

23 FEBRUARY 2026

MEMORANDUM

To The Expert Panel, Ryans Road Industrial Area [FTAA-2504-1054]

From Bridget Bailey, Vanessa Hamm, Holland Beckett

Precautionary Principle - Fast-track Approvals Act 2024

1. We set out below our advice on the following matters as directed in Minute 9 of the Expert Panel for the Ryans Road Industrial Area:
 - (a) What is the precautionary principle and what does it require of decision-makers?
 - (b) Is the precautionary principle available to consider by an Expert Panel when making a decision on an application under the Fast-track Approvals Act 2024 (FTAA)?
 - (c) How does application of the precautionary principle influence the assessments required under sections 81 and 85 FTAA?

What is the precautionary principle and what does it require of decision-makers?

What is the precautionary principle?

2. The precautionary principle is an approach that a decision-maker can apply when undertaking the evaluation of actual and potential effects under s 104(1)(a) of the Resource Management Act 1991 (RMA) where there is scientific uncertainty about the nature of an effect, the risk of it occurring and in the context of the significance of harm that may result if that effect does occur. The Environment Court in *Mahanga E Tu Inc v Hawkes Bay Regional Council*¹ succinctly defined the approach as:

“The short point is that what is required, if there is an unknown degree of risk, but possible significant adverse effects if the risk comes to pass, is that those undertaking whatever it is should be very careful in assessing what activities might be regarded as appropriate in that place.”²
3. We note that case law often both conflates and distinguishes the ‘precautionary principle’ and the ‘precautionary approach’, with the term being used interchangeably at times. The Courts have acknowledged that the precautionary approach as it applies in the RMA has evolved from the precautionary principle as established in the 1992 Rio Declaration. For the purpose of this advice, we have focused on the precautionary approach as it is generally applied in the RMA and considered its specific applicability to the FTAA.
4. The key cases that first considered the application of the precautionary approach in the RMA are *McIntyre v Christchurch City Council*³ and *Shirley Primary School v Christchurch City Council*,⁴ both regarding the risk of human health effects from potential adverse effects of telecommunication towers.

¹ *Mahanga E Tu Inc v Hawkes Bay Regional Council* [2014] NZEnvC 83.

² *Mahanga E Tu Inc v Hawkes Bay Regional Council* [2014] NZEnvC 83 at page 17.

³ *McIntyre v Christchurch City Council* PT A15/96.

⁴ *Shirley Primary School v Christchurch City Council* EnvC136/98 at page 114.

5. The Planning Tribunal in *McIntyre* considered the relevance of the precautionary principle under the RMA:

“On the general precautionary principle, we note that a consent authority is entitled to have regard to any other matter not listed in s 104(1) which it considers relevant and reasonably necessary to determine the application; and that the definition in s2(1) of the term ‘environment’ extends to include people. The purpose of the Act is to promote the sustainable management of natural and physical resources. The term “sustainable management” is described by reference among other things to enabling people to provide for their health and safety.

There may be resource consent applications in which a consent authority may consider it relevant and reasonably necessary to have regard to the precautionary principle. In the context of the Resource Management Act the principle can apply to people and their health as well as for the rest of the natural and physical environment. So a consent authority may allow its discretionary judgment to grant or refuse consent to be influenced by the precautionary principle to the extent consistent with the statutory purpose of promoting the sustainable management of natural and physical resources and with judicial exercise of that discretion.”⁵

6. Following *McIntyre*, the Environment Court in *Shirley Primary School* questioned the need for a separate ‘precautionary principle’ under the RMA for three reasons:

“First a precautionary approach is already implicit in the Act and emerges in the flexibility of the standard of proof applied by the Court and (as we shall see) in the weight given to evidence that has only been “proved” to a low standard (probability). Secondly such a “principle” is an unnecessary complication in an already complex statutory and factual matrix. Thirdly, application of the precautionary principle (or any of the other rules of thumb) to our decision under section 105(1) would lead to double-counting of the need for caution. If the appropriate standard of proof is on a sliding scale between the balance of probabilities and beyond reasonable doubt, depending on the impact of the effect, the fact is that the appropriate caution has been exercised when deciding under section 104(1)(a) what the effects are to be considered under section 105. If the Court applies the “precautionary principle” as another matter under section 104(1)(i)147 then the need for caution will have been considered twice.”⁶

