

Before the Board of Inquiry

Waterview Connection Project

in the matter of: the Resource Management Act 1991

and

in the matter of: A Board of Inquiry appointed under s 149J of the Resource Management Act 1991 to decide notices of requirement and resource consents applications by the NZ Transport Agency in relation to the Waterview Connection Project

Representation and legal submission on behalf of the

Forest and Bird Motu Manawa Restoration Group to the Board of Inquiry

William L (Bill) McNatty

Dated: 7 March 2011

Hearing Date Start: 7 February 2011

May it please the Board

1. My full name is William (Bill) Leslie McNatty.

1.1. I have been engaged as an advocate for the Royal Forest and Bird Protection Society Inc (the Society) in the matter of the Waterview Connection Proposal and of the Society's grave concerns regarding certain aspects of the proposal.

1.2. My qualifications are a BSoc Sc (Hons) (2001) majoring in psychology from the University of Waikato; and MEnvLS (2008) School of Law, University of Auckland.

1.3. I have for the last 10 years acted as an advocate; in matters before Local Authority Planning and Consent committees, in matters before the Environment Court and in matters before Parliamentary Select Committees.

1.4. I am the proprietor of a consultancy and contracting business located at Helensville

2. Clarification

2.1. I ask the Board of Inquiry to note that the submissions 217-1 and subsequent documentation are in the name of the Forest & Bird Motu Manawa Restoration Group.

2.2. I request that the Board note for the record that while there are many branches and interest groups within Forest and Bird, there is however only a single legal entity; that of the Royal Forest and Bird Protection Society Inc.

2.3. Should the Board consider it either necessary or appropriate the Society will seek leave to be considered the successor as per RMA (2A, (1.) and (2.))

3. General statement

The Society does not in principle oppose the Waterview Connection Proposal, however it considers that NZTA has given insufficient regard to the status of the Motu Manawa -Pollen Island Marine Reserve when determining adverse environmental effects, including, historical, immediate, accumulated, real and potential and the subsequent consequences of those adverse effects specific to the marine reserve.

4. The Society and NZTA are having on-going discussions in order to resolve issues. The following matters unresolved:

4.1. The level of remedy or mitigation for the adverse environmental effects stemming from loss of a substantial area of the Marine Reserve; and

4.2. The effective management of the adverse effects of sediment contaminant levels within the Waterview Basin portion of the Motu Manawa -Pollen Island Marine Reserve including;

4.2.1. Historical liability apportionment of the contaminated sediment

4.2.2. Accumulation effects of the contaminated sediment

4.2.3. How to avoid, remedy, or mitigate

4.2.3.1. the historical liability apportionment of the contaminated sediment

4.2.3.2. the accumulation effects of the contaminated sediment

5. The Society sees merit in further caucusing.

Intention(s)

6. It is the Society's intention to address

6.1. the point of law raised by His Honour;and

6.2. why the status and applicability of the RMA condition in the Marine Reserve Gazette Notice should be considered; and

6.3. existing use rights

6.4. the matter of a permitted baseline.

6.5. the matter of adverse effects

6.6. how the Board may consider matters within NZCP 2010

Question of Law

7. Question of Law

7.1. His Honour has raised the question in this hearing on the legal point¹

"...whether, if (a) we have the power and (b) whether we should, if we do have the power, direct that anything occur in relation to the existing, or more particularly historical environment as opposed to that which the witness says has been his brief from NZTA. ..."

Further in a commentary of the relevance of historical adverse effects posited whether "where the son might as a matter of law to deal with the evils inflicted by the father."².

7.2. In response the Society will address the matters

7.2.1. of authority; and

¹ Transcript NZTA Waterview Connection Proposal 15 February 2011 Page307, 309

² Transcript NZTA Waterview Connection Proposal 15 February 2011 Page 309

7.2.2. of direction to address the historical environment.

