

BEFORE THE HEARING PANEL

IN THE MATTER of the Resource Management Act 1991

AND of the proposed Te Tai o Poutini Plan

**LEGAL SUBMISSIONS
FOR THE DIRECTOR-GENERAL OF CONSERVATION**

5 February 2024

Natural Character and the Margins of Waterbodies and Activities on the Surface of Water

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Legal submissions before the Commissioners

1. The Director-General of Conservation (Director-General) lodged a submission and further submission on the proposed Te Tai o Poutini Plan (pTTPP).
2. These legal submissions focus on:
 - a) Statutory Framework;
 - b) National Direction;
 - c) West Coast RPS;
 - d) Operational and Functional need; and
 - e) The Director-General's submission points relating to Natural Character and the Margins of Waterbodies and Activities on the Surface of Water.

Evidence to be called by the Director-General

3. The Director-General calls one witness to provide expert evidence, Ms Amy Young, an RMA planner, who has prepared evidence on planning matters relating to the Director-General's submission on the pTTPP.

Statutory Framework

4. As the section 42A Officer has noted in the case of the Natural Character and the Margins of Waterbodies and Activities on the Surface of Water topics, the RMA provides significant direction¹.
5. In relation to the matters of national importance, section 6(a) of the RMA provides that district councils are required to recognise and provide for the preservation of the natural character of the coastal environment, wetlands and lakes and rivers and their margins, and protect them from inappropriate subdivision, use, and development².
6. Section 6(c) of the RMA provides that district councils are required to recognise and provide for "*the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna*".

¹ Paras 27 to 31 of the Officer's Report

² Other section 6 matters, including (c) to (f) are also relevant to these topics as noted by the Officer

7. Under section 31 of the RMA district councils are responsible for the management of activities on land, including the margins of waterbodies.
8. District councils are also responsible for:
 - a) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of the maintenance of indigenous biological diversity³; and
 - b) the control of any actual or potential effects of activities in relation to the surface of water in rivers and lakes⁴.

NPS-FM

9. The National Policy Statement for Freshwater Management 2020 (NPS-FM) applies to all freshwater and, to the extent they are affected by freshwater, to receiving environments. It has a single objective, Te Mana o te Wai. The NPS- FM is explicit that Te Mana o te Wai is a fundamental concept and “*is relevant to all freshwater management*”⁵.
10. In order to give effect to the NPS-FM 2020, local authorities that share jurisdiction over a catchment must co-operate in the integrated management of the effects of land use and development on fresh water. This fits with *ki uta ki tai*, the recognition and management of the interconnectedness of the whole environment, from the mountains, springs and lakes, down the rivers to hāpua (lagoons), groundwater, wahapū (estuaries) and to the sea.
11. District councils must include objectives, policies, and methods in their district plans to promote positive effects, and avoid, remedy, or mitigate adverse effects (including cumulative effects), of urban development on the health and well-being of water bodies, freshwater ecosystems, and receiving environments⁶.

³ Section 31(1)(b)(iii) of the RMA

⁴ Section 31(1)(e) of the RMA

⁵ Clause 1.3(2)

⁶ Clause 3.5(4)

West Coast RPS

12. The RMA requires that district plans must “give effect” to the Regional Policy Statement of a region⁷ and must “not be inconsistent with” regional plans⁸.

13. The West Coast RPS was made operative on 24 July 2020. The Minister of Conservation was involved in the hearings and appeal mediations on the RPS and had an interest in chapters relating to natural character and land and water, which are of most relevance to these topics in question.

14. DOC has reviewed the natural character and land and water chapters of the RPS. To assist the Panel, I provide the following comments in relation to the natural character chapter:
 - a) The chapter is brief (only two pages) but appears to align with section 6(a) of the RMA in relation to the preservation of natural character or wetlands and lakes and rivers and their margins; and
 - b) The policy to allow activities which have no more than minor adverse effects on natural character is consistent with case law.⁹

15. In relation to the Land and Water chapter of the West Coast RPS I note that it does not give effect to the NPS-FM 2020. Although the NPS-FM is primarily directed towards regional councils it is relevant to district councils as per my submission in paras 9 to 11 above.

16. If the Panel considers that the West Coast RPS conflicts the NPS-FM, given the NPS-FM was gazetted after the RPS was made operative, then the NPS-FM 2020 should prevail.