7. The majority of the case law post-*McIntyre* and *Shirley Primary School* considers the precautionary approach in the context of activities involving application for aquaculture and the New Zealand Coastal Policy Statement (**NZCPS**) which expressly requires a precautionary approach in certain circumstances.⁷
8. The Court has also applied the precautionary approach in cases involving discharges to air and the use of geothermal resources where there was a regional policy direction requiring a precautionary approach when considering such applications.⁸

⁵ *McIntyre v Christchurch City Council* PT A15/96 at page 27.

⁶ *Shirley Primary School v Christchurch City Council* EnvC136/98 at 114.

⁷ Policy 3 of the NZCPS directs “Adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.”

⁸ See for example, *Rotokawa Joint Venture Ltd v Waikato Regional Council* A041/17 at 127-128, regarding an application to take geothermal fluid which involved a regional policy statement that required a precautionary approach for applications of this kind in certain circumstances. See also in *Allied Asphalt Ltd v Bay of Plenty Regional Council* [2024] NZEnvC 247 and *Swap Stockfoods Ltd v Bay of Plenty Regional Council* [2023] NZEnvC 1, both involving applications for air discharges in the Mount Maunganui Airshed. In those cases, the Court found that the regional policy statement policy required a precautionary approach to managing natural and physical resources which warranted a precautionary approach to the applications.

9. The Court has commented (albeit briefly) on the suitability of a precautionary approach generally under s 104 RMA in cases involving collision risk and traffic safety,⁹ the impact on international beef markets from concerns regarding animal health from effluent discharge consents¹⁰ and groundwater effects,¹¹ though the facts of these cases did not require the Court to apply the precautionary approach in detail.
10. The precautionary approach is also often considered in the context of whether an adaptive management framework is required for conditions (often following a policy or plan direction), but again is not restricted to conditions of this kind.
11. In our view, there has been a refinement of the application of the precautionary approach under the RMA to that first contemplated by *McIntyre*. The precautionary approach will be squarely in play for applications where there is a clear policy or plan direction requiring it to be considered (i.e. the NZCPS), but it is less commonly used by the Courts in the absence of a plan or policy direction when exercising their discretion under s 104 RMA to consider effects. The Courts have consistently noted that the RMA is already precautionary in nature given the wide definition of ‘effect’, ‘environment’ and the ability to consider potential effects of high probability in s 3(e) RMA, and potential effects of low probability but high potential impact in s 3(f) RMA.¹²
12. Overall, we do not consider there is anything in the RMA or case law that precludes the application of the precautionary approach in the absence of a policy or plan direction given the wide range of discretion available to a decision under s 104(1)(a) RMA, and the inherently precautionary nature of the RMA. Where a decision-maker choose to apply a precautionary approach, the below case establishes the principles that should be followed.
13. We note that we have not interrogated the issues for this application in detail as it is beyond the scope of the instruction, however we understand that broadly that the issues in contention are potential civil aviation safety effects. Civil aviation hazards have been held to be relevant effects under the RMA to the extent that they relate to human safety. The Court has recognised the importance of human safety in the purpose of the RMA in cases involving potential civil aviation hazard effects and have held that these effects must be considered.¹³
14. As noted above, the Environment Court in *McIntyre* held that the precautionary principle can apply to people and their health as well as the natural and physical environment. We therefore consider that a precautionary approach is available to issues involving human health and safety, noting again it must be applied within the principles of case law and the relevant statutory framework, as set out below.

What does a precautionary approach require of decision-makers?

15. The Supreme Court in *Environmental Defence Society v New Zealand King Salmon Company Ltd*¹⁴ summarised the principles of the precautionary approach as it applied to deciding resource consent applications as distilled by the Environment Court in *Sea-Tow Ltd v Auckland Regional Council*¹⁵:

⁹ *East Park Development Ltd v Auckland Council* [2012] EnvC 190 at [16].

