

Before the

MACKENZIE DISTRICT COUNCIL

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

**of Plan Change 19 to the
Mackenzie District Plan**

**Further legal submissions for the
DIRECTOR-GENERAL OF CONSERVATION**

11 December 2018

Director-General of Conservation

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MAY IT PLEASE THE COMMISSIONERS

- 1) These submissions address the panels' minute of 4 December 2018, in which directions were made to provide:
 - a) additional legal submissions on the precautionary approach discussed during the hearing; and
 - b) a summary specifying the submissions relevant to Mr Grant's evidence and the relief being sought.

Precautionary approach

- 2) At the hearing Counsel submitted that a precautionary approach is appropriate when enabling any activity which has potential to increase pressure on braided river species.
- 3) The precautionary approach, and the precautionary principle, were considered by the Environment Court in *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66 (*Telecom*). The Court stated the precautionary principle refers to an approach to risk management when there are uncertainties and environmental risks that need to be managed while taking those uncertainties into account, noting that the principle has become a norm of international law linked to sustainable development¹.
- 4) The precautionary principle derives from the Rio Declaration's Principle 15² which states:

"In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."
- 5) An element of anticipation is central to Principle 15, which reflects that effective environmental measures need to be based on action which takes a long-term approach, and which anticipates changes, including developing scientific knowledge.
- 6) *McIntyre v Christchurch City Council* [1996] NZRMA 289, is an earlier case (dealing with similar issues to those in *Telecom*), in which the Planning Tribunal cited an Australian

¹Royden Somerville QC, A Public Law Response to Environmental Risk. (2002) 10 Otago LR 143

² Rio Declaration on Environment and Development adopted at the *United Nations Conference on Environment and Development*, Rio de Janeiro, 3-14 June 1992, [1992] International Legal Materials 876,879

case (Leatch v National Parks and Wildlife Service and Shoalhaven City Council (1993) 81 LGERA 270) describing the precautionary principle as:

“a statement of common sense ... It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities), decision-makers should be cautious.”

- 7) Discussing the applicability of the precautionary principle in RMA decision-making, the Court in *Telecom* noted that in New Zealand the correct position is that *“the RMA is precautionary, and thus justifies a precautionary approach”*.³
- 8) The Court stated that the precautionary approach applies when there is a threat of serious or irreversible damage: a lack of certainty about the threat does not mean no action should be taken to minimise risk. Section 3(f) of the RMA was identified as an example of the way in which the precautionary approach is inherent in the Act as it provides that the term **effect** includes any potential effect of low probability which has a high potential impact.
- 9) The Court considered a precautionary approach is already implicit in the Act and emerges in the flexibility of the standard of proof applied in *“the weight given to evidence that has only been “proved” to a low standard.”*⁴
- 10) The issue for determination, therefore, becomes the weight to be accorded to evidence. The approach the Environment Court takes is that those opposing an activity because of concerns over the chance of future adverse effects must demonstrate, evidentially, that there is a risk of harm⁵ (my emphasis). A mere assertion or suspicion of harm is not enough.
- 11) Where the risk that an activity may have adverse effects is supported by expert opinion, decision-makers have a duty to consider all the evidence, and the task becomes one of assessing the relative merits of the evidence and the weight it is to be given. When

³ *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66, 219

⁴ Note 3 at 223

⁵ Note 3 at

there is a threat of serious or irreversible damage it is appropriate to have regard to potential effects of low probability but high potential impact.⁶

12) That approach was supported by the High Court in *Francks v Canterbury Regional Council*⁷ in which the Court stated that while the RMA is not a no-risk statute, the sustainable management purpose of the Act necessarily entails a forward-looking process in which decision-makers are commonly required to make decisions about future events. The existence of risk is a matter of judgment, not proof.

13) In the subsequent decision⁸ on the same case (on an application for leave to appeal), the High Court stated that:

A number of themes were identified and discussed. These included that a “no risk regime” was incompatible with the very purpose of the Act being the sustainable management of natural and physical resources : s5. The health and safety of people in communities is not to be achieved at the expense of their economic well-being. Rather a balance is to be struck. The cases suggest that this is best achieved by assessing both the probability of an occurrence and its potential impact. If the potential impact is dire, then only a very small risk of its occurrence can be contemplated. Risk assessment is characterised as a matter of judgment, rather than factual proof, so that the application of a conventional standard of proof may be unhelpful. Finally, the authorities recognise the need for evidence as to the likely occurrence of events and their potential impact. It is inappropriate to proceed on the basis of subjective community perceptions unsupported by evidence.

