

**BEFORE THE ENVIRONMENT COURT
I MUA I TE KŌTI TAIAO O AOTEAROA**

**AT CHRISTCHURCH
KI OTAUTAHI**

ENV-2018-CHC-000036

IN THE MATTER

of the Resource Management Act 1991

AND

of an appeal under clause 14 of the First
Schedule of the Act

BETWEEN

**Director-General of Conservation
*Tumuaki Ahurei***

Appellant

(ENV-2016-CHC-000036)

AND

Southland Regional Council

Respondent

**Topic B Tranche 3 – Topic B6 Infrastructure – Supplementary Expert
Evidence (Planning) of Linda Elizabeth Kirk for Director-General of
Conservation *Tumuaki Ahurei***

Dated 9 December 2022

Department of Conservation Te Papa Atawhai

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Introduction

1. My full name is Linda Elizabeth Kirk.
2. My qualifications and experience are set out in my Expert Statement of Evidence date 15 February 2019 in relation to Topic A.
3. I have been involved in the appeal processes in relation to the proposed Southland Water and Land Plan (pSWLP) for both Topics A and B (Tranches 1 and 2).
4. I have been asked by the Director-General of Conservation *Tumuaki Ahurei* (**D-G**, Director-General) to provide independent planning evidence in relation to the Joint Witness Statement – Topic B - Waiau – Planning (dated 29 and 30 November 2022) (**JWS Topic B6 Planning Nov 2022**) matters on the proposed Southland Water and Land Plan (**pSWLP**).
5. In preparing this evidence, the additional information and documents I have read and considered since my expert evidence on Topic B Tranche 3 - Topic B6 Infrastructure, dated 26 August 2022, are the:
 - a. Minute of the Environment Court Timetable directions – Tranche 3 (dated 22 November 2022);
 - b. Joint Witness Statement – Topic B - Waiau – Planning (dated 29 and 30 November 2022) (**JWS Topic B6 Planning Nov 2022**);
 - c. Memorandum of Counsel for the Southland Regional Council (dated 22 November 2022);
 - d. Opening Legal Submissions of Counsel for Tranche 3 parties (dated 14 and 15 November 2022):
 - Southland Regional Council (**SRC**);
 - Ngā Rūnanga;
 - Meridian Energy Limited;
 - Royal Forest and Bird Protection Society of New Zealand (**F&B**);
 - Aratiatia Livestock Limited;
 - Mr English;

- Southland Fish and Game Council (**F&G**);
 - Waiau River Care Group Incorporated; and
 - Director-General of Conservation (**D-G**).
- e. Statement of Evidence for Meridian Energy Limited – Topic B6 Infrastructure – Rule 52A Drafting (dated 16 November 2022):
- Ms Whyte;
- f. Joint Witness Statement – Topic B - Waiau – Planning (dated 21 September 2022) (**JWS Topic B6 Planning Sep 2022**); and
- g. pSWLP - Tranche 3 - transcript up to 18 November 2022.
6. I have also had some personal communication on this matter with Mr Farrell, Ms Jordan and Ms Sitarz.

Code of Conduct

7. I confirm that I have read the code of conduct for expert witnesses as contained in section 7.1 of the Environment Court’s Practice Note 2014. I have complied with the practice note when preparing my evidence and will do so when I give oral evidence before the Court.
8. The data, information, facts and assumptions I have considered in forming my opinions are set out in my evidence to follow. The reasons for the opinions expressed are also set out in the evidence to follow.
9. Unless I state otherwise, this evidence is within my sphere of expertise, and I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express.

Scope

10. I have been asked by the Director-General to provide independent planning evidence in relation to the JWS Topic B6 Planning Nov 2022 which considered the proposed plan provisions Policy 26 and Rule 52A. While I have not provided expert evidence on Policy 26 in my 26 August 2022 statement of evidence, I

provide some comments on the relationship of Policy 26 and Rule 52A that may assist the Court.

11. My focus is on whether or not the planning framework enables future NOF processes (post NOF processes) be provided for in the Tranche 3 provisions.

Executive Summary

12. From a planning perspective, I am comfortable with either a restricted discretionary activity (RDA) or discretionary activity (DA) status for Rule 52A. I do not have any preference.
13. I have no preference for either version of Policy 26 in the JWS Topic B6 Planning Nov 2022.
14. In my opinion:
 - a. I consider that the planning framework enables an RDA for post-NOF processes to be drafted ahead of the NOF processes;
 - b. For a policy to apply to an RDA, the policy needs to relate to a matter of discretion. If the matter of discretion required further direction on the exercise of a discretion, then that should also be in the policy so that the rule could implement the policy as required under s67(1). More than a single policy applies to renewable electricity generation activities, including the MPS;
 - c. For a DA, the policy framework of the plan applies;
 - d. Regardless of activity status, Policy 26 should also refer to:
 - i. The activity of “discharges” alongside the specified activities of take, use and diversion of water; and
 - ii. to provide clear direction for the Plan user with respect to giving effect to subpart 1 of the NPSFM 2020 in relation to tangata whenua involvement in the consenting process of the MPS going forward.
 - e. If there was to be an RDA rule post-NOF processes, Policy 26 should include the following (or words to like effect):

