BEFORE THE HEARINGS COMMISSIONERS

UNDER THE	Resource Management Act 1991
AND	
IN THE MATTER	of the Proposed Otago Regional Policy Statement 2021 ("PORPS") (Non-Freshwater Parts)

SUBMISSIONS FOR THE OTAGO REGIONAL COUNCIL IN RESPONSE TO SUBMITTERS ON THE IMPLICATIONS OF THE SUPREME COURT JUDGMENT IN *PORT OTAGO LIMITED v ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED*

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May it Please the Commissioners:

1. In its Minute 18 dated 29 August 2023, the Panel directed that the Otago Regional Council ("the ORC") reply to submissions by submitters on the implications of the Supreme Court judgment in *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 by 29 September 2023.

Introduction

The Court's findings in POL v EDS

2. In *POL v EDS* the Court held that:

    2.1. the avoidance policies and the ports policy in the NZCPS are all directive;

    2.2. one does not override the other; and

    2.3. there is thus potential for conflict between those policies.

3. The Court concluded that reconciliation of any potential conflict between the avoidance policies and the port policy should be addressed at the regional policy statement and plan level so far as possible, and not left entirely for the resource consent process.

4. The Court held that in considering a particular project to give effect to the port policy the resource consent decision-maker would have to be satisfied that:

    4.1. the work is required (and not merely desirable) for the safe and efficient operation of the ports;

    4.2. if the work is required, all options for dealing with safety or efficiency needs have been evaluated and, where possible, the option chosen should not breach the avoidance policies;

4.3. where a breach of the avoidance policies is unable to be averted, any breach is only to the extent required to provide for the safe and efficient operation of the ports.

5. If the decision-maker is satisfied as above, then resource consent may, but will not necessarily, be granted.

6. In deciding whether to grant resource consent all relevant factors would have to be considered in a structured analysis, designed to decide which of the directive policies should prevail, or the extent to which a policy should prevail, in the particular case.

The limits of POL v EDS

7. In paragraph [1] of its judgment the Court noted (footnotes omitted):

"Resolving these issues requires us to address the principles established by this Court in Environmental Defence Society v The New Zealand King Salmon Co Ltd (King Salmon) and Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd (Sustain Our Sounds) in a different context."

8. The Court noted in footnote 75:

"*We do not disagree with the Environment Court when it says that policy 9 of the NZCPS also applies to new ports and we also agree with its comment that this directive does not apply in any particular place or at a particular time…. No issue relating to new ports is, however, before us in this appeal and the judgment is not therefore to be understood as dealing with new ports.*"

9. And in footnote 78:

"*Our comments are limited to the efficient and safe operation of existing ports. Because it is not before us, we do not deal with expansion of the operations of the ports, although the line between expansion and efficiency will not necessarily be fixed. As the Environment Court remarked, "even existing ports cannot necessarily expand indefinitely and whenever their operators want"*"

10. The judgment might therefore be considered to be context specific and having direct application only to the safe and efficient operation of

existing ports and not to their expansion or to new ports.

Dealing with new or expanded activities

11. Even if the judgment is taken as authority for the proposition that all national policy conflicts must, should or may be resolved in subordinate instruments, it is certainly not authority for the proposition that enabling policies must always prevail over avoidance policies.

12. In context of an existing port the Court provided for a very limited exception to the avoidance policies with no presumption that even within that exception a consent would be obtained.

13. The Court noted: "*As the Environment Court remarked, "even existing ports cannot necessarily expand indefinitely and whenever their operators want*"".[1]

14. When dealing with new or expanded activities enabled under policies which conflict with avoidance policies (which should be very rare) *POL v EDS* is not authority that enabled activities must be provided for in all circumstances without limitation.

15. It is clear from how the limited exception to provide for the safe and efficient operation of an existing port was framed that avoidance policies are not subordinate, and that even within limits there is no presumption that an enabled activity will be permitted.

16. It follows that resolving conflict as to expanded or new activities will involve policy decisions as to whether, where and how such activities may occur. In other words, consideration of such activities will be within limits and even then there is no presumption that an activity may occur.