14) The DGC’s case is not based on “subjective community perceptions”. Neither is it unsupported by evidence. In the evidence presented, the limits of the current scientific understanding have been acknowledged. However, that acknowledgement does not mean there is a complete absence of evidence, nor that the evidence that has been presented for the DGC can be treated as subjective evidence.

15) Mr Grant’s evidence was candid in that he acknowledged there have not been any probative peer reviewed studies on the effects of motorised craft on the relevant bird

⁶ Note 3 at 221

⁷ HC CHCH CIV-2003-485-001131

⁸ Above note 7, 15 February 2005 at 14

species. The absence of such research is unsurprising given the circumstances; including that:

- a) the relevant species are endangered and cannot be subjected to experimentation that may be harmful to them, and
- b) until recently, navigation bylaws restricted boat speeds on the relevant rivers (and potentially limited boating activity as a consequence).

16) Despite the lack of formal research directly assessing the effects of motorised craft on braided river birds, it would not be correct to conclude that there is a complete absence of evidence on which a decision can be made to include controls in the district plan.

17) Mr Grant's expert evidence is sufficient to support a finding that the potential impact of increasing the existing pressure on species is indeed dire. That is particularly so in the case of kaki, which are barely recovering from being very close to extinction.

18) Mr Grant's evidence referred to a study on the Dart River which confirmed that braided river birds' behaviours are affected by boat use of the river: their feeding was disrupted every time a boat passed by, and adult birds retreated from the wake. That study concluded "*it is incorrect to assume that braided river birds are not affected by jet boats, because jet boat wake changed their behaviour*".⁹

19) Mr Grant's opinion is that motorised craft on braided rivers cause a range of effects that will have an impact on birds, including wake wash, noise, turbidity and general disturbance, and those effects present both immediate and long-term risks to braided river bird species. He acknowledged that there has been little formal research on those effects, meaning it is not possible to quantify the potential impact of the effects, and that it would be very difficult to construct a formal study that would quantify the impact of adverse effects.

20) In my submission, an inability to quantify the potential impacts of adverse effects does not mean the effects themselves can be disregarded: there is sufficient evidence to support a conclusion that motorised craft do have adverse effects on birds, and therefore pose a risk of harm to the species. The evidence is clear that:

⁹ Evidence of A Grant at para 36-37

- a) adult birds are disturbed by motorised craft and their feeding behaviour changes, and
 - b) Chicks can be caught up in wake-wash (Mr Jolly acknowledged that on at least one occasion chicks have been observed being washed into the river by a jet-boat wake).
- 21) For critically endangered species such as kaki, where any additional adverse effect has a high potential impact on the population, it would be wrong to disregard that evidence solely on the basis that it can only be proved to a low standard.
- 22) In this case it is also relevant that the decision in question is about provisions in the District Plan. It is not an application for resource consent. The plan provisions will determine whether or not motorised craft can be used on the relevant rivers as of right, or whether their use is to be managed through the consenting regime.
- 23) If controls are included in the plan, it will be possible to assess a range of potential effects in any future application for resource consent, such as the frequency and timing of trips, intensity of effects such as noise, wake-wash, and numbers and types of craft that can be present in a location on any day or week or during particular times of the day or year.
- 24) Another important consequence of implementing a consenting regime is the ability to review conditions of consent. If a consent is granted and unanticipated adverse effects are identified, that could trigger a review of the conditions of consent pursuant to sections 128 and 129 of the Act.
- 25) By contrast, if the panel rejects the DGC's submission seeking the inclusion of controls in the plan, there will be no mechanism through which adverse effects (whether acute or chronic), can be managed.

Relief sought and relation to the evidence

- 26) The DGC's submission sought to include plan provisions that would allow motorised craft to be used on the Tasman, Cass, Godley and Dobson Rivers for specified purposes such as search and rescue, pest control and scientific research, and would otherwise make commercial and non-commercial motorised craft on those rivers a non-complying activity.

27) Detail of the relief sought is included below, with proposed additions and deletions marked up.

28) If implemented the inclusion of the relief proposed by the DGC would enable the specific effects of activities identified by Mr Grant to be managed, including the frequency and timing of trips.

Conclusion

29) A precautionary approach is consistent with the scheme of the RMA. In this case, there is a risk that adverse effects have high potential impact on endangered indigenous species. Weight can be given to evidence which can only be proven to a low standard, to enable activities causing those effects to be managed through the District Plan.



