

Before the Proposed Porirua District Plan Hearings Panel In Porirua

Under the Resource Management Act 1991 (the Act)

In the matter of the Proposed Porirua District Plan - Hearing Stream 4: Energy, Infrastructure and Transport, General District-Wide Matters

Between **Porirua City Council**
Local authority

And **Transpower New Zealand Limited**
Submitter 60 and Further Submitter FS04

Counsel's speaking notes for Transpower New Zealand Limited – Hearing Stream 4

Dated 14 February 2022

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1 Overview

1.1 Preliminary matter – amended relief:

- a As the Panel knows DOC raised concerns with Ms Whitney’s recommended INF-P6,7,8;
- b The parties indicated they would discuss and have now done so. The parties filed a joint memo and supplementary statement of Ms Whitney; and
- c I will return to that in due course.

1.2 Introductions

- a **Ms Rebecca Eng** will provide evidence on the National Grid Corridor approach and ACRE process from a Transpower perspective;
- b **Mr Ben Cartwright** will provide engineering evidence on risks arising from the National Grid and on National Grid activities; and
- c **Ms Pauline Whitney** will provide planning evidence and make recommendations as to the final form of PDP provisions that Transpower has an interest in.

1.3 Transpower’s case in Hearing Stream 4:

- a As in previous hearings, Transpower is largely in support of the recommendations in the Officer’s Report. Ms Whitney’s Appendix C sets out in full the officer recommendations that are supported (or accepted), and where Transpower has outstanding relief.
- b Also as in previous hearings, Transpower’s relief centres on recognising the significance of the national grid, enabling ‘transmission activities’ (while managing effects in a practical way), and protecting the Grid from third party activity.

1.4 The main outstanding ‘topics’ (as per Ms Whitney’s evidence) are (subs at 1.8):

- a Plan Structure (in that regard Transpower retains preference for National Grid provisions to be consolidated);
- b Provisions relating to enabling the National Grid (New sought Policy INF-Px);
- c Provisions relating to managing the effects of the National Grid:
 - i INF-P7 Operation and maintenance and repair of the National Grid;

- ii INF-P8 *Upgrading of the National Grid* (renumbered from INF-P6); and
 - iii INF-P9 *Development of the National Grid* (renumbered from INF-P7);
- d Provisions relating to managing the effects on the National Grid;
- i INF-P6 Adverse effects on the National Grid;
 - ii Land use activities (Rules GRZ-R5, GRZ-R14 and corresponding rules in the GRUZ, RLZ, OSZ and FUZ zones, and Rule INF-R25); and
 - iii Earthworks (EW-P5 and EW-R4).

2 Statutory framework

- 2.1 I don't understand there to be any dispute on this. Transpower generally agrees with the description in the various officer reports. Other parties do not appear to have challenged.
- 2.2 Previous submissions and Ms Whitney's evidence¹ address what is required to give effect to the NPSET (i.e. to implement, strong direction, intended to constrain decision makers). Again no real dispute about that in principle, is more about the nuances of what the various NPSET policies direct or require.

Port Otago

- 2.3 Written submissions do touch on the *Port Otago* case. Panel may be surprised given it was about the strength of an 'avoid' direction:
- 2.4 Court found [and I would note, in the absence of a competing higher order policy direction in another instrument] that a direction for effects to be avoided:²
- cannot be substituted with "avoid remedy or mitigate". They are altogether distinct concepts, and the later formulation fundamentally dilutes the former.
- 2.5 For Transpower, this decision underscores the need to faithfully give effect to higher order documents such as the NPSET, rather than 'watering down' its directions.³
- 2.6 Concern here that some of the recommendations in the Officer's report (and relief sought by other parties) would have the effect of inappropriately 'diluting' key directions in the NPSET, and in the absence (at least outside of the coastal environment) of any

¹ Whitney, 10 September 2021, paras 5.5 – 5.18, Outline of legal submissions for Transpower New Zealand, 22 September 2021, paras 4.1 – 4.5.

² *Port Otago*, at [79].

³ *Port Otago*, at [82].

countervailing higher order policies to warrant such an outcome. [particular directions at issue discussed below]

The NPSET and the NZCPS

2.7 NB *Port Otago* case was about internal relationships between NZCPS policies (and its 'directive hierarchy'); not relationship between the NZCPS and other NPS. Specifically it didn't have to consider the NPSET.

