BEFORE THE ENVIRONMENT COURT

In the matter of	appeals under clause 14 of the First Schedule to the Resource Management Act 1991 concerning Proposed One Plan for the Manawatu-Wanganui Region.
	FEDERATED FARMERS OF NEW ZEALAND **ENV-2010-WLG-000148**
and	**MERIDIAN ENERGY LTD** **ENV-2010-WLG-000149**
and	**MINISTER OF CONSERVATION** **ENV-2010-WLG-000150**
and	**PROPERTY RIGHTS IN NEW ZEALAND** **ENV-2010-WLG-000152**
and	**HORTICULTURE NEW ZEALAND** **ENV 2010-WLG-000155**
and	**WELLINGTON FISH & GAME COUNCIL** **ENV-2010-WLG-000157**
	Appellants
and	**MANAWATU-WANGANUI REGIONAL COUNCIL** *Respondent*

EVIDENCE IN REPLY FROM CLARE BARTON ON THE TOPIC OF BIOLOGICAL DIVERSITY ON BEHALF OF MANAWATU-WANGANUI REGIONAL COUNCIL

Dated: 14 March 2012

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EVIDENCE IN REPLY FROM CLARE BARTON ON THE TOPIC OF BIOLOGICAL DIVERSITY ON BEHALF OF MANAWATU-WANGANUI REGIONAL COUNCIL

Introduction

Qualifications and experience

1. My name is Julie Clare Barton and I am a Senior Consents Planner at Manawatu-Wanganui Regional Council (MWRC). My qualifications and experience are set out in my statement of evidence to the Court dated 31 January 2012.

Planner Conferencing on Biodiversity

2. On 27 February 2012 the planners for Meridian/Trustpower, Minister of Conservation/Fish and Game, Federated Farmers, Transpower/Powerco and myself met. A record of the conferencing statement was provided to the Court on 6 March 2012. There was general agreement amongst the planners on a number of matters with the remaining areas of disagreement covering the following:

   (a) The activity status for rare and threatened habitats – either non-complying or discretionary.

   (b) The need to delete the following in Policy 7-2A(e)(ii): *"Which may include the establishment of infrastructure and other physical resources of regional or national importance as identified in Policy 3-1."*

   (c) The need to delete the following in Policy 7-2A(e)(iv): *"not unreasonably restrict the existing use of production land."*

   (d) Policy 12-5(b) and (c) in terms of the mitigation hierarchy, particularly in relation to offsets.

   (e) Policy 12-5(c) and the use of the word "may" instead of "must generally" in relation to "consent must generally be granted..."

   (f) Policy 12-6(a)(i)(B): whether functioning ecosystem processes is a matter that informs habitat representativeness in and of itself, or if functioning ecosystem processes are linked to the size of the habitat area.

(g) The need for a new discretionary activity rule as proposed by Mr Le Marquand for Transpower/Powerco for transmission or renewable energy activities if activities within rare and threatened habitats are made non-complying activities.

(h) Exclusion of cultivation from policies and rules for Sites of Significance - Aquatic.

3. I propose to provide brief comment on each of the items (a) to (h) above for the purpose of clarifying my opinion on each matter. In relation to item (a) relating to the activity status for rare and threatened habitats, I will provide comment on the link between activity status and discussions on site as referred to in the evidence of Ms Marr and the deterrent effect of the gateway tests of s104D.

Areas of Disagreement Amongst the Planners

The activity status for rare and threatened habitats – non-complying or discretionary.

4. Ms Marr for the Wellington Fish and Game Council and the Minister of Conservation sets out in her Statement of Evidence in Chief[1] the reasons why she considers it appropriate that the activity classification for activities in rare and threatened habitats should be altered from discretionary to non-complying. I do not propose to reiterate the reasons why I consider it appropriate to retain the activity classification as discretionary as these are set out in my Statement of Evidence in Chief[2]. I do however, wish to clarify the following, that are matters that have been included in the evidence of Ms Marr:

(a) The "deterrent effect" of the gateway tests imposed by section 104D and the "extra hurdles" (Ms Marr's wording at paragraph 85[3]) imposed.

[1] Statement of Evidence in Chief of Helen Marie Marr on behalf of the Minister of Conservation and Wellington Fish & Game Council 17 February 2012. Paragraphs 52-111, pages 18-33.