¹⁰ *New Zealand Environmental Education Charitable Trust v Manawatu-Wanganui Regional Council* W057/02 at [77].

¹¹ *I&P Farming Ltd v Hawkes Bay Regional Council* [2025] NZEnvC 328.

¹² *Pierau v Auckland Council* [2017] NZEnvC 90 at [239]. See also *Ngati Kahu Ki Whangarao Co-Operative Society Ltd v Northland Regional Council* [2001] NZRMA 299 at [163], *Shirley Primary School v Christchurch City Council* EnvC136/98.

¹³ *Rotorua Regional Airport Ltd v Fischer* ENC A113/09 at [79], citing *Glentanner Park (Mount Cook) Limited Anor v Mackenzie District Council* W50/1994. Refer also *Aviation Activities Ltd v Mackenzie District Council* ENC C72/2000 at [13] and [27].

¹⁴ *Environmental Defence Society v New Zealand King Salmon Company Ltd* [2013] NZHC 1992 at [74].

¹⁵ *Sea-Tow Ltd v Auckland Regional Council* EnvC A066/06 at [462], as set out below:

- a. *Good environmental decision-making under the Act involves careful and balanced judgement. In many cases such a judgement is reached without the need to call in aid any principle of precaution; but in others,*

- (a) A careful balanced judgement is required; in some cases that may only be achieved by adopting a precautionary approach;
 - (b) The precautionary approach may be applied to influence the exercise of a discretion to the extent consistent with the purpose of the RMA;
 - (c) Even if there is a dispute of material fact, that does not necessarily mean that the precautionary approach must be adopted: rather, the obligation is to consider the evidence; and
 - (d) A precautionary approach should only be applied where there is scientific uncertainty or ignorance about the scope or nature of the relevant environmental harm; there needs to be a plausible basis, not just a suspicion or innuendo, for adopting the precautionary approach.
16. The Courts have held that a decision maker must consider the evidential basis for whether an effect exists, and that it would be taking the precautionary approach to an “unacceptable level” to refuse consent where the probability of effect is so remote as to take it beyond the level of ‘effect’ contemplated in the RMA.¹⁶
17. Turning to risk, the Courts have held that an assessment of risk is part of the consideration of whether a precautionary approach should be adopted, but has consistently recognised that the RMA is not a no-risk statute and the RMA does not require the elimination of all risk.¹⁷
18. The Supreme Court in *Sustain Our Sounds Inc v New Zealand King Salmon Company Ltd*¹⁸ considered whether the precautionary approach requires an activity to be prohibited until further information is available, rather than an adaptive management or other approach. The Court held that the assessment will depend on a combination of factors:¹⁹
- (a) The extent of the environmental risk (including the gravity of the consequences if the risk is realised);
 - (b) The importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment);
 - (c) The degree of uncertainty; and

particularly those where scientific uncertainty exists, the need for balance may only be adequately achieved by applying precaution to the ultimate judgement.

- b. A consent authority may allow its discretionary judgement to grant or refuse resource consent to be influenced by the precautionary principle to the extent consistent with the statutory purpose of promoting the sustainable management of natural and physical resources and with judicial exercise of that discretion.*
- c. The fact that a dispute exists as to the basic material upon which the decision must rest, does not mean that necessarily the most conservative approach must be adopted. The obligation is to consider the material and decide on the weight which can be given to it with such care as the situation requires.*
- d. A precautionary approach should only be applied where there is scientific uncertainty or ignorance about the nature or scope of environmental harm. Conflicting opinions about whether a proposal would result in adverse effects, where the expert witnesses were in no doubt about how the effects arise, what creates them, what might cause them, are not lack of scientific knowledge. There needs to be a plausible basis, not mere suspicion or innuendo, for adopting that approach.*

¹⁶ *New Zealand Environmental Education Charitable Trust v Manawatu-Wanganui Regional Council* W057/02 at [77].

¹⁷ *Creswick Valley Residents Association Inc v Wellington City Council* [2015] NZEnvC 149 at [2-32].

¹⁸ *Sustain Our Sounds Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 40.

¹⁹ *Sustain Our Sounds Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 40 at [129].

