

**BEFORE THE PALMERSTON NORTH CITY, MANAWATŪ DISTRICT (MDC)
AND TARARUA DISTRICT COUNCILS**

IN THE MATTER of the Resource Management Act 1991 ("the Act")

AND

IN THE MATTER NOTICES OF REQUIREMENT by NZTA under s168 of the Act for the construction, operation, maintenance and improvement of approximately 11.5km of new State Highway between Ashurst and Woodville to replace the closed section of SH3 through the Manawatū Gorge and associated works, know as the Te Ahu a Turanga, Manawatū Tararua Highway Project ("the Project")

**MEMORANDUM OF COUNSEL
ON BEHALF OF THE DIRECTOR-GENERAL OF CONSERVATION**

Dated: 15 March 2019

COUNSEL:
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MAY IT PLEASE THE PANEL

1. The purpose of this Memorandum is to raise process concerns prior to the Director-General of Conservation's ('DOC's') scheduled appearance.
2. Good resource management practice requires that, in general, all the resource consents for a project should be carefully identified from the outset, and applications for them all should generally be made so that they can be considered together or jointly.¹ That has not occurred here. Some of the Panel's questions go to this matter (e.g. the relevance of section 91). The urgency of the Project appears to have driven the process, and this has been explained by the Applicant.²
3. The Applicant considers that the approach of "*a corridor within which a road can be constructed with acceptable effects*", is consistent with the designation provisions of the Act.³ As explained in this Memorandum, DOC does not consider that approach to be appropriate in this instance where:
 - 3.1. Horizons Regional Council has responsibility for "*objectives, policies and methods for the purpose of establishing a Region-wide approach for maintaining indigenous biological diversity*" and "*developing rules controlling the use of land to protect [SNA's] and to maintain indigenous biodiversity*";⁴ and
 - 3.2. The NOR involves potential adverse effects on ~32 hectares of habitat that is significant under the One Plan's section 6(c) criteria, over 12 different ecosystem types.⁵
4. The Applicant's process raises the question whether any recommendation can be made to confirm the requirement in reliance on section 6(c) 'safeguards' provided in:
 - 4.1. *conceptual* NOR conditions;
 - 4.2. outline plan procedure; and/or
 - 4.3. future (resource consent) process.

¹ *AFFCO NZ Limited v Far North District Council (No. 2)* [1994] NZRMA 224 (PT). This principle applies even though section 91 RMA does not apply to NOR's

² In the EIC of L Dalzell for NZTA. Also the subject of the Applicant's request for an earlier hearing, dealt with in the Panel's Minute 1.

³ For example at page 203 of the Notice of Requirement for Designations Part 1; statutory matters [44.11].

⁴ Policy 6-1 Horizons One Plan (RPS).

⁵ EIC of Dr Martin for DOC – this excludes indirect effects that extend beyond the limits of vegetation removal.

5. DOC's position is that, without detail of mitigations/offsets/compensation/remediation, it cannot be known whether effects of a specific design within the 'envelope' would be acceptable. The Applicant's ecological expert appears to accept this and errs on the side of confidence.⁶ DOC's ecological experts take a different approach, and consider that more certainty is required. In summary they say that the very nature of a 'net indigenous biological diversity gain', requires detail.

6. Ms McLeod, providing planning evidence for the Applicant, states that it is only the effects of allowing the requirement that are to be considered (rather than a broader consideration that may include the effects of granting future resource consents for activities that are not enabled by the requirement).⁷ However Ms McLeod goes on in her evidence to discuss adverse effects on indigenous biodiversity. This raises the question – are indigenous biodiversity effects to be considered or not?

7. The consideration of adverse effects on indigenous biodiversity by Ms McLeod no doubt recognises that:
 - 7.1. section 171 is "subject to Part 2" of the Act;⁸
 - 7.2. under section 171 there is a requirement to have "particular regard to" objectives and policies of the Horizons One Plan (combined RPS and regional plan);
 - 7.3. indigenous biodiversity feeds into other matters within the purview of the District Plans including natural character, landscape, historic heritage and Maori cultural values; and
 - 7.4. the District Councils retain some functions for indigenous biodiversity under Policy 6.1 of the One Plan.

8. The approach ultimately dictates that effects on indigenous biodiversity are to be considered at a 'high level' only. DOC says that this is not possible. Understanding adverse effects involves:

⁶ E.g. Forbes EIC at [95] "*The package performs well against biodiversity offsetting principles, although not all principles are strictly met. As the proposed gains are greater than the losses, the treatments proposed are not out-of-kind, and the areas and types of biodiversity have been balanced using Table 6.A.1, I consider the positive effect package to be conservative. In my opinion the package is one from which an overall gain in biodiversity can be expected.*" (Emphasis)

⁷ McLeod EIC at [347(a)(i)].

