

UNDER THE

FAST-TRACK APPROVALS ACT 2024

IN THE MATTER OF

an application for replacement resource
consents in relation to the Tekapo Power
Scheme

BY

GENESIS ENERGY LIMITED

Applicant

AND

**ROYAL FOREST AND BIRD PROTECTION
SOCIETY OF NEW ZEALAND INCORPORATED**

Invited Person

COMMENTS BY THE ROYAL FOREST AND BIRD

PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED

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Royal Forest and Bird Protection Society of New Zealand

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INTRODUCTION

1. The Takapō River is a naturally uncommon, braided river system of exceptional ecological and landscape value. The river's dynamic flow regime historically sustained a mosaic of habitats, ephemeral wetlands, sparsely vegetated gravel bars, and dryland ecosystems. A rich diversity of freshwater and terrestrial species, including nationally threatened fish, macroinvertebrates, plants, and birds was supported. The river's high freshwater values are reflected in the historical presence of longfin eels and non-migratory galaxiids.
2. The Takapō River supports more than 5% of the national population of black-fronted tern, meeting the threshold for national ecological significance. It also provides habitat for other threatened and at risk braided river birds, including wrybill, banded dotterel, and South Island pied oystercatcher.
3. The diversion of water for the Tekapo Power Scheme (TPS) has dewatered approximately 6.6 km of the Takapō River, resulting in a near-total loss of aquatic habitat and severely compromising ecosystem health, hydrological connectivity, and sediment transport in that reach.
4. The absence of residual and flushing flows has led to armoured riverbeds, reduced morphological diversity, and persistent nuisance periphyton, including didymo, which further degrades macroinvertebrate communities and water quality, in the dewatered reach and these effects extend along the downstream reach to Lake Benmore. Indigenous fish populations have suffered markedly, with longfin eels now functionally extinct in the catchment due to turbine mortality and blocked migration pathways. Non-migratory galaxiids have also been significantly impacted, compounding the loss of biodiversity and ecological resilience.
5. The diversion has also degraded braided river habitat, reducing nesting and foraging opportunities for key bird species such as wrybill, black-fronted tern, and banded dotterel. Vegetation encroachment, driven by diminished flow variability, has increased predation risk and compromised habitat quality.
6. Genesis Energy Ltd (Genesis) has applied under the Fast-track Approvals Act 2024 (FTAA) for replacement approvals to continue operating the TPS, a nationally significant hydroelectric scheme located at the head of the Waitaki Valley.
7. The application seeks to re-authorise a suite of activities, including damming, diversion, use, and discharge of water, without providing environmental flows in the Takapō River.

8. This approach has significant adverse effects on waterbodies and is contrary to the requirements of the Waitaki Catchment Water Allocation Regional Plan (WAP), the National Policy Statement for Freshwater Management (NPSFM), and Part 2 of the Resource Management Act 1991 (RMA).
9. Conditions to provide for environmental flows in the Takapō River, including minimum and flushing flows, are necessary to support indigenous biodiversity, ensure that the effects of the TPS are appropriately managed, and in taking into account the planning framework, and are not more onerous than necessary to address those reasons.
10. The compensation package proposed by Genesis requires amendment to properly reflect the effects of the TPS. This is necessary due to serious deficiencies in the compensation package. The compensation package is a negotiated agreement between Genesis and DOC. It reflects a negotiated outcome rather than an effects-based assessment and fails to meet the requirements of the National Policy Statement for Freshwater Management NPSFM, particularly the effects management hierarchy. The proposed compensation package is inadequate to address the ongoing adverse effects of the dewatering of the Takapō River, which is caused by the current operations of the TPS. The conditions for the compensation package are also inadequate.
11. The application raises a number of legal issues.
12. These include the requirements for resource consents under the FTAA, including weighting and matters to take into account under Clause 17 of Schedule 5 of the FTAA.
13. Clause 17 requires an assessment of the application under the provisions of the RMA that direct decision-making, before standing back and conducting an overall balancing against the purpose of the FTAA. While that purpose must be given the most weight, the purpose of the FTAA is neutral regarding the takes, diversions, and discharges because the infrastructure, including the intake structure, control gates, canals, and power stations, are long-standing. There is nothing to “deliver” through this substantive application. ““Infrastructure” (defined by reference to the RMA definition) does not include the takes, diversions and discharges. Neither are they a “development project”. The purpose of the FTAA therefore is not furthered by granting the takes, diversions and discharges.
14. There is also an issue regarding the “environment” against which the project is assessed for the purposes of Clause 17 and s 81. Forest & Bird’s position is that the “environment” (or “existing environment”) excludes the water takes, diversions and discharges for which consent is sought. This position is based

on case law stating that the consent process must assess applications for replacement takes, diversions, and discharges on the basis that the environment excludes those activities.

15. These submissions also address the activity status asserted by Genesis, the implications of the proposed compensation package, and the statutory instruments that govern the Panel's assessment. The most significant issue arising is that the damming of Lake George Scott is a non-complying activity unless a minimum flow is maintained in the Takapō River downstream. Forest & Bird says that the failure to provide flows below Lake George Scott makes the activity non-complying under Rule 16, rather than controlled under Rule 15A.
16. Even if this interpretation is incorrect, Rule 15A requires the Panel to consider the imposition of environmental flows. This would be a meaningless exercise if the Genesis interpretation of "existing environment" is adopted, as it wrongly constrains the 104(1)(b) assessment so as to exclude consideration of environmental flows.¹
17. Under both the original WAP provisions and the amendments made by PC3, the expectation was that a meaningful assessment of environmental flows for the Takapō River would be undertaken at the time of reconsenting. This expectation was supported by assurances provided by Genesis about the level of environmental flows that would not frustrate a grant of consent, with the result that controlled activity status under Rule 15A was considered appropriate in PC3. Those assurances and the resulting planning framework should be given significant weight in the Panel's assessment.
18. These comments start by providing the factual context for the Takapō River and the TPS. The legal context and the decision-making approach under the FTAA are then discussed. This is followed by a discussion of the "applicable clauses" for resource consent applications,² which brings into focus s 104 and Part 2 of the RMA. This requires analysis of the existing environment (including answers to the questions posed by the Panel), the legal implications of the WAP, and the flawed compensation package proposed by Genesis. These submissions conclude with a discussion of the conditions sought by Forest & Bird and a reconciliation of those under the FTAA's requirements.