[2] Statement of Planning Evidence by Clare Barton on the Topic of Biological Diversity on behalf of Manawatu-Wanganui Regional Council, 31 January 2012. Paragraphs 46-57, TEB pages 4606-4613.

[3] Page 26.

(b) The link between activity status and discussions on site with prospective applicants about particular activities.

Deterrent Effect of Section 104D

5. Ms Marr states:

"Because the objectives and policies in this case are so clear, so directive and so clearly setting up a framework to deter all but the most well balanced of applications, then in my view a non-complying activity status is more appropriate than the more "open minded" approach of a discretionary activity." [4]

6. Ms Marr then goes on to state:

"…I believe that there are reasonable "policy gateways" in my recommended Policy 12-5 such that the merits of a well designed proposal could in the appropriate circumstances be considered. The wording I recommend for clause (a)(v) of the Policy contributes to this by directing the decision-maker to recognise benefits of electricity transmission and renewable energy proposals, consistent with the NPS's on these matters." [5]

7. Ms Marr concludes that the policies deter all but the most well balanced applications and therefore the more stringent tests of a non-complying activity status are more appropriate. Ms Marr then reaches the conclusion that there is a need for policy gateways to enable consents to be granted in appropriate situations and therefore the policy needs to specifically enable regard to be had to the benefits of electricity transmission and renewable energy activities. Presumably the additional clause regarding electricity transmission and renewable energy activities is to assist them in meeting the gateway tests imposed by section 104D, as in Ms Marr's opinion these are appropriate activities. The question this raises for me is what may be other appropriate activities that should also qualify for some form of policy "out"? Is it appropriate to provide for policy exceptions?

[4] Statement of Evidence in Chief of Helen Marie Marr on behalf of the Minister of Conservation and Wellington Fish & Game Council, 17 February 2012,. Paragraph 108, page 33.

[5] Paragraph 109, page 33.

8. For the reasons outlined in paragraph 29 below I consider it to be inappropriate to provide for certain activities or provide an easier path for them, not on the basis of the adverse effects of the activities but in this case because of the presence of two NPSs.

9. I consider it far more effective to not provide for policy exceptions, but rather to ensure the activity classification is appropriately targeted to the issue and to ensure policy guidance is provided that is both certain and clear.

<u>The link between activity status and discussions on site with prospective applicants about particular activities.</u>

10. Ms Marr states:

"In relation to Ms Barton's b), I agree that on-site discussion about plan provisions is good practice and that where activities can be re-sited to avoid adverse impacts on an identified habitat that is a good outcome. However I am unsure exactly what role Ms Barton feels that discretionary activity status has had to play in this outcome. In my view the same outcome could also be achieved with non-complying activity status, and in fact the deterrent effect I discuss above would actually aid in this outcome." [6]

11. The extent of my comment regarding the role that on-site discussions have was to signal the importance of that dialogue in terms of achieving good and workable outcomes. Experience of "on-the-ground" MWRC staff confirms the dialogue is helpful. Ms Marr is correct in that the dialogue could occur under a different activity classification. I think the key difference between Ms Marr and I is summed up by her final comment above where she says: *"in fact the deterrent effect I discuss above would actually aid in this outcome"*. The outcome Ms Marr seeks is avoiding adverse impacts on an identified habitat and she considers this is best achieved by having a non-complying activity classification. I consider that avoiding an identified habitat may be the ultimate outcome but is not the only potential outcome. Indeed, Policy 12-5(b) goes through a hierarchy of avoid, to remedy or mitigate, to the application of offsets.

[6] Statement of Evidence in Chief of Helen Marie Marr on behalf of the Minister of Conservation and Wellington Fish & Game Council, 17 February 2012. Paragraph 91, page 28.

