

**BEFORE THE INDEPENDENT HEARINGS PANEL
AT DUNEDIN / ŌTEPOTI**

IN THE MATTER OF the Resource Management Act 1991
AND
IN THE MATTER of submissions and further submissions on the Proposed
Otago Regional Policy Statement – Freshwater Planning
Instrument
AND **The Royal Forest & Bird Protection Society Inc**
(submitter FPI045)

**SUBMISSIONS ON BEHALF OF THE ROYAL FOREST AND BIRD PROTECTION SOCIETY INC IN
RESPONSE TO MINUTE 9**

15 SEPTEMBER 2023

MAY IT PLEASE THE PANEL

1. These submissions are presented on behalf of the Royal Forest & Bird Protection Society (**Forest & Bird**) in response to the Freshwater Hearing Panel's Minute 9 dated 29 August 2023 regarding the Supreme Court's decision *Port Otago Limited v Environmental Defence Society (Port Otago)*.¹
2. In that Minute, the Freshwater Hearing Panel seeks views on the possible implications of *Port Otago*.
3. Forest & Bird provided submissions on the matter in its legal submissions to the Freshwater Hearing Panel dated 6 September 2023.² These submissions do not intend to repeat matters but respond to additional points raised in legal submissions of other submitters.

Interaction with other national policy statements

National Policy Statement for Electricity Transmission 2008

4. The submissions on behalf of Transpower New Zealand rely on *Port Otago* as authority that "directive enabling policies mean that a breach of strong "avoid" policies is necessary, albeit that efforts should be made to avert or narrow such a breach."³ With respect, their submissions have mischaracterised and overstated the relevance of *Port Otago* to these proceedings.
5. The "strong terms" in the National Policy Statement for Electricity Transmission (**NPSET**) referred to by Transpower include "recognise and provide for" and "enable reasonable operational, maintenance and minor upgrade requirements". However, there is nothing in the terminology employed in the NPSET policies that give them a "directive character" in the same vein as the "ports" policy in the NZCPS.
6. The Supreme Court's guidance⁴ as to addressing conflicting policies is not engaged as far as the NPSFM and NPSET are concerned.
7. NZCPS Policy 9 states:

¹ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112.

² Legal submission on behalf of the Royal Forest & Bird Protection Society dated 6 September 2023 at [5]-[27].

³ Transpower submissions dated 1 September 2023 at [3.8].

⁴ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [75]-[82].

Recognise that a sustainable national transport system requires an efficient national network of safe ports, servicing national and international shipping, with efficient connections with other transport modes

8. In *Port Otago*, the Court found that the terms used in NZCPS Policy 9 (**‘the ports policy’**) gives the Ports policy a “directive character” in the same category as NZCPS Policies 11, 13, 15 and 16 (**‘the avoidance policies’**).⁵ The Court stated:⁶

[69] Turning to the NZCPS ports policy, we broadly agree with the Environment Court and Miller J that “requires” is a key verb in the policy. We accept that “recognise” is also an operative verb and that the clause begins with it. However, the verb “requires” colours what the decision-maker is being asked to “recognise”. In other words, the decision-maker is being directed to recognise that a port network is required. To recognise that something is required is to accept that is mandatory. **So, the directive nature of the ports policy arises from the two verbs taken together.** (emphasis).

9. The NPSET does not contain parallel formulations.
10. The terms used in NZCPS ports policy, whereby the verb “requires” colours what the decision-maker is being asked to “recognise,” are clearly distinct from the NPSET Policies referred to in Transpower’s submissions⁷:

Policy 1: **In achieving the purpose of the Act, decision-makers must recognise and provide for** the national, regional and local benefits of sustainable, secure and efficient electricity transmission.

Policy 2: **In achieving the purpose of the Act, decision-makers must recognise and provide for** the effective operation, maintenance, upgrading and development of the electricity transmission network.

11. The direction to “recognise and provide for” is broad and flexible in that it gives decision-makers scope for choice as where, how and when national grid can occur. As the Supreme Court reiterated the approach to interpreting the language of policies in *Port Otago*:⁸

[61] The language in which the policies are expressed will nevertheless be significant, particularly in determining how directive they are intended to be and thus how much or how little flexibility a subordinate decision-maker might have. As this Court said in *King Salmon*, the various objectives and policies in the NZCPS have been expressed in different ways deliberately. Some give decision-makers more flexibility or are less prescriptive than others. Others are expressed in more specific and directive terms. These differences in expression matter.

⁵ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [71].

⁶ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [69].

⁷ Transpower submissions dated 1 September 2023 at [3.3].

⁸ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [61].