¹ The Genesis Memorandum on the existing environment, dated 5 December 2019, maintains that it is important not to conflate the controlled activity status and the existing environment assessment under section 104(1)(a) of the RMA, at [22 – 24].

² s 81(2)(b) FTAA

EVIDENCE

19. Forest & Bird presents evidence from four experts:

- a. Kate McArthur on freshwater ecology;
- b. Mike Harding on terrestrial ecology;
- c. Rachel McLennan on avifauna; and
- d. Helen Marr on planning.

Kate McArthur

20. Ms McArthur's evidence is that the TPS has caused significant ecological harm to the Takapō River, particularly the dewatering of 6.6 km of riverbed which has degraded macroinvertebrate and fish communities. Ms McArthur considers that Genesis' technical reports underestimate residual effects and fail to propose meaningful mitigation. The Indigenous Biodiversity and Ecological Package (IBEP) and draft Kahu Ora strategy are lacking in clarity, ecological rigour, and alignment with best practice aquatic compensation under the NPSFM.
21. Forest & Bird asked Ms McArthur to consider an appropriate environmental flow regime to address these impacts. Ms McArthur recommends restoring a residual flow of 26 m³ below Gate 16 and Lake George Scott, based on simulated natural flow records. She also recommends that the conditions provide for regular flushing flows of ~200 m³ to reduce nuisance periphyton and improve macroinvertebrate health. This offers the greatest ecological benefit and alignment with policy objectives. Without such restoration, significant residual effects will persist.

Mike Harding

22. Mr Harding's evidence is that the Takapō River floodplain is ecologically significant, supporting naturally uncommon ecosystems and at least three Threatened and 19 At Risk plant species. Mr Harding considers the vegetation assessment undertaken on behalf of Genesis is inadequate and argues that flow diversion has disrupted the floodplain's dynamic processes, leading to stabilisation and succession dominated by exotic species. This threatens the persistence of low-stature indigenous vegetation, which is not replicated elsewhere in the Waitaki Basin.
23. Mr Harding considers that restoring natural flows is the only way to reinitiate floodplain disturbance. He considers Genesis' proposed weed control insufficient, especially as it is limited to upper reaches. If flow restoration isn't

feasible, Mr Harding suggests broader compensation, such as weed control or long-term funding for wilding conifer management, or some other compensatory protection of similar dryland ecosystems.

Rachel McClellan

24. Dr McClellan finds that the Takapō River supports a nationally significant population of black-fronted terns and other threatened freshwater bird species, despite decades of flow diversion. Dr McClellan notes that low flows have increased vulnerability to mammalian predation and reduced breeding success.
25. Dr McClellan considers that Genesis' ecological assessments lack detail on wetland habitats, bird populations, and predator impacts. Further, she concludes that the proposed compensation package under Kahu Ora is inadequate. Measures like nesting islands and weed control lack specificity and fail to address the core ecological harm caused by reduced flows. Without increased river flows and targeted predator control, the compensation does not meet the ecological requirements of the NPSFM.

Helen Marr

26. Ms Marr's evidence addresses the relevant planning documents. Ms Marr addresses the existing environment from a planning perspective and considers that including all current operations in the existing environment would undermine the integrity of the effects assessment in that it would preclude assessment of adverse effects, for example, on ecology, and positive effects, including on renewable electricity generation. This would conflict with national and regional planning documents, including the NPSFM, which requires maintaining or improving freshwater health and protecting indigenous habitats.
27. Ms Marr also considers the proposed Indigenous Biodiversity Enhancement Programme (IBEP) vague and not aligned with the effects management hierarchy or compensation principles. Ms Marr recommends strengthening adaptive management conditions and securing measurable conservation outcomes through enforceable consent conditions.

THE TAKAPŌ RIVER AND THE TEKAPO POWER SCHEME

28. The Takapō River is a naturally uncommon, braided river system, identified nationally as an endangered ecosystem type due to its declining extent and ecological function. Its coarse substrate, dynamic braiding, and geomorphic

processes historically supported a diverse range of aquatic habitats and species.³

29. The terrestrial ecosystems surrounding the Takapō River and its floodplain are ecologically significant due to their unique assemblages of indigenous flora and fauna adapted to the dynamic conditions of braided river environments.⁴ These habitats support a mosaic of dryland vegetation, ephemeral wetlands, and sparsely vegetated gravel bars, which together provide critical breeding, foraging,⁵ and refuge areas for a range of native species. The natural disturbance regime, driven historically by variable flows and sediment movement, has maintained habitat heterogeneity and ecological resilience across the landscape.⁶
30. The Takapō River and its associated braidplain are of high ecological significance for a suite of nationally threatened and at-risk bird species, including wrybill, black-fronted tern, banded dotterel, and South Island pied oystercatcher.⁷ These species are highly adapted to the dynamic, open gravel habitats of braided rivers, relying on bare substrates and low vegetation cover for nesting, predator avoidance, and foraging.⁸ The Takapō River supports more than 5% of the national population of black-fronted tern, a threshold commonly used to identify sites of national ecological importance. This establishes the Takapō River as nationally significant for the conservation of braided river birds.⁹
31. This diversion associated with the TPS has dewatered approximately 6.6 km of the Takapō River, resulting in a near-total loss of aquatic habitat and severely compromising ecosystem health, hydrological connectivity, and sediment transport.¹⁰
32. The absence of residual and flushing flows has led to armoured beds, reduced morphological diversity, and persistent nuisance periphyton, including didymo, which further degrades macroinvertebrate communities and water quality.¹¹ Indigenous fish populations, particularly longfin eels and non-migratory galaxiids, have been significantly impacted, with longfin eels now

