

**BEFORE THE ENVIRONMENT COURT
CHRISTCHURCH REGISTRY**

ENV-CHC-2024

**I MUA I TE KOOTI TAIAO O AOTEAROA
ŌTAUTAHI ROHE**

IN THE MATTER of an appeal under clause 14 of the first
schedule of the Resource Management
Act 1991

BETWEEN Environmental Defence Society
Incorporated
Appellant

AND Otago Regional Council
Respondent

NOTICE OF APPEAL BY THE ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED

Dated 15 May 2023

Environmental Defence Society Inc
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**To: The Registrar
Environment Court
Christchurch**

1. The Environmental Defence Society Incorporated (**EDS**) appeals against the decision of the Otago Regional Council (**ORC**) in respect of the non-freshwater planning instrument parts Proposed Otago Regional Policy Statement 2021 (**pORPS**).
2. EDS made a further submission on the pORPS.
3. EDS is not a trade competitor for the purposes of s 308D of the Resource Management Act 1991 (**RMA**).
4. The decision was publicly notified on 30 March 2024.
5. The decision was made by the ORC which adopted the recommendations in the report of the Hearings Panel appointed by the Council on the non-freshwater parts of the pORPS.
6. EDS is willing to participate in alternative dispute resolution processes.
7. The parts of the decision that EDS is appealing are provisions relating to definitions, integrated management, the coastal environment, land and soil, ecosystems and indigenous biodiversity, energy and infrastructure, transport.

The reasons for appeal, and relief sought

8. In addition to the reasons set out in Table 1 below, the general reasons for EDS's appeal are that the provisions appealed against:
 - a. Do not give effect to the New Zealand Coastal Policy Statement (**NZCPS**);
 - b. Do not give effect to the National Policy Statement on Fresh water management (**NPSFM**);
 - c. Do not give effect the National Policy Statement for Indigenous Biodiversity (**NPSIB**).
 - d. Are not consistent with Part 2 of the Resource Management Act (**the Act** or **RMA**);
 - e. Do not implement the Council's functions under s 30 of the Act;
 - f. Do not represent the most appropriate way to achieve the objectives of the pORPS in accordance with s 32 of the RMA;
 - g. Do not represent best resource management practice.
9. The parts of the decision appealed, reasons for the appeal and relief sought are set out in Table 1 below. Where specific wording changes are proposed by way of relief, EDS seeks in the alternative any wording that would adequately address the reasons for its appeal. EDS also seeks any consequential changes made necessary by the relief sought below.

TABLE 1: ADDITIONAL REASONS FOR APPEAL AND RELIEF SOUGHT TO THE PROPOSED OTAGO REGIONAL POLICY STATEMENT

Provision	Reasons	Relief (changes are shown in underline and strike through to the decision version)
Definition of terms		
Commercial port activity	<p>NZCPS Policy 9 concerns safe ports per se and does not extend to such matters as the operation of commercial ships.</p> <p>This definition is connected to EIT-TRAN-P23 and has the effect of broadening EIT-TRAN-P23 beyond the safe and efficient operation of existing ports to broader matters beyond the scope of Policy 9.</p>	Delete the definition of “commercial port activity” or confine to include activities specifically related to the safe operation of the existing ports.
SNA, or significant natural area	SNAs must be treated as such irrespective of whether they are mapped in the plan or identified via another process (resource consent, plan change, notice of requirement).	Expand definition to include SNAs that have been identified via other processes (even if they are not yet identified or mapped).
IM – Integrated management		
IM-O4-Climate change	Responses to climate change in Otago should be consistent with achieving national targets and budgets and the Emissions Reduction Plan (i.e. the national pathway to achieve those targets and budgets).	Amend clause 2 as follows: (2) assist with achieving the national targets, budgets and plans for emissions reduction, including by having a highly renewable energy system,
IM-P10-Climate change adaptation and mitigation	New activities should not exacerbate risk.	Reinstate clause 2.
IM-P12-Contravening limits for climate change mitigation and climate change adaptation	The twin crises of climate change and biodiversity loss are intertwined, they need to be addressed synergistically. IM-P12 may provide for the former, at the expense of the latter. Climate change mitigation and adaptation should be provided for within ecological limits.	Amend as follows: If a proposed activity demonstrates it provides or will provide an enduring regionally or nationally significant climate change mitigation or climate change adaptation with commensurate benefits for the well-being of people and communities and the wider