12. The direction to “recognise and provide for” in NPSET Policy 1 also applies to the “national, regional and local **benefits** of sustainable, secure and efficient electricity transmission”. In Policy 2, the direction applies to the “effective operation, maintenance, upgrading and development of the electricity transmission network”. These outcomes are distinguishable from the ports policy which “**require** a national network of safe ports, servicing national and international shipping”. There are number of ways of providing for the benefits of electricity transmission, but ports will always be constrained to existing ports in the coastal marine area. National grid assets may have operational (cost) constraints in terms of development but are not functionally constrained in the same way a port will be.
13. NPSET Policies 1 and 2 can be met at the same time as requiring national grid to meet directive bottom lines. In other words, these policies must be determined and implemented in accordance with any constraints that arise because of directions in other policies that establish bottom lines.
14. NPSET Policy 5 instructs decision-makers to enable the “reasonable” operational, maintenance and minor upgrade requirements of transmission assets when considering environmental effects:

Policy 5: When considering the environmental effects of transmission activities associated with transmission assets, **decision-makers must enable the reasonable** operational, maintenance and minor upgrade requirements of established electricity transmission assets.
15. What is “reasonable” must be informed by context,⁹ including standards for environmental protection contained in other applicable national policy statements such as the NPSFM:
 - a. Objective: to **ensure** that natural and physical resources are managed in a way that prioritises: (a) first, the health and well-being of water bodies and freshwater ecosystems.
 - b. Policy 1: “Te Mana o Te Wai is **given effect to**”.
 - c. Policy 6: “There is **no further loss of extent of natural inland wetlands**, their values are protected, and their restoration is promoted.”
 - d. Policy 8: “The significant values of outstanding water bodies are **protected.**”

⁹ Legislation Act 2019, section 10(1): “The meaning of legislation must be ascertained from its text and in the light of its purpose and its context”.

- e. Policy 9: “The habitats of indigenous freshwater species are **protected.**”
 - f. Policy 11: “Freshwater is allocated and used efficiently, all existing over-allocation is **phased out**, and future over-allocation is avoided and future over-allocation is **avoided.**”
16. Accordingly, what is “reasonable” must be interpreted and implemented in a way that is in accordance with the policy imperatives above.
17. The interface between the NPSET and NZCPS was considered by the High Court (Palmer J) albeit in the consenting context whereby Transpower sought consents to replace and realign an existing 110kV electricity transmission line traversing the Tauranga Harbour at Rangataua Bay. This included placing a new pole in front of the Maungatapu Marae. There, Palmer J agreed with earlier characterisation of the NPSET in *Transpower New Zealand Ltd v Auckland Council*¹⁰ in that it provides “relevant considerations in general and that it may be that the NPSET is not as “all embracing” of the RMA’s purpose as the NZCPS”.¹¹ In that case Palmer J found the applicable Regional Coastal Environment Plan (RCEP) gave effect to the NZCPS and NPSET and reconciles them.¹²
18. A summary of the requirements of the NPSET by Palmer J are helpful in this context:¹³

But Policy 2 [of the NPSET] is general in requiring that they “recognise and provide for the effective operation” etc of the network. Policy 5 is more specific in requiring decision-makers to “enable the reasonable operational, maintenance and minor upgrade requirements of transmission assets when considering environmental effects.” That is consistent with the general requirements of the NZCPS as expressed in the more detailed regime for doing so set out in the RCEP and District Plan. Policy 6 is relative, in requiring decision-makers to “reduce” existing adverse effects where there are “substantial upgrades of transmission infrastructure”. And Policies 7 and 8 are consistent with the NZCPS and RCEP in requiring decision-makers to “avoid” or “seek to avoid” certain adverse effects.

19. It is possible for the relevant policies in both the NPSFM and NSPET to be applied at the same time (reconciled), according to their terms. The Supreme Court’s guidance on addressing conflicts between competing policies does not apply to the

¹⁰ *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281.

¹¹ *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201 at [125].

¹² *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201 at [126].

¹³ *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201 at [126](d).

interaction between the NPSFM and NPSET as the policies in these documents do not conflict at the same scale as the NZCPS avoidance policies versus ports policy.

The National Policy Statement for Renewable Electricity Generation 2011

20. The submissions made above equally apply to the National Policy Statement for Renewable Electricity Generation (NPSREG). Forest & Bird agrees with the point in submissions for Manawa Energy where they do not consider “there is a conflict that needs to be resolved here, in the same way the NZCPS port and avoid policies need to be.”¹⁴
21. Again, there are no parallel policy formulations in the NPSREG to the NZCPS ports policy (direction to “recognise” coupled with “required”).
22. The NPSREG employs provisions that are expressed in broad and flexible terms and provide more scope for choice, for example: “to recognise”,¹⁵ “provide for”¹⁶ and “have particular regard to.”¹⁷ The NPSFM contains policies framed in the more specific and unqualified way and are more directive than the NPSREG – which is pitched at a higher level of abstraction. The NPSREG does not overwhelm the planning considerations under the NPSFM 2020.
23. The preamble of the NPSREG specifically states:

This national policy statement does not apply to the allocation and prioritisation of freshwater as these are matters for regional councils to address in a catchment or regional context and may be subject to the development of national guidance in the future.

