In the Environment Court of New Zealand
Christchurch Registry

I Mua I Te Kōti Taiao o Aotearoa
Ōtautahi Rohe

ENV-2018-CHC-29
ENV-2018-CHC-38
ENV-2018-CHC-47
ENV-2018-CHC-50

Under	the Resource Management Act 1991 (**RMA**)
In the matter of	an appeal under clause 14 of Schedule 1 of the RMA in relation to decisions on the Proposed Southland Water and Land Plan
Between	**Aratiatia Livestock Limited, Meridian Energy Limited, Waihopai Rūnaka, Hokonui Rūnaka, Te Rūnanga o Awarua, Te Rūnanga o Oraka Aparima, and Te Rūnanga o Ngāi Tahu, Royal Forest and Bird Protection Society of New Zealand Incorporated**
	Appellant
And	**Southland Fish and Game Council**
	Appellant
And	**Southland Regional Council**
	Respondent

Supplementary Evidence of Ben Farrell

Topic B6

9 December 2022

INTRODUCTION

Qualifications and experience

1 My full name is Ben Farrell. I am an environmental planning expert. My qualifications and experience are as set out in my evidence in chief (**EiC**) dated 20 December 2021.

Code of Conduct for Expert Witnesses

2 I confirm I have read the Code of Conduct for expert witnesses contained in the Environment Court of New Zealand Practice Note 2014 and that I have complied with it when preparing my evidence. Other than when I state I am relying on the advice of another person, this evidence is within my area of expertise. I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express.

Scope of Evidence

3 This supplementary evidence relates to Policy 26 and Rule 52A of the Proposed Southland Water and Land Plan (**pSWLP**) and is provided in response to the Planning JWS dated 29 & 30 November ("**JWS**"), as directed by the Court in its minute dated 22 November.

4 In preparing this evidence I have reflected on the first week of the Court hearing and the evidence before the Court, including the JWS. I have also had some personal communication on this matter with Ms Kirk, Ms Jordan, Ms Sitarz, and Mr McCallum-Clarke.

Summary of Evidence

5 Reflecting on the matters raised in this hearing to date, I consider:

a. Full discretionary activity status is the most appropriate for reconsenting the Manapouri Power Scheme ("**MPS**").

b. Rather than trying to identify matters of discretion, Policy 26 should be retained and apply to all REG, and a bespoke policy should be introduced to specify (or 'tease out') matters that decision-makers must have regard to when considering resource consent applications affecting the MPS (including reconsenting the MPS).

c. Policy 26 need not 'tease out' reverse sensitivity effects, as this task does not appear to be 'reasonably possible' (based on the evidence provided to date). Clauses 1 and 2 of Policy 26 provide sufficient protection for reverse sensitivity effects.

EVIDENCE

Direction for exercising discretion

6 As a matter of good plan drafting, it is not appropriate to:

(a) Restrict discretion (through an RDA rule) in absence of clear policy guidance.

(b) Include a permitted, controlled or RDA rule that is ambiguous.

7 As part of opining whether or not discretion is best exercised in a policy or a rule, it is helpful to understand the premise upon which Ms Whyte and Ms Davidson are supporting the RDA status over the full discretionary status. Based on all submissions and evidence filed to date, I understand:

(a) **Nga Rūnunga**[1] want to ensure their interests in the reconsenting of the MPS are adequately recognised and not missed. This includes a broad range of matters stemming from the management of effects related to customary use of mahinga kai and nohoanga; taonga species; and the spiritual and cultural values and beliefs of tangata whenua.

(b) Meridian Energy Limited ("**MEL**") interests appear to revolve around matters of administration efficiency, primarily MEL is seeking to avoid process duplication and litigation risks (namely avoidance of resource consent applications that may 're-open' matters resolved through the FMU Plan Change Tuatahi process ("**PCT**")).

(c) Ms Whyte and Ms Davidson have narrowed down the respective interests of MEL and Nga Rūnunga to those matters of discretion listed in the two versions of the RDA rule on pages 12-14 of the JWS. Ms Whyte and Ms Davidson effectively support the RDA approach over a full discretionary approach on the basis that matters 'considered' and settled in PCT should not be contestable through a subsequent resource consent process.

8 Based on my understanding of the above, it may not be possible to draft a RDA rule that provides MEL and Rūnunga with an outcome that they are actually seeking. In this regard:

[1] Waihopai Rūnaka, Hokonui Rūnaka, Te Rūnanga o Awarua, Te Rūnanga o Oraka Aparima, and Te Rūnanga o Ngāi Tahu

(a) Rule 52A or its successor will be subject to PCT.

(b) The significant problem with the above approaches, including the RDA framework, is that the actual content and detail of PCT is unknown, and ahead of PCT it is simply not possible to construct a rule that accurately identifies what might be 'in' or 'out' of PCT.