Susan Newell
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Department of Conservation

Plan Change 19 – Tracked changes showing relief sought by DGC

Section 7 - Rural Zone Rules new Clause 7A – Activities on or Within Waterbodies

Changes sought to notified text by DOC indicated with Additions in double underline and deletions in ~~double strikethrough~~

C Amend Section 7 - Rural Zone Rules by adding the following new Clause 7A – Activities on or Within Waterbodies

7A ACTIVITIES ON OR WITHIN WATERBODIES

7A.1 Activities on or within Lakes Tekapo, Benmore and Ruataniwha and all rivers other than the Godley, Tasman, Cass, Dobson, Opihi and Opuha Rivers

7A.1.1 Permitted Activities on or within Lakes Tekapo, Benmore and Ruataniwha and all rivers other than the Godley, Tasman, Cass, Dobson, Opihi and Opuha Rivers

7A.1.1.a Use of motorised and non-motorised craft for search and rescue, civil emergency, scientific research and monitoring and pest control purposes.

7A.1.1.b Non-commercial motorised and non-motorised activities. Where it is a motorised activity, access to the waterbody must be via a formed accessway or boat ramp.

7A.1.1.c Craft on the surface of waterways used for accommodation where all effluent is contained on board the craft.

7A .1.2 Discretionary Activities on or within Lakes Tekapo, Benmore and Ruataniwha and all rivers other than the Godley, Tasman, Cass Dobson, Opihi and Opuha Rivers

7A.1.2.a Commercial motorised and non-motorised activities

7A.1.2.b Jetties and boat ramps

7A.1.3 Non-complying Activities on or within Lakes Tekapo, Benmore and Ruataniwha and all rivers other than the Godley, Tasman, Cass Dobson, Opihi and Opuha Rivers

7A.1.3.a Craft on the surface of waterways used for accommodation where effluent is not contained on board the craft.

7A.2 Activities on or within Lake Pukaki

7A.2.1 Permitted Activities on or within Lake Pukaki

7A.2.1.a Use of motorised and non-motorised craft for search and rescue, civil emergency, scientific research and monitoring and pest control purposes.

7A.2.1.b Non-commercial non-motorised activities

7A.2.2 Non-complying Activities on or within Lake Pukaki

7A.2.2.a Commercial non-motorised activities

7A.2.2.b Jetties and boat ramps

7A.2.3 Prohibited Activities

7A.2.3.a Commercial motorised activities

7A.2.3.b Non-commercial motorised activities

7A.2.3.c Craft on the surface of waterways used for accommodation.

7A.3 Activities on or within Lakes Alexandrina and McGregor

7A.3.1 Permitted Activities on or within Lakes Alexandrina and McGregor

7A.3.1.a Use of motorised and non-motorised craft for search and rescue, civil emergency, scientific research and monitoring and pest control purposes.

7A.3.1.b Non-commercial non-motorised activities (excluding yachts and sail-boats).

7A.3.2 Discretionary Activities on or within Lakes Alexandrina and McGregor

7A.3.2.a Commercial non-motorised activities (excluding yachts and sail-boats).

7A.3.3 Non-complying Activities on or within Lakes Alexandrina and McGregor

7A.3.3.a Jetties and boat ramps

7A.3.3.b Craft on the surface of waterways used for accommodation

7A.3.4 Prohibited Activities on or within Lakes Alexandrina and McGregor

7A.3.4.a Commercial motorised activities

7A.3.4.b Non-commercial motorised activities

7A.3.1.c Commercial soil-boats or yachts

7A.3.1.d Non-commercial sail-boats or yachts

7A.4 Activities on or within the Godley, Tasman, Cass Dobson, Opihi and Opuha Rivers

7A.4.1 Permitted Activities on or within the Godley, Tasman, Cass Dobson, Opihi and Opuha Rivers

7A.4.1.a Use of motorised and non-motorised craft for search and rescue, civil emergency, scientific research and monitoring and pest control purposes.

7A.4.1.b Non-commercial non-motorised activities

7A.4.2 Discretionary Activities on or within the Godley, Tasman, Cass Dobson, Opihi and Opuha Rivers

7A.4.2.a Jetties and boat ramps

7A.4.2.b Commercial non-motorised activities

7A.4.3 Non –complying Activities on or within the Godley, Tasman, Cass Dobson, Opihi and Opuha Rivers

7A.4.3.a Commercial motorised activities

7A.4.3.b Non-commercial motorised activities

7A.4.3.c Craft on the surface of waterways used for accommodation

