

BEFORE THE FRESHWATER HEARING PANEL

UNDER THE Resource Management Act 1991

AND

IN THE MATTER of the Proposed Otago Regional Policy Statement 2021:
Freshwater Planning Instrument

**MEMORANDUM FOR THE OTAGO REGIONAL COUNCIL ON THE
IMPLICATIONS OF THE NATIONAL POLICY STATEMENT FOR INDIGENOUS
BIODIVERSITY ON FRESHWATER ISSUES**

Dated 11 August 2023

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**MEMORANDUM FOR THE OTAGO REGIONAL COUNCIL ON THE
IMPLICATIONS OF THE NATIONAL POLICY STATEMENT FOR INDIGENOUS
BIODIVERSITY ON FRESHWATER ISSUES**

May it Please the Panel:

1. In its Minute 7 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 freshwater issues by 11 August 2023.

Scope

2. The NPS-IB was gazetted on 7 July 2023 and came into force on 4 August 2023.
3. The ORC must prepare its regional policy statement in accordance with the NPS-IB¹ and give effect to it².
4. The scope for the freshwater hearing panel to give effect to the NPS-IB is not limited to making recommendations within the scope of submissions made on the freshwater planning instrument³ (“FPI”).
5. Clause 49 of Part 4, Schedule 1 provides (**emphasis** added):

“49 Freshwater hearings panel must make recommendations to regional council on freshwater planning instrument

(1) *A freshwater hearings panel must make recommendations on the freshwater planning instrument.*

(2) The freshwater hearings panel—

(a) is not limited in making recommendations only within the scope of submissions made on the freshwater planning instrument; and

¹ Section 61(1)(da) RMA

² Section 62(3) RMA

³ Clause 49(2)(a) of Subpart 4, Schedule 1, RMA

(b) may make recommendations on any other matters relating to the freshwater planning instrument identified by the panel or any other person during the hearing.

(3) The freshwater hearings panel must provide its recommendations to the relevant regional council in 1 or more written reports.

(4) Each report must include—

(a) the panel's recommendations on the provisions of the freshwater planning instrument covered by the report, **and identify any recommendations that are out of scope of the submissions made in respect of those provisions;** and

(b) the panel's recommendations on the provisions and matters raised in submissions made in respect of the provisions covered by the report; and

(c) the panel's reasons for accepting or rejecting submissions and, for this purpose, may address the submissions by grouping them according to—

(i) the provisions of the freshwater planning instrument to which they relate; or

(ii) the matters to which they relate.

(5) Each report may also include—

(a) matters relating to any consequential alterations necessary to the freshwater planning instrument arising from submissions; and

(b) any other matter that the panel considers relevant to the freshwater planning instrument that arises from submissions or otherwise.

(6) To avoid doubt, a panel is not required to make

recommendations in a report that address each submission individually.”

6. There are no scope impediments to giving effect to the NPS-IB in the freshwater hearing process.
7. Accordingly, to the extent the NPS-IB can be given effect to in the FPI, it should be.

National Policy Statement for Indigenous Biodiversity

8. Clause 1.3 of the NPS-IB is entitled “*Application*”, and provides:

“(1) This National Policy Statement applies to indigenous biodiversity in the terrestrial environment throughout Aotearoa New Zealand”.

9. Helpfully, “*terrestrial environment*” is defined in clause 1.6 of the NPS-IB at page 12:

“terrestrial environment means land and associated natural and physical resources above mean high-water springs, excluding land covered by water, water bodies and freshwater ecosystems (as those terms are used in the National Policy Statement for Freshwater Management 2020) and the coastal marine area”.

10. Clause 1.3(2) creates the following limited exceptions to the NPS-IB’s strict application to the terrestrial environment:

“...

(2) However:

- (a) geothermal ecosystems are covered by this National Policy Statement, whether or not they are in the terrestrial environment (but excluding any within the coastal marine area) (see clause 3.13); and*
- (b) specified highly mobile fauna are covered by this National Policy Statement, whether or not they use areas outside the terrestrial environment (such as the coastal marine area or water bodies)*

for part of their life cycle (see clause 3.20); and

- (c) provisions relating to promoting restoration and increasing indigenous vegetation cover extend to include natural inland wetlands (see clauses 3.21 and 3.22); and*
- (d) regional biodiversity strategies may extend to include areas outside the terrestrial environment, including the coastal marine area and water bodies (see clause 3.23); and*
- (e) if an SNA (significant natural area) contains a natural inland wetland, the wetland may be treated as part of the SNA it is located in.”*

- 11. Clause 1.3(3) is explicit that nothing in the NPS-IB applies to the development, operation, maintenance or upgrade of renewable electricity generation assets and activities and electricity transmission network assets and activities.
- 12. The exceptions in Clause 1.3(2) relevant to the FPI are subclauses (b) specified highly mobile fauna, (c) indigenous vegetation cover in natural inland wetlands, and (e) natural inland wetlands in SNAs. These are produced below:

“3.20 Specified highly mobile fauna

- (1) Where information about areas used by specified highly mobile fauna is available, every regional council must record areas outside SNAs that are highly mobile fauna areas, by working together with tangata whenua (in the manner required by clause 3.3), any potentially affected landowners, territorial authorities in its region, and the Department of Conservation. (2) If it will help manage adverse effects on specified highly mobile fauna, regional councils must include in their regional policy statements (where practicable) a map and description of each highly mobile fauna area in the region.*
- (3) Local authorities must include objectives, policies, or*

methods in their policy statements and plans for managing the adverse effects of new subdivision, use, and development on highly mobile fauna areas, in order to maintain viable populations of specified highly mobile fauna across their natural range. (4) Local authorities must provide information to their communities about: (a) highly mobile fauna and their habitats; and (b) best practice techniques for managing adverse effects on any specified highly mobile fauna and their habitats in their regions and districts.