- (d) The extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty.
19. In *Wilson v Waikato Regional Council*²⁰ the Environment Court considered whether applying a precautionary approach requires a decline of a consent application, or the imposition of conditions. The Court held that its “consideration of that issue is informed significantly by the second dimension of risk, namely likelihood.”²¹ The Court in *Wilson* concluded, in applying the factors established by *Sustain Our Sounds*, that a precautionary approach can be effectively reflected in consent conditions, rather than dictating consent decline.²²
20. The Supreme Court in *Environmental Defence Society v New Zealand King Salmon Company Ltd*²³ held that in the absence of a direct obligation, the application of the precautionary approach was a matter of discretion for the decision maker, and that the weight given to the precautionary approach was a matter of discretion for that decision maker.²⁴
21. In our view, the above case law (with particular reference to *Sustain Our Sounds*) establishes that the precautionary approach under the RMA requires a decision maker to:
- (a) Consider the evidential basis as to the nature of the effect, including whether the effect is within the level of effect contemplated in the RMA;²⁵
 - (b) Consider the extent of environmental risk (which can include the risk to human health and safety based on the definition of ‘environment’);
 - (c) Consider the degree of uncertainty and risk as to whether that effect will occur, noting that the precautionary principle should not be applied where the risk is insignificant or the issues are evenly balanced. It may be applied where there is a need to prevent serious or irreversible harm to the environment in situations of scientific uncertainty; and
 - (d) Consider whether activity should be declined until further information is available or whether there are any measures to manage that uncertainty i.e. by conditions or an adaptive management response.
22. A decision maker will also need to consider whether there is any direct obligation to apply a precautionary approach (i.e. under a policy or planning direction) in applying that discretion.²⁶ In the absence of such a direct obligation, the application of a precautionary approach will be a matter of discretion and weight for the decision-maker under s 104 RMA.
23. We discuss the application of the above principles to the FTAA below.

²⁰ *Wilson v Waikato Regional Council* [2021] NZEnvC 131.

²¹ *Wilson v Waikato Regional Council* [2021] NZEnvC 131 at [108].

²² *Wilson v Waikato Regional Council* [2021] NZEnvC 131 at [155].

²³ *Environmental Defence Society v New Zealand King Salmon Company Ltd* [2013] NZSC 1992.

²⁴ *Environmental Defence Society v New Zealand King Salmon Company Ltd* [2013] NZSC 1992 at [85].

²⁵ Noting that the Courts have consistently emphasised that there needs to be a plausible basis, not just a suspicion or innuendo, for adopting the precautionary approach. Conflicting opinions about whether a proposal would result in adverse effects, where the expert witnesses were in no doubt about how the effects arise, what creates them, what might cause them, are not lack of scientific knowledge.

²⁶ *Environmental Defence Society v New Zealand King Salmon Company Ltd* [2013] NZSC 1992 at [85].

Is the precautionary principle available to consider by an Expert Panel when making a decision on an application under the FTAA?

24. Yes, an Expert Panel has a discretion to apply a precautionary approach to an approval sought under the FTAA. Section 81 FTAA imports s 104 into the FTAA as matter that an Expert Panel must consider for an approval under the FTAA. There are no modifications to those sections that are relevant to the precautionary approach.
25. There is also nothing in the FTAA that precludes the application of a precautionary approach. We consider the case law principles decided under the RMA set out above can apply to a resource consent application under the FTAA, but note that they must be applied within the specific statutory framework of the FTAA, which we discuss below. We note the Expert Panel in Waihi North Project, which was decided under the FTAA, adopted a precautionary approach in imposing conditions to manage the effects on indigenous biodiversity.²⁷

How does application of the precautionary principle influence the assessments required under sections 81 and section 85 FTAA

