

Before the Freshwater and Non-Freshwater Hearing Panels

**Under the** Resource Management Act 1991

**In the matter** of submissions on the proposed Otago Regional Policy Statement  
2021

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**SUPPLEMENTARY LEGAL SUBMISSIONS ON BEHALF OF TRANSPOWER NEW  
ZEALAND LIMITED (314, FS314, FPI013, FSFPI013)**

**Implications of the *Port Otago* decision**

**15 September 2023**

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## May it please the Panel

### 1. Introduction

1.1 These submissions are filed on behalf of Transpower New Zealand Limited (**Transpower**) and address the Supreme Court’s decision in *Port Otago Limited v Environmental Defence Society Incorporated (Port Otago)*,<sup>1</sup> in conjunction with the high level submissions presented at the pORPS freshwater hearing on 5 September.

1.2 Transpower’s submission is four-fold. First, *Port Otago* provides further authority and reinforcement for interpreting a national policy statement in light of its purpose and context.<sup>2</sup> In Transpower’s case, the National Policy Statement on Electricity Transmission 2008 (**NPSET**) provides for the National Grid, which is essential infrastructure. The current context, namely the need to increase electrification to transition to a zero-carbon economy, reinforces the National Grid’s importance.

1.3 Secondly, *Port Otago* provides guidance on the meaning of “avoidance policies” and clarifies that the effects that are to be avoided must be material. Whether avoidance is achieved for activities that Transpower undertakes will depend on the context, activity in question and measures that can be put in place. Mitigation measures may contribute to an overall position that meets the intent of an avoidance policy.

1.4 Thirdly, *Port Otago* provides guidance on addressing conflicts, both actual and apparent, between competing directive policies. This guidance applies within the NPSET, as well as to the NPSET’s interaction with other national policy statements, given it includes policies that are highly directive.

1.5 Fourthly, the approach sought by Transpower, which is that the RPS provide a bespoke carve-out policy for managing effects of the National Grid, properly achieves, in an efficient and clear manner, the Supreme Court’s direction that

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

2 *Port Otago* at [60].

competing directive policies should be addressed at the regional policy statement level as far as possible.<sup>3</sup>

**1.6** Accordingly, Transpower submits that *Port Otago* reinforces the appropriateness of the relief Transpower has sought in its submissions and throughout the hearings on the RPS, and that:

- (a) the proposed Otago Regional Policy Statement (**pORPS**) should be amended to provide a carve-out policy for managing effects of the National Grid. As previously noted, a carve-out approach was taken in the partially operative Otago Regional Policy Statement; and
- (b) consideration should be given to whether provisions in the pORPS that give effect to avoidance policies in higher order documents (including Transpower’s relief) can be further refined, to give effect to *Port Otago*.

## **2. How to interpret the NPSET**

**2.1** The Supreme Court correctly identifies that the NZCPS, as with all other national policy statements, is secondary legislation. Therefore, its meaning must be ascertained from the text in light of its purpose and its context.<sup>4</sup> This equally applies to the NPSET.

**2.2** In its decision, the Supreme Court paid close attention to the purpose and context of the competing “avoidance policies”<sup>5</sup> and the “ports policy”<sup>6</sup>. Regarding the ports policy, the Supreme Court agreed with Miller J (in the Court of Appeal) that:<sup>7</sup>

- (a) for the Regional Council, provision of the port is not optional;
- (b) the port is essential infrastructure, which the NZCPS deems to be important to community wellbeing;

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<sup>3</sup> *Port Otago* at [72].

<sup>4</sup> *Port Otago* at [60].

<sup>5</sup> NZCPS, policies 11, 13, 15 and 16.

<sup>6</sup> NZCPS, policy 9.

<sup>7</sup> *Port Otago* at [70].

- (c) the Regional Council has no choice about deciding whether to provide for the port, and no choice about where to situate it;
- (d) it follows that what policy 9 requires of the Regional Council is that it consider how and when to provide in its plans for the port's efficient and safe operation, the development of its capacity for shipping, and its connection with other transport modes.

**2.3** It is submitted that the purpose and context of ports (provided for in the NZCPS's ports policy) and the National Grid (provided for in the NPSET) is substantially similar.