	<p>Clause 3 does not accurately reflect the effects management hierarchy of the NPS IB.</p>	<p>environment, decision makers may allow non-compliance with limits set in, or resulting from, any policy or method of this RPS only if they are satisfied that:</p> <p>Delete clause 3 in its entirety.</p> <p>Reinstate clause 4.</p> <p>Amend clause 5 as follows:</p> <p>(5) the activity will not contravene a national policy statement or national environmental standard <u>including any relevant limits, policies, or ecological bottom lines.</u></p> <p>Include the following clause:</p> <p>(x) there is no alternative location, site, or method for the activity</p>
CE- Coastal environment		
CE-O5 – Activities in the coastal environment	In accordance with the NZCPS only activities that have a functional need to be located within the coastal environment should locate there.	<p>Amend as follows:</p> <p>(3) are only provided for within appropriate locations and limits <u>where there is acknowledging that some activities have</u> a functional need to be located in the coastal environment</p>
CE-P9-Activities on land within the coastal environment	In accordance with the NZCPS only activities that have a functional need to be located within the coastal environment should locate there.	<p>Amend clause (2A) as follows:</p> <p>(2A) recognising <u>there are activities that have a functional need to be located in the coastal marine area</u> and providing for the functional needs and operational needs of infrastructure</p>
CE-P10- Activities within the coastal marine area.	As above.	<p>Amend clause 3 as follows:</p> <p>(3) have a functional need or operational need to be located in the coastal marine area, or</p>
LF-LS-Land and Soil		

<p>LF-LS-P16A – Managing pests</p>	<p>Wilding conifers can have a significant impact on indigenous biodiversity, SNAs, landscapes and natural features. Planting them in these areas be prohibited.</p> <p>Additionally, wilding conifers should not be able to be planted in areas of high value or where there is a risk to spread into such areas that would adversely affect indigenous biodiversity and ecosystem health. The goal should be to eliminate wilding conifers otherwise efforts to control and reduce their spread become difficult to sustain.</p>	<p>Amend as follows:</p> <p>Reduce the impact of pests, including wilding conifers, by:</p> <p>(1) avoiding afforestation and replanting of plantation forests with wilding conifer species listed in APP5 within:</p> <p>(a) areas identified as outstanding natural features, outstanding natural landscapes, or significant natural areas, and (b) buffer zones adjacent to the areas listed in (a) where it is necessary to protect those areas,</p> <p>(2) outside plantation forests, avoiding the planting of wilding conifer species listed in APP5 and any other pests in a way that is consistent with the Otago Regional Pest Management Plan 2019-2029,</p> <p><u>(2a) avoiding afforestation and replanting of plantation forests with wilding conifer species listed in APP5 within:</u></p> <p><u>(a) areas identified in a district plan as being of high amenity values;</u></p> <p><u>(b) outstanding natural features and landscapes;</u></p> <p><u>(c) the coastal environment; and</u></p> <p><u>(d) within other areas, including prevailing upwind of such areas, where wilding spread would have adverse effects on indigenous biodiversity, ecosystem health, or restoration where degraded; and</u></p> <p>(3) enabling the control of pests on land, and</p> <p>(4) supporting initiative to control and eliminate pests and limit or eliminate their further spread.</p>
<p>ECO – Ecosystems and indigenous biodiversity</p>		

ECO-O1 – Indigenous biodiversity	ECO-O1 is contrary to s 6(c) of the RMA and results in the objective failing to give effect to: a. elements of the National Policy Statement for Indigenous Biodiversity. b. Objective 1 and Policy 11 of the New Zealand Coastal Policy c. Policies 6, 8, 9 of the National Policy Statement for Freshwater Management	Reinstate ECO-O1 as notified.
ECO-P2 – Identifying significant natural areas and taoka	P2 needs to ensure that SNAs that have been identified but not yet mapped are captured by the ECO chapter.	Clarify that SNAs can be identified via resource consent, plan changes and notices of requirement.
ECO-P10 – Integrated approach	The reference to ECO-O1 in ECO-P10 is too broad and uncertain to direct appropriate permitted or controlled activity rules. ECO-P3(1) provides more certainty that adverse effects will be appropriately managed for consistency with the NPSIB	Amend clause 1 as follows: (1) ensuring any permitted or controlled activity in a regional plan or district plan rule does not compromise the achievement of ECO-O1 <u>or ECO-P3(1)</u>
ECO-P11 – Resilience to climate change	Amendments are required to ensure consistency with RPS terms and to ensure enhancement or improvement activities are captured rather than solely “restoration” activities. Indigenous biodiversity play a significant role in mitigating the effects of climate change, but also in climate change adaptation.	Amend clause 2(a) as follows (2) Considering the effects of climate change when making decisions on: (a) Restoration proposals <u>relating to the restoration, enhancement or improvement of indigenous biodiversity,</u> and Amend clause 4 as follows: (4) recognising the role of indigenous biodiversity in mitigating <u>and adapting to</u> the effects of climate change.
ECO-M2- Identification of significant natural areas	The requirement to provide ecological assessments must not cease once significant natural areas are identified and mapped. Biodiversity is not stagnant.	Amend clause 4 as follows: (4) <u>until significant natural areas are identified and mapped in accordance</u>

