

DRAFT NATIONAL POLICY STATEMENT FOR INDIGENOUS BIODIVERSITY

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1.0 Introduction

This submission has been prepared on behalf of Z Energy Limited, BP Oil New Zealand Limited and Mobil Oil New Zealand Limited (the Oil Companies) in response to the draft National Policy Statement for Indigenous Biodiversity (*the draft NPSIB*).

The Oil Companies receive, store and distribute refined petroleum products nationwide through a network of commercial, shore and marine based, aviation and bulk storage facilities. The Oil Companies are also owners of retail outlets (service stations and truck stops) and suppliers of petroleum products to individually owned retail outlets and commercial clients.

The nature and function of the Oil Companies' networks are such that they have assets in every region within New Zealand, and consequently, experience with territorial and regional authorities across the country. The core assets of the Oil Companies are operated in a similar manner nationally with key

environmental matters applying across jurisdictions, including in relation to ongoing operation maintenance and upgrading.

The Oil Companies act collaboratively on environmental issues through the Oil Industry Environmental Working Group (OIEWG), where it is appropriate to have a common approach. OIEWG advocates for industry good practice.

2.0 Application to the Oil Companies

With some exceptions, the draft NPSIB does not apply to the Coastal Marine Area (CMA) or freshwater ecosystems. The draft NPSIB is, however, relevant to a range of activities undertaken by the Oil Companies, including maintenance and upgrading of existing pipelines outside of the CMA. These pipelines convey fuel between ports and airports and bulk fuel storage facilities (*terminals*), for instance the pipeline that extends over the Christchurch Port Hills between the Lyttelton and Woolston terminals and the pipeline that supplies fuel from the Wiri Oil Terminal and Auckland Airport. The draft NPSIB is also relevant to a range of activities that the Oil Companies may undertake, for instance the addition of new pipelines to meet increasing demand and improve the resilience of the fuel supply chain.

The Oil Companies are network utility operators and requiring authorities and can designate accordingly, for instance pipelines for the distribution or transmission of petroleum. If designated, section 9(3) of the RMA (which relates to district plan rules) does not apply but section 9(2) of the RMA relating to regional plan rules does. Designating therefore provides a pathway through district plan provisions, including those provisions for the purpose of the maintenance of indigenous biological diversity (section 31(1)(b)(iii)), but not regional provisions, including those for the purpose of the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological biodiversity (section 30(1)(ga)).

Parts 3.8, 3.9 and 3.12 of the draft NPSIB are of most relevance to the Oil Companies and are the focus of this submission and the amendments sought at section 5.0.

3.0 General Approach

The Oil Companies support the Government's intent to improve conservation management and safeguard the indigenous ecosystems of New Zealand for future prosperity. The Oil Companies consider the drafting of the NPSIB is critical to it achieving the stated intent.

Case law, particularly *King Salmon (The Environmental Defence Soc Inc v New Zealand King Salmon Co Ltd [2014] NCSC 38)*, has helped refocus parties on ensuring provisions in all levels of policy clearly articulate exactly what they mean, for instance only using avoid when it really is intended to prevent the occurrence of a particular effect or activity. The *King Salmon* decision has been reinforced by subsequent decisions, including by the High Court in *Environmental Defence Society Incorporated v Otago Regional Council [2019] NZHC 2278*. In that case, the High Court held that the avoidance policies take precedence over the infrastructure and development provisions (in the context of the New Zealand Coastal Policy Statement (NZCPS) and a port); and that the avoidance policies require *absolute avoidance* of adverse effects on the stated values. This is a shift from how the courts have applied *King Salmon* previously, including in relation to minor and transitory effects, and the decision states that

this will inevitably result in prohibited activities and preclude the use of adaptive management to address conflict with the avoidance policies.

Unlike the NZCPS, the draft NPSIB is being prepared post King Salmon. Any lack of clarity will likely result in significant implications, including for local authorities seeking to give effect to the NPSIB while providing for sustainable management.

The draft NPSIB requires the maintenance of indigenous biodiversity (policy 7) and the identification and protection of significant indigenous vegetation or fauna by identifying and managing them as Significant Natural Areas (SNAs) (policy 6). Importantly, policies recognise that locational constraints apply to specific subdivisions, uses and developments (policy 8) and the need to provide for appropriate existing activities that have already modified indigenous vegetation and habitats of indigenous fauna (policy 10). The intent of these provisions is supported and the Oil Companies focus below on how the draft NPSIB addresses implementation.