The meaning of 'avoid'

17. The Court discussed the meaning of the word 'avoid' in a more general sense.

18. The Court cited its prior judgments in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593, *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] 1 NZLR 673 and *Trans-Tasman Resources Ltd v Taranaki-Whanganui*

[1] At footnote 78

Conservation Board [2021] 1 NZLR 801 and held:

"All of the above means that the avoidance policies in the NZCPS must be interpreted in light of what is sought to be protected including the relevant values and areas and, when considering any development, whether measures can be put in place to avoid material harm to those values and areas."[2]

[my emphasis]

19. Earlier in its judgment the court summarised its earlier decision in *Trans-Tasman Resources* that:

"...decision-makers must either be satisfied there will be no material harm or alternatively be satisfied that conditions can be imposed that mean:

(i) material harm will be avoided;

(ii) any harm will be mitigated so that the harm is no longer material; or

(iii) any harm will be remedied within a reasonable timeframe so that, taking into account the whole period harm subsists, overall the harm is not material..."[3]

20. It seems that for an avoidance policy to be breached, the harm to the values protected must now be material.

21. It remains to be seen whether this is a significant shift from the concept of minor or transitory effects in *King Salmon.*

22. Regardless, this does not require any amendment to the pORPS. When 'avoid' is used in the pORPS the Court's direction on its meaning will apply.

IM-P1

23. During closing submissions, the Panel expressed some concern with the reply report version of policy IM-P1.

24. Ms Boyd has raised with me that IM-P1 might now be amended in a

[2] At paragraph [68]
[3] At paragraph [66]

manner consistent (by analogy) with the Supreme Court judgment.

25. As she is on leave, I deal with this possibility.

26. Amendment of IM-P1 as follows would be appropriate:

Giving effect to the integrated package of objectives and policies in this RPS requires decision-makers to:

(1) -consider all provisions relevant to an issue or decision and apply them according to the terms in which they are expressed, and

(2) if after (1) there is an irreconcilable conflict between provisions in this RPS which apply to an activity, only consider the activity if:

(a) the activity is necessary to give effect to a policy in this RPS and not merely desirable, and

(b) all options for the activity have been considered and evaluated, and

(c) if possible, the chosen option will not breach any other policy of this RPS, and

(d) if (c) is not possible, any breach is only to the extent required to give effect to the policy providing for the activity, and

(3) if (2)(d) applies, evaluate all relevant factors in a structured analysis to decide which of the conflicting policies should prevail, or the extent to which a policy should prevail, and

(4) in the structured analysis under (3), assess the nature of the activity against the values inherent in the conflicting policies in this RPS in the particular circumstances.~~that cannot be resolved by the application of higher order documents, prioritise:~~

~~(1) the life-supporting capacity and mauri of air, water, soil, and ecosystems, and then~~

~~(2) the health and safety of people and communities, and their ability to provide for their social, economic, and cultural well-being, now and in the future.~~

[The amendments are tracked against the wording in the reply report version of the PORPS.]

27. It is acknowledged that this is a different context to *POL v EDS*.

28. It is proposed to adopt the Court's methodology not because the Court's judgment requires it, rather because it is a suitable policy response to resolve any conflict which (despite best efforts) remains in the pORPS, so as to achieve integrated management.

EDS

29. EDS does not consider that *POL v EDS* has wider implications than setting the policy for ports.

30. No specific change to the pORPS is sought and no reply is required.

Kai Tahu

31. Kai Tahu submits that the Supreme Court's decision in *POL v EDS* turns on its own particular facts and does not upset the established orthodoxy under *King Salmon* and that when considering the potentially competing policy directives, including between the avoidance policies in the NZCPS, the NPS-FM, and the NPS-IB, and the enabling, but less directive policies in relation to electricity transmission, renewable energy and other non-national level directives, greater weight should still be given to those policies which require avoidance of adverse effects on particular environments or species.