7.3. On the point of authority, the Society submits that the answer must be contained within the statutory provisions that enable a Board, the directions of the Minister and the matters it must consider. s 149P (2) for consents and s 149P (4) for designations.

s 149P (2) A board of inquiry considering a matter that is an application for a resource consent must apply sections 104 to 112 and 138A as if it were a consent authority.

s149P (4) A board of inquiry considering a matter that is a notice of requirement for a designation or to alter a designation—

(a) must have regard to the matters set out in section 171(1) and comply with section 171(1A) as if it were a territorial authority; and ...

7.4. The Society submits that in an application for a resource consent, the Board can authoritatively direct itself to consider relevant aspects of adverse historical effects within the context of s 104 (c)

any other matter the consent authority considers relevant and reasonably necessary to determine the application.

7.5. The Society submits that in an application for a designation the Board can authoritatively direct itself to consider aspects of adverse historical effects within the context of s 171 (1) d

any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.

7.6. The Society submits that the relevant and reasonably necessary consideration of adverse historical effects should be limited to those matters where:

7.6.1. an action (or non action) caused historical effects that contributed to a degraded state of the environment.

7.6.2. the consequences of those actions (or non actions) are a basis for consideration when determining the matter of accumulative adverse effects

7.7. In support of the Board considering the “historical environment” the Society relies on the meaning of effect to include that of s 3 (c) and s 3 (d) of the Resource Management Act (RMA) . S (3) (c) any past, present or future effect; and s (3) (d) any cumulative effect which arises over time or in combination with other effects.

Meaning of effect

*In this Act, unless the context otherwise requires, the term **effect** includes—*

- (a) any positive or adverse effect; and*
- (b) any temporary or permanent effect; and*
- (c) any past, present, or future effect; and*
- (d) any cumulative effect which arises over time or in combination with other effects—
regardless of the scale, intensity, duration, or frequency of the effect, and also includes—*
- (e) any potential effect of high probability; and*
- (f) any potential effect of low probability which has a high potential impact.*

8. On whether the historical effect is relevant within the purpose of the RMA, the Society relies on sec5 (2) (c)

avoiding, remedying, or mitigating any adverse effects of activities on the environment.

9. The Society submits that the word “remedying” must be used within the simple meanings of the English Language.

10. Remedy

10.1. Definition from the Oxford dictionary ³

10.1.1. remedy

noun

- *a means of counteracting or eliminating something undesirable*
- *a means of legal reparation*

verb

- *set right (an undesirable situation)*

11. The society submits that within the context and obligation of s 5 (2) (c) and the definition of effect within s (3) the historical context of an effect is unable to be ignored.

Motu Manawa – Pollen Island Marine Reserve

12. History of the condition attached to the Gazette Notice

13. The Gazette Notice 9th October 1995 for the creation of the Motu Manawa (Pollen Island) Marine Reserve is included in full in the evidence⁴ of Marilyn Fullam from the Department of Conservation. The exception clause within the Gazette notice is below for completeness

³ http://www.oxforddictionaries.com/view/entry/m_en_gb0699840#m_en_gb0699840 as at 4 March 2011

⁴ Marilyn Fullam, Department of Conservation Evidence 32-1, 15 December 2010, Attachment 1

3 Condition of declaration

(1) The declaration contained in clause 2 is subject to the condition that where, at the commencement of this order,—

(a) a contaminant is being discharged within the marine reserve or into the marine reserve; and

(b) all legal requirements in relation to the discharge within the marine reserve or into the marine reserve of the contaminant referred to in paragraph (a) are being complied with,—

the discharge of that contaminant may, subject to the provisions of the Resource Management Act 1991 and subject to continued compliance with all other legal requirements relating to the discharge of that contaminant, continue.

*(2) In this clause the terms **discharge** and **contaminant** have the meanings given to them by section 2(1) of the Resource Management Act 1991.*

14. It is the Society's contention that Transit NZ and NZTA as its successor has failed to comply with the Resource Management Act provision within the above exception clause and is allegedly in breach of the discharge offenses of the Marine Reserves Act. While the Society fully acknowledges that such alleged breach of the Marine Reserves Act (MRA) is not a matter for the Board to consider, the Society submits that the matter of actions (or non actions) by NZTA relevant to stormwater discharge from the SH16 motorway complex into the coastal marine area is such a matter for the Board.