- i. *“considering an application for replacement consents for the operation of the existing Manapōuri hydro-electric generation scheme consents that are granted are to be consistent with the attainment of the environmental outcomes established for values in the Waiau FMU via the National Objectives Framework”;*
 - ii. *“Provided that in exercising its discretion where environmental flows and levels and limits have been made operative through an FMU process for the Waiau FMU under the NPSFM 2020, the consent authority must not require environmental flows and levels and limits more restrictive than those set in the Plan unless:*
 1. *The adverse effect and/or management response being addressed has not been considered as part of the FMU process for the Waiau FMU under the NPSFM 2020 when identifying environmental outcomes and/or setting environmental flows and levels and limits, or*
 2. *The adverse effect and/or management response being addressed has been considered as part of the FMU process for the Waiau FMU under the NPSFM 2020 when setting environmental flows and levels, and limits, but it is identified in the Plan as a matter to be addressed in a resource consent process, or*
 3. *The applicant has proffered more restrictive environmental flows and levels or limits”;*
- f. Minor wording amendments are provided for either an RDA or DA status for Rule 52A in the “Conclusion” of this evidence. In summary, amendments seek to:
- i. remove uncertainty in the use of the NPSFM terminology in relation to “volume” and “rate” within the rule; and
 - ii. ensure that all matters specified in the ‘replacement consents’ are provided for i.e. “take, use, divert or discharge of water” (or words to similar effect).

Principles of Rule Drafting

15. At paragraphs 8-9 of the Court’s Minute (dated 22 November 2022), the Court stated:

“Rules implement policies

[8] It is the court’s preliminary view that while the reservation of discretion over cultural effects and other effects on the environment is orthodox, the direction on how the discretion is to be exercised is not. Direction on the exercise of a discretion² is usually given in the plan’s policies that the rule is to implement (i.e. Policy 26).

[9] Without limiting the scope of the conference, the planners attending the conference are to consider whether the direction is a matter of policy or a matter for a rule. If their recommendation is to leave the direction for the rule only, they are to set out their reasoning for the same.”

16. In response, the JWS Topic B6 Planning Nov 2022 at paragraph [8], considered “the direction on how the matter of discretion is to be exercised is a matter for a rule”, with a reference to Section 77B(4) of the RMA which states:

s77B(4) of the RMA:

“The local authority must specify in the rule the matters over which it has restricted its discretion in relation to the activity.”

17. I disagree with the JWS Topic B6 Planning Nov 2022 at paragraph [8] and agree with the Court that the “*direction on the exercise of discretion* [being, in this case, Roman numerals (i) and (ii) of Rule 52A (for example, version dated 7 November 2022¹)] *is usually given in the plan’s policies that the rule is to implement (i.e. Policy 26)*”.
18. I agree with JWS Topic B6 Planning Nov 2022 at paragraph [8] that “in applying an RDA the matters over which discretion is restricted in relation to the activity must be specified in the rule” as required by s77B(4) of the RMA.
19. At paragraph [9] of the JWS Topic B6 Planning Nov 2022, I do not believe the Court was suggesting “replacing the RDA with a policy”, but rather, seeking opinion on where in the planning framework the “direction on the exercise of discretion” should be placed.

¹ “Consolidated changes sought to Waiau provisions”, dated 07 November 2022, page 4 – Meridian version

20. The following provides, in my opinion, a high-level summary of the general principles in relation to matters of discretion in rule drafting for restricted discretionary activities and discretionary activities. This is done to assist the Court in providing transparency of my thinking in rule drafting.
21. Pursuant to s67(3) of the RMA, the pSWLP must give effect to the any national policy statement, New Zealand Coastal Policy Statement (NZCPS) and the regional policy statement (RPS). To achieve this, as stated under s67(1) of the RMA, the plan must include objectives for the region, policies to implement these objectives, and rules (if any) to implement the policies.

Restricted Discretionary Activity

22. For a restricted discretionary activity (RDA), only those matters of discretion listed can be considered in the assessment of applications, including against the policy framework.
23. For a policy to apply to an RDA, the policy needs to relate to a matter of discretion. If the matter of discretion required further direction on the exercise of a discretion, then I consider that the policy would need to provide that direction so that the rule could implement the policy as required under s67(1).
24. Matters of discretion should not be so wide as to make the restriction meaningless. For example, the use of the phrase “any effects” is so broad that it essentially becomes meaningless. It would be preferable to describe, or to specify, the type of effects that are of concern for the matter of discretion. This will enable more clarity of what effects are to be considered by the plan user and decision maker.

