation and significant habitats of indigenous fauna;
  - (ii) Outstanding natural features, landscapes and seascapes;
  - (iii) Areas of outstanding natural character;
  - (iv) Outstanding water bodies or wetlands;
  - (v) Places or areas containing significant historic heritage.
- (b) Where it is not possible to avoid locating in the areas listed in a) above, having regard to the extent to which ~~avoiding significant~~ adverse effects have been avoided, remedied or mitigated ~~on these values that contribute to the significant or outstanding nature of those areas;~~
- (c) ~~Avoiding, remedying or mitigating other adverse effects;~~
- (d) ~~Considering offsetting for residual adverse effects on indigenous biological diversity.~~
- (e) The benefits of the infrastructure; and
- (f) If infrastructure is proposed across regional or district boundaries, apply a consistent and coordinated approach to the provisions.

#### Policy 4.3.4

29. *Reason for appeal:* Transpower considers that policy 4.3.4 does not fully give effect to policies 10 and 11 of the NPSET. Under Policy 10, local authorities are required to the extent reasonably possible to manage activities to avoid reverse sensitivity effects on the National Grid and to ensure the operation, maintenance, upgrading and development of the National Grid is not compromised. This is an onerous obligation. Policy 11 requires local authorities to identify a buffer corridor within which it can be expected that sensitive activities will generally not be provided for.
30. The issue is policy 4.3.4(b) is confined to avoiding significant effects only. This is not envisaged by the NPSET which as noted above contemplates avoiding reverse sensitivity effects and other impacts that can constrain the Grid, and not just significant effects. This is why Transpower seeks the policy be amended to avoid adverse effects, and ensure that there is no change to existing activities that increases their incompatibility with existing infrastructure.
31. Similarly, Transpower considers that the limiting of policy 4.3.3(d) to sensitive activities does not give full effect to the NPSET. Policy 10 of the NPSET requires decision-makers to ensure that the operation, maintenance, upgrading, and development of the electricity transmission network is not compromised. This means other activities that are not defined as “sensitive activities”, such as industrial operations under transmission lines, may need to be controlled to ensure they do not generate adverse effects on the National Grid. Transpower considers that clause (d) should apply to all activities.
32. *Relief sought:* Amend Policy 4.3.4 as follows:
- Protect infrastructure of national or regional significance, by all of the following:
- (a) To the extent reasonably possible, avoiding ~~Restricting~~ the establishment of activities that may result in reverse sensitivity effects;

- (b) ~~Avoiding significant adverse effects on the operation, maintenance, development, and upgrading functional needs of such infrastructure;~~
- (c) ~~Avoiding, remedying or mitigating other adverse effects on the functional needs of such infrastructure;~~
- (d) ~~Identifying and p~~Protecting existing and future infrastructure corridors by ensuring that development within these corridors does not generate adverse effects on the infrastructure; from sensitive activities, now and for the future.
- (e) Ensuring that there is no change to existing activities that increases their incompatibility with existing infrastructure;
- (f) Notifying the owners and operators of infrastructure of consent applications that may adversely affect such infrastructure.

**Policy 4.4.4**

33. *Reasons for appeal:* The policy only enables electricity transmission activities that achieve all of the clauses. This includes the requirement to enhance the efficiency of transporting electricity, which may have unintended implications. Therefore Transpower seeks the focus shifts to enhancement of the safe, efficient, and effective development, operation, upgrade, and maintenance of electricity infrastructure.

34. *Relief sought:* Amend Policy 4.4.4 as follows:

Enable electricity transmission and distribution infrastructure activities that achieve all of the following:

- (a) Maintenance or improvement of the security and reliability of electricity supply; or
- (b) Enhancement of the safe, efficient, and effective development, operation, upgrade, and maintenance of electricity infrastructure efficiency of transporting electricity; and
- (c) Avoidance, remediation or mitigation of adverse effects from that activity.

#### Policy 4.5.7

35. *Reasons for appeal:* Transpower considers that the approach to reverse sensitivity is relatively weak in failing to direct decision-makers to achieve a pattern, form and design of land use that does not adversely affect the efficient operation, use, upgrading and development of infrastructure of regional or national importance.