³ Evidence of Rachel McLellan, paragraph 22-23

⁴ Evidence of Mike Harding, paragraphs 17 - 18

⁵ Evidence of Kate McArthur, paragraphs 61

⁶ Evidence of Kate McArthur, paragraphs 61

⁷ Evidence of Rachel McLellan, paragraph 22-23

⁸ Evidence of Rachel McLellan, paragraph 24-25

⁹ Evidence of Rachel McLellan, paragraph 30-32

¹⁰ Evidence of Kate McArthur, paragraphs 38–39

¹¹ Evidence of Kate McArthur, paragraphs 44-46, 53-55

functionally extinct in the catchment due to turbine mortality and blocked migration pathways.¹²

33. The loss of braided river habitat has also diminished nesting and foraging opportunities for key bird species such as wrybill, black-fronted tern, and banded dotterel.¹³ Vegetation encroachment, driven by reduced flow variability, has increased predation risk and compromised habitat quality.¹⁴
34. While island creation has been proposed as a mitigation measure, without sufficient flow to isolate these islands, they are unlikely to function effectively as predator refuges.¹⁵
35. Broader terrestrial effects include degradation of riparian and floodplain habitats and reduced habitat heterogeneity.¹⁶
36. The TPS has caused significant adverse effects on the Takapō River's ecological values. These include the degradation of macroinvertebrate communities, the loss of habitat for threatened galaxiid species, and the removal of longfin eels from the ecosystem, which has disrupted trophic dynamics and ecological processes.¹⁷

FAST-TRACK APPROVALS ACT

37. This section addresses the FTAA. It does this by identifying and assessing the relevant provisions of the FTAA. In doing so, the two draft decisions on substantive applications under the FTAA that are available at the time of writing are addressed. While this panel is not bound by the approach to interpretation taken by other panels, it may assist to understand how other panels have approached the key FTAA provisions.¹⁸

Panel's functions under the FTAA

38. The Panel must, for each approval sought in a substantive application, decide under s 81(1) whether to:¹⁹
 - a. grant the approval and set any conditions to be imposed on the approval;
 - or

¹² Evidence of Kate McArthur, paragraphs 66-74

¹³ Evidence of Rachel McLellan, paragraphs 22-24

¹⁴ Evidence of Rachel McLellan, paragraphs 25-27

¹⁵ Evidence of Rachel McLellan, paragraphs 28-29

¹⁶ Evidence of Mike Harding, paragraphs 24-25

¹⁷ Evidence of Kate McArthur, paragraphs 61–62, 90–92 and Evidence of Rachel McLellan, paragraphs 30-32

¹⁸ Forest & Bird notes also the requirement to use “consistent” processes in the procedural principles (s 10 FTAA).

¹⁹ Section 81(1) FTAA

- b. decline the approval.
39. Although under the RMA a controlled activity application must be granted,²⁰ that RMA provision is a matter to “take into account” under the FTAA and does not fetter the Panel’s discretion to grant or decline the approval under s 81(1) FTAA. In that regard, Forest & Bird disagrees with the applicant that the substantive application “must be granted”.²¹
40. In making its s 81(1) decision, the Panel:²²
- c. must apply the applicable clause for the approval type, as set out in s 81(3);
 - d. must comply with s 82;
 - e. must comply with s 83 in setting conditions;
 - f. may impose conditions under s 84;
 - g. may decline the approval only in accordance with s 85.
41. When taking the purpose of the FTAA into account, the Panel must consider the extent of the project’s regional or national benefits.²³
42. When considering a consent application and conditions, Clauses 17 to 22 of Schedule 5 apply²⁴ and the panel must take into account, giving the greatest weight to paragraph (a):²⁵
- a. the purpose of the FTAA; and
 - b. the provisions of Parts 2, 3, 6, and 8 to 10 of the Resource Management Act 1991 that direct decision making on an application for a resource consent (but excluding section 104D of that Act); and

²⁰ Section 104A(a) RMA provides that after considering an application for a resource consent for a controlled activity, a consent authority must grant the resource consent, unless it has insufficient information to determine whether or not the activity is a controlled activity. There are also limitations in s 104A(b) on the matters on which the consent authority may impose conditions.

²¹ The applicant’s Memorandum of Counsel for Genesis Energy Ltd in Advance of Convener’s Conference dated 9 June 2025 said: “There is no legal, evidentiary or procedural complexity in respect of the replacement consents sought. Despite the scale of the Tekapo PS and the significant regional and national benefits, the application for replacement resource consents is likely as straightforward of an application that will ever be considered through the FTAA regime: ... only one type of approval is being sought; **the replacement resource consents have a controlled activity status and must be granted**”.

²² Section 81(2)(b).

²³ Section 81(4) FTAA

²⁴ Section 81(3)(a) FTAA

²⁵ Clause 17(1) Schedule 5 FTAA

- c. the relevant provisions of any other legislation that directs decision making under the Resource Management Act 1991.

“Take into account”

43. The interpretation of “take into account” used by the Bledisloe panel was:²⁶

[120] We understand the phrase “take into account” as requiring us to directly consider the matters so identified and give them genuine consideration; rather than mere lip service, such as by listing them and setting them aside: *Royal Forest and Bird Protection Society Inc v New Zealand Transport Agency* [2024] NZSC 26 [*East West Link*].