Discretionary Activity

25. For a discretionary activity (DA), there are no matters of discretion listed that are to be considered in the assessment of applications.
26. The policy framework of the plan applies to the DA.

Restricted Discretionary Status (RDA) or Discretionary Activity (DA) Status?

27. Having an understanding of the issues to be addressed by any rule is pertinent, and for an RDA, to the framing up of any matters of discretion. This may help guide the appropriate circumstances for when an RDA status is appropriate or otherwise.

28. If the effects of concern can be well-specified, then an RDA is more efficient and just as effective as a DA. But if the effects can't be well-specified, then an RDA either risks missing important effects (so is not effective) or has to be so broad that there is no efficiency gain.

Applying the General Drafting Principles

29. I support the policy provision for consideration at paragraph [10] of the JWS Topic B6 Planning Nov 2022, to be included in Policy 26. This would enable Policy 26 to provide the direction for Rule 52A to implement the policy as required under s67(1).

NOF Process and Plan Change Tuatahi

30. SRC memorandum dated 22 September 2022 at paragraph [3] confirmed that “It is the Council’s intention to reconsider the planning *framework, including the activity status with Rule 52A.*”
31. In my opinion, this confirms the purpose of the pSWLP to be more focused on region-wide provisions and that these will be added to or replaced by the FMU-specific provisions through the FMU process, as stated on page 10 of the pSWLP:

pSWLP – page 10, paragraph [6]:

“This Plan outlines objectives, policies and rules that apply to the whole of the region. Through the FMU limit setting process, freshwater objectives, policies, limits and rules will be developed for each FMU. These will be tailored to respond to the pressures faced within each particular catchment. As the FMU limit setting process proceeds, the region-wide objectives, policies and rules in the Plan may be added to or replaced by the freshwater objectives, policies and rules specific to each FMU. The Southland Regional Council intends to complete its FMU limit setting programme by December 2025.”

32. Part 3 of the NPSFM 2020 is in relation to its implementation. This applies to pre and post-NOF processes. Part 3.1 of the NPSFM 2020 “*sets out a non-exhaustive list of things that local authorities must do to give effect to the objective and policies in Part 2*”, with clause 3.1(3) identifying the 3 subparts to be applied as follows:

Clause 3.1(3) of the NPSFM 2020:

“(3) In this Part:

- (a) subpart 1 sets out how local authorities must implement this National Policy Statement, particularly in relation to giving effect to Te Mana o te Wai*
- (b) subpart 2 sets out the National Objectives Framework for managing freshwater*
- (c) subpart 3 set out additional requirements on regional councils relating to freshwater management.”*

33. In my opinion, the application of both subparts 1 and 2 of the NPSFM 2020 are important for considering the appropriate matters of discretion if the activity status of Rule 52A is an RDA.
34. Subpart 1 specifies the approaches to implementing the NPSFM 2020, which includes clauses 3.2 Te Mana o te Wai, clause 3.3 Long-term visions for freshwater, clause 3.4 Tangata whenua involvement, clause 3.5 Integrated management, and clause 3.6 Transparent decision-making.
35. In my opinion, if an RDA has a matter of discretion, such as that provided in either version of Rule 52A² for tangata whenua, this is appropriate as it would give effect to, but not limited to, clauses 3.4(1)(a), 3.4(1)(c) and 3.4(2) of the NPSFM 2020. This would in turn, in my opinion, give effect to the principles of active protection, partnership, Tino Rangatiratanga and reciprocity of the Treaty of Waitangi (Tiriti o Waitangi). Of course, tangata whenua would be more appropriate to respond to the relevant Tiriti o Waitangi principles, as I am not tangata whenua. This would implement the following provisions of the pSWLP: Interpretation Statement, Objectives 1, 2, 3, 4, 5, 7, 9/9A, 15 and 16, and Policies 1, 2, 3, Policy A4 of the National Policy Statement for Freshwater Management 2014 (as amended in 2017), 13, 14³, 20, 40, 44, 45 and 47.

² Matter of discretion 4 of Rule 52A – Preferred Version of Rule and Matter of discretion 3 for Rule 52A – alternative way of expressing matters of discretion (or to like effect):

“The adverse effects and any seasonal effects on: the customary use of mahinga kai and nohoanga: taonga species; and the spiritual and cultural values and beliefs of tangata whenua, including measures to avoid, remedy or mitigate adverse effects”

³ I note that Policy 14 is a preference for discharges to land but particular regard shall be given to any adverse effects on cultural values associated with a discharge to water.