**2.4** Provision of the National Grid is not optional. The NPSET's preamble deems the National Grid to play "a vital role in the well-being of New Zealand, its people and the environment" and Policy 1 requires decision-makers to "recognise and provide for the national, regional and local benefits of sustainable, secure and efficient electricity transmission".<sup>8</sup>

**2.5** Mr Noble's evidence, filed in advance of hearings on the pORPS (non-freshwater) highlights the importance of the National Grid. While Transpower's role is already of fundamental importance, a reliable and secure supply of electricity is vital to the transition to a zero-carbon economy. Demand for electricity will increase. New renewable energy generation will require new connections, and demand for electricity may also require direct connection to the National Grid. There will be a substantive increase in total load across the National Grid. These factors pose significant challenges and uncertainties, but will necessitate substantial development and upgrade of the National Grid. Transpower will also need to maintain and upgrade existing (and in most cases, aging) assets.

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8 NPSET, policy 1.

**2.6** It is in this context that the pORPS must give effect to the NPSET’s policies. In particular, the pORPS must give effect to:

- (a) Policy 2, which requires the pORPS to “recognise and provide for the effective operation, maintenance, upgrading and development of the electricity transmission network”; and
- (b) Policy 5, which requires the pORPS to enable the reasonable operational, maintenance and minor upgrade requirements of established assets.

**2.7** Policies 3 and 4 provide context to these enabling policies, by requiring decision-makers to consider the real constraints on Transpower being able to avoid, remedy or mitigate adverse effects, and that adverse effects may arise despite trying to avoid them through route, site and method selection.

**2.8** The NPSET policies on managing the effects of the National Grid must also be interpreted in light of their purpose and context, and in light of the strong direction in Policies 1, 2 and 5 to provide for the National Grid.

**2.9** For example, Policy 8, which provides strong guidance for managing effects in rural environments, also clearly anticipates that in some circumstances, it will be acceptable for National Grid activities to give rise to adverse effects in the rural environment. This policy directs that planning and development of the National Grid “should seek to avoid adverse effects on outstanding natural landscapes, areas of high natural character and areas of high recreation value and amenity and existing sensitive activities”.

### **3. Threshold for avoidance policies**

**3.1** *Port Otago* provides guidance on the meaning of “avoidance policies”. The Court clarified that the effects that are to be avoided must be “material”, and that mitigation and remedial measures may serve to meet the “avoid” standard by bringing the level of harm down so that material harm is avoided.<sup>9</sup>

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<sup>9</sup> *Port Otago* at [65].

**3.2** The Court concluded that avoidance policies must be interpreted not only in light of what is sought to be protected, but also in terms of “whether measures can be put in place to avoid material harm to those values and areas”.<sup>10</sup>

**3.3** Whether avoidance is achieved for activities that Transpower undertakes will therefore depend on the context, activity in question and measures that can be put in place.

#### **4. Addressing conflicting directive policies**

*Port Otago is authority for addressing conflicting policies across different NPSs*

**4.1** Although *Port Otago* concerns competing directive policies within the NZCPS, it is submitted that the principles in the decision are also instructive for reconciling potentially conflicting policies across different national policy statements (**NPS**).

**4.2** *Port Otago* concerns how to reconcile conflicting policies consistent with section 62(3) of the RMA, which requires an RPS to give effect to the NZCPS. Section 62(3) identically requires the RPS to give effect to every national policy statement. Given this identical obligation, as well as the potential for there to be apparently conflicting policies across different NPSs and the NZCPS, it follows that decision-makers should adopt the same approach for reconciling apparently conflicting directive policies across different NPSs and the NZCPS, as it would to policies within the NZCPS.

*The NPSET contains highly directive policies*

**4.3** While policies 1, 2 and 5 of the NPSET have already been mentioned above, Policy 10 is also directive (providing that, to the extent reasonably necessary, decision-makers must avoid reverse sensitivity effects on the National Grid).

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<sup>10</sup> *Port Otago* at [68].

**4.4** Further, the Environment Court’s recent determination<sup>11</sup> concerning regionally significant infrastructure provisions in the Queenstown-Lakes proposed district plan, emphasises the directiveness of Policy 8 of the NPSET, while also seeking to place this alongside the enabling directives in the NPSET. As a result, while Policy 6.3.3.6 provides that outstanding Natural Features and Outstanding Natural Landscapes are to be protected, this is expressly subject to Policy 30.2.8.2, which provides:

Recognise that the provision of a secure and sufficient electricity supply to the District is likely to require National Grid assets to be located within the District’s distinctive landscapes or natural environments...

*These policies conflict or appear to conflict with other policies*

**4.5** The NZCPS and the NPSFM both contain highly directive avoid policies that conflict, or apparently conflict, with the directive policies in the NPSET.