2.8 Some guidance from HC in *Hairini (TEPS v TCC)* case:

- a the NZCPS or NPSET should not be treated, as a starting point, as "trumping" the other, and neither should be given priority or 'give way' to the other.⁴ Instead:⁵

As the Supreme Court in *EDS v King Salmon* stated, their terms should be carefully examined and reconciled, if possible, before turning to that question. It may be that, in relation to a specific issue, the terms of one policy or another is more specific or directive than another, and accordingly bear more directly on the issue, as counsel submit.

2.9 That 'careful examination' of the terms of the instruments is the exercise that DOC and Transpower went through – and have gone through on an number of occasions in different planning contexts (issues are well understood but as all plans are structured differently there is no universally agreed 'boilerplate' set of policies).

2.10 The detail of what was discussed and agreed will be addressed by Ms Whitney.

3 Enabling the National Grid / Recognising benefits (New INF-Pxx)

3.1 The first category of provisions of interest to Transpower relates to recognising and providing for the benefits of the National Grid.

3.2 The relevant NPSET directions are contained in Policies 1 and 2, which broadly require that decision-makers "must recognise and provide for":

- a "the national, regional and local benefits of sustainable, secure and efficient electricity transmission" (Policy 1);⁶ and
- b "the effective operation, maintenance, upgrading and development of the electricity transmission network" (Policy 2).⁷

⁴ *Tauranga Environmental Protection Society v Tauranga City Council* [2021] NZHC 1201 at [125].

⁵ *Tauranga Environmental Protection Society v Tauranga City Council* [2021] NZHC 1201 at [125].

⁶ NPSET, Policy 1.

⁷ NPSET, Policy 2.

- 3.3 Transpower submits that 'must' is a strong direction, as is 'provide for'. The Panel are 'decision makers'.
- 3.4 Transpower sought a new policy INF-Pxx (refer Whitney Appendix D p60), 'The Benefits of the National Grid'.
- 3.5 Rejected by Officer on the basis that:
- a 'recognition' of infrastructure (generally) was addressed in INF-P1; and
 - b 'providing for' the infrastructure is addressed in Grid specific policies
- 3.6 Transpower's submission is that:
- a In order to give effect to the NPSET (Policy 1 in particular), the PDP should include a direction to 'provide for' the benefits of the National Grid.
 - b 'recognise' is not as strong a direction. The Court of Appeal held in *Port Otago* that a direction to 'recognise' (or consider) gives decision makers "considerable flexibility and scope for choice".⁸ There is much less discretion with a direction of 'must.. provide for' (Ms Whitney also considers it a stronger policy directive).
 - c As such, substituting 'recognise and provide for' in the NPSET with merely 'recognise' in the PDP represents an inappropriate dilution of the NPSET direction, and fails to give effect to it.
 - d While it is true that the later NG policies include the 'provide for' wording, those relate to specified transmission activities themselves, rather than to the benefits of the National Grid.

4 Managing effects of the National Grid (INF-P7 to P9)

- 4.1 The next section of Transpower's relief concerns Policies INF-P7 to P9, which are the policies on which some compromise has recently been reached with the Director General of Conservation (DOC). As noted in written legal submissions there are currently no National Grid assets within (or intended for) the coastal environment, but the further changes have now been agreed in order to provide for that scenario in any event.
- 4.2 The relevant NPSET directions are Policies 2-8, in Part 7 of the NPSET. I summarise the relevant directions at paragraph 6.1 of my written legal submissions. To distil that down further:

⁸ *Port Otago*, at [81].

- a Policies 2-5 are, in broad terms, enabling or encouraging of transmission activities. They are framed in terms of things that “decision makers” “must” do.
- b Policies 6-8 are essentially obligations on Transpower as the owner and operator of the National Grid (as well as on decision makers). They are expressed in terms of things Transpower ‘should’ do. Policies 6 and 8 are also qualified by ‘where appropriate’ and ‘seek to’, respectively.
- c Transpower submits that this difference in language was deliberate. ‘Should’ and ‘seek to’ admit the possibility that the directed outcome may not be practicable or possible, and in such circumstances the policy could still be met if Transpower could demonstrate it had appropriately ‘sought’ to achieve the outcome in question.
- d The policies are very enabling of the operation and maintenance of existing assets, and of minor upgrades. It is only more significant upgrades, new lines, and ‘planning and development’ that are *steered towards* avoiding effects or considering alternatives. There are obvious practical reasons for this.