36. I also note that Policy 14⁴ is a preference for discharges to land but particular regard shall be given to any adverse effects on cultural values associated with a discharge to water.
37. In summary, in my opinion, subpart 1 provides the framework to have a specific matter of discretion in relation to tangata whenua that is envisioned to go beyond the NOF process in subpart 2. Such a matter should be in Policy 26 regardless of a rule's activity status.
38. Subpart 2 of the NPSFM 2020 is the National Objectives Framework (NOF), which includes 14 clauses specifying the NOF process and all of the steps that area required to implement the NOF.
39. In my opinion, the NOF process should consider all values as required by, but not limited to, clauses 3.7(1) and 3.7(2) of the NPSFM 2020 and develop the appropriate activity status of MPS having considered all the information on the potential effects of the MPS that may be raised through that process. This should result in the environmental outcomes sought, and the associated environmental flow and level limits, take limits etc being determined in accordance with Te Mana o te Wai (clause 1.3 of the NPSFM 2020: in particular, Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.) This would apply to all values for the FMU, not just the MPS.
40. This is consistent with Plan's expectations of the process as described above at paragraph [31]. As directed for each step of the NOF process at clause 3.7(1), the regional council must "engage with communities and tangata whenua" and "apply the hierarchy of obligations set out in clause 1.3.(5), as required by clause 3.2(2)(c)." Therefore, I consider that if there is an RDA for the 'reconsenting' of the operational consents of the MPS, it is appropriate for an RDA to provide for matters of discretion that fall outside of the NOF process in subpart 2. The NPSFM 2020 enables this to occur.

⁴ pSWLP "Policy 14 – Preference for discharges to land

Prefer discharges of contaminants to land over discharges of contaminants to water, unless adverse effects associated with a discharge to land are greater than a discharge to water. Particular regard shall be given to any adverse effects on cultural values associated with a discharge to water."

Policy 26

41. At paragraph [11a] of the Court’s Minute (dated 22 November 2022), the Court asked “whether a single policy is to apply to renewable electricity generation (‘REG’) activities, including the MPS and if so, proposing amendments to Policy 26 (DV) (if required)”.
42. The JWS Topic B6 Planning Nov 2022 at paragraph [17-20] considered the policy could be re-merged into a single policy for renewable energy either as ‘Combined’ version or with the MPS in a separate clause as a ‘Separate’ version of Policy 26. I have no preference as to either option.
43. To respond directly to the Court’s question, in my opinion, I do not think a single policy does apply to REG activities. As stated at paragraph [26] above, I consider that the policy framework of the plan applies to discretionary activities. For restricted discretionary activities, as stated at paragraphs [22 and 23] above, only those matters of discretion listed can be considered in the assessment of applications, including against the policy framework. For a policy to apply to a RDA, the policy needs to relate to a matter of discretion.
44. For clarification, I consider that the following pSWLP policies are relevant to REG: Policies 1, 2, 3, A4, 13, B7, 15A, 15B, 20, 21, 22, 26, 27A, 37, 40, 41, 42, 44, 45, 46 and 47.
45. However, I do consider for reasons of efficiency and effectiveness that Policy 26 should also refer to “discharges” as the drafting of the various versions of Rule 52A in the JWS Topic B6 Planning Nov 2022 at pages 12-15 are explicit about the replacement of identified consents, which includes two discharge permits (consent numbers 96021 and 96023). These discharge permits are for discharges of water from Lake Te Anau and Lake Manapouri (i.e. discharges of water within the Waiau FMU). The discharge permits commenced from 28 November 1996 for consent number 96021, and 19 December 1996 for consent number 96023. Both have the common expiry date of 28 November 2031⁵.
46. I consider that there is potential uncertainty in the existing policy framework of the pSWLP in relation to discharges of water from Lake Te Anau and Lake Manapouri (consent numbers 96021 and 96023). From my interpretation of the water quality policies 15A and 15B of the pSWLP, reference is specific to

⁵ Supplementary Statement of Evidence of Andrew Feierabend for Meridian Energy Limited, dated 6 August 2019, at paragraph [6] and Appendix 2
SAR 04-83-117 SWLP Appeal - Topic B6 Tranche 3 Supplementary Expert Planning Evidence Statement KIRK - 9 Dec 2022 - DOC-7223252 (3)

Appendix E. As I understand, Appendix E does not apply to the MPS, therefore in terms of discharges, Policies 15A and 15B do not apply:

“The standard for a given parameter will not apply in a lake, river, artificial watercourse or modified watercourse or natural wetland where:

- (a) due to natural causes, that parameter cannot meet the standard; or*
- (b) due to the effects of the operation of the Manapōuri hydro-electric generation scheme that alters natural flows, that parameter cannot meet the standard.”*

