

BEFORE THE ENVIRONMENT COURT

I MUA I TE KOOTI TAI AO O AOTEAROA

IN THE MATTER OF the Resource Management Act 1991
AND
IN THE MATTER of appeals under clause 14 of the First
Schedule to the Act
BETWEEN **ARATIATIA LIVESTOCK LIMITED**
(ENV-2018-CHC-29)
MERIDIAN ENERGY LIMITED
(ENV-2018-CHC-38)
WAIHOPAI RŪNAKA, HOKONUI RŪNAKA, TE
RŪNANGA O AWARUA, TE RŪNANGA O ORAKA
APARIMA, and TE RŪNANGA O NGĀI TAHU
(collectively NGĀI TAHU)
(ENV-2018-CHC-47)
ROYAL FOREST & BIRD PROTECTION
SOCIETY OF NZ INC
(ENV-2018-CHC-50)
Appellants

AND **SOUTHLAND REGIONAL COUNCIL**
Respondent

AND **ROYAL FOREST AND BIRD PROTECTION SOCIETY**
OF NEW ZEALAND INCORPORATED

s274 Parties

SUPPLEMENTARY STATEMENT OF EVIDENCE OF NATASHA SITARZ
ON BEHALF OF THE ROYAL FOREST AND BIRD PROTECTION SOCIETY

OF NEW ZEALAND INC

9 December 2022

(Planning)

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INTRODUCTION

1. My name is Natasha Leigh Sitarz. I provided planning evidence (EIC), on behalf of the Royal Forest and Bird Protection Society of New Zealand Incorporated (F&B) on its appeal, dated 29 July 2022.
2. In this statement, I am responding to the Court's minute of 22 November 2022, which directed "Planners initially supporting a Discretionary Activity Rule are to file supplementary evidence in response to the above JWS" by 6 December 2022.
3. I was unable to attend the hearing due to having Covid 19. In preparing this evidence I have reviewed the transcript with respect to the presentation of Ms Whyte's evidence.

QUALIFICATIONS AND EXPERIENCE

4. My qualifications, experience, and confirmation of compliance with the Code of Conduct for Expert Witnesses contained in the Environment Court Practice Note 2014 are as set out in my EIC dated 29 July 2022. I can confirm that I have complied with the practice note when preparing this evidence.

EVIDENCE

5. I have structured this evidence in the same way as the JWS is structured which is as a response to questions A-H. I start by considering Question A, which relates to Rule 52A. I then consider Questions B-H together, as these which relate to Policy 26.
6. I have considered the memorandum of counsel for Forest & Bird dated 8 December 2022, which sets out the provisions sought by Forest & Bird. I consider that these provisions are appropriate and address the concerns I discuss in in my evidence below.

Question A – Is the direction on how the discretion is to be exercised a matter of policy or a matter for a rule?

7. In my opinion, direction on how discretion is to be exercised is a matter of policy. This would be appropriately achieved by considering the wording of policies in the plan, not by the inclusion of policy direction specifically in the exercise of discretion.
8. I generally agree with the reasons set out in the JWS¹ that policy wording such as suggested in the JWS, which reflects the direction on how discretion is to be applied included in the RDA supported by Meridian, does not take matters further than as required in giving effect to the NPSFM. I also consider that such a policy would not be helpful until the FMU outcomes are included in the Plan, and that at that time, those provisions incorporated as a result of the FMU process can be relied on to provide direction for how the plan is to be implemented with respect to the Waiau FMU when considering a consent application.

Redrafting of the restricted discretionary activity (RDA) rule

9. The JWS sets out a restricted discretionary rule for the MPS.² I have a number of concerns about the “preferred” and “alternative” RDA rules set out in the JWS. I have considered the approach being taken in the JWS to RDA rule drafting and no longer consider an RDA rule to be an appropriate option for the MPS prior to the FMU process.
10. While I consider that discretionary activity status is appropriate, I provide comment on the RDA rule to assist the Court.
11. After considering the reasons provided in the JWS:
 - a. I agree that providing a specific rule for the MPS is appropriate, but consider that a discretionary rule is appropriate in this respect.³