Policy 7-2A(e)(ii) and the deletion of *"Which may include the establishment of infrastructure and other physical resources of regional or national importance as identified in Policy 3-1."*

12. At the planner conferencing I considered that it was not necessary to delete part of Policy 7-2A(e)(ii) (the phrase proposed to be deleted is shown as strike through text – note that I have used the version of the clause as agreed at conferencing): *"consider indigenous biological diversity mitigation offsets in appropriate circumstances as defined in Policy 12-5, ~~which may include the establishment of infrastructure and other physical resources of regional or national importance as identified in Policy 3-1.~~"*

13. Having considered the matter further, I consider it is appropriate to delete this clause for the following reasons:

    (a) Policy 7-2A(e)(ii) deals with offsets and requires the Regional Council and Territorial Authorities, when regulating activities, to consider offsets in appropriate circumstances. The issue is how to define what an appropriate circumstance is. Currently, the clause attempts to define appropriate circumstances by relating them to particular activities including the establishment of infrastructure and other physical resources of regional or national importance. In terms of defining appropriate circumstances it should, in my opinion, relate to when an offset may be used. If clause (ii) refers to Policy 12-5, then there is a clear link to when an offset may be appropriate. Specifically Policy 12-5 covers off when an offset may be used (in Policy 12-5(b) and (c)) and the assessment criteria for what an offset must achieve (in Policy 12-5(d)).

    (b) Policy 7-2A (e)(ii) states (note that I have used the version of the clause as agreed at conferencing): *"allow the maintenance, operation and upgrade of existing structures including infrastructure and other physical resources of regional or national importance as identified in Policy 3-1…"* In my opinion, this is the appropriate place to reference existing infrastructure and other physical resources of regional or national importance because it appropriately places the emphasis on the consideration of allowing these activities.

Policy 7-2A(e)(iv) and the deletion of *"not unreasonably restrict the existing use of production land."*

14. After planner conferencing was complete there was further email correspondence amongst the planners regarding the deletion of *"not unreasonably restrict the existing use of production land"* from Policy 7-2(e)(iv). It was agreed that the clause should be retained, and instead the clause should be clarified and be more focused. Specifically the following wording was agreed (proposed wording is underlined):

Policy 7-2A(e)(iv). *Not restrict the existing use of production land <u>where the effects of such land use on rare habitat*, threatened habitat* or at risk habitat* remain the same or similar in character, intensity and scale.</u>*

15. The re-focus on not unreasonably restricting the use of production land, where such use is already established and the effects on the habitat is the same or similar, appropriately signals that where effects may be other or different to those that currently exist there may be a need to regulate these activities.

Policy 12-5(b) and (c) and the mitigation hierarchy particularly in relation to offsets.

16. Mr Clubb for the Minister of Conservation helpfully outlines the concept of biodiversity offsets in relation to the Business and Biodiversity Offsets Programme (BBOP) and sets out the principles for biodiversity offset design and implementation[7]. I understand that Principle 3 of BBOP defines a mitigation hierarchy as one which tumbles from avoid, minimise, rehabilitate or restore through to offset. Offset is a measure that compensates for any residual significant adverse effect.

17. I understand the ecologists generally accept that the BBOP principles are sound and provide useful guidance regarding offsets.

18. The planners, whilst not all agreeing, did discuss acknowledging the concept of a mitigation hierarchy. Policy 12-5(b) and (c) as contained in the DV POP does

[7] Statement of Evidence in Chief of Spencer John Clubb for the Minister of Conservation. Paragraph 19 , pages 5 and 6.

currently set out a tumble concept, with the emphasis being on avoiding adverse effects and otherwise remedying or mitigating adverse effects. Where adverse effects cannot be avoided, remedied or mitigated, they are offset. Given the significance of rare, threatened and at risk habitats within the Region, I consider the tumble concept is helpful in the policy as it signals that avoiding adverse effects in the first instance is appropriate. Consideration then can be given to other approaches, but only having first considered and accepted that avoidance is not achievable.

19. Ms Maseyk, in her Statement of Evidence in Reply, considers the appeal point from Wellington Fish and Game and the Minister of Conservation regarding mitigation within an area of habitat rather than mitigation elsewhere. Ms Maseyk sets out an example of a proposed activity that may have a detrimental impact on an area of habitat which could be part of a larger on-farm management programme. Ms Maseyk concludes: *"In such cases, the ability to account for previous or current 'good works', or to agree on an out-of-kind mitigation package away from the "area of habitat affected by the activity" could, on balance, have a greater benefit than would otherwise be achieved."* [8]

20. I agree that offsets need to be considered to deal with residual effects that cannot be avoided, remedied or mitigated. The question is whether the different forms of offsets are all considered together in the mix or whether the policy can set a hierarchy or tumble down approach. I understand the ecologists to generally accept that a strong element of locality to the application is important.