47. “Policy A4 of the National Policy Statement for Freshwater Management 2014 (as amended in 2017)”⁶ (Policy A4) is the only other policy in the pSWLP that is of relevance for the consideration of potential adverse effects from discharges that could apply to the MPS. While Policy A4 does apply to the consideration of any applications for a discharge in the pSWLP, clauses 4 and 5 provide exceptions to this policy. This enables potential uncertainty as to whether or not the applications for the “reconsenting of the MPS” are exempted or not, due to the phrase “Paragraph [1/2] of this policy does not apply to any application for consent first lodged [my emphasis] before the [NPSFM 2011/2014] [took effect on 1 July 2011/takes effect].” In my opinion, the application for a “replacement consent” is a new consent and should be regarded as such, i.e. a new discharge as under clause 3(a) of Policy A4. However, to avoid any uncertainty, I consider that the term “discharges” should be explicitly expressed in Policy 26 and Rule 52A to remove any uncertainty in the potential application of Policy 26.
48. As noted at paragraph [36] above, I note that Policy 14⁷ is a preference for discharges to land but particular regard shall be given to any adverse effects on cultural values associated with a discharge to water.
49. I am comfortable with Policy 26 to explicitly refer to other matters of discretion that an RDA is to consider that other policies in the Plan may already do. This may be more efficient having all matters in one place. This would be as effective as referring to all relevant policies that may apply to the RDA.

⁶ Consolidated Plan (SRC Final Changes) dated 3 October 2022, page 37

⁷ pSWLP “Policy 14 – Preference for discharges to land

Prefer discharges of contaminants to land over discharges of contaminants to water, unless adverse effects associated with a discharge to land are greater than a discharge to water. Particular regard shall be given to any adverse effects on cultural values associated with a discharge to water.”

50. As discussed at paragraphs [22-24] above, I consider that for a policy to apply to an RDA, the policy needs to relate to a matter of discretion. If the matter of discretion required further direction on the exercise of that discretion, then I consider that the policy would need to provide that direction so that the rule could implement the policy as required under s67(1).

51. As such, if there was to be an RDA rule that may apply post-NOF process, I consider that Policy 26 should include:

- a. the policy provision (or to like effect) for consideration at paragraph [10] of the JWS Topic B6 Planning Nov 2022, (as discussed at paragraph [29] above):

“considering an application for replacement consents for the operation of the existing Manapōuri hydro-electric generation scheme consents that are granted are to be consistent with the attainment of the environmental outcomes established for values in the Waiau FMU via the National Objectives Framework”;

- b. the direction on the exercise of discretion for Rule 52A as summarised (or to like effect) in “Rule 52A – alternative way of expressing matters of discretion” version in the JWS Topic B6 Planning Nov 2022 at page 14:

“Provided that in exercising its discretion where environmental flows and levels and limits have been made operative through an FMU process for the Waiau FMU under the NPSFM 2020 the consent authority must not require environmental flows and levels and limits more restrictive than those set in the Plan unless:

- 4. The adverse effect and/or management response being addressed has not been considered as part of the FMU process for the Waiau FMU under the NPSFM 2020 when identifying environmental outcomes and/or setting environmental flows and levels and limits, or*
- 5. The adverse effect and/or management response being addressed has been considered as part of the FMU process for the Waiau FMU under the NPSFM 2020 when setting environmental flows and levels, and limits, but it is identified in the Plan as a matter to be addressed in a resource consent process, or*
- 6. The applicant has proffered more restrictive environmental flows and levels or limits”;* and

- c. as discussed at paragraphs [45-47] above, Policy 26 should also refer to “discharges” to consider the effects that may arise in the discharge of

water that relate to the discharge permits in Rule 52A alongside the take, use or diversion of water of the MPS operational activities.

Rule 52A – Manapōuri Hydro-electric Generation Scheme

52. If Rule 52A has a discretionary activity status for the MPS, this enables all potential adverse effects and all relevant RMA matters to be taken into account, including those matters of uncertainty in relation to potential cumulative effects and lag effects on the coastal environment, Te Mana o te Wai and ki uta ki tai. A discretionary activity status would also support the Murihiku iwi management plan which provides strong direction on what needs to be taken into account⁸. Therefore, it would give effect to the higher order regulatory framework.
53. I am aware of the concerns of Ms Jordan and Ms Sitarz in relation to applying the NPSFM 2020 terminology of “total rate” in any Rule 52A in that the context for this phrase is in relation to an FMU or part of an FMU rather than a specific activity. I agree with this concern and suggest amending this term (or others as appropriate) to provide clarity that the rate or volume for any of the Rule 52A versions in the JWS Topic B6 Planning Nov 2022 is at the scale in relation to the MPS activity itself, not the FMU scale, or part of an FMU scale. It may be appropriate to refine the terms to just “rate” or “volume” accordingly, or in the alternative, “total rate for the MPS activity” for example. I prefer the former wording.
54. For the JWS Topic B6 Planning Nov 2022 “Rule 52A – ALTERNATIVE – Discretionary Only” at pages 14-15, I make the following comments:
- a. The rule needs to be explicit to the Waiau FMU to provide clarity in its application and provides a clear relationship to Policy 26 which refers to the “Waiau catchment”; and
 - b. All matters in the consents specified need to be provided for so suggest amending (a) and (b) to read:

“That does not seek a ~~total~~ volume, ~~total~~ rate or both a ~~total~~ volume and ~~total~~ rate at which water is taken, used, diverted or discharged of water is greater than that currently consented ...”

