BEFORE A PANEL APPOINTED BY THE MINISTER FOR THE ENVIRONMENT

UNDER The Resource Management Act 1991 (RMA)

IN THE MATTER of a draft national policy statement for freshwater management (DNPS) and proposed national environmental standards for freshwater (PNES)

LEGAL SUBMISSIONS ON BEHALF OF

OCEANA GOLD (NEW ZEALAND) LIMITED

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Executive Summary

1 The minerals sector comprises an important part of New Zealand’s primary sector, contributing export earnings; essential mineral products that are in demand locally and/or globally; highly paid jobs, royalty and tax revenue for the nation; significant regional social and economic benefits; and conservation value enhancement through targeted effects mitigation, offset, and compensation projects associated with mineral development.

2 The proposals contained in the Proposed National Environmental Standards for Freshwater would result in non-complying activity status for core mining activities such as those undertaken by New Zealand’s largest producer of gold and silver, Oceana Gold (New Zealand) Limited (OGNZL), at its two large mines in New Zealand. Despite the fact that OGNZL’s mines produce nearly all of New Zealand’s gold and silver, and that the company has a strong record of delivering no net loss (NNL) and net gain of conservation values (including wetlands and rivers) through its mining developments, there has been no consultation with OGNZL or any of the extractives part of the primary sector in the development of the government’s proposals, and the analysis in the Interim Regulatory Impact Analysis for Consultation: Essential Freshwater (IRIA) does not contain any recognition of the impact the proposals would have on the extractives sector.

3 OGNZL’s assessment is that in its current form the proposals would likely make further development of the mineral resources in respect of which it holds mining permits from the Crown impossible, where those developments unavoidably impact wetland and stream values, and irrespective of what can be proposed by way of an integrated mitigation, offset and compensation packages to achieve NNL or net gain in affected values.

4 Mining has functional constraints that have implications for the extent to which it unavoidably impacts on other values. Minerals can only be extracted in the few places where they naturally occur in economically viable quantities, and the nature of a mineral occurrence (such as its size, concentration, and depth from surface) will dictate the mining methods that can be used, and in particular whether a resource needs to be extracted by surface (i.e. open pit) or underground mining.
Depending on the location of a mineral resource and the mining methods appropriate for extracting it, there will on occasions be unavoidable impacts on and loss of wetland and river habitat and values.

The ability to use the full effects management hierarchy (avoid, remedy, mitigate, offset, compensate) provides an opportunity to develop a management response that will result in NNL or even a net gain in wetland and river values.

Whether or not a particular proposal achieves a NNL or better outcome needs to be determined on the facts of the proposal, having regard to the values affected and what is proposed by way of remediation, mitigation, offsetting and compensation.

Discretionary activity status is appropriate in order to ensure that the full effects management hierarchy is able to be considered by developers and councils where wetland and stream values are unavoidably affected by activities with functional constraints.

Discretionary activity status allows proposals that do not promote the sustainable management purpose of the RMA because they result in a net loss of important wetland and stream values to be refused consent, while allowing other proposals that achieve NNL or better and otherwise promote sustainable management to proceed.

Non-complying activity status in situations where functional need means that wetland and stream values are unavoidably impacted is generally inappropriate because the application of the gateway test in section 104D RMA does not allow for offsets and compensation to be considered when assessing whether the net effects of an activity are more than minor.

There are a number of concerns with the way some of the attribute tables in the DNPS are expressed which need to be addressed.

Introduction

OGNZL’s submission addresses several matters that arise from the scope and content of the DNPS and PNES that will impact its operations and requests a number of changes to the documents to make them more practical and workable, so as to better achieve the objective of better managing New Zealand’s freshwater resources. In these submissions I focus on those aspects of OGNZL’s submission that I have been asked to assist with from a legal perspective. OGNZL’s submission is supported by evidence from:
a. Mr Gavin Lee and Ms Kathy Mason – senior OGNZL staff with extensive knowledge of the company’s mining operations and interactions with the environment at Macraes and Waihi respectively;

b. Drs Michael Thorsen and Greg Ryder who provide expert evidence in relation to wetland and river/stream issues respectively that arise from the DRPS and PNES that affect OGNZL;

c. Mr Richard Turner who provides expert planning evidence.

13 OGNZL owns and operates two large gold mines based at Macraes Flat in East Otago (in the Otago Region and Waitaki and Dunedin City Districts) and Waihi (in the Waikato Region and Hauraki District).

14 The Macraes and Waihi mines together produce the vast majority of New Zealand’s gold and silver\(^1\) and have been successfully operating for nearly 30 years. The mines are valuable physical resources\(^2\), and the mining activity represents a very high value primary production activity.