4.0 Part 3

Identifying SNAs (Part 3.8)

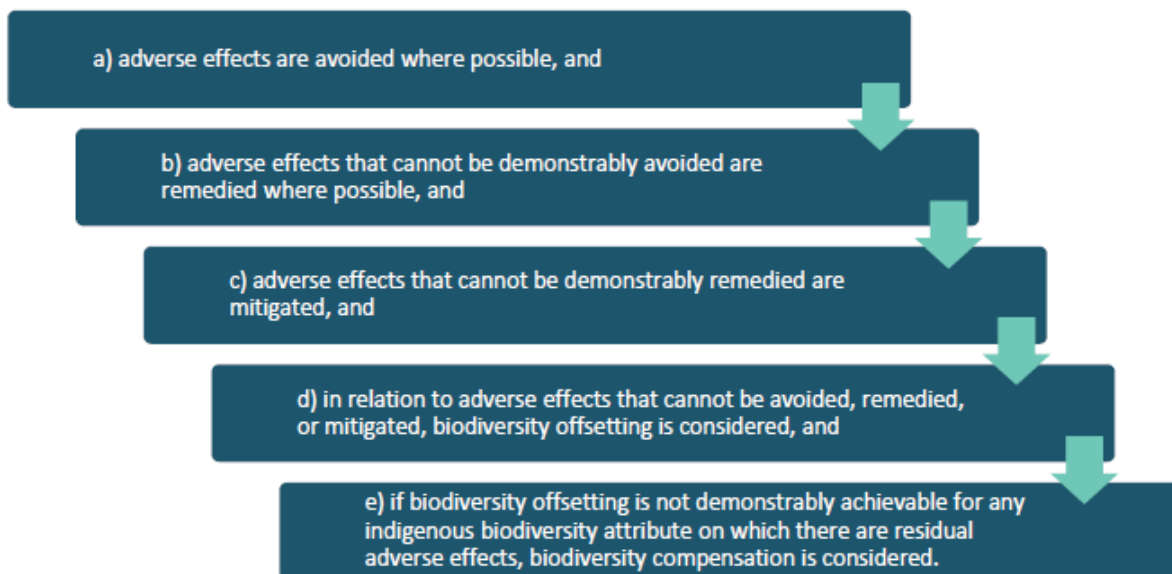
Fundamental to the draft NPSIB is identification of SNAs as addressed at Part 3.8. The Oil Companies support the requirement for territorial authorities to undertake a district wide assessment in accordance with Appendix 1 with classification of SNAs in accordance with Appendix 2, including notification of corresponding plans or plan changes to incorporate mapped areas into plans.

The Oil Companies anticipate that the mapped areas will be broad and may overlap with a range of linear infrastructure, including infrastructure with limited potential effects on indigenous biodiversity. As set out below, the implications of a SNA classification are potentially significant and may require absolute avoidance of adverse effects on particular values. For this reason, the Oil Companies are concerned that Clauses 3.8(4) and 3.8(6) provide for the adoption of significant indigenous vegetation and significant habitat of indigenous fauna layers in policy statements or plans as SNAs without a plan change process. The Oil Companies consider that SNAs should only be introduced via a plan change process to enable input from stakeholders.

Managing adverse effects on SNAs (Part 3.9)

Part 3.9 addresses the management of adverse effects on SNAs. Clause 3.9(1) applies to new subdivision, use or development¹ and requires avoidance of four key adverse effects on SNAs and application of the management hierarchy to other effects. The latter is depicted in Figure 4 of the discussion document as follows:

¹*new subdivision, use or development means a subdivision, use or development that is not an existing activity nor an activity captured by section 10 of the RMA*



Exceptions to the avoidance requirements for particular activities are provided at Clause 3.9(2), including (as most relevant to the Oil Companies and noting that all must be met for the exception to apply):

- New subdivision, use or development is to take place or affects an SNA classified as Medium (but not SNAs classified as High); and
- There is a functional or operational need² for the subdivision, use or development to be in that particular location; and
- There are no practicable alternatives; and
- The subdivision, use or development is associated with (inter alia) nationally significant infrastructure³

Exceptions are also provided at Clause 3.9(4), including for SNAs classified as High where the adverse effects arising from a use or development are for the purpose of protecting a SNA or addressing a severe or immediate risk to public health and safety. In some circumstances, the exceptions at 3.9(4) may be relevant to the Oil Companies.

The Oil Companies support the overall intent of Part 3.9, particularly clauses 3.9(1), 3.9(2), 3.9(4), but seek the amendments at section 5.0 to address the issues set out below.