44. While the *East West Link* case cited in Bledisloe concerned the phrase “have regard to” rather than “take into account”, the approach adopted by the Bledisloe panel is correct. The Court in *East West Link* said that the duty to have regard to relevant provisions of planning instruments in s 104 does not invest consent authorities with a broad discretion to “give genuine attention and thought” to directive policies, only to then refuse to apply them.²⁷ A relevant plan provision is not properly had regard to if it is simply considered for the purpose of putting it to one side.²⁸

Weighting

45. The weighting to be accorded to relevant considerations by a statutory decision maker is normally for that decision maker to determine²⁹ (subject to unreasonableness). However, where a statute directs the weight to be given to a matter, that direction must be followed.³⁰
46. Clause 17 specifies that the greatest weight is to be given to paragraph (a), the purpose of the FTAA. A very similar legislative weighting was also used in s 34 of the Housing Accords and Special Housing Areas Act 2013 (“HASHAA”), and that provision was considered by the Court of Appeal in *Enterprise Miramar Peninsular Inc v Wellington City Council* [2018] NZCA 541.
47. The Court in *Enterprise Miramar* set out the hierarchy of matters in s 34, and said:

[41] The plain words indicate, therefore, that greatest weight is to be placed on the purpose of HASHAA, namely enhancing affordable housing supply in certain districts. That said, other considerations have been deliberately included. Decision-makers must be careful not to rely solely on the purpose of HASHAA at the expense of due consideration of the matters listed in (b)—(e).

²⁶ Bledisloe panel draft decision at [120]

²⁷ See *East West Link* at [72], [79], [80], [167] and fn. 157, at [169].

²⁸ *RJ Davidson* (CA) at [73].

²⁹ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR (HC) 188 at 223.

³⁰ *Quarantine Waste (New Zealand) Ltd v Waste Resources Ltd* [1994] NZRMA 529 (HC) at 540.

48. The Court found that the decision-maker was required to assess the matters listed in subs (1)(b)—(e) (i.e. the matters other than the Act’s purpose) uninfluenced by the purpose of HASHAA, before standing back and conducting an overall balancing.³¹ As a result, environmental effects “may be outweighed by the purpose of enhancing affordable housing supply, or they may not.”³²
49. This indicates that a statutory requirement to give an Act’s purpose the most weight does not mean that it will always outweigh other considerations (in which case there would be no point in listing those other considerations). The same must be correct in relation to the FTAA. That interpretation is supported by s 85(3) of the Act (addressed below).
50. As with the FTAA, the HASHAA decision-maker was required to consider Part 2 RMA. The Court saw the decision-maker’s “cursory analysis” of Part 2 matters in *Enterprise Miramar* as an example of the decision-maker having allowed the purpose of HASHAA to neutralise or minimise the other matters that arose for consideration, which resulted in those matters not being given due consideration and weight. Rather than merely treating the purpose of HASHAA as the most important and influential matter to be weighed, the decision-maker used the purpose of HASHAA to eliminate or greatly reduce its consideration and weighing of the other 34(1) factors, and that was a “significant error of law”.³³
51. Accordingly, the correct approach under cl 17 is to carefully consider each of the listed matters on their own terms, before moving to the weighing exercise. In that exercise, environmental effects or other impacts may be outweighed by the Act’s purpose, or they may not.
52. The Bledisloe panel applied *Enterprise Miramar* in the FTAA context.³⁴ It noted that there is a difference between s 34 HASHAA and cl 17 in that “the HASHAA created a hierarchy of criteria, with the greatest weight to be given to criterion (a) and the least weight to be given to criterion (e), whereas in the FTAA the requirement is simply for the decision maker to give the greatest weight to criterion (a). The implication, therefore, is that in the FTAA the criteria in (b)-(c) are to have equal statutory weight”.³⁵

³¹ *Enterprise Miramar* at [53]

³² At [55]

³³ At [55]

³⁴ In contrast, the Maitahi panel “did not find reference to section 34(1) HASHAA to be of much assistance” (at [68])

³⁵ Bledisloe Expert Consenting Panel draft decision at [122]

53. Subject to bearing that in mind, the Bledisloe panel considered that *Enterprise Miramar* provided helpful guidance, which it adapted to apply to the FTAA:³⁶
- a. While the greatest weight is to be placed on the purpose of the FTAA, we must be careful not to rely solely on that purpose at the expense of due consideration of the other matters listed in (b) to (c): *Enterprise Miramar*, at [41].
 - b. Clause 17 requires us to consider the matters listed in clause 17(1)(a)-(c) on an individual basis, prior to standing back and conducting an overall weighting in accordance with the specified direction: *Enterprise Miramar*, at [52] – [53].
 - c. The purpose of the FTAA is not logically relevant to an assessment of environmental effects. Environmental effects do not become less than minor simply because of the purpose of the FTAA. **What changes is the weight to be placed on those more than minor effects; they may be outweighed by the purpose of facilitating the delivery of infrastructure and development projects with significant regional or national benefit, or they may not:** *Enterprise Miramar*, at [55]
- (emphasis added)

Clause 17(1)(a) of Schedule 5: purpose of the FTAA

54. Clause 17(1)(a) is the purpose of the FTAA, that is, “to facilitate the delivery of infrastructure and development projects with significant regional or national benefits”.
55. “Infrastructure” is defined by reference to the definition in s 2 RMA.³⁷ “Development” is not defined.
56. When assessing this criterion, panels must consider the extent of the project’s national or regional benefits.³⁸ The Maitahi panel described this as “essentially a forensic exercise”.³⁹ Panels must reach their own assessment of the extent of benefits and are not required or obliged to treat a project as having significant regional or national benefits on the basis of its listing or referral. The Maitahi panel rejected the applicant’s submissions that the Panel could rely on the fact that the Project is listed in Schedule 2 for any finding that it has significant regional or national benefits.⁴⁰

[84] ... these findings were made by bodies other than the Panel which has statutory responsibility for making decisions on approvals sought in a substantive application under s 81. By virtue of s 81(4) it falls to the Panel, when taking the purpose of the FTAA into account, to consider the extent of the regional or national benefits. This is something the

³⁶ At [122]

³⁷ Section 4(2)(a) FTAA

³⁸ Section 81(4) FTAA

³⁹ At [82]

⁴⁰ At [83] – [85]

Panel itself must do in the context of its analysis of, and findings on, regional or national benefits.