32. No specific change to the pORPS is sought, and no response is required.

OWRUG

33. OWRUG submits that the Supreme Court's finding that reconciliation of any conflict between the NZCPS avoidance policies and the ports policy should be dealt with at the regional policy and plan level as far as possible clearly applies beyond the NZCPS, to all national directions that contain conflicting and directive policies.

34. It notes that: "*in Otago, communities are enabled to provide for their social, economic, and cultural wellbeing and activities that contribute to*

New Zealand's social, economic, cultural and environmental wellbeing are recognised and provided for" citing policy 15 of the NPSFM and policy 10 of the NPSIB.

35. The OWRUG interest is noted:

"(a) As has previously been submitted the proposed RPS does not cover the field in addressing the full suite of resource management issues for the Region. It is substantively deficient with respect to activities reliant on resources that support the social, cultural and economic wellbeing of communities. This is a failure to respond to policy direction in the various National Policy Statements (and indeed, the purpose of the Act). But it also means that the reconciliation function that the RPS is supposed to perform, can't be.

(b) The repeated rhetoric throughout these hearings of "this can be dealt with in the land and water regional plan". Port Otago is clear, that is not acceptable. It is the function of the pRPS to take the first step in providing direction on how policies in conflict need to be reconciled at a regional level."

36. OWRUG submits that the pORPS needs to: "*recognise the conflicts that exist, or are likely to arise and either reconcile them, or at least provide a framework for doing so which is to be applied through the lower order documents*" and that the provisions sought by the farming submitters assist by providing a transition framework and direction around the application of regulatory tools.

37. The provisions cited as creating a conflict do not involve any element of conflict.

38. Policy 15 of the NPSFM states that communities are to be enabled: "*in a way that is consistent with this National Policy Statement*".

39. Policy 10 of the NPSIB uses the wording: "*recognised and provided for as set out in this National Policy Statement*".

40. Neither sets up a conflict.

41. *POL v EDS* does not therefore bear on the provisions sought regarding a transition framework and the application of regulatory tools. Those provisions need to be considered on their merits in the usual way, as Ms

Boyd has done.

42. The repeated (ORC) rhetoric has not been that "this can be dealt with in the land and water regional plan". Rather, that specific provisions of the NPSFM require specific aspects to be dealt with in the regional plan (in specific ways, which the pORPS has very limited scope to alter).

43. In any case it should be noted that *POL v EDS* is expressly limited to the efficient and safe operation of existing ports and not dealing with new ports or the expansion of existing ports. No policy conflict of this nature is mentioned in the OWRUG submission.

44. To the extent a *POL v EDS* rationale should be applied more broadly in the pORPS, how conflicts (ie genuine conflicts not resolved by a careful examination of the provisions and the words used) between or within higher order instruments are dealt with remains a matter of policy discretion for the lower order policy or plan maker.

45. Even if there is a conflict akin to that in *POL v EDS*, the provisions sought by OWRUG bear no resemblance to the guidance in *POL v EDS*. That guidance enables consideration of the relevant activity only if and to the extent necessary to give effect to the enabling policy, if alternative options are not possible and then to be subject to structured analysis with no presumption that the activity may proceed.

46. That formula is proposed to be adopted in IM-P1 to provide a mechanism to resolve any remaining conflict in the pORPS.

Transpower

47. Transpower submits that *POL v EDS* supports a bespoke carve out policy for the National Grid.

48. Provision for the National Grid is not optional, and that in that sense at least it is similar to ports.

49. However, *POL v EDS* does not support a carve out of the nature sought.

50. *POL v EDS* is expressly limited to the efficient and safe operation of existing ports not dealing with new ports or the expansion of existing ports.

51. *POL v EDS* is not authority for the proposition that any conflict concerning new or expanded National Grid activity should be resolved in any particular way. If given broader application it may be seen as authority that conflict (if any) should be resolved, but not how the conflict should be resolved. As the pORPS stands, there is no remaining conflict. *POL v EDS* is not authority that any conflict must be resolved differently, in the manner Transpower seeks.

52. The policy guidance for enabling efficient and safe operation of an existing port enables consideration of the activity only if and to the extent necessary for the efficient and safe operation of the port, and if alternatives are not possible, and then to be subject to structured analysis with no presumption that the activity may proceed.

