

BEFORE THE HEARING PANEL

IN THE MATTER of the Resource Management Act 1991

AND of the proposed Te Tai o Poutini Plan

**RESPONSE TO QUESTIONS FROM THE PANEL
ON BEHALF OF THE DIRECTOR-GENERAL OF CONSERVATION**

21 March 2024

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MAY IT PLEASE THE PANEL

1. The Director-General of Conservation (Director-General) was asked a series of questions by the Panel on 5 March 2024 in relation to its position on policy NF-P2. These related to:
 - a) Whether reference to the effects management hierarchy (EMH) is justified (including offsetting and compensation) by National Direction?
 - b) Whether the Courts have used the EMH more broadly, going further than how it is used in current National Policy Statements?
 - c) Is strict avoid necessary or is there alternative wording that might better give effect to the higher order documents? For example avoid, remedy or mitigate, rather than reference to the EMH?

National Direction

2. As discussed with the Commissioners at the hearing, the EMH has been used in the two most recent National Policy Statements that have been promulgated, those being the NPS-FM 2020 and NPS-IB, which was gazetted in 2023.
3. Neither of these NPS relate to effects on landscape or natural features. The EMH relates to the effects of activities on indigenous biodiversity and effects on the extent or values of a wetland or river.
4. However, the presence of the EMH in recent National Direction reflects the broad policy rational to ensure that there should be an appropriate cascade of effects management approaches, starting with avoidance, and ending with offsetting or compensation of residual adverse effects, to appropriately manage adverse effects on significant values.
5. That is the primary reason the Director-General has sought the inclusion of EMH at various instances in the pTTPP.

Court decisions

6. The Director-General has reviewed recent Court decisions to see if the Courts have used the EMH more broadly, going further than how it has been applied through the NPS-FM and NPS-IB. From the Court decisions reviewed, no examples have been found where

the Courts have addressed EMH more broadly than in relation to the indigenous biodiversity and effects on the extent or values of a wetland or river respectively (as contemplated by the NPS-FM/NPS-IB). However, the decisions the Director-General has reviewed only relate to consent decisions and not decisions on planning instruments.

7. For example in *Royal Forest and Bird Protection Society of New Zealand Inc v West Coast Regional Council and Buller District Council* [2023] NZEnvC 68, the Court noted that consideration of s 104(1)(a) effects will be undertaken within the policy framework of Chapter 7 of the West Coast RPS (Ecosystems and Indigenous Biological Diversity) which follows the EMH. For example, policy 7 of the West Coast RPS includes reference to the EMH (where use or development within land areas of water bodies contains indigenous biological diversity that does not meet any of the significance criteria).
8. In *Te Rūnanga O Ngāti Whātua v Auckland Council* [2023] NZEnvC 277, the Court discussed the EMH but again this is in the context of rivers, wetlands, and indigenous biodiversity.

Avoid Policy/ Effects Management Hierarchy in relation to NFL-P2

9. The Director-General has sought the planning opinion of Ms Young whose view is a strict avoidance policy is not required as there are no prohibited activities listed in the rules section of this chapter. If there were specific activities that were prohibited, Ms Young's view is a strict avoidance policy may be appropriate.
10. Ms Young's view is that policies that are worded to avoid, remedy or mitigate effects are appropriate as the plan provides for these activities in these landscapes so long as landscape values are protected.
11. In relation not NFP-2, Ms Young's view is that the "*where practicable avoid significant adverse effects*" aspect of NFP-2 is problematic in that this wording does not align well with the wording used in the RPS (in particular, policy 4). A possible rewording of policy NFP-2 would be:

Avoid significant adverse effects on the values that contribute to outstanding natural landscapes described in Schedule Five and outstanding natural features described in Schedule Six. Other adverse effects must be avoided, remedied, or mitigated.

12. The Director-General acknowledges the difficulty of offsetting and compensation in relation to effects on landscape/natural features and considers avoid, remedy or mitigate to be a sufficient cascade in managing effects. The wording suggested above would ensure that overall adverse effects in ONL/ONF would be no more than minor in line with policy 4 of the West Coast RPS.
13. Alternative wording which has been used in the Dunedin City District Plan¹ (Policy 10.2.5.2 and Policy 10.2.5.3) would be to avoid specified activities unless any adverse effects on the landscape values of the ONL/ONF are insignificant.
14. The Dunedin City District Plan (Policy 10.2.5.8) only allows some specified activities that cause adverse effects on landscape values provided that the adverse effects on the landscape values are insignificant or; where there are no practicable alternative locations and are adequately mitigated. These activities include network utility structures and transport activities.

¹ Second Generation Dunedin City District Plan (appeals version)