

# **BEFORE THE DISTRICT HEARINGS PANEL**

Under the Resource Management Act 1991

In the matter of

**Proposed Queenstown Lakes District Plan – Chapter 3  
Strategic Directions, Chapter 4 Urban Development, and  
Chapter 6 Landscape**

and

**Transpower New Zealand Limited (Submitter 805)**

Submitter

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**Addendum to Legal Submissions on behalf of Transpower  
New Zealand Limited dated 21 March 2016**

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## Introduction

1. We appreciate the opportunity to provide a considered response to the Hearings Panel's questions, and submit amended relief on behalf of Transpower New Zealand Limited (**Transpower**) for consideration by the Hearings Panel.

## What “give effect to” the NPSET means in practice

2. Transpower accepts that giving effect to the NPSET does not involve expressly enabling the National Grid in every potential location, such as buffer corridors over the Hollyford Pass (as was raised at the hearing). Conversely, Transpower rejects the notion that the Council is only required to provide for Transpower's existing assets and any known future development plans in order to “give effect” to the NPSET.
3. Instead we submit that the requirement “to give effect” to the NPSET imposes a positive obligation on the Council to actually do something that implements the policy directions made at a national level. At a high-level we consider this entails including:
  - (a) Provisions enabling the operation, maintenance, development and upgrade of the National Grid;<sup>1</sup>
  - (b) Provisions that reflect the policy direction as to how the environmental effects *of* the National Grid are to be managed;<sup>2</sup>
  - (c) General provisions that reflect the policy direction as to how adverse effects *on* the National Grid are to be managed;<sup>3</sup> and
  - (d) Specific buffer corridors and associated rules for Transpower's existing assets and any medium to long-term plans for the alteration or upgrading of the National Grid.<sup>4</sup>

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<sup>1</sup> Objective, Policy 1, Policy 2, Policy 12, and Policy 13

<sup>2</sup> Policy 3, Policy 4, Policy 5, Policy 6, Policy 7, Policy 8, and Policy 9

<sup>3</sup> Policy 10 and Policy 11

<sup>4</sup> Policy 11 of the NPSET

4. Setting aside the Council's legal obligations to "give effect" to the NPSET, one of the key reasons why it is important to include provisions of general application is because it is not possible to foresee all new development that may be required within the horizon of the Proposed Plan. As highlighted by Mr Renton at the hearing, Transpower often needs to upgrade its lines or undertake new development in response to the activities of third parties. It is important the Proposed Plan does not foreclose these options by failing to provide supporting policy direction. Further, while Transpower has a planning horizon of 30 years, these plans are updated bi-annually.

### **Consistency between Part 2 and NPSET**

5. The Hearings Panel asked whether the NPSET is consistent with Part 2 of the RMA on the basis it allows significant adverse effects on outstanding natural landscapes and features.
6. The Supreme Court in *King Salmon* clarified how Parliament intended a NPS and Part 2 of the RMA to interact.<sup>5</sup> The Court considered that a NPS is a mechanism that translates the high level intentions of Part 2 into a specific context (in that case, the coastal environment). It follows that the NPSET provides decision-makers with direction as to how they are required to incorporate Part 2 matters in their decisions that involve the National Grid.
7. In reaching its conclusion the Supreme Court pointed to the involved process to create a NPS, including section 32 evaluation, public feedback and a hearing by a Board of Inquiry.<sup>6</sup> It would create somewhat of an anomaly if the decision-maker could ignore this detailed process and revert back to Part 2 in reaching its decision.
8. Policies in a NPS can provide a degree of flexibility for decision-makers as to how to implement the provisions of the NPS. However, it was not

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<sup>5</sup> *Environmental Defence Society Incorporated v The New Zealand King Salmon Company* (2014) 17 ELRNZ 442, para 85

<sup>6</sup> *Environmental Defence Society Incorporated v The New Zealand King Salmon Company* (2014) 17 ELRNZ 442, para 86

intended that local authorities could use Part 2 to “trump” a NPS.<sup>7</sup> As we noted in our opening legal submissions, the more directive the language used, the more constrained a decision-maker will be.

9. The preamble to the NPSET does state that it: “is not meant to be a substitute for, or prevail over, the Act’s statutory purpose or the statutory tests already in existence. Further, the national policy statement is subject to Part 2 of the Act.”
10. However, the NPSET<sup>8</sup> preceded the Supreme Court decision in *King Salmon*. Pre *King Salmon*, NPSs were considered by the Environment Court to be subject to Part 2 in accordance with an “overall broad judgement” approach.<sup>9</sup>
11. Notably, the Board of Inquiry’s recommended preamble for the NZCPS 2010 contained an almost identical statement. Under the heading “Giving Effect to the NZCPS”, the Board’s recommended Preamble stated that:

... the NZCPS is not intended to be a substitute for, or prevail over, the Act’s purpose or the statutory tests already in existence. Like all planning documents, it too is subject to Part 2 of the Act.
12. The above wording did not make it into the preamble of the finalised NZCPS, as it was considered to be only contextual material.<sup>10</sup>
13. Further, and no doubt for similar reasons, all subsequent NPSs also omitted the same reference to Part 2, as used in the NPSET. Thus if the NPSET was “subject to Part 2”, it would oddly be the only one. There is no statutory direction that that should be the case – NPSs are treated the same way under the RMA.