15 Both mines have demonstrated that NNL and even net gain is a realistic outcome from mine development that unavoidably impacts wetland and stream values. Examples are provided from both mines in the evidence of senior OGNZL environmental officers Mr Gavin Lee and Ms Kathy Mason showing that through good design and effective engagement with stakeholders it is possible to both maintain and protect important natural values associated with wetlands and streams, while at the same time enabling the multiple economic and social benefits of mining to be achieved. The ability to achieve good net outcomes even though there are unavoidable adverse impacts on wetland and river values is also discussed in the expert evidence of Dr Mike Thorsen and Dr Greg Ryder.

16 Notably, major mine development proposals in recent years have utilised the full effects management hierarchy to achieve NNL or better and have been determined to be acceptable by key stakeholders including the Department of Conservation, Iwi, and ecological experts advising the consent authorities. These are discussed in some detail in the evidence of Gavin Lee.

17 All gold and silver in New Zealand is owned by the Crown, and the Crown licenses entities under the Crown Minerals Act 1991 (CMA) to mine, process and sell the Crown’s mineral resource in accordance with an agreed work programme and

\(^1\) OceanaGold’s Contribution to New Zealand, KPMG, October 2017, page 2
\(^2\) ‘natural and physical resources’ includes land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced) and all structures – section 2, RMA
upon payment of a specified royalty. The purpose of the CMA is set out in section 2(1) of that Act and is “to promote prospecting for, exploration for, and mining of Crown owned minerals for the benefit of New Zealand”.

18 OGNZL holds permits from the Crown issued under the CMA and consistent with the CMA’s purpose that authorise the company to mine and process the mineral-bearing ore at Macraes and Waihi.

19 To put the direct value to the Crown of these mines into perspective, I am advised that the combined royalties and taxes paid to the Crown from OGNZL’s New Zealand operations over the past three financial years was $109,674,000. Total economic contribution measured as direct expenditure into the New Zealand economy in 2016 was $373million according to OGNZL’s calculations.

20 100% of the minerals produced by the mines are exported, providing valuable earnings and contributing to the country’s GDP\(^3\). Gold and silver are highly valuable international commodities used in many ways across the globe\(^4\), and the gold and silver from OGNZL’s mines earn more for New Zealand in exports than the entire national export earnings from all fruit and vegetable products other than wine and kiwifruit\(^5\). The district and regional direct and indirect employment and economic contributions are significant, and the mines enjoy strong local support from their host communities\(^6\). Mining is recognised as a regionally important activity in both Otago and Waikato\(^7\).

21 While the underlying motivation behind the proposed reforms is to address water quality deterioration and loss of associated values through changing agricultural land uses across many parts of the country, the proposals in their current form are likely to have a major negative impact on OGNZL’s ability to continue to produce wealth and deliver biodiversity outcomes for the benefit of New Zealand.

22 There has been no consultation with OGNZL or the minerals sector generally on the new freshwater proposals, and there is no discussion whatsoever in the IRIA of the impacts the proposal will have on the very small number of mines that produce the vast majority of New Zealand’s most valuable metallic minerals. The

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\(^3\) GDP contribution in 2016 was $174million and in 2017 $178million – figures supplied by OGNZL
\(^4\) Information on the nature of demand for gold can be accessed from the World Gold Council [https://www.gold.org/about-gold/gold-demand/sectors-of-demand](https://www.gold.org/about-gold/gold-demand/sectors-of-demand)
\(^5\) MPI NPS-HPL discussion document, Figure 1 and OceanaGold’s contribution to New Zealand, KPMG, October 2017
\(^6\) For example, for the most recent major resource consent round in Waihi – Project Martha – a majority of the submissions received from the public were in support of the development
\(^7\) The partially operative Otago Regional Policy Statement 2019, policy 5.3.1 includes providing for mineral exploration, extraction and processing in rural areas to support the region's economy and communities. Policy 6.8 of the operative Waikato Regional Policy Statement recognises the value of Waikato’s mineral resources.
IRIA identifies impacts on land uses only by reference to land areas and makes no attempt to analyse what activities are likely to be impacted by the proposed new restrictions on activities that impact wetlands and rivers.

23 It is manifestly clear that the IRIA analysis has given no consideration to the impact the proposed regulations will have on mineral development. For example, when analysing the benefits and costs of the proposed measures in relation to wetlands the analysis is confined to benefits and costs on fertile lands\(^8\) which uses a land classification system that takes no account of the presence of mineral resources.

24 An even more striking example is found in relation to the analysis of the costs of the proposed measures to prevent the further loss of streams.\(^9\) The analysis of costs is restricted to those associated with housing developments. There appears to be no understanding in the analysis that mineral development will at times require stream infilling, and that the effects of this may be capable of appropriate mitigation, offsetting and compensation.

25 I submit that the Panel must ensure that before recommending measures to the Minister that could operate to restrict the ongoing responsible development of New Zealand’s mineral resources, the extent to which the measures will likely have that effect, and the value (cost) of that effect should be properly analysed. The analysis should also include the foregone value of wetland and stream enhancement works that only occur because mining activities fund and can leverage this work, as discussed in the evidence of OGNZL’s witnesses.