15. It is common ground that the local authority Auckland City Council sought and obtained from the Auckland Regional Council a Comprehensive Stormwater Discharge Consent within the General Authority provisions of the Transitional Auckland Regional Plan – Coastal 1991 . Mr Burn, Planner for NZTA in examination confirmed that he knew of no such similar comprehensive stormwater discharge right for Transit or its successor⁵.

16. A search by Dr M Bellingham of the Royal Forest and Bird Protection Society of ARC stormwater discharge consents⁶ found that apart from the three consents identified as ARC consent numbers 30235, 35626 and BH8735⁷, no stormwater discharge consents for impermeable motorway surfaces exist, nor apart from the application before the Board is there any evidence of an application for a stormwater discharge consent from the SH16 causeway to the coastal marine area.

Extinguishment of existing use rights

17. The Society acknowledges and notes that:

⁵ Transcript New Zealand Transport Agency Waterview Connection Proposal – 18 Feb 2011 page 487

⁶ M Bellingham evidence page4 para 10 dated 17 Dec 2010 rev 1 March 2011

⁷ technical report G15 page 21 and 22,

17.1. the existing SH16 causeway constructed in the early 1950s was lawfully established.

17.2. the activity of construction and operation (including the discharge of contaminated stormwater) of the SH16 motorway if not consented is reasonably captured by the principles of existing use⁸ within sec 9, 10, 10A and 20A of the RMA⁹

17.3. sec 10 (4) excludes certain activities including those within the coastal marine area

17.4. while activity in the coastal marine area is specifically excluded by sec 10(4), sec 10 (3) does set out a threshold principle (with supporting case law¹⁰) that sets a legal test that failure to meet extinguishes existing use rights.

“the effects of the activity are the same or similar in character, intensity, and scale to those which existed before...”

17.5. Sec 20 A(1) (b) and sec 20A (2) carry forward similar wording to that of s 10 (3)

“ the effects of the activity are the same or similar in character, intensity, and scale to the effects that existed before ...”

18. The Society submits that the consequence of granting of consents for the construction, operation, (including stormwater discharge) of the Patiki interchange 2000 altered the volume of traffic effects on the adjacent non consented motorway, such they substantially increased in intensity and scale of the activity prior to the operation of the interchange.

19. An alternate limb for extinguishing existing rights is drawn from the Transitional Auckland Regional Plan – Coastal 1991 where existing storm water discharge rights in transition from the Water and Soil Conservation Act to the RMA were offered legitimacy noting an expiry on the 10th anniversary of the RMA that is 2001

20. The Society submits that either under cl 17 or cl 18 above NZTA or its predecessor Transit NZ should have applied for stormwater discharge consents from SH16 to the coastal marine area (CMA) in 2001.

⁸ For commentary on principles and case law regarding “existing use” ref *Lendich Construction Ltd v Waitakere City Council* (ENC, 20/07/99)

⁹ s10, s10A and s20A Resource Management Act (1991) as amended by the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31).

¹⁰ See paras 77-82, *Hinsen v Queenstown Lakes DC* [2004] NZRMA 115 (EnvC).; following *Te Kupenga o Ngati Hako Inc v Hauraki DC* (1999) 5 ELRNZ 533;

Statutory baseline

21. The Society contends that by failing to apply by 2001 for a storm water discharge consent from SH16 to the CMA NZTA or its predecessor Transit NZ voided its right to continue to discharge into the Motu Manawa - Pollen Island Marine Reserve under the MRA.
22. The Society submits that storm water discharge is an adverse effect allegedly having voided its legitimacy under a statute identified by Policy 5 of the NZCPS 2010. That is the same Policy whereby the Board is required to have regard to the purposes for which the land or waters are held or managed, and is an adverse effect in relation to the purpose of the Marine Reserves Act

For completeness Policy 5 NZCPS 2010 is included in full

Policy 5 Land or waters managed or held under other Acts

(1) Consider effects on land or waters in the coastal environment held or managed under:

(a) the Conservation Act 1987 and any Act listed in the 1st Schedule to that Act; or

(b) other Acts for conservation or protection purposes;

and, having regard to the purposes for which the land or waters are held or managed:

(c) avoid adverse effects of activities that are significant in relation to those purposes; and

(d) otherwise avoid, remedy or mitigate adverse effects of activities in relation to those purposes.