(c) Both versions of the RDA proposed in the JWS give rise to ambiguity. For example:

(i) The RDA entry conditions rely on the FMU process being complete. However, ahead of PCT being completed (or at least notified), there is no way of knowing what might be in or out of the FMU process. Therefore, the rule will be open to interpretation, for example there will be a risk of disagreement between MEL, SRC or a third party as to whether or not an application is RDA or Discretionary.

(ii) In respect of the matters of discretion, it is unclear whether reference to 'measures', as opposed to referencing environmental effects (for example), will allow decision-makers to decline an RDA application if the 'measures' do not adequately address environmental effects. In this regard, the PCT may not address all relevant environmental effects or mitigation methods through environmental flows, levels and limits.

(iii) It remains unclear if the Nga Rūnunga concerns are adequately addressed in the RDA rule presented in the JWS. For example, the rule appears to limit the effects 'mitigation toolbox' to environmental flows, levels and limits. This potentially excludes some mitigation measures like fish passage, habitat restoration and enhancement, species monitoring and relocation, and improved access to the Waiau.

9 There is no need for an RDA rule to provide MEL and Nga Rūnunga an outcome that they are seeking. For example:

(a) The pSWLP policies (and primarily Policy 26 as this is a clear parent policy to Rule 52A) can be superseded or amended through PCT to provide clearer policy guidance / directives to decision makers on resource consent applications.

(b) It is appropriate to assume that the interests of Nga Rūnunga and MEL will or can be appropriately recognised and provided for in the PCT process, which they can fully participate in.

Policy direction (or discretion) to apply post FMU

10 For reasons set out in my EiC it is not appropriate to provide policy direction in this pSWLP that will be superseded by the FMU process, in accordance with the NPSFM 2020.

11 Expert planners and parties involved in appeals on Policy 15C (including MEL) provided a similar rationale for unanimously recommending that Policy 15C be deleted.

12 Any references to a post FMU scenario would be inconsistent with the architecture of the pSWLP, at least in respect of the notified version:

(a) The pSWLP was notified on the basis that no policies or rules were intended to apply specifically to an FMU post the FMU process being settled (policies 44-47 provide FMU process directives and are designed to inform the FMU processes that will be undertaken at a later date in accordance with PCT).

(b) The council decisions version of the pSWLP introduced two provisions (Rule 52A and Policy 15C) that they intended to apply post FMU process. These are anomalies in respect of plan architecture.

(c) Other than Rule 52A and Policy 15C, there are no policies or rules in the pSWLP that do not apply ahead of the FMU process being completed (i.e. the “interim period”).

Amendments to Policy 26

Matters decision-makers should have particular regard

13 The matters Ms Whyte and Ms Davidson have articulated as matters of discretion can be applied as matters of policy that decision-makers can be required (through the manner in which the policy is expressed) to have particular regard to.

14 I have set out in Appendix BF2 an amended Policy 26. This version of the policy started off with all the matters of discretion presented in the JWS, however, for reasons set out above it is not appropriate for Policy 26 to include direction for decision makers that applies only after the FMU process is completed. Therefore I do not recommend including any reference (or policy direction) to post FMU scenarios.

15 The policy as I recommend has evolved from discussions with Ms Kirk, Ms Sitarz, Mr McCallum-Clarke and Ms Jordan. For example, speaking with Mr McCallum-Clarke, the following matters (if included in Policy 26) may be superfluous as they are already covered in other policy directives. Accordingly, I have not included these matters in my recommended amended Policy 26:

(a) *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.*

(b) *The collection, recording, monitoring, reporting and provision of information concerning the exercise of consent;*

(c) *Lapse period, duration of consent and consent review requirements*

16 I understand the version of the policy I support is generally supported by Ms Jordan.

<u>Reverse sensitivity</u>

17 Policy D of the NPSREG is not applicable to clause (a) of the JWS preferred version of Policy 26, because clause (a) deals with the allocation and prioritisation of freshwater.

18 The 'reverse sensitivity' matters presented in the JWS version of policy 26 in relation to reverse sensitivity do not appear to all relate to reverse sensitivity effects, as identified by Ms Jordan[2].

19 The JWS versions of Policy 26 applies to all REG, not just the MPS. Consequently:

(a) The JWS directive to manage activities to 'avoid' reverse sensitivity effects on renewable electricity generation activities is more stringent / onerous than the direction in the NPSREG, which is to manage activities to avoid reverse sensitivity effects on consented and on existing REG 'to the extent reasonably possible'.

(b) Reference to 'avoiding' effects is different to the decisions version and all evidence filed to date, which made recommendations in relation to reverse sensitivity effects in the context of the MPS only, not all REG.

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[2] Jordan EiC @ pars 141-146

(c) The efficiency and effectiveness of widening the reach of an 'avoidance' directive, to capture all REG, has not be identified or evaluated.

20 My EiC assumed MEL could more readily clarify what activities and development may be incompatible with the MPS or how the MPS should be protected (as provided for in RPS Method INF.1). However, in respect of reverse sensitivity effects, the evidence presented to date has not clarified (i) what activities and development may be incompatible with the MPS, and (ii) how the MPS should be protected from such activities. Accordingly, it appears that it is not 'reasonably possible' for the pSWLP to include clearer policy direction to manage activities to avoid reverse sensitivity effects on the MPS (based on the evidence to date).