**Wetlands**

26 The DNPS’s key provision relating to wetlands is found at 3.15. In my submission the drafting of this provision is internally inconsistent and needs to be clarified. Mr Turner has suggested appropriate amendments to the wording in his evidence and these are reflected in OGNZL’s submission.

27 Clause 3.15(2) relates to inland wetlands and directs regional councils to amend their regional policy statements to include a policy stating that the loss or degradation of all or any part of a natural inland wetland is avoided.

28 In my submission, taken at face value this is a clear and directive requirement which provides absolutely no flexibility or ability for councils to make decisions informed by the facts of a particular proposal. It requires, on its face, that any

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\(^8\) IRIA, Part 1: Summary and Overview, section 5.2, Table 1, page 51  
\(^9\) Ibid, page 53
activity that has the effect of degrading even a small part of a minor wetland with low ecological value must not take place.

29 When the variable ecological value and condition of wetlands is understood as set out in Dr Thorsen’s evidence it is in my submission clear that this approach is unreasonable and disproportionate.

30 Clause 3.15(4) is more reasonable and requires regional councils to include provisions in regional policy statements and plans requiring that when considering resource consents adverse effects on inland wetlands are managed by applying the effects management hierarchy. The effects management hierarchy is defined in 3.15(1) and requires that avoidance of adverse effects be the first priority, but that remediation, mitigation, offsetting and compensation are able to be considered and used as appropriate.

31 In my submission clauses 3.15(2) and (4) are contradictory. Clause 3.15(2) is unreasonably restrictive and is unsupported by the evidence. Clause 3.15(4) is more realistic. Mr Turner suggests changes to 3.15(2) to refer to the avoidance of further net loss of inland wetland values, and a minor change to clause 3.15(4) to also refer to the values of natural inland wetlands.

32 With the changes Mr Turner suggests clause 3.15’s internal inconsistency is resolved. It is clear that the clause is referring to net loss of wetland value rather than any loss of wetland value, and that in achieving this outcome appropriate use of the full effects management hierarchy is able to be considered on a resource consent application. Mr Turner’s suggestion is reflected in OGNZL’s submission.

33 Amended in this manner will also mean that there is no tension on a resource consent application between the DRPS’s provisions regarding wetlands and the requirement on consent authorities to have regard to any offset and compensation proposals an applicant might advance to ensure a positive effect on the environment.\(^\text{10}\)

34 In relation to wetlands the IRIA makes assertions that are unsupported when the likely future impacts on OGNZL’s operations as set out in the evidence of Mr Lee and Ms Mason are considered. For example, in relation to wetlands it is asserted\(^\text{11}\):

> Wetlands are highly valuable ecosystems that provide greater benefits to wider society than is likely gained by developing them for other purposes. There is a

\(^{10}\) Section 104(1)(ab) RMA

\(^{11}\) IRIA, Appendix 13, page 261
low percentage of non-protected wetlands on the land most likely to be
developed, therefore the costs of these regulations to landowners are likely to be
minimal.

35 The above statement does not stand scrutiny in the case of OGNZL’s
developments because:

a. While there is no dispute that wetlands are highly valuable ecosystems, as Dr
Thorsen discusses in his evidence, their ecological value can be highly variable.
For example, many of the small wetlands in the Macraes area have low
ecological value and cannot be compared with high value large wetland
complexes that provide important ecosystem services and contain significant
populations of important species;

b. The benefits to wider society from the development of significant mineral
resources are large. No attempt has been made in the IRIA to understand what
those values are, and there is no evidence provided to support the proposition
that the modest ecosystem service values provided by small, and often
compromised wetlands (e.g. where the wetland provides a source of stockwater
and little else), are worth more to society than the benefits derived from the
extraction of valuable mineral resources that are co-located. In my submission
the evidence of the OGNZL witnesses strongly suggests that in many instances
the opposite is true;

c. Particularly in the case of the Macraes area the evidence is that the cost of the
proposed regulations relating to wetlands in relation to OGNZL’s operations are
likely to be high, not minimal. The inference from the IRIA is that because the
percentage of land area covered by wetlands in the different regions is (except
in the case of the West Coast region) less than 1%, the impact on future
development of avoiding all further wetland impacts will be minimal. The IRIA
ignores the fact that some activities, such as mining, have a functional need to
locate where the resource is located, and simply do not have the ability to
relocate or reconfigure the activity so that wetland impacts are avoided. In
these cases, the impact on future development if wetland effects must be
avoided is significant – to the point that the activity will not be able to be
undertaken, and the benefits of the mineral development will be entirely
foregone.

12 Ibid, page 262
d. The IRIA analysis overlooks the ability to offset or compensate where adverse impacts on wetlands are unable to be avoided, so that there is NNL or net gain in overall wetland values.

36 Part 2 Subpart 1 of the PNES contains regulations relating to the management of wetlands and is presumably designed to give effect to the policy direction on wetlands in the DNPS.