[85] The notion that a panel could rely on findings of another body is also inconsistent with the statutory requirement for the Panel to undertake a proportionality test under s 85(3). ...

57. For all matters of interpretation, s 10(1) of the Legislation Act 2019 will apply. It provides that “the meaning of legislation must be ascertained from its text and in the light of its purpose and its context”. The Maitahi panel found that purpose and context was “conveniently summarized in the Legislative Statement outlining the Parliamentary intention for decision making by expert panels” as follows:⁴¹

The purpose and provisions of the Bill will take primacy over other legislation in decision making. This means that approvals can be granted despite other legislation not allowing them, such as, projects that are prohibited activities or those which are inconsistent with RMA National Direction. This approach is intended to ensure key infrastructure and other development projects with significant benefits for communities are not declined where the benefit of approving the project outweighs any issue identified.

58. Extent “should be assessed or quantified depending on their nature as varying between modest and meaningful, substantial or of real value”.⁴²
59. Both the Maitahi and Bledisloe panels took “some guidance” from s 22 FTAA which relates to the criteria for assessing a referral application, because the first criterion is whether “the project is an infrastructure or development project that would have significant regional or national benefits”.⁴³ The Maitahi panel described the s 22 matters as providing “some useful guidance ... a flavour of what is required”, but with the question of whether a project is in fact one with significant regional or national benefits remaining “an intensely factual determination turning on the particular circumstances of the Application”.⁴⁴
60. Noting the dictionary definition of significant as “full of meaning or import, and “important, notable”, the Maitahi panel was content to use “sufficiently great or important to be worthy of attention; noteworthy” as a working definition.⁴⁵
61. Any factual assessment of regional or national benefits, particularly in relation to infrastructure or development projects, will be informed by related economic and social factors. The relevant regional context will therefore be

⁴¹ At 50, citing the Legislative Statement, para 17.

⁴² Maitahi panel draft decision at vi (Executive Summary)

⁴³ Maitahi panel draft decision at [435], Bledisloe panel draft decision at [287]

⁴⁴ Maitahi panel draft decision at [435]

⁴⁵ At [436]

important.⁴⁶ The Maitahi panel noted that the word “extent” is not defined and that the dictionary definition refers variously to terms such as “assessment” or “assessed value” or degree, size, magnitude, dimensions or breadth of the thing being measured. The panel took that approach to its evaluative task, “bearing in mind that not all benefits are able to be calculated in precise financial or monetary terms. Sometimes expression of quantification or value in absolute terms may simply not be possible”.⁴⁷

62. While the Maitahi project’s contribution to housing and construction jobs was considered undeniably regionally significant, the panel did not consider upgrades to increase the capacity of downstream wastewater pipe infrastructure and a new shared commuter path to be significant.⁴⁸

[445] ... While these are undoubtedly benefits of the development, arguably they do not classify as being of regional significance. They are amenities which will serve to enhance the environment for those who live there. At best the benefits will accrue to visitors who seek to enjoy the environment and amenities associated with proposed walking tracks and cycleways.

Clause 17(1)(b) of Schedule 5: RMA provisions

63. Clause 17(1)(b) refers to the provisions of Parts 2, 3, 6, and 8 to 10 of the RMA that direct decision making on an application for a resource consent (but excluding section 104D of that Act).
64. The exclusion of s 104D means that the “gateway test” does not apply. However, non-complying activity status means that the relevant RMA decision-making provision is s 104B, not s 104A (which applies to controlled activities).
65. Clauses 17(3) and (4) provide that, where any provision of the RMA requires a decision maker to decline any application for a resource consent, the Panel must take such a provision into account, but “must not treat the provision as requiring the panel to decline the application ...”.
66. The FTAA does not specify which provisions direct decision-making. It is “left to the Panel to determine which such provisions ought to be taken into account”.⁴⁹
67. The Maitahi panel saw procedural RMA provisions as not “directing” decision making,⁵⁰ which must be correct. It considered ss 5, 6 and 7, and s 104 to be relevant “because they do operate to direct decision making in the RMA

⁴⁶ At [437] and [620]

⁴⁷ At [620]

⁴⁸ At [445]

⁴⁹ Maitahi panel draft decision at [72]

⁵⁰ At [73]

context”.⁵¹ In addition to those provisions, Forest & Bird considers that ss 104A, 104B or 104C, and ss 104G, 105, 106, 107, 217 and 230 RMA must be relevant (where the circumstances make them so).⁵²

68. The Maitahi panel considered that:

[75] ... the statutory direction for a panel to take into account key provisions of the RMA brings into focus the question of whether the Application promotes sustainable management (s 5 of the RMA). It also requires consideration of how the Proposal recognises and provides for the matters of national importance in s 6(a) to (h) of the RMA. Decision makers must also take into account the matters referred to in s 7(a) to (j) of the RMA.

69. In the RMA context, the Courts have identified that it will likely not be necessary to directly consider Part 2 RMA where a national policy statement or regional/district plan has already fully implemented Part 2. In those cases, significant reliance is placed on the planning instruments instead.⁵³ However, that concept does not apply to the FTAA because of the different structure of cl 17, under which directive planning instruments do not have the same force and effect as they would under the RMA. It will be necessary for panels to directly consider Part 2 in those circumstances.