24. In *Carter Holt Harvey Ltd v Waikato Regional Council*, the Environment Court observed the effect of the NPS-REG preamble as follows:¹⁸

... the National Policy Statement [for Renewable Electricity Generation] should not be used to justify always giving hydro-electricity generation activities priority when making freshwater allocation decisions. It envisages that there may be circumstances where this will not be appropriate and should not occur.

¹⁴ Legal submissions on behalf of Manawa Energy dated 31 August 2023 at [50].

¹⁵ NPSREG Objective.

¹⁶ NPSREG Policy A.

¹⁷ NPSREG Policy B.

¹⁸ *Carter Holt Harvey Ltd v Waikato Regional Council* [2011] NZEnvC 380 at [58]-[59].

“Material harm”

25. The legal submissions on behalf of Beef + Lamb New Zealand and Deer Industry New Zealand make some general comments on applicability of *Port Otago*. Their submissions state the Supreme Court’s considerations as to material harm may be relevant when considering NPSFM Policies 11 and 15.¹⁹
26. Forest & Bird submits that the findings as to material harm in *Port Otago* do not apply to the policy formulations in the NPSFM.
27. NPSFM Policy 11, which directs “freshwater is allocated and used efficiently, all existing over-allocation is phased out, and future over-allocation is avoided”, was addressed in Forest & Bird’s earlier legal submissions.²⁰ To summarise:
 - a. “Over-allocation” is defined as including, inter alia, “where a resource use exceeds a limit” or if limits have not been set, “an FMU or part of an FMU is degraded or degrading.”²¹
 - b. “Degraded”²² and “degrading”²³ have specific meanings under the NPSFM, which are not prone to subjective assessment. For example, an FMU for which a target attribute applies may be degraded as it is below a “national bottom line”. These “national bottom lines” for attributes are fixed within the NPSFM.²⁴ An FMU will either be below or above a bottom line.

¹⁹ Legal submissions for Beef + Lamb NZ and Deer Industry NZ dated 4 September 2023.

²⁰ Legal submission on behalf of the Royal Forest & Bird Protection Society dated 6 September 2023 at [13]-[27].

²¹ NPSFM clause 1.4: “in relation to both the quantity and quality of freshwater, means the situation where: (a) resource use exceeds a limit; or (b) if limits have not been set, an FMU or part of an FMU is degraded or degrading; or (c) an FMU or part of an FMU is not achieving an environmental flow or level set for it under clause 3.16.”

²² NPSFM clause 1.4: “degraded, in relation to an FMU or part of an FMU, means that as a result of something other than a naturally occurring process: (a) a site or sites in the FMU or part of the FMU to which a target attribute state applies: (i) is below a national bottom line; or (ii) is not achieving or is not likely to achieve a target attribute state; or (b) the FMU or part of the FMU is not achieving or is not likely to achieve an environmental flow and level set for it; or (c) the FMU or part of the FMU is less able (when compared to 7 September 2017) to provide for any value described in Appendix 1A or any other value identified for it under the NOF.”

²³ NPSFM clause 1.4: “degrading, in relation to an FMU or part of an FMU, means that any site or sites to which a target attribute state applies is experiencing, or is likely to experience, as a result of something other than a naturally occurring process, a deteriorating trend (as assessed under clause 3.19).”

²⁴ NPSFM Appendix 2A.

- c. Determining “over-allocation” does not require a nuanced assessment in the same way as determining “material harm” as it is a factual matter to determine. A limit, such as minimum flow or take limit, is either breached or it is not. For example, for water takes beyond an allocation limit, the latitude to assess the scale of adverse effects should have already occurred with any defined “exceptions” to the taking of water below minimum flow/levels or in exceedance of an allocation limit (e.g. for community drinking supplies).
 - d. The wording in NPSFM Policy 11 is clear and does not invite assessment of whether the proposed “over allocation” will create adverse effects, material harm, or otherwise. It is assumed to do so.
28. NPSFM Policy 15 is that “communities are **enabled** to provide for their social, economic, and cultural well-being **in a way that is consistent with this National Policy Statement.**”
29. The direction to “enable” in NPSFM Policy 15 is tempered by the words “in a way that is consistent with the National Policy Statement”. Like NPSET Policy 5, what is “enabled” must be implemented in a way that is in accordance with other NPSFM policy imperatives (including the directive bottom lines in NPSFM Objective and Policies 1, 6, 8, 9 and 11).

Conclusion

30. In the context of the Freshwater Planning Instrument parts of the PORPS, counsel maintains that the findings in *Port Otago* do not alter the approach set out in *King Salmon* with respect to reconciling provisions in higher order documents.
31. The findings as to “material harm” in *Port Otago* have little bearing on what must be decided on in the Freshwater Planning Instrument parts of the PORPS.

Dated this 15th day of September 2023 at Wellington



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