37 Where a wetland and its surrounding 10m area\textsuperscript{13} are to be impacted by a mining development in relation to either vegetation clearance or earthworks, the PNES makes the activity non-complying\textsuperscript{14}.

38 The PNES contains no apparent recognition of the reality that on occasion important mineral development will unavoidably impact wetlands. I submit that on the basis of the evidence the Panel can reasonably conclude that in the future important mineral development opportunities will unavoidably impact inland wetland values, whether for vegetation clearance or earthworks, or both. In this regard the position is no different from that which applies in relation to building, maintaining or operating any new or existing nationally significant infrastructure\textsuperscript{15}.

39 In the case of nationally significant infrastructure both vegetation clearance and earthworks in or close to wetlands are given discretionary status\textsuperscript{16}, and an applicant will be required to demonstrate they have followed the effects management hierarchy (i.e. they will need to demonstrate they have looked first to avoid the effect, and only then can they proceed to apply the other parts of the hierarchy in order). Ultimately the consent authority has a discretion to grant or refuse consent, with the latter option clearly being contemplated as a realistic outcome, even in cases of nationally significant infrastructure. This outcome is consistent with the policy direction in the DNPS at 3.15(4).

40 In my submission there is no effects-based basis upon which other activities that, because of functional need, may unavoidably impact wetland values should be treated differently. \textit{All} proposals that come within the scope of the PNES and which impact inland wetland values must apply the effects management hierarchy\textsuperscript{17}, and \textit{all} such proposals should be assessed as to whether or not the

\textsuperscript{13} Noting that as Dr Thorsen explains in his evidence it is not always clear where a wetland’s boundaries are, and that Dr Ryder explains that there is uncertainty in the current wording as to what constitutes a wetland and what constitutes a stream

\textsuperscript{14} Regulation 8 and 11.

\textsuperscript{15} As defined in Regulation 4, including as a first step the need to demonstrate why the adverse effect cannot be avoided

\textsuperscript{16} Regulations 7(e) and 10(1)(d)

\textsuperscript{17} DNPS clause 3.15(4)
activity will result in NNL of wetland values. In cases where despite the application of the full effects management hierarchy there will be a net loss of wetland values a consent authority will have the ability to decline consent, and in reaching a view on that will (under the wording proposed by Mr Turner and reflected in OGNZL’s submission) be required to have regard to amended provision 3.15(2) of the DNPS which seeks to avoid further net loss of the values of inland wetlands.

41 Further, as I explain later in these submissions, and as Mr Turner discusses in his evidence, giving non-complying activity status to vegetation clearance and earthworks associated with wetlands is likely to mean that two key components of the effects management hierarchy - offsets and compensation – will be unavailable. In my submission if this was the outcome it would frustrate clause 3.15(4) of the DNPS. Such an outcome would also, in my submission, make little sense. If any activity is going to result in NNL or even a net gain in wetland values, and is going to result in other benefits to people and communities, surely this promotes sustainable management and should be provided for.

Stream/River infilling or reclamation

42 The evidence of Mr Lee, Ms Mason and Dr Ryder make it clear that future developments at the Macraes mine in particular, but also likely the Waihi mine, will unavoidably result in impacts to and loss of stream habitat.

43 As the evidence explains, loss of stream habitat is able to be mitigated, offset and compensated for using various techniques to achieve NNL or better, and OGNZL has successfully demonstrated this with its mine developments at Macraes, as Mr Lee describes in his evidence.

44 As Ms Mason also explains in her evidence, the presence of the mine in Waihi has provided the resources to allow an enormous amount of voluntary stream and associated habitat enhancement and improvement works in the Waihi area to be completed. These works have involved extensive engagement with iwi and the general community and have won awards. In my submission they would not have happened but for the presence of the large mine and its staff in the area. As Ms Mason notes, there still remains a lot of work to be done, and OGNZL is committed to an ongoing role in making the wetland and riverine environments in the area better.
The DNPS addresses rivers\(^{18}\) at clause 3.16, and in the PNES riverbed infilling is addressed in Regulation 18.

I agree with Mr Turner’s opinion that as presently drafted the provisions are somewhat unclear and are not necessarily properly aligned and integrated. The result is at best confusing and could lead to unintended and unhelpful outcomes.

In my submission the changes proposed in OGNZL’s submission and discussed in Mr Turner’s evidence are appropriate to achieve a consistent and sensible policy and regulatory approach. I submit the recommended approach also reflects the reality that activities with functional needs to be located where they are, such as mineral development, will on occasion unavoidably impact on streams, and provision needs to be made to deal with that in a fair way.

In particular I submit that there is a clear inconsistency between clause 3.16(5) of the DNPS and Reg 18 in the PNES.

Clause 3.16(5) is unreasonably restrictive in my submission. It requires that infilling be avoided unless there are “no other practical alternative methods of providing for the activity” but then goes on to restrict that by saying that the allowance for functional need only applies to restoration or enhancement works, nationally significant infrastructure, and flood prevention/erosion control works.