70. The Bledisloe panel also carefully considered Part 2 matters.⁵⁴

71. Although the planning instruments that are a matter to have regard to under s 104(1)(b) RMA / cl 17(1)(b) FTAA may have less impact on decisions than they would under the RMA, the approach to the interpretation and reconciliation of planning instruments described in *King Salmon* and *Royal Forest & Bird v NZTA (East West Link)*⁵⁵ remains relevant when they are being applied under the FTAA:

- a. Directive policies, such as policies requiring particular environmental impacts to be avoided, have greater potency than other non- or less directive policies.⁵⁶ Policies that provide for use and development, through terms such as “ensure”, “require” and “recognise,” can also be directive, depending on how those terms are used in the policy.⁵⁷

⁵¹ At [74]

⁵² Section 8 RMA is not relevant. Per cl 17(2)(a), “Part 2” RMA means sections 5, 6, and 7 RMA only.

⁵³ *EDS v New Zealand King Salmon Company Limited* [2014] NZSC 38; *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [70] – [74].

⁵⁴ Bledisloe panel draft decision at [320]

⁵⁵ *East West Link*

⁵⁶ *East West Link* at [72]; *King Salmon* at [129] and [152].

⁵⁷ *Port Otago* at [28] and [69]

- b. “Avoid” means “not allow” or “prevent the occurrence of”.⁵⁸ However, prohibition of minor or transitory effects is not likely to be necessary.⁵⁹ The standard is protection from material harm. The concepts of mitigation and remedy may serve to meet the “avoid” standard by bringing the level of harm down so that material harm is avoided. To be consistent with the concept of avoidance, decision-makers must either be satisfied there will be no material harm or alternatively be satisfied that conditions can be imposed that mean material harm will be avoided; or any harm will be mitigated so that the harm is no longer material; or any harm will be remedied within a reasonable timeframe so that, taking into account the whole period harm subsists, overall the harm is not material.⁶⁰
- c. In applying s 104(1)(b), the consent authority must undertake a fair appraisal of the objectives and policies read as a whole. Isolating and de-contextualising individual provisions in a manner that does not fairly reflect the broad intent of the drafters must be avoided. Attention must be paid to the relevant objectives and policies both on their own terms and as they relate to one another in the overall policy statement or plan. Relevant objectives and policies cannot “simply be put in a blender with the possible effect that stronger policies are weakened and weaker policies strengthened”.⁶¹
- d. There may be instances where policies pull in different directions. This is likely to occur infrequently, and an apparent conflict may resolve if close attention is paid to the words used.⁶² Where directive policies conflict, a “structured analysis” should be adopted.⁶³ The appropriate balance between the directive policies depends on the particular circumstances, considered against the values inherent in the various objectives and policies. All relevant factors must be considered to assess which of the conflicting policies should prevail in the particular circumstances of the case (for example, the nature and importance of ports’ safety and efficiency requirements, and the environmental values at issue).⁶⁴

⁵⁸ *King Salmon* at [93]

⁵⁹ *King Salmon* at [145]

⁶⁰ *Port Otago* at [65]–[66], applying *Trans-Tasman Resources* [2021] NZSC 127, at [252] per Glazebrook J, [292]—[293] per Williams J and [309]—[311] per Winkelmann CJ and [5]—[6] of the summary.

⁶¹ *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26, at [80]

⁶² *King Salmon* at [129]

⁶³ *Port Otago*, at [78]

⁶⁴ *Port Otago* at [77] – [81]

Clause 17(1)(c) of Schedule 5: other legislation

72. Clause 17(1)(c) refers to the relevant provisions of *any other legislation* that directs decision making under the RMA.⁶⁵ The Resource Management (Waitaki Catchment) Amendment Act 2004 (“the Waitaki Act”) is relevant to this substantive application. It is addressed below at paragraph 150.
73. Clauses 17(3) and (4) (which provide that, where any provision of the RMA requires a decision maker to decline any application for a resource consent, the Panel must take such a provision into account, but “must not treat the provision as requiring the panel to decline the application ...”) also applies to “any other legislation” considered under cl 17(1)(c).

Duration of consent

74. Sections 123 and 123A RMA, which specify the maximum duration of consents, apply to resource consents approved under the FTAA.⁶⁶

Conditions on resource consents

75. When setting conditions on a resource consent, RMA provisions that are relevant to setting conditions apply to the panel (subject to all necessary modifications).⁶⁷
76. Of relevance here, s 104A(b) (determination of applications for controlled activities) provides that a [panel] may impose conditions on the consent under s 108 only for those matters:
- a. over which control is reserved in national environmental standards or other regulations; or
 - b. over which it has reserved its control in its plan or proposed plan.
77. However, as set out below Forest & Bird says that the application is non-complying rather than controlled (in which case the relevant RMA provision is s 104B which provides that the [panel] “may impose conditions under s 108” without restriction) not s 104A, and in any event the matters of control in Rule 15A clearly encompass environmental flow conditions.⁶⁸
78. Section 108AA RMA is also relevant. It provides that consent conditions must:
- a. be agreed to by the applicant;

⁶⁵ This could include, for example, the Water Services Act 2021.

⁶⁶ Clause 17(7) of Schedule 5

⁶⁷ Clause 18 of Schedule 5

⁶⁸ See Rule 15A, set out at paragraph X above.