INF-P7 Operation, maintenance and minor upgrade

- 4.3 INF-P7 is a new standalone National Grid policy, recommended by the Officer in response to Transpower’s submissions, to provide for operation/maintenance/repair. (The closest equivalent general RSI Policy is INF-P4)
- 4.4 However, the two constraints in clauses 1 and 2 as recommended by the Officer are, in Transpower’s view, wholly inappropriate and fail to give effect to the NPSET (particularly Policy 5):
 - a (must) ‘minimise (all) adverse effects is a significant restriction (and actually goes further than what is proposed in relation to upgrades in later policies).
 - b It doesn’t make sense to limit the nature and scale of transmission lines (including existing lines) in terms of the characteristics of overlays. These are determined by the technical and operational needs of the infrastructure (as per Policy 3)
 - c It is difficult to work out how either requirement is intended to meaningfully apply to the operation and maintenance of existing assets (noting Ms Whitney recommends adding ‘minor upgrade’)
- 4.5 Concerns with the Officer’s wording are further addressed in Ms Whitney’s evidence.
- 4.6 Following discussions, Transpower and DOC now support the following wording:

Provide for the operation, maintenance and minor upgrade of the National Grid while managing the adverse effects of those activities.

- 4.7 Transpower submits this wording is appropriate in light of the national significance of the National Grid (clause 4 NPSET), the need to recognise and provide for the effective operation and maintenance of the transmission network (Policy 1), and the requirement on decision makers to 'enable' reasonable operation/maintenance/minor upgrading (Policy 5).

INF-P8 Upgrading of the National Grid (previously INF-P6)

- 4.8 Ms Whitney's primary evidence also recommended a number of changes to what is now INF-P8.
- 4.9 Following discussions with DOC, Ms Whitney has revised her recommended wording – as set out in her supplementary evidence and the joint memorandum. The key change is that Ms Whitney (and thus Transpower) now support the 'seek to avoid' direction being retained in respect of 'high value' Overlays (although not in terms of all open space or recreation zones).
- 4.10 Ms Whitney continues to recommend (and Transpower continues to seek) that the cross reference to the ECO policies be removed, with SNAs simply being included in the (now retained) 'seek to avoid' direction. DOC now supports that approach as well.
- 4.11 The remaining differences from the Officer's recommendations are generally in the nature of 'planning tidy ups', and best addressed by Ms Whitney.

INF-P9 Development of the National Grid (previously INF-P7)

- 4.12 Finally, Ms Whitney recommended a number of changes to now INF-P9, which was largely unchanged in the Officer's version.
- 4.13 Ms Whitney's primary evidence sought a number of amendments. The original wording included an 'avoid' direction (cl 3) with respect to effects on SCHED9 ONFL areas in the coastal environment, and a cross reference to the ECO policies in relation to SNAs.
- 4.14 Ms Whitney's revisions are to instead have SNAs (generally) included as part of a seek to avoid direction in clause 2 (rather than refer to the ECO policies), and to have the policy include a 'mitigation hierarchy' for high value areas in the coastal environment.
- 4.15 That approach has been refined further in Ms Whitney's supplementary evidence, following discussion with DOC. DOC now supports this approach as far as it goes, but (as indicated in the joint memorandum) seeks a further clause alluding to a need to avoid significant effects on non-outstanding values in the coastal environment, in some circumstances.

- 4.16 Transpower submits that the revised wording in Ms Whitney's evidence appropriately reconciles the different directions between the NPSET and the NZCPS in respect of effects on coastal values – consistent with the approach outlined in *Hairini*.
- 4.17 Further, Transpower submits that a reference to 'avoidance' (rather than 'seeking to avoid') significant effects in the coastal environment would not be consistent with the 'seek to avoid' direction in NPSET Policy 8, or the wider need to recognise and provide for the effective upgrading and development of the network in terms of Policy 2.
- 4.18 While Transpower would as a practical matter seek to avoid high value areas in the coastal environment (and likely the coastal environment entirely), that might not always be practical. Further, particularly for higher voltage (larger) lines it may not be practicable to avoid affects that might ultimately be considered 'significant'.