21. I therefore consider the approach proposed in the tracked changes attached to the Record of Planner Conferencing[9] is appropriate. This approach retains the focus on avoid and then remedy or mitigate, and then further clarifies that offsets within the area followed by offsets outside the area will be considered. It allows for the retention of a hierarchy and further clarifies how offsets can be considered.

[8] Evidence in Reply of Fleur Maseyk for the Manawatu-Wanganui Regional Council. Paragraph 52, pages18-19.

[9] Record of Planner Conferencing on the Topic of Biodiversity dated 6 March 2012.

Policy 12-5(c) and the use of the word *"may"* instead of *"must generally"* in relation to *"consent must generally be granted…"*

22. Policy 12-5 (c) states (Note that I have used the version of the clause as agreed at conferencing): *"Consent must generally be granted for resource use activities in an at-risk habitat* assessed not to be an area of significant indigenous vegetation or a significant habitat of indigenous fauna when…"* The inclusion of the words *"must generally be granted"* seems to pick up on consistency of wording with Policy 12-5(b) which states in relation to rare and threatened habitats that *"consent must generally not be granted"*. In the context of Policy 12-5(b), a strong statement that consent must generally not be granted seems appropriate. In the context of Policy 12-5(c), however, saying consent must generally be granted takes the notion of clear policy direction too far in my opinion. I understand the ecologists to be in agreement that at-risk habitats are still important and that the particulars of any situation need to be considered. On the basis that there may be situations where approval may not be appropriate, it seems the policy would be clearer if "may" is used rather than "must generally".

23. I therefore consider the approach proposed in the track changes attached to the Record of Planner Conferencing[10] is appropriate.

Policy 12-6(a)(i)(B) – whether functioning ecosystem processes is a matter that informs habitat representativeness in and of itself or if functioning ecosystem processes are linked to the size of the habitat area.

24. Ms Maseyk in her Statement of Evidence in Reply states the following in relation to the concept of "functioning ecosystem process" in Policy 12-6:

"When presented as a stand alone criterion, the meaning becomes ambiguous. What level of function? What processes? The usefulness of such a criterion is further restricted by the current incomplete understanding of, for example, the drivers of ecological functions and processes, how they manifest themselves, operate across trophic levels, or how they can be easily recognised or measured. How much

[10] Record of Planner Conferencing on the Topic of Biodiversity dated 6 March 2012.

functionality can be absent or compromised before a site fails to pass the test? This is a crucial question given the highly modified nature of much of the Region's remaining indigenous habitat." [11]

25. I understand the only ecologist to disagree at conferencing with the need to link functioning ecosystem processes with the size and species composition of the habitat is Mr Park for TrustPower Ltd and Meridian Energy. I do, however, refer to the comments made by Mr Park in his Statement of Evidence in Chief where he states:

"Where I do agree with the appellants' is that functioning ecosystem processes alone is not determinative of ecological significance. It is simply one of a range of recognised criteria that assist in qualifying "representativeness" to ensure that good quality examples are significant. In my experience, areas with functioning ecosystem processes are likely to have species, vegetation or habitats that would tick at least one of the assessment criteria. On this matter I therefore disagree with Ms Barton's statement (page 34) that all three sub-clauses in Policy 12-6(a)(i) stand on their own and if any of the provisions is found in a particular circumstance that the box is ticked and therefore the habitat is considered representative. Similarly, for the reasons I have outlined above in relation to the examples of wetlands and cliffs, scarps and tors, while these areas may be reduced from their former extent (i.e. 20% or less of known or likely former cover), this is not sufficient rationale, on its own, to determine that any remaining areas of this habitat type are automatically ecologically significant." [12]

26. I understand Mr Park in his evidence to be saying that functioning ecosystem processes on its own is not determinative of ecological significance. Therefore it would be necessary to link functioning ecosystem processes with clause (b).

27. In my Statement of Evidence in Chief[13] I reached the conclusion that all three sub-clauses should stand on their own and the word "and" between clause (b) and (c) be replaced with "or". Having considered the outcomes of the further conferencing and

[11] Evidence in Reply of Fleur Maseyk for the Manawatu-Wanganui Regional Council. Paragraph 24, page 12.

[12] Statement of Evidence in Chief of Mr Matiu Park for Meridian Energy Ltd and TrustPower Ltd. Paragraph 6.10, page 16.