¹ Paragraph 9 of the JWS Whyte & Davidson dated 11/12/2022

² Paragraph 11 and Appendix A of the JWS Whyte & Davidson dated 11/12/2022

³ Paragraph 11(a) and (b) of the JWS Whyte & Davidson dated 11/12/2022

- b. I agree with the view that a consenting process is not the most appropriate place to establish environmental flows and limits, identify values and establish environmental outcomes, and I agree with what can be anticipated for the FMU process as set out with respect to the NPSFM.⁴
- c. I agree that a consent process should rely on provisions included in the plan as a result of the FMU process.⁵ However, I consider that it may be appropriate to consider other provisions in the Plan and in higher order documents, including the NPSFM.⁶
- d. I agree that the specific drafting for cultural matters in Matter 4 means that those matters cannot be missed.⁷ However, as set out further with respect to my comments on Matter 1 and 4 below, I consider that the restriction to Matter 1 will limit the extent to which effects can be addressed.
- e. I generally agree that when addressing matters it is appropriate for this to occur within the context of environmental flows and levels and limits and target attribute states set through National Objectives Framework in the NPSFM 2020.⁸ However, I do not agree that such consideration should be confined to that context. In my opinion there may be no clear-cut line between a matter that is to be considered in that context and one that would fall outside that context.
- f. I generally agree that discretion should not exclude consideration of matters that were not addressed by the FMU process.⁹ However, I

⁴ Paragraph 11(c) of the JWS Whyte & Davidson dated 11/12/2022

⁵ Paragraph 11(d) of the JWS Whyte & Davidson dated 11/12/2022

⁶ NPSFM 2020 Part 3 Implementation, Clause 3.1 (2) Nothing in this Part: (a) prevents a local authority adopting more stringent measures than required by this National Policy Statement; or (b) limits a local authority's functions and duties under the Act in relation to freshwater

⁷ Paragraph 11(e) of the JWS Whyte & Davidson dated 11/12/2022

⁸ Paragraph 11(f) of the JWS Whyte & Davidson dated 11/12/2022

⁹ Paragraph 11(g)(ii) and (iii) of the JWS Whyte & Davidson dated 11/12/2022

consider that providing discretion in this regard is problematic as I explain with respect to Matter 1 below.

- g. I understand that the Council intends to reconsider the planning framework, including the activity status within Rule 52A as part of Plan Change Tuatahi.¹⁰
- h. I do not agree that revisiting rules as part of the FMU process reduces the effectiveness of a rule,¹¹ it may in fact result in amendments to improved effectiveness.
- i. I agree with using terms referred to within the NPSFM.¹² However, in using these terms it is important to consider the context as many of the terms used in the NPSFM are applied to the FMU rather than to activities individually. I have identified that this causes a particular problem with using the term “total rate” in the proposed Rules.
 - i. Total rate: the use of this term in the NPSFM is with respect to the FMU or part of the FMU. Clause 3.17 of the NPSFM provides that Councils are required to identify in their plan, the total volume and total rate for the FMU or part of the FMU. While the term “total volume” could be used to apply to the FMU or to a consent, the total volume in question may be different. The term “total rate” however, is not something that reflects an amount of water for a specific consent, nor is that how the term is used in the NPSFM. My interpretation is that “total rate” is for the FMU not for a specific activity. My understanding is that the “rate” as applied to a consent would refer to the rate at which water is taken or discharged and that this may fluctuate; it may include minimum, averages or maximum. “Total rate” does not make

¹⁰ Paragraph 3 of the Memorandum of Counsel for SRC, 22 November 2022 and Paragraph 12 of the JWS Whyte & Davidson dated 11/12/2022

¹¹ Paragraph 13 of the JWS Whyte & Davidson dated 11/12/2022

¹² Paragraph 14 of the JWS Whyte & Davidson dated 11/12/2022

sense in that context. In my opinion, this term should be removed when referring to water take or discharge of current and replacement consents, or replaced with an appropriate alternative term(s). It may also be appropriate to change the use of the term “total volume” to volume to avoid any confusion with the terms that apply to the FMU. This may be as simple as removing the term “total” when referring to the consented volume and rate in rule 52A.

- ii. For clarity, I consider that it is appropriate to use the terms “total volume” and “total rate” where these are used with respect to limits set for the FMU.

Comments on the JWS preferred RDA rule

12. Other than with respect to the matter of “total volume” and “total rate” I have no concerns with the conditions of entry into the rule.
13. Matter 1 provides:

Matter 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;*

14. In my view, Matter 1 reads more like a policy than a matter of discretion. It describes how the plan is to be implemented following the FMU process. When the Council has set out flow, level and limits in its plan it can be expected to implement those provisions when considering a resource consent application. There is no need to include a matter of discretion to direct the council to implement provisions of the plan or to constrain discretion to achieving outcomes of the plan.