**4.6** As an example of a potential conflict that Transpower had previously identified, Policy 15(a) of the NZCPS requires that activities must avoid adverse effects on outstanding natural features and outstanding natural landscapes in the coastal environment. However, *Port Otago* clarifies that this avoidance policy can be complied with if the adverse effects of the activity in question are not material, or if measures can be put in place to avoid material adverse effects.

**4.7** As a result, there will be certain National Grid activities that can responsibly occur in the coastal environment, for example maintenance activities on existing assets.

**4.8** Ms McLeod’s evidence proposes amendments to Policy EIT-INF-P13A so that it states:<sup>12</sup>

When providing for new nationally significant infrastructure within the coastal environment, manage effects in accordance with Policy EIT-INF-P13, but recognise that there will be areas of the coastal environment

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11 [2023] NZEnvC 69.

12 McLeod statement of evidence, 24 November 2022, at [8.41].

where avoidance of adverse effects is required to protect the values and characteristics of those areas.

- 4.9** However, in light of *Port Otago* and notwithstanding the bespoke policy set out below, it is submitted that for clarity, this policy should be amended to read as follows:

When providing for new nationally significant infrastructure within the coastal environment, manage effects in accordance with Policy EIT-INF-P13, but recognise that there will be areas of the coastal environment where avoidance of material adverse effects on the values and characteristics of those areas is required, including by use of mitigation or other measures to reduce the level of effects.

- 4.10** Transpower's proposed bespoke policy similarly provides that:

- (a) adverse effects in some urban areas and sensitive activities in urban environments are to be avoided; and
- (b) there will be areas within the coastal environment where adverse effects must be avoided.

- 4.11** If the Panel accepts Transpower's primary relief and therefore supports the inclusion of this bespoke policy in the RPS, similar wording could be added to improve the clarity of the meaning of avoid / avoidance.<sup>13</sup> Transpower's planning expert has prepared the following updated wording for that purpose, which Transpower adopts as its preferred approach and relief now sought:

***"EIT-INF-Px Managing the effects of the development of the National Grid***

*Manage the adverse effects of the operation, maintenance, upgrade and development of the National Grid by:*

- 1. enabling the operation, maintenance and minor upgrading of the National Grid;*

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13 00314.038.



2. *in urban environments, avoiding material adverse effects on the values and characteristics of town centres, areas of high recreation value and existing sensitive activities, including through mitigation or other measures to reduce effects;*
3. *managing effects on the values or extent of natural wetlands in accordance with LF–FW–P9 – Protecting natural wetlands;*
4. *in the coastal environment, recognising that there will be areas of the coastal environment where avoidance of material adverse effects on the values and characteristics of those areas is required, including by use of mitigation or other measures to reduce the level of effects ~~that there will be areas where avoidance of adverse effects is required to protect the special values and characteristics of those areas;~~*
5. *where (1), (2), (3) or (4) do not apply, seeking to avoid material adverse effects on the values or characteristics of the following:*
  - a. *outstanding water bodies;*
  - b. *areas of high or outstanding natural character;*
  - c. *outstanding natural features, outstanding natural landscapes or outstanding natural seascapes;*
  - d. *significant natural areas;*
  - e. *areas or places of significant or outstanding historic heritage;*
  - f. *wāhi tapu, wāhi taoka and areas with protected customary rights;*
6. *where material adverse effects on the values or characteristics of the areas or places listed in (5) above cannot be avoided, remedying or mitigating adverse effects. having regard to:*
  - a. *the operational needs of the National Grid and the extent those requirements constrain measures to avoid, remedy or mitigate adverse effects;*
  - b. *the extent significant adverse effects are avoided;*
  - c. *the extent to which any adverse effects have been avoided, remedied or mitigated by route, site and method selection for new infrastructure or major upgrades;*
  - d. *the extent to which existing adverse effects have been reduced as part of any substantial upgrade; and*

- e. *the extent to which adverse effects on urban amenity have been minimised; and*
  - f. *and where there are residual adverse effects on indigenous biodiversity values following the implementation of (a) to (e) above, to consider the appropriateness of the extent to which any residual adverse effects are offsetting or compensated for;*
7. *avoiding, remedying, or mitigating other adverse effects, having regard to the matters in 6(a) to (f); and*
  8. *in the event of any conflict between EIT-INF-Px and other policies in this regional policy statement, EIT-INF-Px prevails over those policies.”*

**4.12** *Port Otago* also provides that, while reconciliation of any conflict should be addressed at the policy statement level as much as possible, this will depend on the level of information that is available to plan drafters, and specific reconciliation may not be possible where there is less information available.<sup>14</sup> For the National Grid, it is accepted that the pORPS is unable to address all potential conflicts regarding development of the Grid, given the uncertainty around the Grid’s future requirements and location of new assets. But by contrast, it is submitted that the pORPS can appropriately address conflicts concerning operation, maintenance and minor upgrade of existing assets (provided for in Policy 5 of the NPSET).