3.21 Restoration

- (1) *Local authorities must include objectives, policies, and methods in their policy statements and plans to promote the restoration of indigenous biodiversity, including through reconstruction of areas.*
- (2) *The objectives, policies, and methods must prioritise all the following for restoration:*
 - (a) *SNAs whose ecological integrity is degraded:*
 - (b) *threatened and rare ecosystems representative of naturally occurring and formerly present ecosystems:*
 - (c) *areas that provide important connectivity or buffering functions:*
 - (d) *natural inland wetlands whose ecological integrity is degraded or that no longer retain their indigenous vegetation or habitat for indigenous fauna:*
 - (e) *areas of indigenous biodiversity on specified Māori land where restoration is advanced by the Māori landowners:*
 - (f) *any other priorities specified in regional biodiversity strategies or any national priorities for indigenous biodiversity restoration.*

- (3) *Local authorities must consider providing incentives for restoration in priority areas referred to in subclause (2), and in particular where those areas are on specified Māori land, in recognition of the opportunity cost of maintaining indigenous biodiversity on that land.*
- (4) *In relation to activities in areas prioritised for restoration, local authorities must consider:*
 - (a) *requiring conditions for restoration or enhancement on resource consents that are new or being reviewed; and*
 - (b) *recommending conditions on any new designations.”*

3.22 Increasing indigenous vegetation cover

- (1) *Every regional council must assess the percentage of indigenous vegetation cover in:*
 - (a) *each of its urban environments; and*
 - (b) *its non-urban environments.*
- (2) *The assessment may be done by a desktop analysis, by ground truthing, or both, and must be done in collaboration with relevant territorial authorities, and tangata whenua (to the extent they wish to be involved).*
- (3) *Regional councils must:*
 - (a) *set a target of at least 10% indigenous vegetation cover for any urban or nonurban environment that has less than 10% cover of indigenous vegetation; and*
 - (b) *consider, in consultation with tangata whenua and territorial authorities, setting higher targets for urban and non-urban environments that already have at least 10% coverage of indigenous vegetation; and*

- (c) *include any indigenous vegetation cover targets in their regional policy statements.*
 - (4) *Local authorities must promote the increase of indigenous vegetation cover in their regions and districts through objectives, policies, and methods in their policy statements and plans:*
 - (a) *having regard to any targets set under subclause (3) by regional councils; and*
 - (b) *giving priority to all the following:*
 - (i) *areas referred to in clause 3.21(2):*
 - (ii) *ensuring indigenous species richness appropriate to the ecosystem:*
 - (iii) *restoration at a landscape scale across the region:*
 - (iv) *using species, and seed from species, that are local to the area.*
13. Clause 1.4 sets out the NPS-IB's relationship with other national direction and provides:

“1.4 Relationship with other national directions and iwi participation legislation

- (1) *Both the New Zealand Coastal Policy Statement and this National Policy Statement apply in the terrestrial coastal environment.*
- (2) *If there is a conflict between the provisions of this National Policy Statement and the New Zealand Coastal Policy Statement 2010 (or any later New Zealand Coastal Policy Statement issued under the Act), the New Zealand Coastal Policy Statement prevails.*
- (3) *If there is a conflict between the provisions of this National Policy Statement and the National Policy Statement for Freshwater Management 2020 or the Resource*

Management (National Environmental Standards for Freshwater) Regulations 2020, the latter prevail.

...”

Conclusion

14. ORC must give effect to the NPS-IB in its preparation of the pORPS.
15. There is scope in this hearing to do so.
16. However, the NPS-IB has limited application to the FPI because:
 - 16.1. The FPI provisions, which are subject to this hearing, are those within the pORPS which “*directly relate to the maintenance or enhancement of quality or quantity of freshwater*”.
 - 16.2. The NPS-IB is limited in its application to indigenous biodiversity in the terrestrial environment⁴, which excludes land covered by water, water bodies, freshwater ecosystems, and the coastal marine area.
 - 16.3. Where either the NESF, NPSFM or NZCPS apply and there is conflict, they prevail over the NPS-IB.
17. The limited provisions of the NPS-IB that do apply to the FPI are:
 - 17.1. specified highly mobile fauna; and
 - 17.2. indigenous vegetation cover in natural inland wetlands; and
 - 17.3. natural inland wetlands in SNAs.
18. The implications for the FPI provisions, analysis and recommended changes are set out in the supplementary evidence of Ms Boyd filed together with this memorandum.



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Dated: 11 August 2023

⁴ But for the exceptions at Clause 1.3(2)