15. My main concern with Matter 1 and subsequently how it is applied to other matters is that it limits Councils discretion to “measures”. My interpretation of “measures” is that it refers to the content of conditions of consent and methods to achieve those conditions. While considering the measures to address adverse effects of a proposal is appropriate, restricting discretion solely to the “measures” is only appropriate for a controlled activity where consent will be granted. It is not clear in my view whether council retains discretion to decline on the basis inadequate measures.
16. In my view when considering the effects of an activity it cannot be assumed that the limits etc set through the FMU process will resolve all environmental concerns. The NPSFM does not limit the Council’s discretion in this regard. The NPSFM¹³ specifically sets out that the list of things local authorities must do (this includes those things for the FMU process) is a non-exhaustive list:

3.1 Overview of Part

(1) This Part sets out a non-exhaustive list of things that local authorities must do to give effect to the objective and policies in Part 2 of this National Policy Statement, but nothing in Part 3 limits the general obligation under the Act to give effect to the objective and policies in Part 2 of this National Policy Statement.

(2) Nothing in this Part:

(a) prevents a local authority adopting more stringent measures than required by this National Policy Statement; or

(b) limits a local authority’s functions and duties under the Act in relation to freshwater.

17. My reading of this is that there may be additional things to those set out for the FMU process that the Council will need to do to give effect to the objective and policies in Part 2 and that the Council could also adopt more stringent measures, including with respect to the FMU process.
18. The first part of Matter 1 provides discretion on “*Measures to achieve environmental flows and levels and limits established through the FMU*”

¹³ Clause 3.1, Part 3 Implementation of the NPSFM 2020

process for the Waiau FMU". Setting aside my concern with restricting discretion to "measures" and reading more like policy, in my view the wording "to achieve" is an improvement over previous wording. This wording leaves scope for Council to consider other activities or changes in the environment that may require in different flow, level or limit on the consent than that set for the FMU. This could occur where the different flow, level or limit was necessary to achieve the flows and levels and limits for FMU.

19. I understand that the second part of Matter 1 which provides discretion to consider "measures to achieve" alternative environmental flows and levels and/or limits to those set under the FMU process via clauses (a) and (b) is intended to address concerns raised by parties and experts before the Court.
20. With respect to Matter 1, clause (a), I consider there are a number of uncertainties to determine whether a matter that has "not been considered". This seems to place some duty on the Council to record all matters considered during the process which appears to go beyond what would be required by the NPSFM. There could also be questions over the adequacy of any consideration of a matter. A further area of uncertainty is the meaning of "matter": is it an entirely new matter or could it include changes to circumstances such as a threat status change for a species that was considered? In my view, this clause would likely be to result in disputes during the consent process and would not be effective. It is not necessary in my view to constrain future decision making to what was or was not considered during the FMU process.
21. In relation to Matter 1, clause (b), my understanding is that this clause is intended to address the circumstance where as a result of the FMU process wording is included in the plan to direct that an environmental flow and/or limit is to be identified through a resource consent process. Other than the clause not being clear where this direction would come from, i.e. the Plan, I do not have additional concerns with this clause, noting my overall

concerns with the matter being more of a policy and its limitation to measures.

22. While I consider that Matter 1 is an improvement over previous¹⁴ and the alternative RDA wording¹⁵ which limits Council's discretion to not requiring more restrictive limits than set for the FMU or in the Plan, I consider it is not appropriate. Nor do I consider that the alternative considerations under clauses (a) and (b) could be improved to resolve my concerns given the limitation of the matter to measures and that the matter is more in the form of policy.

23. Matter 2 provides:

Matter 2

Measures to achieve target attribute states set through the FMU process

24. I have similar concerns with this matter as for matter 1 with respect to matter being more of a policy and its limitation to measures.

25. Matter 3 provides:

Matter 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;

26. The wording "In accordance with matter of discretion 1" makes the matters set out effectively subject to Matter 1. If the reference to Matter 1 were removed this would be appropriate as a matter of discretion. In my view, in implementing its plan the Council would consider this matter in terms of achieving environmental flows and levels and limits set out in the plan and there is no need to limit this to Matter 1.

27. It would also be appropriate in my view for these matters to be considered in addressing other matters of discretion, and should that consideration

¹⁴ Rule 52A in Appendix 1 of Ms Whyte's evidence dated 29 July 2022

¹⁵ Rule 52A Alternative in the JWS of Ms Whyte and Ms Davidson 30 November 2022

should not be limited to the subject of matter 1. This could result in perverse outcomes and does not enable council to effectively address the effects set out in matters of discretion.