26. In short, we do not see the use of a precautionary approach as having any material influence on the assessments already required of the Expert Panel under ss 81 and 85 FTAA.
27. Particularly, we do not consider that a precautionary approach influences any additional considerations under s 85(3) FTAA beyond those which already apply to the Expert Panel.²⁸ Rather, s 85 FTAA constrains the applicability of a precautionary approach as it limits the ability to decline an approval to the specific circumstances within that section. We discuss this further below.
28. In meeting its obligations under s 81 FTAA, the Expert Panel will need to consider the application under cl 17, Sch 5 FTAA, which requires it to apply Part 6 of the RMA and consequently s 104 RMA. As part of considering the actual and potential effects on the environment under s 104(1)(a) RMA, the Expert Panel will need to consider the nature of the effect at issue and the evidence regarding those effects to determine whether a precautionary approach is warranted.
29. The Expert Panel will also need to consider whether there is any policy or plan direction requiring a precautionary approach. We note that in the absence of a direct obligation, the Expert Panel ultimately has a discretion whether to apply a precautionary approach, and to decide the weight to be given to a precautionary approach.
30. If the Expert Panel considered a precautionary approach was necessary, it would follow the same principles to that approach as set out above (but for the question of decline, which we discuss further below). The Expert Panel would consider:
- (a) The evidential basis as to the nature of the effect, including whether the effect is within the level of effect contemplated in the RMA;²⁹

²⁷ Waihi North Project Record of Decisions of the Expert Panel under Section 87 of the Fast-track Approvals Act 2024 dated 18 December 2025 https://www.fasttrack.govt.nz/_data/assets/pdf_file/0020/20279/Decision-Text-18-December-2025.pdf See paragraphs [32], [36], [64], [297]. We note that the New Zealand Policy Statement of Indigenous Biodiversity 2023 was in play, and Policy 3 directed a precautionary approach when considering adverse effects on indigenous biodiversity.

²⁸ We have considered how the precautionary approach influences s 85(3) FTAA as we do not understand any of the grounds in ss 85(1) and (2) are in play.

²⁹ Noting that the Courts have consistently emphasised that there needs to be a plausible basis, not just a suspicion or innuendo, for adopting the precautionary approach. Conflicting opinions about whether a proposal would result in adverse

- (b) The extent of environmental risk (which can include the risk to human health and safety based on the definition of 'environment');
 - (c) The degree of uncertainty and risk as to whether that effect will occur, noting that the precautionary principle should not be applied where the risk is insignificant or the issues are evenly balanced. It may be applied where there is a need to prevent serious or irreversible harm to the environment in situations of scientific uncertainty; and
 - (d) The appropriateness of conditions to manage that effect (which can be imposed in accordance with clauses 18 and 19, sch 5, FTAA and in compliance with s 82 FTAA).
31. The Expert Panel would ultimately make a finding on the significance of that effect as a result of the above assessment, as it is required to do under s 104(1)(a) RMA.
 32. Turning to the question of decline, unlike the RMA, the Expert Panel would not consider whether the precautionary approach alone warranted the decline of an approval under the FTAA. This is because under the FTAA, the ability to decline a consent is limited to the grounds in s 85 FTAA. This is in contrast to the RMA, where a precautionary approach can warrant a resource consent application being declined (provided this is within the statutory framework applicable to the application at issue).
 33. In our view, the limited nature of s 85 FTAA means an Expert Panel cannot decline an application based on a precautionary approach alone and must complete the assessment required under s 85 FTAA, including as to conditions, when considering the question of decline.
 34. If the Expert Panel found that adverse impacts remained, it must then undertake the 'proportionality' assessment in s 85(3) FTAA and consider whether those adverse impacts are sufficiently significant to be out of proportion to the project's regional or national benefits that the Expert Panel must consider under section 81(4) FTAA, after taking into account conditions as required by s 85(3)(b)(i) and (ii) FTAA. This requirement applies regardless of whether a precautionary approach is applied, but we note that a precautionary approach may influence the Expert Panel's finding on the significance of those effects.
 35. If the Expert Panel found that there were adverse impacts that were sufficiently significant to outweigh the project's regional and national benefits, even after the consideration of conditions to address those adverse effects, this would be relevant to the question of decline under s 85(3) FTAA.

Yours faithfully
HOLLAND BECKETT



Vanessa Hamm / Bridget Bailey
 Partner / Senior Associate
 M 027 466 1347
 E bridget.bailey@hobec.co.nz
 Supervising Partner Vanessa Hamm

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