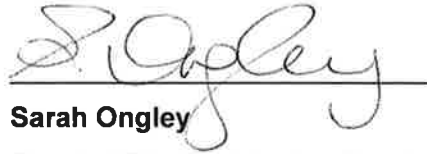
⁸ *New Zealand Transport Agency v Architectural Centre Inc* (Basin Bridge decision) [2015] NZHC 1991 and *Queenstown Airport Corp v Queenstown Lakes DC* [2013] NZHC 2347 – the latter decision stating that the change to the position of the words "subject to Part 2" in the middle of the chapeau did not alter the effect of the phrase as making clear that Part 2 matters are to prevail over other considerations in the event of a conflict, a matter discussed in *McGuire v Hastings DC* [2002] 2 NZLR 577 (PC).

- a) Identifying the receiving environment;
 - b) Identifying the actual and potential effects on that environment;
 - c) Assessing the impact of those effects; and
 - d) Identifying what measures are proposed to avoid, remedy or mitigate (or in this case offset) those effects.
9. Dr Martin's evidence raises issues with a) – d) above including:
- 9.1. lack of survey for terrestrial invertebrates, identification of which may be critical for the appropriateness of the Project's footprint;
 - 9.2. uncertainty as to where the loss is to occur;
 - 9.3. uncertainty of the sites for the proposed gains;
 - 9.4. inability to determine extent of restoration sites, or 'ECR's', when the degree to which those sites needs to be improved is uncertain ('additionality').
10. DOC's experts have been involved in extensive consultation with NZTA. DOC now questions the value of further expert conferencing when it is fundamentally problematic to assess mitigations/offsets at a conceptual level.
11. Similar issues have been expressed in the section 42A Report (terrestrial ecology).⁹
12. DOC considers that potentially significant adverse effects on significant indigenous biological diversity cannot be addressed in a conceptual or 'high-level' way. It is not possible for experts to assess essential mitigations/offsets/compensation when they have not yet been developed. This means that such effects are potentially unaddressed or, at least, unable to be understood.
13. Counsel has corresponded with Counsel for Applicant in relation to these concerns, and I attach a copy of that correspondence for the Panel's information.¹⁰ Counsel will, in any event, be attending the first day of the hearing and so will be available to address the Panel on this issue.

⁹ E.g. Lambie at [127] "*The only "proof" we have that there is a net-gain is that NZTA are offering up a 10:1 ECR. This is a net-gain in areal extent only, and only if it can be achieved. Ecological equivalence is yet to be demonstrated for effects on bats and lizards because of the reliance on management plans, and the proof offered for invertebrates is at best, hypothetical.*"

¹⁰ Letter S Ongley to D Randal dated 13 March 2019 and reply dated 14 March 2019.

14. The focus in this Memorandum on section 6(c) should not be taken to mean that DOC does not hold similar concerns regarding other section 6 matters.¹¹

A handwritten signature in cursive script, appearing to read 'S. Ongley', is written over a horizontal line.

Sarah Ongley

Counsel for the Director-General of Conservation

Dated: 15/3/19

¹¹ For stream loss, at least the SEV methodology is more established as compared to the methodology(s) suggested by Dr Forbes for terrestrial indigenous biodiversity offset/compensation.

13 March 2019

Mr David Randal
Buddle Findlay
WELLINGTON

By email: david.randal@buddlefindlay.com

Dear David

Te Ahu a Tūranga – Manawatū Tararua Highway

1. Further to previous discussions DOC/NZTA on the level of information provided for ecological adverse effects for the NOR, the experts for the Director-General of Conservation have considered the evidence lodged by NZTA.
2. The Director-General of Conservation considers that NZTA should seek an adjournment of the hearing so that the Hearings Panel have sufficient information before it. In the circumstances of this Project, this is likely to require applications for the recourse consents.
3. Although the approach taken by NZTA may be acceptable in an urban or even a pastoral environment, key adverse effects for the Manawatu Gorge Project include potentially significant effects on indigenous biodiversity values. Although those matters would, no doubt, be thoroughly considered by the Horizons Regional Council, DOC considers that they must also be addressed in this process, under s171 of the RMA. On current information it appears to the Director-General that there is a conflict between the Project and the relevant planning documents.
4. The difficulty that the Director-General's experts have is with the conceptual level at which mitigations are able to be proposed. A full understanding of the effects must include not only identifying the actual and potential effects, but also identifying measures proposed to avoid, remedy, mitigate (or in this case offset) those effects.¹ Unfortunately, without further detail of mitigation/offsets/compensation it simply cannot be known whether the effects of a specific design within the envelope are to be acceptable. The Director-General's experts are forced to assess the Project on a 'worst case' scenario, and as such are not able to support any recommendation to confirm the requirement. That is, it cannot be alleged at present that the proposed gains would be greater than the losses. It also seems rather pointless to be discussing ECRs as essential offset or compensation for potentially significant adverse effects under s6(c), when Dr Forbes has stated that ECRs would need to be reassessed once the restoration sites are confirmed.²

¹ Full details of mitigations are required by form 18 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003, for this reason.