- b. be directly connected to an adverse effect of the activity on the environment, or applicable rule, national environmental standard or environmental performance standard; or
 - c. relate to administrative matters that are essential for the efficient implementation of the resource consent.
79. This RMA cross-reference indicates that case law on condition-setting under the RMA is also likely to be relevant (subject to s 83 FTAA which is discussed below). The following principles relevant to setting conditions on resource consents were applied by the Bledisloe⁶⁹ and Maitahi⁷⁰ panels:
- a. a resource consent condition must be for a resource management purpose, not an ulterior one; must fairly and reasonably relate to the development authorised by the resource consent or designation; and must not be so unreasonable that a reasonable planning authority, duly appreciating its statutory duties could not have approved it.⁷¹
 - b. The underlying purpose of the conditions of a resource consent is to manage environmental effects by setting outcomes, requirements or limits to that activity, and how they are to be achieved.⁷²
 - c. Conditions must be certain and enforceable.⁷³
 - d. A condition must not delegate the making of any consenting or other arbitrary decision to any person, but may authorise a person to certify that a condition of consent has been met or complied with or otherwise settle a detail of that condition.⁷⁴ Such authorisation is subject to the following principles:
 - i. the basis for any exercise of a power of certification must be clearly set out with the parameters for certification expressly stated in the relevant conditions;
 - ii. the power of certification does not authorise the making of any waiver or sufferance or departure from a policy statement or plan except as expressly authorised under the RMA;

⁶⁹ Bledisloe panel draft decision at [308]

⁷⁰ Maitahi panel draft decision at [603]-[608]

⁷¹ *Newbury District Council v Secretary of State for the Environment* [1980] 1 All ER 731 (HL), at 739

⁷² *Summerset Village (Lower Hutt) Ltd v Hutt City Council* [2020] MZEnvC 31 at [156].

⁷³ *Bitumix Ltd v Mt Wellington Borough Council* [1979] 2 NZLR 57.

⁷⁴ *Turner v Allison* (1970) 4 NZTPA 104.

- iii. the power of certification does not authorise any change or cancellation of a condition except as expressly authorised under the RMA.
80. For all approvals under the FTAA, panels must also comply with s 83 in setting conditions.⁷⁵ This provides:⁷⁶
- When exercising a discretion to set a condition under this Act, the panel must not set a condition that is more onerous than necessary to address the reason for which it is set in accordance with the provision of this Act that confers the discretion.
81. The ordinary meaning of “onerous” is “difficult to carry out”.⁷⁷ This provision will not generally set a higher standard than would otherwise apply to conditions under the RMA, which must already “directly relate” relate to an environmental effect or applicable rule (etc). It will require a panel to check that proposed conditions are not more “difficult to carry out” than is necessary to address the reason for the condition, and in some circumstances it may have a substantive impact, e.g. where there are two equally effective alternative methods of controlling an effect proposed by participants and one is more onerous than the other.

PRELIMINARY ISSUE – ACTIVITY STATUS

82. The provision of flows in the Takapō River is critical for Forest & Bird. The Takapō River is currently dewatered for 6.6 km below the lake and Genesis seeks to retain this as the status quo. Forest & Bird considers that the dewatering of the Takapō River is a significant adverse effect and seeks that flows be provided for the Takapō River. An important issue arises regarding activity status.
83. The substantive application has been made as if it were a controlled activity. However, the WAP provides that the activity is controlled only if flows are provided in the Takapō River below Lake George Scott, an artificial lake in the bed of the Takapō River near the Tekapo A station. If no such flow is provided the activity is non-complying.
84. Rule 15A provides:

Rule 15A

Any activity that is part of the Waitaki Power Scheme, for which a consent is held and is the subject of an application for a new consent for the same activity and is:

⁷⁵ Section 81(2)(d) FTAA

⁷⁶ Section 83 FTAA

⁷⁷ Collins New Zealand Dictionary, 2017 Harper Collins.

- (a) the use of water for the generation of electricity; or
 - (b) the taking, damming or diverting of water for storage; or
 - (c) the taking or diverting of water into canals; or
 - (d) the taking, damming, or diverting of water to protect the structural integrity of dams, power houses, canals and appurtenant structures;
- is a controlled activity, provided the activity complies with Rules 2, 3, 6 and 7.

The matters over which control is reserved are:

- (a) In respect of flows into the Pukaki River, the Lower Ohau River or the Tekapo River (above the confluence with the Forks Stream), adverse effects, including effects on Ngai Tahu culture, traditions, customary uses and relationships with land and water, unless the environmental flow and level regimes for these rivers have been reviewed after the public notification date of this rule and the outcome of the review has become operative in accordance with clause 20 of Schedule 1 to the Resource Management Act;
- (b) Any mitigation measures to address adverse effects (including effects on Ngai Tahu culture, traditions, customary uses and relationships with land and water), except for changes or alterations to environmental flow and level regimes, minimum lake levels, annual allocation to activities, or the provision of flows into the Lower Waitaki River, set by this Plan;
- (c) Collection, recording, monitoring and provision of information concerning the exercise of consent; and
- (d) Lapse period, duration of consent and review requirements.'

85. Rule 2 provides:

- (1) Except as provided in (2), (3), and (4) no person shall take, use, dam or divert surface water or groundwater unless:
 - a. the flow in the relevant river or stream, or the level in the relevant lake, is above the minimum flow or level in Table 3B

86. In relation to the Takapō River, Row ii of Table 3B of provides a minimum flow below Forks Stream.

- a. An allocation limit from Lake George Scott to the confluence with the Grays River of 0 m³/s
- b. From the Fork Stream confluence to Lake Benmore, a minimum flow of 3.4 m³/s measured immediately downstream of the Mary Burn confluence

- c. An allocation limit from downstream of the Grays River confluence to Lake Benmore of 0.7 m³/s
 - d. Any taking of water that has been released into the Tekapo River from Lake George Scott for agricultural and horticultural activities is in addition to the allocation limits in a and c above
 - e. No flow-sharing regime
87. Table 3B also includes Row xxii, which relates to *“All other rivers and streams (except for the Pūkaki River, lower Ōhau River and the Tekapo River upstream of Lake George Scott)”*. The environmental flow regimes is set out as:
- e. A minimum flow of the 5-year, 7-day low flow as assessed by the Canterbury Regional Council set at the downstream end of the catchment
 - f. A flow-sharing threshold at the mean flow as assessed by the Canterbury Regional Council
88. Row xxii excludes the Takapō River above Lake George Scott but includes the Takapō River below Lake George Scott.
89. The application does not propose a minimum flow in the Takapō River below Lake George Scott as required by Table 3B. Rule 15A provides for a controlled activity where the activity complies with Rule 2. Non-compliance with Rule 2 means that Rule 16 applies, in which case the activity status is non-complying.