28. Matter 4 provides:

Matter 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;

29. As with earlier matters, the wording “In accordance with matter of discretion 1” makes the matters set out effectively subject to Matter 1. This would limit the consideration of effects on these matters to measures that achieve environmental flows and levels and limits for the Waiau FMU (or alternatives set out at matter 1(a) and (b)) and thus be problematic for the reasons I have set out with respect to Matter 1. The inclusion of “avoid” in Matter 5 is an improvement in my view, however the limitation on discretion being to “measures that achieve environmental flows” etc would also constrain any consideration of effects to measures to avoid, remedy or mitigate effects on the measures set out in Matter 1. If Matter 1 were removed this would be appropriate as a matter of discretion.

30. Matter 5 provides:

Matter 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;

31. I have similar concerns as for Matter 4. In addition, I consider the lack of specificity as to the environmental effects creates some uncertainty as to what will be considered. I agree with the JWS¹⁶ reasons with respect to Matter 4 that “specific drafting means these matters cannot be missed”. In my opinion specific drafting should be included for “any effects on river

¹⁶ Paragraph 11(e) of the JWS Whyte & Davidson dated 11/12/2022

flows, wetland and lake water levels, the coastal waters and coastal processes, estuaries, aquatic ecosystems, and water quality and natural character;” so that those matters cannot be missed.

32. I consider that the reference to matter of discretion 4 serves no purpose as whether a matter falls under 4 or 5 or both the discretion is the same.
33. I have no further comments on matters 6, 8 and 9 and consider they are generally appropriate.¹⁷
34. I consider that including Matter 7 is appropriate in the context of the proposed RDA rule, noting that I do not support the rule as drafted.

The alternative RDA¹⁸

35. I generally support the approach to drafting Matters 3 and 4 to “The adverse effects on...” I maintain my concerns as to lack of specificity on environmental matters.
36. I do not support the additional wording direction of the exercise of discretion. I consider that the requirement that “the consent authority must not require environmental flows and levels and limits more restrictive” is inappropriate for the reasons set out in my EIC 94 to 97 and 274 evidence 18 to 20.
37. The exceptions within the direction of the exercise of discretion are problematic for the same reasons I have set out with respect to Matter 1 of the JWS preferred RDA rule above.

Conclusion on rule

38. As set out above and in my previous evidence, I have numerous concerns with the RDA rules as discussed in the JWS. As a result of these concerns, I no longer consider an RDA rule to be an appropriate option for the MPS prior to the FMU process.

¹⁷ See [92] of the evidence dated 29 July 2022 at [92]

¹⁸ Paragraph 15 and Appendix A of the JWS Whyte & Davidson dated 11/12/2022

39. If the Court is minded to use an RDA rule, I note that the corresponding discretionary rule that would apply pre-FMU process requires a minor change to clarify where the rule applies. This is because the reference to where “any one or more condition in Rule 52A(a)” is not met would capture Condition 2, when in fact non-compliance with Condition 2 results in a non-complying activity under rule 52A(c).
40. The concerns I have with the JWS RDA rules do not arise under a discretionary rule. I would support a discretionary rule along the lines of that drafted in the JWS.¹⁹ I consider a minor amendment is required to address concerns with the use of the term “total rate” as set out above. It is not clear whether the note regarding changing the rule as part of the FMU process is intended to be included in the plan. In my view this would not be appropriate. I consider reviewing the rule may be appropriate but that does not mean a change would or should be required.

Policy 26: Responses to Questions B to H

41. I generally agree with the JWS responses B to H²⁰ other than with respect to Questions F and G where I hold a different view. I also have some concerns with the drafting set out in Appendix A.
42. The response to Question F in the JWS sets out that the policy drafting contains more specificity as to the activities that may have reverse sensitivity effects. Having considered the draft supplementary evidence of Ms Jordan on what may be determined as “reverse sensitivity” and the explanation for reverse sensitivity in the RPS with respect to Rural provisions²¹ (noting that there is no definition or detailed explanation with

¹⁹ Paragraph 16 and Appendix A of the JWS Whyte & Davidson dated 11/12/2022

²⁰ While I agree with respect to C. that the “when” should appear on a separate line, I consider this is not necessary in the combined version set out in the JWS.