² Joint Witness Statement 22 February 2012, Dr Forbes and Dr Martin, at [10(b)]. Forbes EIC at [62] regarding the transaction for wetlands and at [90] "As restoration sites are currently unconfirmed, it is difficult to confirm the precise level of gain that restoration activities would yield."

5. I have been instructed to raise these concerns with the Hearings Panel but would like to discuss them with you first.

Yours faithfully

A handwritten signature in black ink, appearing to read 'S. Ongley', written in a cursive style.

SARAH ONGLEY
email: sarah@ongley.co.nz

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14 March 2019

To
Sarah Ongley
Barrister

From
David Randal

By Email
sarah@ongley.co.nz

Dear Sarah

Te Ahu a Turanga; Manawatū-Tararua Highway

1. Thank you for your letter of 13 March 2019, and for raising your client's concerns with me directly before communicating them more broadly. I would welcome the opportunity to discuss these matters with you, as you have suggested.
2. I appreciate that some experts working in the resource management field may not have come across a 'designation-only' process before, and I agree that the process gives rise to some concepts to be worked through (as will be explained to the Hearing Panel at the hearing).
3. I understand from your letter that there is a degree of acceptance that the assessment of adverse effects (by the experts advising my client) has been robust. As you know, considerable work has gone into that assessment, potential differences of view between experts as to methodology and approach have been ironed out, and 'envelopes' set to ensure that effects are **capable** of being effectively addressed in accordance with the relevant guidance.
4. Further, in my view it is clear that a 'worst-case' approach to assessment, bearing in mind the flexibility inherent in a designation corridor (albeit tempered by the 'envelopes' proposed), is the correct way to have approached the assessment.
5. Rather, I understand your client's concerns to relate to uncertainty about how the project's adverse effects will be offset and/or compensated for.
6. The evidence of the New Zealand Transport Agency ("**Transport Agency**") witnesses forms the basis for its legal case on that issue, but it can be summarised as follows:
 - (a) The Transport Agency has proposed a designation condition that requires the project to achieve a 'net biodiversity gain' outcome. On that basis alone, in response to one comment in your letter, the Hearing Panel and participants in the process can absolutely be assured that a net gain will be the outcome – that is the legal effect of the condition. Put another way, the proposal will not be able to proceed unless that outcome can be demonstrated.

- (b) Other conditions enshrine the central role that your client and others (including iwi) will play in developing the package of measures to achieve that outcome.
 - (c) The Environmental Compensation Ratios ("ECRs") queried in your letter are put forward on an assumed basis of planting into pasture, and are proposed to be fixed in conditions as key 'building blocks' towards a net-gain outcome. That being the case, in my view it is certainly incumbent on the experts to discuss the appropriateness of the ECRs. Additional measures may be required, however, over and above the ECRs – hence the condition requiring additionality to be considered, and enshrining the net-gain outcome.
 - (d) If your client's concern is that the Transport Agency has not yet secured the property interests necessary to implement planting and other measures, I would observe that nor has the Transport Agency secured the property interests necessary to impact on the valued habitats. The Transport Agency is well aware that it will have to implement a package of measures to address adverse ecological effects (while in the meantime putting in place incentives for the designers to minimise those effects), and that it will need to acquire the relevant land interests to do that.
7. More generally, people in the Manawatū and Tararua (and beyond) are experiencing very difficult issues arising from the closure of the Gorge, including risks to personal safety and wellbeing, so the Transport Agency is doing all it can to implement the project as quickly as possible.
 8. The pressing need for the project has underpinned the Transport Agency's approach of seeking designations in advance of applying for resource consents, as explained in the evidence filed on behalf of the Transport Agency (see the statement of Lonnie Dalzell).
 9. In that light, the Transport Agency would be grateful for the support of your client for its efforts to push ahead as quickly as possible, with appropriate safeguards (including those summarised above) to ensure that important ecological values are appropriately addressed.
 10. In particular, if there is any further assurance on these issues or wider assistance that the Transport Agency can give the representatives of the Department, please let me know.
 11. Thank you again for raising these concerns with me directly. As I say, it would be good to have an opportunity to discuss them with you in more detail before things proceed any further.

Yours sincerely



David Randal
Partner

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