⁸ Statement of Evidence of Ailsa Cain, dated 1 August 2022, para 54
SAR 04-83-117 SWLP Appeal - Topic B6 Tranche 3 Supplementary Expert Planning Evidence Statement KIRK - 9 Dec 2022 - DOC-7223252 (3)

55. In my opinion, I consider it is also appropriate that the pSWLP could provide a restricted discretionary status (RDA) for the MPS for post-FMU applications. As discussed at paragraphs [39-40] above, I consider that the NOF process in Plan Change Tuatahi will enable all relevant RMA matters to be considered as required and that the activity status of the MPS will be reconsidered at this time. For Rule 52A as an RDA to appropriately implement Policy 26 and other policies as required under s67(1) of the RMA, Policy 26 would need to provide both the matters of discretion and the direction on the exercise of a discretion (if needed).
56. I reiterate paragraph [45] of my 26 August 2022 evidence, whereby:
- “I agree with Ms Sitarz⁹ that “the benefit of having a restricted discretionary status is that listing matters of discretion provides greater certainty to applicants, council and interested parties on matters that can be anticipated to be considered in decision making.””*
57. While I agree with all matters listed in the intent of the drafting approach taken in the JWS Topic B6 Planning Nov 2022 as detailed at paragraph [11], I am unclear as to whether 11(b) was meant to limit the drafting of the RDA to Objectives 1, 2, 3 and 10 only as it states “to meet the Objectives of the Plan including [my emphasis]”. Just to clarify, I consider that the drafting of any rule (including an RDA rule) for the MPS, the relevant objectives are Objectives 1, 2, 3, 4, 5, 6, 7, 9/9A, 10, 11, 14, 15, 16, 17 and 18.
58. I summarise my interpretation of the intent behind the drafting of an RDA for Rule 52A in the JWS Topic B6 Planning Nov 2022 (at paragraph [11]), as follows:
- a. The MPS is a unique situation in that it is of such a scale and significance that the higher order planning framework recognises this and bespoke provisions and planning framework in the pSWLP is appropriate;
 - b. As discussed at paragraph [39], the NOF process for Plan Change Tuatahi will consider all the values in consultation with tangata whenua and the community. This will provide the environmental outcomes for the values, environmental flows and levels and take limits, target attributes etc for all values;

⁹ Statement of Evidence of Natasha Sitarz, dated 29 July 2022, paras 79
SAR 04-83-117 SWLP Appeal - Topic B6 Tranche 3 Supplementary Expert Planning Evidence Statement KIRK - 9 Dec 2022 - DOC-7223252 (3)

- c. Any effects or matters that are not provided for in the NOF process, i.e. the ‘exceptions’ to Plan Change Tuatahi, are the focus of the matters to be able to be considered in a resource consent process;
 - d. The RDA rule is to provide for such matters of discretion as follows:
 - i. Tangata whenua matters can be provided for in accordance with subpart 1 of the NPSFM 2020 and in my opinion, this would give effect to the Principles of the Treaty of Waitangi/Tiriti o Waitangi;
 - ii. Matters not considered in the NOF process (e.g. new information or a new change in the environment); and
 - iii. Matters specified in the NOF process for resource consent processes to specifically address such as ramping rates or flow variability; or imposing conditions on resource consents e.g. environmental flow and/or limit (in drafted matter of discretion 4).
59. I can support a restricted discretionary status for the MPS provided that the matters of discretion are not so wide they become meaningless. They need to provide greater clarity on the matters that are anticipated to be considered.
60. For the matters of discretion for the JWS Topic B6 Planning Nov 2022 “*Rule 52A – Preferred Version of Rule*”, I make the following comments:
- a. as discussed at [37] above, I consider it “*appropriate for an RDA to provide for matters of discretion that fall outside of the NOF process in subpart 2 as is the intent of the drafting of provisions in the JWS Topic B6 Planning Nov 2022 (at paragraph 11), and provide for matters of discretion that are provided for in subpart 1 of the NPSFM 2020*”);
 - b. as discussed in paragraphs [34-37] above, matter of discretion 4 gives effect to clauses 3.2 and 3.4 of the NPSFM 2020 as well as giving effect to the Principles of the Treaty of Waitangi;
 - c. matter of discretion 5 uses the phrase “adverse effects” but I consider that this is appropriate as it allows for the consideration of adverse effects in the round for adverse effects on the environment that occur outside the NOF process or as identified as a matter to be addressed in a resource consent process. The intent of this matter of discretion is to implement the intentions as outlined at paragraph 11(g) of the JWS Topic B6 Planning Nov 2022;