(2) Have regard to publicly notified proposals for statutory protection of land or waters in the coastal environment and the adverse effects of activities on the purposes of that proposed statutory protection.

23. The Society submits that the derived statutory baseline for non permitted discharges from SH 16 into the Motu Manawa –Pollen Island Marine Reserve under the MRA is zero and that the required consideration of (1) b) c) and d) of the NZCPS 2010 is sufficient to warrant selective scrutiny of the status of the adverse effect including its accumulative future effect. The Society submits that there is requirement to consider avoiding remedying and mitigating adverse effects for two separate purposes.
24. The Society is not attributing the total of the sediment contaminant levels within the Waterview embayment portion of the Motu Manawa- Pollen Island Marine Reserve to NZTA or its predecessors. It is however mindful of the contaminant modelling work reported in Technical Report G30 where the author of that report identified a quantum of contaminant from SH16 to the Waterview Basin. (ref para 27 below)

Adverse effects

25. Historical adverse effects.

The Waterview Basin portion of the Motu Manawa – Pollen Island Marine Reserve has since the formation of the SH16 causeway endured an acceleration of sedimentation due to the restriction of the causeway on the pre causeway natural flushing mechanism (coastal process). The change in rate of sedimentation has brought instances where the level of accumulated contaminants within the embayment have been recorded at critical levels

26. Accumulated adverse effects

The technical Report G30 acknowledges¹¹ that with the proposed stormwater treatment devices contaminated sediment will accumulate within the Waterview Basin portion of the Motu Manawa- Pollen Island Marine Reserve albeit at slower rates than exist currently.

27. Quantification of contribution to adverse sedimentation effects

It is common ground that contaminated sediments enter the Waterview Basin part of the Motu Manawa – Pollen Island Marine Reserve from a variety of sources, principally; Oakley Creek, Auckland City storm water discharge network, industrial sites on and adjacent to the Rosebank Peninsula and the SH16 motorway causeway. The Technical Report G30¹² quantifies the estimated contaminant load into the Waterview Basin from the current SH16 causeway

At present, the existing SH 16 motorway area within the Project is estimated to generate 29 tonnes of sediment, 379 kg of zinc and 56 kg of copper annually.

28. The Society submits that the proposed contaminant discharges should be improved in terms of s 5 (2) c *avoiding, remedying, or mitigating any adverse effects of activities on the environment.*

From Salmon Environmental Law Commentary

The words “effect” and “environment” appear together only in s [5\(2\)\(c\)](#) which appears to exclude consideration of positive effects in the foregoing parts of that section. See [BP Oil NZ Ltd v Waitakere CC W037/94, 3 NZPTD 456](#). See also [Campbell v Southland DC W114/94, 4 NZPTD 6](#), where it was held that s [5\(2\)](#) is not about achieving a balance between benefits occurring from an activity and its adverse

¹¹ G30 Assessment of Associated Sediment and Contaminant Loads, page 23

¹² *ibid*

effects. The definition requires adverse effects to be avoided, remedied or mitigated irrespective of the benefits which may accrue.¹³

The decision noted in [Winstone Aggregates Ltd v Papakura DC](#)¹⁴ is a requirement to consider the terms “avoid, remedy or mitigate” as to be read conjunctively.

29. The Society submits that under the current proposed stormwater treatment levels NZTA has failed to achieve the best practicable options (BPO) available.