Operational and Functional need

17. I note the reporting officer has suggested an amendment to NC-P3 to provide a consenting pathway for buildings and structures that have an “operational need” in its location.

⁷ Refer to section 75(3)(c) of the RMA

⁸ Refer to section 75(4)(b) of the RMA

⁹ See *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] SC 38, para 145

18. Having considered this amendment, the Director-General's view is that NC-P3 should be retained as notified¹⁰. This would still allow a consenting pathway for buildings and structures within riparian areas where such structures have a "functional need".

19. I have reviewed relevant National Direction for guidance in relation to provision of activities that have an operational/functional need. I note that the NPS-FM does make some limited allowances for activities which have a "functional need" in providing a consenting pathway where the values of wetlands¹¹ and rivers¹² are affected. However, there is no provision for activities within these areas on the basis of an "operational need".

20. The NPS-IB defines operational need in the same way the Officer has proposed it be defined in the pTTPP:

"operational need means the need for a proposal or activity to traverse, locate or operate in a particular environment because of technical, logistical or operational characteristics or constraints"

21. The NPS-IB does allow activities that have an operational need to be assessed through the effects management hierarchy (in respect of adverse effects on SNAs). In my submission the NPS-IB is not directly applicable to policy NC-P3 which instead relates to effects on the natural character of riparian areas.

22. I note functional need is defined in the pTTPP as:

"means the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment."

23. As per the definition above activities that have a "functional" need can only be located in riparian areas. Ms Young's evidence is that providing a pathway for buildings and structures with an "operational need" is broad and she queries what building or structure would not fall within this definition?¹³ In my submission providing a pathway for buildings and structures within riparian areas on the basis of an "operational need" is not consistent with section 6(a) of the RMA in relation to recognising and providing for the preservation of natural character of wetlands, lakes and rivers and their margins.

¹⁰ Ms Young has addressed this issue in her evidence, see paras 14 to 19

¹¹ Clause 3.22 of the NPS-FM

¹² Clause 3.24 of the NPS-FM

¹³ As noted in Ms Young's evidence, para 19

24. The Officer has recommended rejection of the D-G's submission point S602.108 seeking that Network utilities, renewable electricity generation facilities and other structures are removed from a list of permitted structures in the margins of waterways. The Officer states that National instruments such as the NPS Renewable Energy Generation (NPS-REG), the NPS Electricity Transmission (NPS-ET) anticipate Permitted Activities¹⁴.
25. Policy 2 of the NPS-ET provides for effective operation, maintenance, upgrading and development of the electricity transmission network. Other policies of the NPS-ET relate to managing the environmental effects of transmission, such as policy 8 *"In rural environments, planning and development of the transmission system 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."*
26. The NPS-REG recognises the benefits of renewable electricity generation activities¹⁵. Policy E1 provides that *"district plans shall include objectives, policies and methods (including rules within plans) to provide for the development, operation, maintenance, and upgrading of new and existing renewable electricity generation activities using solar, biomass, tidal, wave and ocean current energy resources to the extent applicable to the region or district"*. Policy C2 of the NPS-REG relates to consideration of effects of REG activities with decision-makers to have regard to offsetting measures or compensation when effects cannot first be avoided, remedied or mitigated.
27. I disagree with the Officer that the NPS-ET and NPS-REG anticipate permitted activities in riparian areas. Existing activities in such areas have the protection of existing use rights pursuant to section 10 of the RMA¹⁶. In respect of new activities in such areas the adverse effects of these activities should be managed through a consent application¹⁷ in order to give effect to other National Direction (like the NPS-FM) and be consistent with part 2 of the RMA.

¹⁴ Officer's report, para 232

¹⁵ Policy A provides that *"Decision-makers shall recognise and provide for the national significance of renewable electricity generation activities, including the national, regional and local benefits relevant to renewable electricity generation activities"*

¹⁶ s 10 - Section 10 seeks to protect uses which existed lawfully at the time a new rule becomes operative or a proposed plan is notified

¹⁷ Refer to para 21 of Ms Young's evidence

Submission points relating to the Natural Character and the Margins of Waterbodies and Activities on the Surface of Water

28. In relation to these topics the Director-General is seeking the amendments to the pTTPP as set out in her submission and the evidence of Amy Young dated 22 January 2024.

29. Having reviewed Ms Young's evidence I note that most of the Director-General's submission points in relation to these topics have been accepted in the recommendations contained in the Officer's report.

5 February 2024



Matt Pemberton
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