²¹ For example, when new land uses are developed near existing primary production activities that can create noise, dust, and odour effects, these changes can result in nuisance complaints that can then lead to constraints on the ongoing operation and/or expansion of rural production and service activities, including existing rural industries, mineral extraction, infrastructure and the wider transportation network. 5.3 Policies, Chapter 5 – Page 68 of the Southland RPS 2017

respect to Infrastructure provisions) it is not clear to me that the matters set out in the JWS drafted Policy 26 are in fact reverse sensitivity. However, I accept that the activities 1 to 3 may cause adverse effects on the MPS and that it is appropriate for the plan to address such effects.

43. I have considered the supplementary evidence of Mrs Jordan with respect to the 4th activity²² where she identifies that there is no clear connection for such activities with the ability of the MPS to meet its consent conditions. The response in the JWS²³ addressing this activity does not refer to a direct effect unlike for activities 1 to 3. In my view it may be useful to have some further clarity on the relevance of this activity before including it in the Policy.
44. I disagree in principle with the JWS response on Question G. In my view the consideration of adverse effects, including reverse sensitivity provisions should apply even where such activities are within limits etc for the FMU. This is because effects may still arise that should be considered in decision making. My understanding is that being within a limit does not necessarily mean the effects of an activity have been considered. However, I also consider that under the JWS drafting which includes the requirement to “avoid” such effects such a board consideration of effects would not be appropriate. I have further concerns with the use of “avoid” which I set out in considering the JWS drafting below.
45. While I generally agree with the JWS response to Question H, that the Policy isn’t intended to apply to indirect effects of activities below the Manapōuri Lake Control structure. The inclusion of the 4th activity in the JWS reverse sensitivity clause added to Policy 26 does not appear to be consistent with this approach.

²² In the JWS of Ms Whyte and Ms Davidson this is clause c. 4 of the Combined Version and clause B. 4 of the Separate Version of Policy 26.

²³ Paragraph 26(d) of the JWS Whyte & Davidson dated 11/12/2022

Comments on JWS Policy 26 drafting

46. Both versions of Policy 26 include the direction to “Manage activities to avoid reverse sensitivity effects on renewable electricity generation activities.” The requirement to “avoid” is directive in my view as there is no other option for addressing such effects. This goes beyond what is required by Policy D of the NPS-REG²⁴ which does not require avoidance in all circumstances. My reading of Policy D is that avoidance is only “to the extent reasonably possible”. The NPS-REG also states that it does not apply the allocation of water, this creates uncertainty in my view as to whether considering reverse sensitivity effects with respect to allocation is relevant to give effect to Policy D.
47. Additionally, as I consider the activities identified in respect of effects on the MPS²⁵ are not clearly reverse sensitivity effects, as set out with respect to Question F above, I consider that it would be more appropriate to amend the wording to reflect Method INF.1 of the RPS rather than that of the NPS-REG.
48. Method INF.1 I directs that Regional Plans:

Include objectives, policies and methods in regional plans that will:

...

(c) ensure that adverse effects, including reverse sensitivity effects, of development and land use on existing and/or planned regionally and nationally significant infrastructure are avoided, remedied or mitigated by identifying:

(i) what activities and development may be incompatible with this infrastructure; and

(ii) how this infrastructure should be protected from such activities;

49. Method INF.1 directs a level of detail on the activities for which adverse effects are to be addressed. This is not delivered by the broad consideration

²⁴ Policy D *Decision-makers shall, to the extent reasonably possible, manage activities to avoid reverse sensitivity effects on consented and on existing renewable electricity generation activities.*

²⁵ In the JWS of Ms Whyte and Ms Davidson this is clause c. of the Combined Version and clause B. of the Separate Version of Policy 26.

of activities with respect to all renewable electricity generation in the first sentence of Policy 26 clause c. or B. of the JWS versions.

50. I suggest changing the wording of this clause to be included in Policy 26 as follows: “Manage the following activities to avoid, remedy or mitigate adverse effects on the Manapōuri hydro-electric generation scheme: ...”
51. I do not support the inclusion of clause (d) in the combined policy,²⁶ for the same reasons I set out with respect to responses on A. above.
52. For completeness, I am generally supportive of Policy 26 as drafted in the JWS. However, I maintain my view that the policy should also include provision for mauri, ecosystem health and degradation as set out my previous evidence and the JWS Planning dated 21 September 2022. I also consider that under the new policy structure this should be specific to the MPS. This is included as Policy 26(d) of the provisions sought by Forest & Bird.

Natasha Sitarz

9 December 2022

²⁶ This is Clause C in the separate version