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<sup>7</sup> *Environmental Defence Society Incorporated v The New Zealand King Salmon Company* (2014) 17 ELRNZ 442, para 86

<sup>8</sup> The NPSET was gazetted in 2008.

<sup>9</sup> *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).

<sup>10</sup> The Minister of Conservation’s summary of the Board’s recommendations, “Preamble included, edited to focus on issues and exclude less useful contextual material.”

14. Further, the NPSET preamble does not have legally binding effect. It clearly states that it “may assist the interpretation of the national policy statement, where this is needed to resolve uncertainty.”
15. In Transpower’s submission, the Supreme Court ruling in *King Salmon* represents the current law on this point. As such, decision-makers cannot circumvent the NPSET to come to an independent analysis under Part 2 of the RMA, save for where the limited exceptions noted in *King Salmon* may apply.
16. To the extent that Part 2 could be referred to, the circumstances would be limited to assisting interpretation (for example, if there is uncertainty as to the meaning of particular policies). However, the Supreme Court essentially cautioned taking this step; preferring that interpretation first be addressed by reviewing the relevant objectives.<sup>11</sup> In this instance, Transpower considers that the exceptions outlined by the Supreme Court do not apply, and therefore there is no impediment to the Council giving effect to the NPSET in the Proposed Plan, without recourse back to Part 2.
17. The requirement to give effect to an NPS without reverting to an analysis under Part 2 was recently considered by the High Court in the context of the National Policy Statement on Freshwater Management in the *Tukituki* decision. The High Court stated:<sup>12</sup>

In my assessment, the Board correctly recognised the need to give effect to the Freshwater Policy Statement 2011. That is the plain meaning of s67(3)(a) of the RMA. It also reflects the detailed and considered process the Freshwater Policy Statement 2011 underwent before the Minister approved the final version of that policy. Those processes included an evaluation under s 32 of the RMA and detailed deliberations by the Board and further reflection and consideration by the Minister for the Environment before issuing the Freshwater Policy Statement 2011.

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<sup>11</sup> *Environmental Defence Society Incorporated v The New Zealand King Salmon Company* (2014) 17 ELRNZ 442, para 89

<sup>12</sup> *Hawke’s Bay and Eastern Fish and Game Councils v Hawke’s Bay Regional Council* [2014] NZHC 3191, [2015] 2 NZLR 688, para 170

The approach taken by the Board was also consistent with the Supreme Court's view that it is necessary to give effect to a national policy statement without necessarily giving primacy to Part 2 of the RMA.

18. The NPSET underwent a similar detailed and considered process. In accordance with the Supreme Court's ruling in *King Salmon* and the High Court's comments in *Tukituki*, the NPSET should be given effect to without necessarily giving primacy to Part 2.
19. In any event, Transpower considers the requirement to "seek to avoid adverse effects" on outstanding natural landscapes and other areas is consistent with Part 2 of the Act.
20. Section 6(b) of the RMA provides for "the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development". Transpower submits this requires an analysis of what is "inappropriate" or "appropriate" development by reference to section 5 of the RMA.
21. The Supreme Court in *King Salmon* noted that the scope of the words "appropriate" and "inappropriate" is heavily affected by context,<sup>13</sup> but considered that when used in the context of protecting areas from inappropriate subdivision, use or development in sections 6(a), (b) and (f), the natural meaning of "appropriate" should be assessed by reference to/against the backdrop of what is sought to be protected or preserved.<sup>14</sup>
22. The requirement in the NPSET to "seek to avoid adverse effects on outstanding natural landscapes" is still considered to be an onerous test to satisfy. It does not provide the National Grid with a veto. In the event Transpower needs to upgrade or construct new transmission infrastructure in an outstanding natural landscape or feature then it will need to demonstrate to any decision-maker that it has sought to avoid adverse effects, including by the route, site, and method selection.

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<sup>13</sup> *Environmental Defence Society Incorporated v The New Zealand King Salmon Company* (2014) 17 ELRNZ 442, para 100

<sup>14</sup> *Environmental Defence Society Incorporated v The New Zealand King Salmon Company* (2014) 17 ELRNZ 442, paras 101 and 105

23. If it is not practicable to avoid all adverse effects on an outstanding natural landscape then there will still need to be an assessment as to whether or not the proposal is appropriate and achieves the sustainable management purpose of the Act.

### **Avoiding, remedying, or mitigating effects**

24. Transpower acknowledges the *Winstone Aggregates Limited v Papakura District Council* case referred to by the Hearings Panel which held that:<sup>15</sup>

While in the wording of the subsection the words “avoid, remedy, or mitigate” follow a continuum, we are of the view that the grammatical construction is such, that the words are to be read conjunctively and with equal importance.