On its face that puts regionally important mining activities such as those Mr Lee describes at Macraes in an impossible position. There are clearly no practical alternative methods to mine the resource at Macraes that will entirely avoid impacting on stream values, and OGNZL and others in a similar position should in my submission have the same opportunity to address the effects on stream values as any other activity, including those presently listed in clause 3.16(5).

I submit that the proper concern is with the net effects on stream values, and that is what regional councils should consider. In my submission whether those net effects arise from a diversion necessitated by a road, a transmission line, a mine, or a flood protection embankment is beside the point. It has long been understood that the RMA and the instruments made under it focus on the effects of activities, and not the activities themselves. In my submission that principle should be consistently applied to the DNPS.

\(^{18}\) which it confusingly calls streams which are then defined to mean what the Act calls a river (see the definition at 1.6 of the DNPS)
52 Regulation 18 in its current drafting is better in this regard in that the drafting of Reg 18(1)(d) makes infilling a discretionary activity for any activity which has a functional need to impact a stream. That is appropriate in my submission.

53 Regulation 18(2)(a) requires every consent granted for infilling to include a condition that any residual adverse effects after avoidance, remediation and mitigation be offset to achieve a NNL outcome. I make the following submissions about that:

a. It is unclear why the reference is just to offsetting and not also compensation, which is acknowledged as a part of the effects management hierarchy. In my submission offsetting is best seen as a subset of compensation, and is a concept that has been, and continues to be, defined and applied differently by different regional councils. I am not aware why the PNES would seek to restrict the tools available to achieve NNL to just offsetting, when the same NNL outcome may also be attainable using compensation methods that fall outside of whatever definition of “offset” finds favour with a particular regional council.

b. What constitutes “no net loss” will presumably be understood by reference to the definition of “net loss” in the DNPS\(^\text{19}\). That definition refers to “no net reduction in environmental values over space and time”. In my submission there is a difficulty with that definition as the reference to no net reduction in space suggests that only offsets that result in no reduction in the number of metres of stream bed can qualify as an offset. In my submission if this is the intent it is far too narrow a view of what ecologists might regard as a NNL outcome. Put in simple terms, an offset (or compensation) that resulted in a reduction in the number of metres of stream bed, but which also resulted in significant overall improvements in stream values (for example through riparian planting to provide shade and nutrient loss attenuation from adjacent farm land; trout exclusion to provide new refuges for threatened indigenous fish; or enhancement of spawning habitat in streams that are managed for their sports fishery values) may be assessed as providing a NNL or net gain outcome.

54 I therefore submit that the appropriate outcome is to align the DNPS to the PNES approach which does not “pick winners” and instead requires all activities that need to impact stream beds to offset or compensate the residual adverse effects (after mitigation) to demonstrate NNL.

55 Discretionary activity status is appropriate in my submission (and non-complying status is not – for the reasons set out later in these submissions) but it is important

\(^{19}\) PNES Reg 1(2) imports the DNPS definitions into the PNES
that NNL is not defined in such a way as to result in overall good outcomes for stream values being discounted because there is a reduction in the number of metres of stream bed.

**Using offsets and compensation**

56 Offsets and compensation are important parts of the effects management hierarchy and can be an integral to delivering positive overall outcomes for wetland and stream values that are impacted by development.

57 Mr Lee’s evidence describes several developments at the Macraes mine that have successfully incorporated offset and compensation techniques (as well as remediation and mitigation) to produce positive net outcomes for wetland and stream values, where these have been unavoidably impacted by proposed mine development.

58 The IRIA discusses the use of offsetting and compensation in the context of preventing further loss of streams\(^20\) and to a more limited extent in relation to wetlands\(^21\).

59 The IRIA refers\(^22\) to the oft-cited definition of biodiversity offsetting being "measurable conservation outcomes resulting from actions designed to compensate for significant residual adverse biodiversity impacts arising from project development after appropriate prevention and mitigation measures have been taken. The goal of biodiversity offsets is to achieve no net loss and preferably a net gain of biodiversity on the ground".\(^23\)

60 The point of a properly designed and implemented offset is therefore to achieve, at worst, a neutral outcome for the values being offset. I submit that on this basis offsets are to be encouraged, and the changes sought to the PNES in OGNZL’s submission and discussed in Mr Turner’s evidence are designed to ensure that offsets are available to be considered in all situations where an activity has a functional need to be located in a place where it unavoidably impacts on wetland or stream values.

61 The IRIA goes on to explain why in the authors’ view offsets should only be used to address residual adverse effects after “avoid, remedy and mitigate” options are exhausted by reference to a quote from a report on a possible NPS for indigenous biodiversity which states “*It is more efficient and cost-effective to maintain existing*
indigenous ecosystems than to try and create new ecosystems. There are inherent difficulties and risks in seeking to recreate or reconstruct indigenous habitat in order to mitigate for continuing removal of indigenous habitat for development projects, and that mitigation may not result in an ecosystem of equivalent richness of function”.