- d. matters of discretion 6 and 8 would implement Policies 40 and 41 for efficiency in keeping matters of discretion to the fore in Policy 26; and
- e. matter of discretion 7 allows for the consent applicant to put forward restrictive environmental flows and levels or take limits than established by the NOF process and for the decision maker to then consider that application on that matter. I interpret this to mean taking less water or allowing greater environmental flows and levels than established by the NOF process.
- f. All matters in the consents specified need to be provided for so I suggest amending (a) and (c) to read as follows:
- (a) Condition (2) "*where the replacement consent is for the taking or use of water, the ~~total~~ volume and ~~total~~ rate ~~of take at which water is taken, used, diverted or discharged~~, is not increasing, and the use of water is not changing; and*"
 - (c) *Despite any other rules in this Plan, any activity that is for the taking of water for the generation of electricity from the Manapouri hydro-electric generation scheme in Rule 52A which:*
 - (i) *prior to take limits being established through a FMU process for the Waiau FMU under the NPSFM 2020 being made operative seeks a ~~total~~ volume, ~~total~~ rate or both a ~~total~~ volume and ~~total~~ rate at which water is taken, used, diverted or discharged ~~of water is~~ greater than that currently consented; or*
 - (ii) *once a limit has been established through a FMU process for the Waiau FMU being made operative seeks a ~~total~~ volume, ~~total~~ rate or both a ~~total~~ volume and ~~total~~ rate at which water is taken, used, diverted or discharged ~~of water is~~ greater than provided within the limits set in the Plan*
is a non-complying activity.

61. From initial discussions with Mr Farrell regarding the drafting of his supplementary evidence, Mr Farrell has raised the concern that having a post-NOF process rule put into the plan now is at odds with the pSWLP architecture.

I agree with Mr Farrell in that if the MPS was to have a post-NOF process rule within the current pSWLP framework, this would be the only such rule.

62. However, in light of the first week of the Court hearing and the evidence before the Court, I consider that the planning framework enables an RDA to be applied post-NOF processes. I consider that either an RDA or DA status would be appropriate for the MPS as put forward in the JWS Topic B6 Planning Nov 2022. I am also comfortable with the concept of what I understand Mr Farrell to be putting forward in his supplementary evidence in that there is no activity status applied to the operational activities of the MPS post-NOF processes at this time. I do not have a preference.
63. I understand that the Director-General 's preference is towards an RDA status for Rule 52A.

Conclusion

64. From a planning perspective, I am comfortable with either an RDA or DA status for the MPS in Rule 52A and I do not have any preference.
65. I consider that the planning framework enables an RDA for post-NOF processes to be drafted ahead of the NOF processes.
66. I consider that the policy framework applies to both an RDA and a DA rule and for an RDA, the matters of discretion and the exercise of that discretion (if any), should be at the policy level so that the rule could implement the policy as required under s67(1) of the RMA.
67. I understand that the D-G's preference is towards an Rule 52A being a RDA status for post-NOF processes.
68. To assist the Court, I consider that Policy 26 of the JWS Topic B6 Planning Nov 2022 should be amended to include:
- a. the policy provision (or to like effect) if an RDA is preferred by the Court:

“considering an application for replacement consents for the operation of the existing Manapōuri hydro-electric generation scheme consents that are granted are to be consistent with the attainment of the environmental outcomes established for values in the Waiau FMU via the National Objectives Framework”;

- b. the direction on the exercise of discretion for Rule 52A (or to like effect) if an RDA is preferred by the Court:

“Provided that in exercising its discretion where environmental flows and levels and limits have been made operative through an FMU process for the Waiau FMU under the NPSFM 2020 the consent authority must not require environmental flows and levels and limits more restrictive than those set in the Plan unless:

1. The adverse effect and/or management response being addressed has not been considered as part of the FMU process for the Waiau FMU under the NPSFM 2020 when identifying environmental outcomes and/or setting environmental flows and levels and limits, or
2. The adverse effect and/or management response being addressed has been considered as part of the FMU process for the Waiau FMU under the NPSFM 2020 when setting environmental flows and levels, and limits, but it is identified in the Plan as a matter to be addressed in a resource consent process, or
3. The applicant has proffered more restrictive environmental flows and levels or limits”;

- c. Regardless of activity status, Policy 26 should also refer to:

- i. “discharges” to consider all of the effects that may arise in the discharges of water that relate to the discharge permits in Rule 52A.
- ii. to provide clear direction for the Plan user with respect to giving effect to subpart 1 of the NPSFM 2020 in relation to tangata whenua involvement in the consenting process of the MPS going forward.