30. In support the Society notes that in the case¹⁵ Auckland Volcanic Cones Society Inc v Transit New Zealand Ltd, Transit NZ offered by agreement sediment treatment to achieve the removal 90-95% TSS (Total Suspended Solids)

Permitted baseline

31. Mr Burn, Planner for NZTA expressed in his rebuttal evidence¹⁶ that he disagreed with the s42a report that indicated

“...The ARC Report notes that with respect to the suite of regional resource consents the Project’s scale, geographical extent and construction footprint is significant as to dwarf the stated permitted thresholds. The permitted baseline therefore should not apply in these circumstances”

His response in para 36

“...the permitted baseline becomes important because it provides a measurable “benchmark” against which to determine whether effects may be considered to be minor in terms of sections 104D and 104(2) of the RMA.

And in para 38

“...permitted baseline also has relevance when considering measures to address the effects of the proposal.”

32. The Society contends that the conclusion offered by Mr Burn in his rebuttal evidence appears to be an attempt to create an impression that the existing physical environment is permitted, and only the effects of the current proposal should be measured and given effect to in mitigation.

33. The Society notes that prior to the RMAA 2009 s 104 (2) existing use and other legal activities were available to be disregarded within a permitted baseline. Since the amendment the discretion to disregard an effect is limited as permitted either by a national environmental standard or the plan. s104(2)

¹³ Commentary – Salmon Environmental Law RM5.06 Effects on the environment

¹⁴ See paras 16-18 and 24-25, [Winstone Aggregates Ltd v Papakura DC A049/02](#), 7 NZED 381.

¹⁵ Auckland Volcanic Cones Society Inc v Transit New Zealand Ltd (ENC, 18/10/02)

¹⁶ Owen Burn Rebuttal Evidence (Resource Consents) par 33-38, 3 Feb 2011

When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.

34. Under examination both Drs Bell and Fisher responded that their brief was to take the existing environment as given and report on the probable effects of the proposal on that environment.
35. The Society notes the possibility that the project scoping was prepared at a time that existing use and/or legally permitted activities were able to be considered within a permitted baseline.
36. The Society submits that while s 104(2) is theoretically available to the Board, within the context of the project and in regard to the SH16 proposed works, there is no national environmental standard nor plan that permits the discharge of contaminated stormwater to the coastal marine area.

Relief

37. The Society seek the following relief

37.1. Relief for the loss of area of Marine Reserve

37.1.1. An enforceably protected and appropriately funded management and restoration program applicable to the immediate areas of Motu Manawa Marine Reserve including Pollen Island and Trahern Island to be applicable for the duration of the project

37.2. Relief in regard to contaminant levels with the Waterview embayment portion of the Motu Manawa –Pollen Island Marine Reserve

37.2.1. An appropriately funded and managed program that will ensure the reduction of contaminant levels within the sediments of the Motu Manawa-Pollen Island Marine Reserve;or

37.2.2. In lieu of 38.1 above a mitigation fund specifically for resource management purposes and targeted at the restoration of saltmarsh and ecotone communities in the Auckland region; and

37.2.3. Any further remedy or mitigation the Board considers appropriate

Summary

38. The Society reaffirms that it does not oppose the Waterview Connection Project in principle.
39. The Society submits that with regard to the Motu Manawa- Pollen Island Marine Reserve, NZTA has failed to fully recognise the status of the Reserve in relation to the project.
40. The Society submits that NZTA has failed to consider that adverse effects include historical effects and given light regard to future and accumulated effects.
41. The Society is mindful in closing to refer to s 17 (1) of the RMA where every person has a duty although not strictly enforceable by reason of s17 (2)

17 Duty to avoid, remedy, or mitigate adverse effects

(1) Every person has a duty to avoid, remedy, or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of the person, whether or not the activity is carried on in accordance with—

(a) any of sections 10, 10A, 10B, and 20A; or

(b) a national environmental standard, a rule, a resource consent, or a designation.

The Society thanks the Board for consideration of this representation

Dated 7 March 2011

Auckland.

William L (Bill) McNatty



Advocate

Royal Forest and Bird Protection Society Inc,