In the absence of comprehensive mapping, the potential implications of the requirement at 3.9(1)a) to avoid particular effects on SNAs classified as High are unclear and potentially significant. For instance, a new pipeline between the Wiri Oil Terminal and Auckland Airport may be considered a new activity and may be unable to avoid particular SNAs, including those classified as High. A second pipeline from the Marsden Point Refinery to the Wiri Oil Terminal might similarly be considered new

² Definitions of functional and operational need are as per the National Planning Standards.

³ *Nationally significant infrastructure means any of the following:*

...

d) major gas or oil pipeline services (such as the pipeline from Marsden Point to Wiri and high-pressure, gas transmission pipelines from Taranaki):...

h) commercial ports (as defined in Part A(6) of Schedule 1 of the Civil Defence Emergency Management Act 2002)

development and may be unable to avoid SNAs classified as High, especially given the route of the existing pipeline is likely to be a significant factor in determining the route of a second pipeline. While both would be nationally significant infrastructure, the draft NPSIB requires that the effects at subclause 3.9(1)a) are avoided regardless, except in the narrow set of circumstances prescribed at 3.9(4). While a designation may provide a means of avoiding district rules, the same would not apply to regional rules and may preclude such a development.

The Oil Companies also consider it is important that the effects hierarchy at 3.9(1)b) (which applies to all other effects) requires that adverse effects are avoided and remedied where practicable, not possible. This reflects that it while it may be possible to avoid particular activities, for instance by not undertaking an activity, that is not necessarily sustainable management. In contrast, the Oil Companies consider that a focus on what is practicable allows consideration of what is technically and financially feasible.

In terms of 3.9(2), the Oil Companies note the list of subclauses are conjunctive and that all must apply for the exception to apply. In this respect the Oil Companies support the recognition of nationally significant infrastructure, including specific reference to the pipeline from Marsden Point to Wiri but seek to confirm that it will similarly apply to pipelines transmitting fuel to and from ports, airports and bulk fuel storage terminals around the country. As was highlighted when the Marsden Point to Wiri pipeline was disrupted, the fuel supply chain is based on a network of facilities, all of which are important for the ongoing delivery of fuel to meet demand, particularly when disruption occurs.

Existing activities in SNAs (Part 3.12)

Part 3.12 addresses the management of effects on existing activities on SNAs and requires regional councils to make changes to their policy statements to specify where, how and when plans must provide for existing activities that may adversely affect indigenous biodiversity. In providing for the existing activities in their policy statements and plans, Clause 3.12(3) requires that the continuation of activities does not lead to the loss of extent or degradation of the ecological integrity of any SNA and that adverse effects are no greater in character, intensity or scale than when the NPSIB commenced. The Oil Companies are concerned that this approach is in fact more onerous than what applies to some new activities and may not provide for the ongoing operation and maintenance of existing infrastructure.

The above is best considered by way of an example. Resource consent was recently granted to Mobil Oil New Zealand Limited by Christchurch City Council to enable hazard mitigation works to protect the Lyttelton to Woolston pipeline from potential rockfall. The consent provides for the relocation of rock in defined areas, including in areas with indigenous biodiversity value, subject to conditions. While potential effects on indigenous biodiversity associated with these works may be limited, there remains potential for effects. Under Clause 3.12(3), it is not clear that provisions required in policy statements (and subsequently given effect to in district and regional plans) would enable similar consents to be granted in the future. Similar issues would appear to arise for a range of other activities in SNAs, for instance vegetation clearance to enable the ongoing operation and maintenance of above ground linear network utilities. Often times these activities will in fact be important for safe operations, for instance mitigation of fire risk, and should be encouraged. The Oil Companies consider that further consideration is necessary to give effect to the intent of Policy 10 and provide appropriately for existing activities in SNAs.

5.0 Amendments sought

1. Amend Clause 3.8(6) such that territorial authorities must notify any plan or plan change necessary to map SNAs, including where they are identified as significant indigenous vegetation and significant habitat of indigenous fauna in policy statements or plans.
2. Re-evaluate the need for additional exceptions (beyond those at 3.9(4)) to the avoid requirements at 3.9(1)(a) for SNA classified as High, noting the potential implications for a range of nationally significant infrastructure such as pipelines for transmitting fuel.
3. Amend the effects hierarchy to avoid and remedy adverse effects **where practicable**.
4. Confirm that major gas or oil pipelines include transmission pipelines conveying fuel between ports, airports and bulk fuel storage terminals.
5. Retain Clause 3.9(4) and the recognition that in some circumstances it will not be possible to avoid adverse effects on SNA from existing infrastructure, including those classified as High, particularly where necessary to address a severe and immediate risk to public health and safety.
6. Redraft Part 3.12 to give effect to Policy 10 and better reflect the range of activities that may be required to operate, maintain and upgrade existing infrastructure.