[13] Statement of Planning Evidence of Clare Barton on the Topic of Biological Diversity on behalf of Manawatu-Wanganui Regional Council, 31 January 2012. TEB page 4624.

the evidence of Ms Maseyk, Ms Hawcroft, Dr Gerbeux and Mr Park, I now consider that the wording included in the Planner Conferencing Statement[14] which includes "functioning ecosystem processes" within clause (b) and linked with "or" is appropriate for the following reasons:

(a) Clause (b) captures good sites that are in good condition (i.e. the best of the best) and functioning processes is one important component or measure of condition.

(b) Ensures functionality can be considered but does not set such a high test that would result in less indigenous biodiversity areas being considered significant.

The need for a new discretionary activity rule, as proposed by Mr Le Marquand for Transpower/Powerco for transmission or renewable energy activities, if activities within rare and threatened habitats are made non-complying activities.

28. Mr Le Marquand proposes that, should the Court determine that the activity classification for rare and threatened habitats be altered from discretionary to non-complying, there should be a separate discretionary activity rule for transmission or renewable energy activities. Mr Le Marquand in his Statement of Evidence in Chief states:

"In my opinion, there is merit in separating out transmission and renewable energy generation activities and retaining discretionary activity status for these…. I do not consider that the approach I advocate would result in any less scrutiny of a proposal, however activities could be properly considered against the range of relevant factors in Section 104, rather than to (in the first instance) the threshold tests in Section 104D. This would be a means of clearly giving effect to the NPSET and NPSREG…" [15]

[14] Record of Planner Conferencing on the Topic of Biodiversity dated 6 March 2012. Appendix 2.

[15] Statement of Evidence in Chief of Mr David Le Marquand for Transpower Ltd and Powerco Ltd. Paragraph 69, page 19.

29. For the reasons I have outlined in my Statement of Evidence in Chief[16] I consider the discretionary activity status should be retained for all activities regulated through Rule 12-6 in rare habitats, threatened habitats or at risk habitats. I do not consider it appropriate (if the activity status is altered to non-complying for rare and threatened habitats) to provide for a different activity classification for transmission and renewable energy generation activities for the following reasons:

(a) The potential and actual adverse effects on rare and threatened habitats from transmission and renewable energy activities are no different to other activities. Indeed, the adverse effects of such large scale activities could be potentially worse than other activities.

(b) In my opinion, the National Policy Statement on Electricity Transmission (2008) and the National Policy Statement for Renewable Energy Generation (2011) do not specify that an activity classification for these activities should be more favourable on the basis of the existence of those National Policy Statements.

Exclusion of cultivation from policies and rules for sites of significance aquatic.

30. Ms Wharfe for Horticulture NZ in her Statement of Evidence in Chief states:

"Cultivation will be subject to provisions in Chapters 5 and 12 and I consider inclusion of specific provisions relating to cultivation of existing horticultural land adjacent to sites of significance aquatic within the Chapters 5 and 12 framework would be appropriate." [17]

31. Chapters 5 and 12 are the land chapters within the DV POP. Ms Wharfe does not propose any specific wording to address her proposal regarding management of cultivation adjacent to Sites of Significance - Aquatic. In the absence of any proposed changes I find it difficult to comment on what is sought.

[16] Statement of Planning Evidence by Clare Barton on the Topic of Biological Diversity on behalf of Manawatu-Wanganui Regional Council, 31 January 2012. Paragraphs 46-57, TEB pages 4606-4613.

[17] Statement of Evidence of Chief of Ms Lynette Wharfe for Horticulture New Zealand. Paragraph 26 page 5.

32. In Schedule E there is an at-risk habitat type called 'riparian margin', which is an area extending 20 metres landwards of a site identified as a Site of Significance - Aquatic. The definition in Table E.1 states:

"Any indigenous or exotic woody vegetation that is forest, treeland, scrub or shrubland, that is not classified elsewhere in Schedule E as rare or threatened, within 20m landwards from the top of the river bank adjacent to a site identified in Schedule AB as being a Site of Significance – Aquatic."

33. Clearly this means cultivation is not captured as it is not woody vegetation. I am therefore unclear what Horticulture NZ's concerns are.

Clare Barton

SENIOR CONSENTS PLANNER