62 In my submission this statement over-simplifies the circumstances in which offsets are used. While the creation of new ecosystems in places where they do not currently exist might be one expression of an offset, other expressions include enhancement of existing habitats or averting risks to existing habitats. Whether or not a particular offset proposal is likely to result in an ecosystem of ‘equivalent richness and function’ can only be determined on the facts of a proposal, informed by opinion from suitably qualified and experienced experts.

63 The IRIA states that there are limits to what can be compensated, and goes on to refer to a recent decision of the Environment Court on the Otago Regional Policy Statement Oceana Gold (New Zealand) Limited v Otago Regional Council [2019] NZEnvC41 and the orders made in that case are reproduced as Additional Information 4. There are several points to be made about this statement in my submission:

a. It is important to understand the difference between technical limits to what can be compensated, and policy limits to what can be compensated. In the former case we are talking about circumstances where it is not technically possible to confidently achieve NNL or better. Policy limits to compensation are quite different. Policy limits say that there may be circumstances where compensation to achieve NNL or better is technically available but as a matter of policy we choose not to allow the compensation.

b. In my submission the IRIA appears to see the two approaches to ‘limits’ as being equivalent when in my submission they are different. In my submission the way the PNES are drafted correctly sees whether or not offsets or compensation are available to achieve NNL or better as a technical issue. In other words, are the residual adverse effects on values able to be addressed so that the end result is NNL or better, or are they not?

c. The reference to the Oceana Gold case is confusing because the focus in that case was on the setting of policy limits to the use of offsetting and compensation

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25 Ibid fn 19 at page 38
26 It appears in this context the term ‘compensation’ is used to include offsets
in Otago. OGNZL has appealed that decision to the High Court. The orders made by the Environment Court do not reflect the Crown’s position in that Court, and while the Crown is not a party to the High Court appeal it supports the relief the appellant seeks and does not agree with the Environment Court’s decision. All parties to the High Court appeal are agreed that the decision contains one error of law and the orders will need to be reconsidered by the Environment Court to address that. Additional errors of law are pleaded but are contested as between the parties.

64 The point to be made is that while the Otago RPS contains policies that set ‘limits’ on when offsetting and compensation can be considered, it is unlikely that those provisions will be made operative in their current form, and there is considerable uncertainty how these policies will be given effect to in regional and district plans, particularly having regard to the requirement on consent authorities to consider all offset and compensation proposals that an applicant advances pursuant to section 104(1)(ab) of the RMA.

65 The way offsetting is used in the current drafting of the PNES can only be referring to that term in a technical and not policy sense. In other words, are the residual effects being offset to achieve NNL or better, or are they not. In my submission that general approach is correct, although as OGNZL’s submission requests, the ability to use these techniques must be extended to all activities that have a functional need to locate in places where effects on wetlands and streams cannot be avoided.

66 The use of offsets in the PNES in this way has implications in terms of Reg 2 which allows regional councils to include rules in regional plans that are more stringent than those in the PNES. In my submission rules which limit the use of offsets and compensation as a matter of policy (i.e. in situations where an offset or compensation is technically available but its use is precluded as a matter of policy) would fall into the ‘more stringent’ category, and would need to be justified at a regional level pursuant to section 32(4) of the RMA.

27 The appeal is set down to be heard in mid-November 2019
28 The Crown was a party to the Environment Court proceedings through the Minister of Energy and Resources
29 Rosemary Dixon, Senior Crown Counsel, pers comm
30 Regs 6(a) and 18(2)(a)
Non-complying activity status and the section 104D gateway test

67 Non-complying activities must satisfy the gateway or threshold test in section 104D(1) of the RMA before a consent authority has jurisdiction to consider granting consent to allow the activity to proceed.

68 To satisfy the test a proposal must have effects on the environment that are minor or less\(^{31}\) or not be contrary to the objectives and policies of relevant plans and proposed plans\(^{32}\).

69 Where effects on conservation values – in this case wetland and stream values – are managed so that there is either NNL or a net gain in such values I submit it seems reasonable to proceed on the basis that the adverse effects of the proposal on the environment in relation to those matters will be minor. On this basis it might be considered that the first limb of the gateway test in section 104D(1)(a) would be satisfied.

70 However, in my submission caselaw suggests that in applying the test in section 104D(1)(a) only the first parts of the effects management hierarchy will be relevant, and where NNL or net gain is achieved through the use of offsetting and compensation, those actions will not ‘count’ and the proposal will therefore likely fail the section 104D(1)(a) test.

71 The Environment Court in *Stokes v Christchurch City Council*\(^{33}\) (*Stokes*) discussed the test as to whether effects are more than minor. The Court discussed *Baker Boys Ltd v Christchurch City Council*\(^{34}\), in which it considered the threshold test as it was before the 1997 amendment (section 105(2)(b)). In that case the Court held that in determining whether adverse effects on the environment will be minor, any mitigating conditions may be considered. It went on to state that if no issues arise under section 5 or section 6, it may be proper to weigh positive effects against adverse effects.