21 Reflecting on the above, the wording of limbs Policy 26(1) and (2) of the decisions version should suitably implement Policy D of the NPSREG insofar as the MPS is concerned. Therefore, the decisions version of Policy 26(1) and (2) is more appropriate compared to alternative relief produced to date (including the amendments recommended in my EiC).

Significance of REG include their benefits

22 A small point, as set out in my EiC when referencing "benefits" in the policy, it is more appropriate to say 'including' benefits, rather than 'and' the benefits, because:

a. Reference to 'including' better reflects the NPSREG wording / direction.

b. The regional and national significance of REG is largely derived from their regional and national benefits.

c. If 'benefits' are considered as additional to their significance, then the policy creates unnecessary confusion and unnecessary costs. For example, it could require extra work/assessment to be undertaken to justify the benefits of a project, whereas part of the rationale in the NPSREG for recognising benefits as a matter of significance is to reduce the workload and debate about the significance of the benefits of REG.

Rule 52A: MPS Activity Status Post FMU Completion

23 As set out in my EiC the appropriate activity status for managing the MPS post FMU completion should be notified as part of PCT. It is not logical or necessary to predetermine the status of an activity that is subject to an FMU process. Such an approach is at odds with the rest of the pSWLP framework.

CONCLUSION

24 The matters to be addressed in the FMU process are uncertain and the outcomes of the FMU process cannot be predicted so it is not appropriate to impose a restricted discretionary activity status that relies on the outcome of the FMU process.

25 Including a policy and rule in the pSWLP that applies post FMU only (i.e. not before the FMU being complete) is an anomaly in respect of plan architecture. If policy 26 and Rule 52A are written now to apply post FMU only, then they will be the only two provisions that do so.

26 There is a risk that the existing MPS consents will need to be replaced ahead of the FMU process being completed. It is appropriate for the pSWLP to:

a. Impose a discretionary (unrestricted) activity status for any taking of water from the Waiau Catchment ahead of the FMU process being completed.

b. Retain Policy 26 clauses 1 and 2 in policy 26 to protect the MPS (and other REG) from reverse sensitivity effects.

c. As an alternative to an RDA rule, to provide a bespoke policy with clear directives for decision-makers on resource consent applications in relation to the MPS.

27 Appendix BF2 sets out my revised recommended amendments to Policy 26.

Ben Farrell

Dated this 9th Day of December 2022

APPENDIX BF2 – RECOMMENDED AMENDMENTS

Policy 26 – Renewable Energy

1. Recognise and provide for the national and regional significance of renewable electricity generation activities (including the existing Manapōuri hydro-electric generation scheme in the Waiau catchment), including their national, regional and local benefits ~~of renewable electricity generation activities, the need to locate the generation activity where the renewable energy resource is available,~~ and the practical constraints associated with their ~~its~~ development, operation, maintenance and upgrading, when:
    a. allocating surface water for abstraction, damming, diversion and use; and
    b. considering all resource consent applications for surface water abstractions, damming, diversion and use.

2. In addition to 1 above, when considering resource consent applications in relation to the Manapōuri hydro-electric generation scheme for surface water abstractions, damming, diversion and use within the Waiau Catchment, decision makers shall have particular regard to:
    a. Safeguarding the mauri and ecosystem health of the Waiau River, including reversing or reducing the degradation of the Waiau River; and
    b. Providing for 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.

Rule 52A – Manapōuri Hydro-electric Generation Scheme

(a) Despite any other rules in this Plan, any activity that is part of the Manapōuri hydro-electric generation scheme, for which consent is held and which is the subject of an application for a new consent for the same activity and is:

(i) the taking or use of water; or
(ii) the discharge of water into water or onto or into land; or
(iii) the discharge of contaminants into water or onto or into land; or
(iv) the damming or diversion of water;

is a ~~controlled~~ discretionary activity.

(b) Despite any other rules in this Plan, any activity that is for the taking of water for the generation of electricity from Manapōuri hydro-electric generation scheme which seeks a quantity of water greater than that currently consented is a **non-complying activity**.

Appendix E – Receiving Water Quality Standards

These standards apply to the effects of discharges following reasonable mixing with the receiving waters, unless otherwise stated. They do not apply to waters within artificial storage ponds such as effluent storage ponds or stock water reservoirs or to temporarily ponded rainfall.

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~~ an ancillary activity associated with the maintenance of the Manapōuri hydro-electric generation scheme ~~that alters natural flows,~~ is proposed. This exception only applies where the activity requires a resource consent pursuant to a rule in this plan and will only ~~not~~ result in a temporary ~~permanent~~ change in the state of the water~~, that parameter cannot meet the standard~~. Nothing in this exception precludes consideration of the effects of the proposed activity on water quality through a resource consent process.