36. *Relief sought:* Amend Policy 4.5.7 as follows:

Achieve the strategic integration of infrastructure with land use, by undertaking all of the following:

- (a) Recognising the functional, technical, operational and locational needs of infrastructure of regional or national importance;
- (b) Managing adverse effects of the infrastructure through route, site, and method selection; ~~Locating and designing infrastructure to take into account all of the following:~~
  - (i) ~~Actual and reasonably foreseeable land use change;~~
  - (ii) ~~The current population and projected demographic changes;~~
  - (iii) ~~Actual and reasonably foreseeable change in supply of, and demand for, infrastructure services;~~
  - (iv) ~~Natural and physical resource constraints;~~
  - (v) ~~Effects on the values of natural and physical resources;~~
  - (vi) ~~Co-dependence with other infrastructure;~~
  - (vii) ~~The effects of climate change on the long term viability of that infrastructure;~~
  - (viii) ~~Natural hazard risk.~~

Achieving a pattern, form and design of land use that does not adversely affect the efficient operation, use, maintenance,

development and upgrading of infrastructure of regional or national importance;

(c) ~~Locating~~ Managing growth and development by:

(i) ~~Locating it~~ within areas that have sufficient infrastructure capacity and provision; or

(ii) ~~Locating it~~ where infrastructure services can be upgraded, developed or extended efficiently and effectively;

(iii) Ensuring it is not located in a place or form that constrains existing infrastructure of national or regional importance;

(iv) Notifying the owners and operators of infrastructure of consent applications that may adversely affect such infrastructure.

(d) Coordinating the design and development of infrastructure with land use change in growth and redevelopment planning.

#### **Policy 4.6.9**

37. *Reasons for appeal:* Transpower disagrees with the Hearing Panel that “it is only when significant adverse effects are generated that an activity would fail to align.” The policy has been framed in an absolutist way, which is inappropriate for the reasons discussed above about the use of the term “avoid”. The Supreme Court has held that the word “avoid” means “not allowing” or “preventing the occurrence of”. For example, Transpower’s substations are on the Hazardous Activities and Industries List relating to activities and industries that are considered likely to cause contamination, so a policy to avoid the creation of contaminated land is not appropriate.

38. *Relief sought:* Delete policy 4.6.9.

#### **New objective and policy relating to the National Grid**

39. *Reasons for appeal:* Transpower considers as an alternative to some of the relief set out above, the Proposed RPS could include a specific

objective and policy relating to the National Grid to give effect to the NPSET.

40. *Relief sought:* Insert the following new objective:

To recognise and provide for the ongoing operation, maintenance, upgrade and development of the National Grid within Otago as infrastructure of regional and national significance.

Explanation:

The National Grid is infrastructure which has critical importance at a local, regional and national level. This infrastructure is recognised as nationally significant and as such the National Policy Statement on Electricity Transmission underpins its operation, maintenance, development and upgrade. It is important that land use and subdivision is managed effectively and in line with the NPSET to ensure that the operation, maintenance, development and upgrade of the National Grid is not compromised. This approach also ensures that a secure and reliable electricity supply is provided not only for the Otago region, but also on a national scale. In turn, appropriate management of activities in proximity to the National Grid will assist in minimising the adverse effects of the National Grid on communities, as far as practicable.

41. Insert the following new policy:

Protect the National Grid by:

- (a) Avoiding adverse effects, including reverse sensitivity effects, on the National Grid; and
- (b) identifying and protecting corridors for existing National Grid infrastructure in all resource management decision making;
- (c) not locating new activities and development in a place or manner that could constrain the operation, maintenance, upgrade and development of the National Grid;

- (d) Not allowing existing activities to intensify in a way that increases their incompatibility with existing National Grid infrastructure; and
- (e) Notifying the owners and operators of infrastructure of consent applications that may adversely affect National Grid infrastructure.

### Relief Sought

42. Transpower seeks the following relief from the Court:
- (a) The relief specified in this notice of appeal under each heading '*Relief sought*'; or
  - (b) Such further, consequential or alternative relief as may be necessary or appropriate to give effect to the relief sought.
43. The following documents are attached to this notice of appeal:
- (a) A copy of Transpower's submissions (with a copy of the submission opposed or supported by Transpower's further submission);
  - (b) A copy of the relevant parts of the decision of the Council; and
  - (c) A list of names and addresses of persons to be served with a copy of this notice.



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AJL Beatson / NJ Garvan  
Counsel for Transpower New Zealand Limited

Dated: 9 December 2016



**Address for service of the appellant:**

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**Advice to recipients of copy of notice of appeal**

*How to become party to proceedings*

You may be a party to the appeal if you made a submission or a further submission on the matter of this appeal and you lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court within 15 working days after the period for lodging a notice of appeal ends.

Your right to be a party to the proceedings in the Court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing or service requirements (see form 38).

*How to obtain copies of documents relating to appeal*

The copy of this notice served on you does not attach a copy of the decision appealed. These documents may be obtained, on request, from the appellant.

*Advice*

If you have any questions about this notice, contact the Environment Court in Auckland, Wellington or Christchurch.

**Appendix A**

**A copy of Transpower's submission and further submission on the Proposed Regional Policy Statement (with a copy of the submissions of Alliance Group Limited, PowerNet Limited and Trustpower Limited)**

**Appendix B**

**A copy of the relevant extracts of parts of the decision of the Council**

**Appendix C**

**A list of names and addresses of persons to be served with a copy of this notice**