72 However, the Court in *Stokes* stated that\(^{35}\):

... we consider that while it is still appropriate to consider each adverse effect as mitigated, there is no statutory authority for us to consider the positive effects of a proposal when deciding whether the threshold test... is met. To that extent we consider that in light of *Bayley*, we were wrong in *Baker Boys* in adopting a (qualified) net

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31 Section 104D(1)(a)
32 Section 104D(1)(b)
33 *Stokes v Christchurch City Council* [1999] NZRMA 409
34 *Baker Boys Ltd v Christchurch City Council* [1998] NZRMA 433
35 Paragraph 76
adverse effect approach to the first threshold test. The test is whether the adverse effects as proposed to be remedied and/or mitigated, and taken as a whole, are more than minor.

73 This test has been affirmed and applied by a number of subsequent cases.\[36\]

74 While it is clear that regard may be had to any mitigation of effects, it seems that wider beneficial effects still remain outside the ambit of the test in s104D(1)(a) of the RMA. The Environment Court in *Crater Lakes Park Ltd v Rotorua District Council*\[37\] reiterated the approach taken in *Stokes* as being correct and held that while it could consider mitigating factors or conditions when applying the s104D test, it could not take into account wider beneficial effects.\[38\]

75 This was also the approach taken in *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough DC*\[39\], where the Environment Court considered the effects of the proposed activity as mitigated by consent conditions, but not the positive effects of the activity. The Court said at paragraph 703:

> We thus propose to consider the effects of the proposed scheme as mitigated by the conditions of consent – but not the positive effects of the proposed scheme.

76 The Environment Court in *SKP Incorporated v Auckland Council*\[40\] (SKP) recently discussed the gateway test under section 104D of the RMA. With regard to section 104D(1)(a) the Court stated the following (footnotes omitted):

> Bearing in mind that the positions of the Applicant and the Council under s 104D(1)(a) are different (with Mr Wren giving his opinion that this limb of the gateway is not met because of some particular more-than-minor effects), it is worth noting a concession by the Council's counsel Mr Allen that the *Cookson Road* decision about an holistic approach is consistent with earlier authority on a predecessor provision to s 104D (s 105(2A)), citing *Stokes v Christchurch City Council*. We appreciate Mr Allan's candid submission that ultimately the assessment will involve conclusions by the Court as to facts and the degree of effect. We find that Mr Wren has been unduly conservative, and prefer the legal analysis offered by his counsel.

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36 Carapashi Holdings Ltd v Marlborough District Council (W45/2004), paragraph 123; Main Frame Ltd v Queenstown Lakes District Council (G8/2004), paragraph 52; and Phantom Outdoor Advertising v Christchurch CC (C90/2001) paragraph 41

37 Crater Lakes Park Ltd v Rotorua District Council EnvC A126/09

38 Paragraph 165

39 Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council [2010] NZEnvC 403

As to the "effects" gateway we may take into account aspects of mitigation and outcomes of imposing conditions of consent.

As will be seen from our later analysis of effects on the environment, there are some which individually can be described as more than minor, for instance in connection with visual amenity from certain properties, but the law is that the evaluation under this provision is to be undertaken on a "holistic basis, looking over the entire application and a range of effects", not individual effects.

77 The "Cookson Road decision" referred to in SKP above is the Environment Court decision in Cookson Road Character Preservation Society Inc v Rotorua District Council. This case only discusses the holistic approach to assessing effects and does not refer specifically to section 104D(1)(a) of the RMA.

78 In White v Waitaki DC, the Court considered a subdivision at Kakanui. As part of the development the application proposed a small wetland area (which would also receive stormwater), and to provide all-weather public access across the applicant's land to a boat launching ramp and fishing club headquarters. Mr Constantine, for the applicant, said the provision of legal access was a positive effect however the Court disagreed and said:

It is perhaps best considered as environment compensation along with the new wetland area to be developed at the ends of the estuary and beach.

79 The Court then went on to say:

Applying this test [under section 104D], we consider that the adverse effects of the proposal, after weighing the mitigating effect of beneficial aspects of the development, are very significant. Accordingly the first test is failed.

80 I submit the Court's approach in White is consistent with the line of cases which began with Stokes. Whilst the use of the words "beneficial aspects" is confusing and somewhat unhelpful, I submit that the Court is still saying that in considering the adverse effects, it was the proposal as mitigated that was to be assessed under section 104D(1)(a), and the Court did not take into account the proposed environmental compensation.

81 The Court in White was clear about what it considered to be environmental compensation, however it did not discuss the case law on this and in my

41 Cookson Road Character Preservation Society Inc v Rotorua District Council [2013] NZEnvC 194
43 At paragraph [44].
submission there is not always a clear line of demarcation between mitigation and environmental compensation.