**4.13** In other cases, conflicts may appear to arise, but dissolve on closer inspection. The Supreme Court restated the principles developed in the *King Salmon* decision that “conflicts are likely to be rare if those policies are properly construed” and “any apparent conflicts between policies may dissolve if close attention is paid to the way in which those policies are expressed”.<sup>15</sup>

**4.14** For example:

- (a) As outlined earlier in these submissions, the apparent conflict between enabling policies 1, 2, 5 of the NPSET and the “seek to avoid” direction in

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<sup>14</sup> *Port Otago* at [73].

<sup>15</sup> *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [63], citing *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38 at [129].

policy 8 of the NPSET falls away when these policies are examined in light of their purpose and context.

- (b) Policy 6 of the NPSFM states in black and white terms “there is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted”. But on closer inspection of the NPSFM itself, clause 3.22 provides an express carve-out from its avoidance directive when it comes to specified infrastructure, including the National Grid. If the NPSFM itself does not treat Policy 6 as a prohibition on effects, then it follows that the apparent conflict between this clause and Policies 1, 2 and 5 of the NPSET dissolves. Instead, the pORPS should provide a carve out from the strict position in Policy 6 of the NPSFM, as provided by clause 3.22 of the NPSFM.

**5. *Port Otago* reinforces the correctness of a bespoke policy for managing the effects of the National Grid**

**5.1** *Port Otago* emphasises that reconciliation of any conflict between the policies at issue “should be dealt with at the policy statement and plan level as far as possible” instead of at the consent stage.<sup>16</sup>

**5.2** The approach sought by Transpower, which is that the RPS provide a bespoke carve-out policy for managing effects of the National Grid, properly achieves this direction in an efficient and clear manner by reconciling the various NPS directives.

**5.3** The bespoke policy addresses conflicts by first setting the following clear priorities:

- (a) enabling the operation, maintenance and minor upgrading of the National Grid (Policy 5 of the NPSET);
- (b) avoiding certain adverse effects in urban environments (Policy 7 of the NPSET);
- (c) managing effects on natural wetlands (clause 3.22 of the NPSFM); and

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<sup>16</sup> *Port Otago* at [72] and [73].

(d) in the coastal environment, recognising that there will be areas where avoidance of adverse effects is required (Policies 11, 13, 15 and 16 of the NZCPS).

**5.4** Outside of these priorities, the policy then provides that National Grid activities should seek to avoid adverse effects on matters that are protected under section 6 of the RMA or otherwise protected under an NPS. Next, and in the event that adverse effects cannot be avoided, the policy provides for remedying or mitigating effects on these matters, as well as other adverse effects.

**5.5** It is submitted that this approach resolves apparent and actual conflicts between directive policies in other NPSs, while giving effect to Policy 2 of the NPSET. It also appropriately provides for section 6 matters of national importance, which makes it a particularly efficient method to manage effects of the National Grid.

**5.6** As previously stated, a section 32 analysis supports this approach in terms of efficiency. Ms McLeod's non-freshwater evidence sets out that in her experience a carve-out policy is a more efficient way to give effect to the NPSET.<sup>17</sup> A carve-out policy would provide clear guidance for lower order planning documents, so that there is a clear consenting pathway for Transpower's activities (which is the ideal situation anticipated by the Supreme Court<sup>18</sup>). This in turn would achieve the NPSET's objective more effectively than if decision-makers were required to comb through the provisions of the RPS when determining planning provisions for the National Grid.

## **6. Conclusion**

**6.1** The Supreme Court's decision reinforces the correctness of the approach that Transpower has taken throughout its involvement in the pORPS. As with ports, the National Grid is essential infrastructure that is not optional for the Region and essential for well-being. The pORPS should, as far as possible, address actual and

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<sup>17</sup> McLeod non-freshwater EIC dated 24 November 2022 at [8.25].

<sup>18</sup> *Port Otago* at [72].

apparent conflicts between the NPSET and other directive policies. For the reasons provided, a bespoke policy is the most effective and efficient way to do so.

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