Accordingly, whether emphasis is given to avoidance, remedying or mitigation will depend on the facts of a particular case and the application of section 5 to those facts. A judgment is required to be made which “allows for a comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome”.

25. We submit this remains the correct legal position.
26. In the Supreme Court’s decision in *King Salmon* it was stated in relation to the New Zealand Coastal Policy Statement 2008 that:<sup>16</sup>

It contains objectives and policies that, while necessarily generally worded, are intended to give substance to the principles in pt 2 in relation to the coastal environment. Those objectives and policies reflect considered choices that have been made on a variety of topics. As their wording indicates, particular policies leave those who must give effect to them greater or lesser flexibility or scope for choice. Given that environmental protection is an element of the concept of sustainable management, we consider that the Minister was fully entitled to require in the NZCPS that particular parts of the coastal environment be protected from the adverse effects of development.

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<sup>15</sup> *Winstone Aggregates Limited v Papakura District Council* A049/2002 EnvC Auckland 26 February 2002, para 24-25

<sup>16</sup> *Environmental Defence Society Incorporated v The New Zealand King Salmon Company* (2014) 17 ELRNZ 442, para 152

27. In light of this decision, Transpower accepts that in general the Council can make a policy decision as to whether certain effects on specified resources should be avoided, remedied, or mitigated (or a combination of all responses). However, this is subject to any higher direction to the contrary. For example, in the context of outstanding natural landscapes in rural environments, the Proposed Plan can only “seek to avoid adverse effects” and not include a blanket policy of avoidance.

28. This was affirmed in a recent decision of the Environment Court which held that:<sup>17</sup>

Essentially a lower order document must give effect to those higher order documents. Within most plans there are broad areas which do not militate towards one particular action. The clearest example is the usual reference to avoid, remedy or mitigate.

It seems to us that *EDS v King Salmon* has established the principle that it is possible for national documents, and we would suggest by analogy both regional and district documents, to promulgate particular approaches within their area of influence which are not in conflict with superior documents. Lower order documents must give effect to that approach if sufficiently clear.

29. The Hearings Panel asked if there is case law about the difference between “avoid, where practicable” compared to “seek to avoid”. We have not been able to identify any case law on point. Transpower considers the terminology used in the Proposed Plan should reflect the NPSET and refer to “seek to avoid” instead of “avoid, where practicable” (even though the former may be a more stringent test).

### **Truly exceptional nature of the National Grid**

30. Policy 6.3.1.3 refers to subdivision and development located within an Outstanding Natural Landscape, or an Outstanding Natural Feature “is inappropriate in almost all locations, meaning successful applications will be exceptional cases.” The development or upgrade of the National Grid is likely to be one such exceptional case.

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<sup>17</sup> *Puke Coal Ltd v Waikato Regional Council* [2014] NZEnvC 223, para 142-143



31. We submit the reason the NPSET includes a policy of “seek to avoid” in Policy 8 was a deliberate decision by the Board of Inquiry in light of the fact it is often not practicable for the National Grid to avoid adverse effects on outstanding natural landscapes due to technical, operational, and/or functional constraints. This is reinforced by Policy 7 which imposes a requirement to “avoid adverse effects” (compared to the requirement to “seek to avoid adverse effects” in Policy 8). Further, it is not possible to remedy or mitigate certain types of effects of the National Grid, such as landscape and visual effects. Hence, the focus is on seeking to avoid such effects.
32. This is recognised in the preamble to the NPSET which states that the: “Technical, operational and security requirements associated with the transmission network can limit the extent to which it is feasible to avoid or mitigate all adverse environmental effects.”
33. Transpower recognises that it is subject to a national policy statement, and is likely to be more constrained than other regionally significant infrastructure. It supports provisions that are specific to the National Grid and give effect to the NPSET being included in the Proposed Plan, as an alternative to being included in any provisions for regionally significant infrastructure.

#### **Amendments proposed by Transpower**

34. Transpower proposes the following new policies in Chapter 3 to address its concerns that the chapter does not give effect to the NPSET:
- (a) Provide for the benefits derived from the National Grid by enabling its operation, maintenance, upgrading and development.
  - (a) Managing activities to avoid adverse effects on the National Grid, including by identifying a buffer corridor within which sensitive and other incompatible activities will generally not be provided for.

- (b) Recognise the extent to which any adverse effects of the development of the National Grid are addressed through route, site and method selection while acknowledging that the avoidance, remediation or mitigation of any adverse effects of the National Grid is constrained by its technical, locational and operational requirements.

35. Transpower proposes inclusion of the following new policy in Chapter 6 (as an alternative to other relief sought in relation to Chapter 6 and the landscape provisions in Chapter 3):

New National Grid infrastructure or major upgrades of existing National Grid infrastructure should seek to avoid adverse effects on Outstanding Natural Landscapes and Features, and Rural Landscapes while:

- (c) Considering the constraints imposed on achieving measures to manage environmental effects of National Grid infrastructure by the technical, locational and operational requirements of the network; and
- (d) Having regard to the extent to which any adverse effects have been avoided, remedied or mitigated by the route, site, and method selection.



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