82 "Mitigation", "offset" and "compensation" are not defined in the RMA. The Environment Court in Minister of Corrections v Otorohanga District Council\(^4\) discusses the terms "compensation" and "offset" and states (footnotes omitted and emphasis added):

> The terms "off-set" and "compensation" are technical terms, the meaning of which has yet to be settled by the senior courts. The terms are not, at least in our minds, synonymous and their meaning can be distinguished in the way described by the Board of Inquiry in Transmission Gully.

> Offsetting which related directly to the values affected by an activity was in fact a form of remedy or mitigation of adverse effects and should be regarded as such. Offsetting which did not directly relate to the values affected by an activity could more properly be described as environmental compensation.

The High Court decision of Royal Forest & Bird Protection Society of New Zealand Inc v Buller District Council & Ors [2013] NZHC 1346, which discusses the two terms, lends support for our view the terms are not interchangeable.

83 In regard to mitigation the most relevant case is that of Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council & Ors\(^5\) where the High Court stated that:

> The usual meaning of “mitigate” is to alleviate, or to abate, or to moderate the severity of something. Offsets do not do that. Rather, they offer a positive new effect, one which did not exist before\(^6\).

84 The High Court then went on to say at paragraph [72]:

> I am of the view that counsel for Forest and Bird are correct, that such offsets do not directly mitigate any adverse effects of the activities coming with the resource consents on the environment. This latter proposition is best understood in context. So, for

\(^4\) Minister of Corrections v Otorohanga District Council [2017] NZEnvC 213 at [27]-[28]; the Environment Court was concerned with an application by the Minister of Corrections for an alteration to an existing designation to enable the expansion of the Waikeria Prison.

\(^5\) Royal Forest and Bird Protection Society of New Zealand Incorporated v Buller District Council [2013] NZHC 1346; This appeal concerned an application by Buller Coal Ltd for consents to establish an open cast coal mine on the Denniston Plateau. In particular, the High Court considered the meaning of "mitigating", "compensation" and "offset", the issue being whether or not the concept of "offset mitigation" was relevant and whether mitigation of adverse effects required greater weighting than offsetting under section 104 RMA.

\(^6\) At [72]
example, if open cast mining will destroy the habitat of an important species of snails, an adverse effect, it cannot be said logically that enhancing the habitat of snails elsewhere in the environment mitigates that adverse effect, unless possibly the population that was on the environment that is being destroyed was lifted and placed in the new environment. Merely to say that the positive benefit offered relates to the values affected by an adverse effect is, in my view, applying mitigating outside the normal usage of that term. And the normal usage would appear to apply when reading s 5(2). The usual meaning of “mitigate” is to alleviate, or to abate, or to moderate the severity of something. Offsets do not do that. Rather, they offer a positive new effect, one which did not exist before.

85 From these cases I submit there is a distinction between mitigation of an adverse effect, which reduces the level or severity of the adverse effect, and compensation or offsetting whereby the adverse effect remains however a new positive effect is created. As can be ascertained from the cases referred to, there may be some uncertainty as to where mitigation ends and offsetting and compensation start, but the important point is that where offsetting and compensation are being relied upon as part of a package to deliver NNL or better, the cases suggest that those measures do not ‘count’ as reducing the effect of the activity in question. Rather, they are new positive effects.

86 In the context of the section 104D(1)(a) test this creates an unintended outcome whereby well-designed proposals that achieve NNL or better by using offsetting and compensation techniques will fail the test even though the effects on the values of interest are at worst neutral.

87 As Mr Turner notes in his evidence, under the current draft wording of 3.15(2) of the DNPS, such a proposal is also likely to be contrary to the relevant plan objectives and policies since they will be drafted to give effect to the directive to simply avoid any wetland loss or degradation.

88 On that basis, proposals that will deliver NNL or better in relation to developments that unavoidably impact on wetland and stream values will fail the gateway test. In my submission this would be a perverse outcome and would represent the worst of all worlds whereby the conservation benefits a proposal offers will not be realised and the other benefits that come from the development of the mineral resource will be foregone.
Conclusion

89 The policy and regulatory measures contained in the DNPS and PNES are significant and are intended to make a difference in the way that freshwater is managed. The intention is that New Zealand will as a result have better quality freshwater, and that the values associated with our remaining wetlands and streams will receive greater recognition and protection.

90 OGNZL supports this outcome, and in my submission the changes promoted in OGNZL’s submission and in the evidence of Mr Turner do not detract from the intended result.

91 Rather, those changes seek to:

a. Ensure that all activities apply the effects management hierarchy, and in particular that as a first priority activities that will impact on wetland and stream values demonstrate that there are no practical alternative methods to undertake the activity that could avoid those impacts; and

b. Ensure that the regulatory regime does not frustrate the development of New Zealand’s important mineral resources where that development is able to demonstrate NNL or better in relation to wetland and stream values. This will be achieved by ensuring the instruments regulate on the basis of effects, and not activities; and by ensuring that regional councils are able to consider the full range of tools in the effects management hierarchy in reaching a view as to whether a proposal’s effects are appropriately managed.

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31 October 2019