5 Managing effects on the National Grid (INF-P6 and associated rules/standards)

- 5.1 The final category of provisions of interest to Transpower concern the effects of third party activities on the National Grid itself.
- 5.2 The relevant NPSET directions to be given effect to here are Policies 10 and 11, summarised in legal submission at para 7.2. The submissions also note some commentary from the High Court in the Auckland Unitary Plan decision (at 7.3).
- 5.3 The obligation on decision makers in Policy 10 is a strong one; they 'must' manage activities 'as far as reasonably possible' to:
- a Avoid reverse sensitivity effects;
 - b Ensure the electricity transmission network is not compromised.
- 5.4 Policy 11 of the NPSET also directs the identification of 'an appropriate buffer corridor' in which sensitive activities will 'generally not be provided for'.
- 5.5 As noted by the Council's planning officer (Smeaton Supplementary evidence at 51), it is 'reasonably possible' to avoid reverse sensitivity effects as a result of subdivision by declining subdivision consent, in some circumstances.
- 5.6 The practical concerns in relation to third party activities near or under the National Grid are outlined in **Ms Eng's** and **Mr Cartwright's** evidence.
- 5.7 Transpower broadly supports the new Policy INF-P6 put forward in the Officer's report, with the refinements recommended by Ms Whitney. Transpower submits these refinements are required to:

- a Appropriately manage direct effects, as well as reverse sensitivity effects; and
 - b Give effect to the NPSET directions without inappropriately diluting them (e.g. by replacing 'avoid' with 'avoid, remedy or mitigate').
- 5.8 Transpower understands a question has arisen during the hearing in terms of whether access to existing lines for the purpose of inspection and maintenance is a planning issue or a property rights issue. In other words, should it be provided for in the PDP or is it for Transpower to secure legal access? To respond to this:
- a Transpower has a legal right under section 23 of the Electricity Act to enter land for the purpose of inspecting, maintaining (including minor upgrades⁹) or operating existing transmission lines. (Subject to a statutory process of notice etc)
 - b As such Transpower has no legal need to secure easements for the purpose of access to existing lines¹⁰, and it is inappropriate to suggest it should have to do so.
 - c As explained in Mr Cartwright's evidence however, legal access is no guarantee of practical physical access.
 - d In Transpower's view managing third party activities to enable effective access is squarely within the ambit of NPSET Policies 2 and 10. In other words, practical access is necessary to enable the 'effective' operation and maintenance of the Grid, and not enabling physical access will cause the operation and maintenance of the Grid to be 'compromised'.

Amendments sought to associated rules and standards

- 5.9 Transpower also seeks a number of refinements to the rules and standards for buildings and structures within the National Grid Yard, and Policy EW-P5 and Rule EW-R4 in relation to earthworks within the National Grid Yard.
- 5.10 The reasons for these changes are set out in **Ms Whitney's** and **Mr Cartwright's** evidence. In broad terms the changes are necessary to give effect to Policies 10 and 11 of the NPSET.
- 5.11 Perhaps the only legal point to address here is the inclusion of controls on hazardous substances in Ms Whitney's amendments to Rule INF-Rxx.

⁹ In this section, **maintenance** includes—

(a) any repairs and any other activities for the purpose of maintaining, or that have the effect of maintaining, existing works; and
(b) the carrying out of any replacement or upgrade of existing works as long as the land will not be injuriously affected as a result of the replacement or upgrade.

¹⁰ I.e. 'existing works' as defined in the EA,

- 5.12 The Panel will be aware that the section 31 functions of territorial authorities were amended in 2017 to remove the express requirement to manage hazardous substances. However MFE guidance materials¹¹ make it clear that the intent of the change was to avoid the perception that councils must always include controls on hazardous substances generally, and to ensure they only put in place such controls as are necessary to control effects that are not covered by the HSNO or HSW Acts.
- 5.13 As far as we are aware there is no requirement in either of those Acts to consider risks associated with storing flammable substances near transmission lines. The risks of flammable or explosive substances in proximity to the National Grid are outlined in the evidence of **Mr Cartwright**.¹²

6 Conclusion

- 6.1 I would be happy to answer any questions.



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¹¹ Revised functions for Resource Management Act 1991 decision-makers, the Ministry for the Environment 2017, at pages 5-6. <<https://environment.govt.nz/assets/Publications/Files/Fact-Sheet-2-Revised-functions-for-RMA-decision-makers-amended.pdf>>

¹² Cartwright, 21 January 2022, paras 10.5-10.8.