69. In relation to Rule 52A, if an RDA activity status is preferred by the Court, I support the intent of the JWS Topic B6 Planning Nov 2022 Preferred version of Rule 52A on page 12-13 but with amendments in **blue text** as follows:

Rule 52A – Preferred Version of Rule

Rule 52A – Manapōuri Hydro-electric Generation Scheme

- (a) *Despite any other rules in this Plan, an application for a new consent that is part of the Manapōuri hydro-electricity generation scheme and is replacing one or more of the following consents*

- (i) 96020 Water Permit

- (ii) 96021 Discharge Permit
- (iii) 96022 Water Permit
- (iv) 96023 Discharge Permit
- (v) 96024 Water Permit
- (vi) 206156 Water Permit
- (vii) 206157 Water Permit

is a restricted discretionary activity provided the following conditions are met:

- (1) the application is for the replacement of an expiring resource consent pursuant to section 124 of the Act;
- (2) where the replacement consent is for the taking or use of water, the total volume and total rate of take at which water is taken, used, diverted or discharged, is not increasing, and the use of water is not changing; and
- (3) the application is lodged after environmental flows and levels, limits and target attribute states established through a FMU process for the Waiau FMU under the NPSFM 2020 has been made operative.
- (4) the application complies with any applicable environmental flows and levels and limits made operative through an FMU process for the Waiau FMU under the NPSFM 2020; and
- (5) the applicant has requested that the application be publicly notified.

The Southland Regional Council will restrict its discretion to the following matters:

- 1 Measures to achieve environmental flows and levels and limits established through the FMU process for the Waiau FMU under the NPSFM 2020 or alternative environmental flows and levels and/or limits where:
 - a. a matter has not been considered when identifying environmental outcomes and setting environmental flows and levels and limits in the Waiau FMU; or
 - b. the environmental flow and/or limit is identified as a matter to be addressed in a resource consent process;
- 2 Measures to achieve target attribute states set through the FMU process;
- 3 In accordance with matter of discretion 1 the total volume, total rate or both a total volume and total rate at which water is taken, used, diverted or discharged and the timing of any take, diversion or discharge of water, including how this relates to generation output;

- 4 *In accordance with matter of discretion 1 the adverse effects and any seasonal effects on: the customary use of mahinga kai and nohoanga; taonga species; and the spiritual and cultural values and beliefs of tangata whenua, including measures to avoid, remedy or mitigate adverse effects;*
 - 5 *In accordance with matter of discretion 1 the adverse effects on the environment, including measures to avoid, remedy or mitigate adverse effects that are not addressed under Matter of Discretion 4;*
 - 6 *the collection, recording, monitoring, reporting and provision of information concerning the exercise of consent;*
 7. *Environmental flows and levels or limits that are more restrictive than matter of discretion 1 where these are proffered by the applicant;*
 - 8 *lapse period, duration of consent and consent review requirements; and*
 - 9 *the benefits of renewable electricity generation.*
- (b) *Despite any other rules in this Plan, any activity provided for in Rule 52A that does not meet one or more of the conditions of Rule 52A(a), or is not a non-complying activity in Rule 52A(c), is a discretionary activity-*
- (c) *Despite any other rules in this Plan, any activity that is for the taking of water for the generation of electricity from the Manapōuri hydro-electric generation scheme in Rule 52A which:*
- (i) *prior to take limits being established through a FMU process for the Waiau FMU under the NPSFM 2020 being made operative seeks a ~~total~~ volume, ~~total~~ rate or both a ~~total~~ volume and ~~total~~ rate at which water is taken, used, diverted or discharged of water is greater than that currently consented; or*
 - (ii) *once a limit has been established through a FMU process for the Waiau FMU being made operative seeks a ~~total~~ volume, ~~total~~ rate or both a ~~total~~ volume and ~~total~~ rate at which water is taken, used, diverted or discharged of water is greater than provided within the limits set in the Plan*
- is a non-complying activity.*

70. If a discretionary status is preferred by the Court for Rule 52A, I support the JWS Topic B6 Planning Nov 2022 at paragraph [8] with the amendments in blue text as follows:

ALTERNATIVE – Discretionary Only

- (a) *Despite any other rules in this Plan, an application for a new consent that is part of the Manapōuri hydro-electricity generation scheme in the Waiau FMU and is replacing one or more of the following consents*
- (i) 96020 Water Permit
 - (ii) 96021 Discharge Permit

- (iii) 96022 Water Permit
- (iv) 96023 Discharge Permit
- (v) 96024 Water Permit
- (vi) 206156 Water Permit
- (vii) 206157 Water Permit

That does not seek a ~~total~~ volume, ~~total~~ rate or both a ~~total~~ volume and ~~total~~ rate at which water is taken, used, diverted, or discharged of water is greater than that currently consented, is a discretionary activity.

(b) *Despite any other rules in this Plan, an application for a new consent that is part of the Manapouri hydro-electricity generation scheme in the Waiau FMU and is replacing one or more of the following consents*

- (i) 96020 Water Permit
- (ii) 96021 Discharge Permit
- (iii) 96022 Water Permit
- (iv) 96023 Discharge Permit
- (v) 96024 Water Permit
- (vi) 206156 Water Permit
- (vii) 206157 Water Permit

that does not seek a ~~total~~ volume, ~~total~~ rate or both a ~~total~~ volume and ~~total~~ rate at which water is taken, used, diverted, or discharged of water is greater than that currently consented, is a non-complying activity.



Linda Elizabeth Kirk

Dated: 9 December 2022