	<p>There needs to be an on-going process for identifying and protecting SNAs. The mapping or identification of some areas as significant natural areas does not absolve the duty to consider any remaining areas or to address changing circumstances.</p> <p>SNAs must be treated as such irrespective of whether they are mapped in the plan or identified via another process (resource consent, plan change, notice of requirement).</p>	<p>with (1) and (2), require ecological assessments to be provided with applications for resource consent, plan changes and notices of requirement that identify whether affected areas are significant natural areas in accordance with APP2, and</p> <p>Add a new clause as follows:</p> <p><u>(X) provide for the identification of other areas meeting the criteria in APP2 through consenting processes;</u></p> <p>Or, in the alternative to new clause (x), amend clause 6 to refer to the regional council, regional functions and plans, as opposed to solely the territorial authorities.</p>
ECO-M5- District plans	Wilding conifers can have a significant impact on indigenous biodiversity and SNAs. Planting them should be prohibited.	<p>Reinstate clause 6 as follows:</p> <p>(6) prohibit the planting of wilding conifer species listed in APP5 within areas identified as significant natural areas.</p>
ECO-M7 – Monitoring	All SNAs, not just those mapped, need to be monitored.	<p>Amend clause 1 as follows:</p> <p>(1) establish long-term monitoring programmes for areas identified under ECO-P2 <u>and via other processes (such as via resource consents, plan changes and notices of requirement)</u> that measure the net loss and gain of indigenous biodiversity,</p>
ECO-AER4	Wilding conifers can have a significant impact on indigenous biodiversity and SNAs. Planting them should be prohibited.	<p>Reinstate AER4:</p> <p><i>Within significant natural areas, the area of land vegetated by wilding conifers</i></p>

		<i>is reduced</i>
EIT – Energy, infrastructure and transport		
EIT-INF - Infrastructure		
EIT-INF-O4- Provision of infrastructure	Unconstrained growth is not anticipated by Part 2 of the RMA, nor various national policy statements. “Environmental limits” are akin to environmental bottom lines which are contained in national policy statements e.g., NZCPS Policies 11, 13 and 15, and NPSFM Policies 6 and 11.	Reinstate “ <u>within environmental limits</u> ”.
EIT-INF-P12 – Upgrades and development	Upgrades, and especially new developments, can impact indigenous biodiversity and landscape values. P12 needs to ensure that any adverse effects are managed in accordance with the ECO, CE, NFL and LF chapters.	Add the following clause as follows: <u>(x) adverse effects on indigenous biodiversity are managed in accordance with the respective ECO, CE, NFL, or LF chapters.</u>
EIT-INF-P13 Locating and managing effects of infrastructure, nationally significant infrastructure and regionally significant infrastructure outside the coastal environment	Both the NPSIB and NPSFM prescribe a sequenced approach to the effects management hierarchy which EIT-INF-P13 fails to follow.	Amend to accurately reflect the effects management hierarchy of the NPS IB and NPS FM. Reinstate “(e) areas of high or outstanding natural character” under clause 1.
EIT-EN - Energy		
EIT-EN-O2- Renewable electricity generation	Renewable energy should not be provided at the expense of indigenous biodiversity. The twin crises of climate change and biodiversity loss are intertwined, they need to be addressed synergistically.	Amend clause 1 as follows: (1) is protected and maintained and, where appropriate, increased <u>while protecting or maintaining indigenous biodiversity, and</u>
EIT-EN-P1 – Operation, maintenance and upgrade	Activities listed in EIT-EN-P1 can impact indigenous biodiversity. P1 needs to ensure that any adverse effects are managed in accordance with the ECO, CE, NFL and LF chapters.	Amend as follows. The operation, maintenance, and upgrade of existing renewable electricity generation activities is provided for including the