53. That is a very narrow carve out from any conflicting avoidance policy. If this is to be applied to Transpower, then the relevant avoidance policies must still be given effect to, with any exceptions limited to when no other option is possible, where the activity is truly necessary and limited to the extent it is necessary, without presumption that the activity will be permitted after a structured analysis.

54. That is not the carve out sought by Transpower.

55. Transpower also now proposes additional references to materiality. This is not necessary. *POL v EDS* is now authority for the proposition that avoidance means avoidance of material harm. Additional words in the pORPS are not needed for that to be the case.

56. For completeness, I note that in the evidence filed by the ORC on 27 September 2023 in reply to submitters on the NPSIB recognises a national policy intention that electricity transmission and renewable electricity generation are to have more permissive treatment and proposes a further carve out for those activities.

Dunedin City Council

57. DCC's submission concerns a tension between the need to provide for urban growth, and the associated infrastructure to support that urban growth under the NPS-UD and other national policies.

58. DCC submits that the principles in *POL v EDS* support the DCC's

position to temper the avoid language in the pORPS where it relates to urban growth needs for Dunedin and the essential infrastructure needs to support that growth.

59. No specific policy conflicts are identified. Nor are any specific changes to the pORPS sought.

60. My responses to OWRUG and Transpower apply equally to DCC.

Director-General of Conservation

61. DOC does not seek any change to the pORPS and no response is required.

Meridian Energy

62. Meridian lists four principles, which it says are found in *POL v EDS.*

63. They are not. At least not in the manner or context in which Meridian expresses them.

64. The third principle listed has partial support in that the judgment expressly applies to the safe and efficient operation of existing (but not new or expanded) ports.

65. No specific policy conflict is identified. Nor are any specific changes sought to the pORPS.

66. My responses to OWRUG and Transpower apply equally to Meridian.

Final marked up pORPS

67. The ORC had intended to file a final copy of the pORPS marked up with the final recommendations of chapter authors with this memorandum.

68. Given the extension granted to Port Otago for the port provisions, the final marked up pORPS will now be filed with the final recommended position on the port provisions.

Conclusion

69. ORC agrees that conflict between higher order policies in the Otago context should so far as possible be resolved.

70. *POL v EDS* sets out how "avoid" is to be interpreted and applied. That part of the decision has general application. This does not require any change to the pORPS. The Court's statements as to what avoidance means (ie 'material harm') will apply whenever 'avoid' is used in the pORPS without need for additional words.

71. The Courts findings as to how to resolve the conflict before it are expressly limited to the safe and efficient operation of an existing port.

72. The Court held (in the consenting context, but necessarily relevant to plans and policy statements that regulate consenting) that an activity supported by a policy but conflicting with an avoidance policy should only be considered if it is genuinely necessary, if all other options have been evaluated and are not possible, and then only to the extent that it is necessary. Even then there must then be a structured analysis with no presumption that consent will be granted.

73. If there are analogous conflicts, then any resulting reconciliation should be consistent with the Court's directions. The relief sought by OWRUG and Transpower is not.

74. The judgment does not deal with new ports or expansion of ports. It is not authority that conflicts concerning new or expanded activities will be dealt with in any particular way.

75. Clearly there can be limits. This is evident from the limited exception for the safe and efficient operation of an existing port.

76. It is difficult to see that new or expanded activities should be dealt with in a more permissive manner than the Court held for the safe and efficient operation of existing ports.

77. It remains the case that the words of the applicable national policies must be carefully considered before concluding that there is a conflict. It is not enough that one policy tends to enable while another tends to protect. The words are important.

78. The Council proposes to adopt in IM-P1 a similar formula to that used by the Court to deal with any conflict that might remain within the pORPS.

79. Council authors have though endeavoured to ensure that no such conflict remains, and any conflict the Panel might identify ought to be

dealt with on it merits in accordance with any relevant national policy and not be left to IM-P1, which is a backstop only.

SJ Anderson
Counsel for the Otago Regional Council

Dated: 29 September 2023