		<p>maintenance of generation output and protection of operational capacity <u>in accordance with the respective ECO, CE, NFL, or LF chapters.</u></p>
EIT-EN-P4 Identifying new sites or resources	<p>To provide more certainty, and to give effect to higher order policy direction, it is important that the RPS signal the importance of ensuring investigation, identification, and assessment of potential sites occurs within environmental limits.</p>	<p>Amend as follows:</p> <p>Provide for activities associated with the investigation, identification and assessment of potential sites and energy sources for renewable electricity generation and, <u>when selecting a site for new renewable electricity generation, prioritise those where adverse effects on high value natural and physical resources and mana whenua values can be avoided.</u></p>
EIT-EN-P5 Non-renewable energy generation	<p>The reference to “where practicable” enables economic considerations to be factored into decision-making and essentially can be used to stall the transition to renewables.</p> <p>The range of exceptions included in EIT-EN-P5 mean the policy intent, the transition from non-renewables to renewables, is lost. The exceptions must be removed, otherwise EIT-EN-P5 is superfluous.</p>	<p>Amend as follows:</p> <p>except as provided for in (2) below, restrict the development of non-renewable energy generation activities in Otago, where practicable, and facilitate the replacement of non-renewable energy sources, including the use of fossil fuels, in energy generation, and</p> <p>Delete clause 2.</p>
EIT-EN-P6 – Managing effects	<p>The addition of “significant” does not accord with the effects management hierarchy in the NPS IB.</p>	<p>Delete “significant” from clause 3.</p>
EIT-EN-M1 – Regional Plans	<p>To provide more certainty, and to give effect to higher order policy direction, it is important that the RPS signal the importance of ensuring investigation, identification, and assessment of potential sites occurs within environmental limits.</p> <p>Include a new clause encouraging the transition to renewables.</p>	<p>Reinsert clause 2.</p> <p>Inset new clause:</p> <p><u>restrict the development or replacement of non-renewable energy generation activities in Otago and facilitate change from non-renewable energy sources, including the use of fossil fuels, in energy generation.</u></p>
EIT-EN-M2 – District plans	<p>As above.</p>	<p>Reinsert clause 2.</p> <p>Inset new clause:</p>

		<u>restrict the development or replacement of non-renewable energy generation activities in Otago and facilitate change from non-renewable energy sources, including the use of fossil fuels, in energy generation.</u>
EIT - TRAN - Transport		
EIT-TRAN-O10 – Commercial port activities	The safe and efficient operation of commercial port activities is not unconstrained. In some instances, it will require adverse effects on listed values under the NZCPS to be avoided, and therefore reference to “within environmental limits” should be reinstated.	Reinstate “ <u>within environmental limits</u> ”.
EIT-TRAN-P23 – Commercial port activities	<p>EIT-TRAN-P23 does not give effect to the NZCPS and does not reflect key findings of the Supreme Court in <i>Port Otago Limit v Environmental Defence Society Inc</i> [2023] NZSC 112.</p> <p>The definition of “commercial port activities” is broad and may also capture activities beyond merely safe and efficient operation, capturing matters that are merely desirable. Both the definition and EIT-TRAN-P23 require amendment in order for these provisions to give effect to the NZCPS.</p>	<p>Reinstate “<u>within environmental limits and in accordance with other requirements as set out in Policies CE-P3 to CE-P12</u>” in clauses (1) and (2).</p> <p>Amend clause 4 as follows:</p> <p>if any of policies CE-P3 to CE-P12 cannot be achieved while providing for <u>because</u> the safe and efficient operation or development of commercial port activities <u>may cause adverse effects on the values that contribute to the significant or outstanding values identified in CE-P5, CE-P6 or CE-P7</u>, then resource consent for such activities may be sought where:</p> <p>(a) the proposed work is required for the safe and efficient operation of commercial port activities, and</p> <p>(b) the adverse effects from the operation or development are established to be the minimum necessary to achieve the safe and efficient operation of the commercial port activities.</p> <p>Add a new clause:</p>

		<u>(x) recognise that in some instances, the importance or rarity of values under CE-P5, CE-P6 or CE-P7 will require consent to be declined.</u>
EIT-TRAN-M7 – Regional plans	As above.	Reinstate “ <u>within environmental limits</u> ” in clause 3.

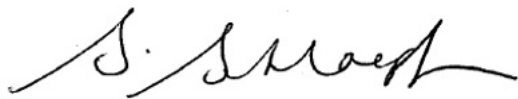
Attachments

10. The following documents are attached to this notice of appeal:

- A copy of the of Council’s decision (Appendix A);
- A copy of the Hearing Panel’s recommendation report (Appendix B);
- A list of names and addresses of persons to be served with a copy of this notice (Appendix C); and
- A copy of EDS’s further submission (Appendix D).

11. Parties served with a copy of this notice of appeal will not be served with the attachments and may obtain a copy from the Appellant on request.

Dated: 15 May 2024



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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 appellant's submission or 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.

- Schedule 1 form 7 heading: amended, on 1 November 2010, by [regulation 19\(1\)](#) of the Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2010 (SR 2010/279).
- Schedule 1 form 7: amended, on 1 November 2010, by [regulation 19\(1\)](#) of the Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2010 (SR 2010/279).
- Schedule 1 form 7: amended, on 1 June 2006, by [regulation 10\(4\)](#) of the Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2006 (SR 2006/99).