Rule 16

Any activity which contravenes any of Rules 2, 6 or 7 is a non-complying activity. In considering an application to which this rule applies the consent authority will have regard, among other matters, to all the policies of this Plan.

90. Genesis has not provided minimum flows in accordance with Row xxii of Table 3B. Accordingly, the activity applied is non-complying. The activity status is important because it supports the provision of flows for the Takapō River.
91. The fact that the TPS is non-complying activity under the WAP is a strong policy signal. It reflects the plan’s deliberate choice to treat applications that do not provide for flows in the Takapō River as presumptively inappropriate, enabling them to be declined under the RMA. By assigning non-complying status to such applications, the plan underscores the importance of maintaining flows in the Takapō River. It supports the need for flows in the Takapō River to address the adverse effects of the absence of flows.

CLAUSE 17(1)(b) - SECTION 104 RMA

92. The Panel is required to take into account the matters set out in s 104 of the RMA.⁷⁸ This includes an assessment of “any actual and potential effects on the environment of allowing the activity” under s 104(1)(a) any relevant provisions of the relevant planning documents under s 104(1)(b). How the “environment” is defined, particularly the extent to which it includes activities which are presently consented but for which the consents will expire, is relevant to both.
93. When the factual environment is overlayed by the effects of permitted and consented activities, this is often referred to as the “existing environment”. The High Court has cautioned practitioners and judges against the use of the term “existing environment” because it is not a term found in the legislation,⁷⁹ but has acknowledged it is a “shorthand” reference to the authorities concerning the range of activities to be taken into account when examining any actual or potential effects of allowing the activity that is the subject of an application. The term “existing environment” is used in that way (as shorthand) in this document.
94. These submissions set out Forest & Bird’s position and discussing the case law on the existing environment. This is then applied to s 104(1)(a) and (b). The questions posed by the Panel are then answered.
95. There is an issue about the extent to which the TPS forms part of the existing environment. This is an issue because Genesis says that all of the current operations of the TPS, including the takes, diversions and discharges, form part of the existing environment. The implication is that there is no basis to include conditions relating to flow. Consequently, Genesis has not provided any information or evidence that would form the basis for imposing conditions providing for flows in the Takapō River.
96. Forest & Bird considers that the takes, diversions, and discharges associated with the TPS do not form part of the existing environment. This position is strongly reinforced by the fact that the evaluation under s 104(1)(b) requires consideration of the relevant planning documents, including the WAP, which provides that the Panel can impose conditions providing for flows into the Takapō River (i.e., can make changes to current operations).

⁷⁸ Clause 17(1)(b) FTAA

⁷⁹ *Royal Forest & Bird Protection Society of New Zealand Inc v Buller District Council and ors* [2013] NZHC 1324 at [13]-[14] and [23]. The caution was noted in *Aratiatia Livestock Ltd v Southland Regional Council* [2019] NZEnvC 208 at [204].

97. In *Queenstown Central Limited v Foodstuffs (South Island) Limited*, the High Court observed that:⁸⁰

None of the baseline or receiving environment cases has ever been deployed before to rule out consideration by a consent authority of the prospect that an application would impede an established objective in the operative plan.

98. This observation applies to the description of the existing environment being proposed by Genesis in this case. If correct, the Genesis description would rule out the consideration of environmental flows when the WAP expressly anticipates such consideration.

99. In *Queenstown Central*, the High Court went on to state that:⁸¹

The consent authority cannot consider any adverse effect on the community of using land for retail activities, which is suitable for industrial activities, if the s 104D(1)(a) analysis is done without the Court being able to have regard to the future needs of Queenstown for industrial land, and the objective in the operative district plan to provide more industrial land at Frankton Flats.

100. Although made in the context of s 104D, these comments are equally applicable to assessments under s 104(1)(a) and (b). The Panel is required to take into account the matters of control in Rule 15A, and in particular, the potential for environmental flows to address adverse effects. A description of the existing environment that prevents the Panel from doing so cannot be supported.

The “environment”

101. The RMA defines the “environment” broadly, as:

...includes—

- (a) ecosystems and their constituent parts, including people and communities; and
- (b) all natural and physical resources; and
- (c) amenity values; and
- (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters

⁸⁰ *Queenstown Central Limited v Foodstuffs (South Island) Limited* [2013] NZHC 815, at [70]

⁸¹ At [76]

*Queenstown Lakes District Council v Hawthorn Estate Limited*⁸²

102. In *Hawthorn*, the Court of Appeal clarified that, when assessing the effects of a proposed activity under s 104(1)(a) of the RMA, it is both permissible and often necessary to consider the future state of the receiving environment. Crucially, this includes changes resulting from permitted activities under a district plan (now provided for under s 104(2)) and from resource consents that have already been granted and are likely to be implemented.⁸³ The Court rejected the broader approach taken by the High Court, which had suggested that even potential future consents could be considered. The assessment includes foreseeable and legally authorised changes, rather than speculative developments.⁸⁴
103. Applied to Genesis' application, the water permits Genesis seeks cannot be treated as part of the "existing environment" because they are neither permitted activities nor granted consents. Genesis's argument goes beyond *Hawthorn*, which only includes granted and likely-to-be-implemented consents in the existing environment.

*Sampson v Waikato Regional Council Asset Management Group*⁸⁵

104. *Sampson* involved a request for flood protection works in the Lower Waikato River floodplain, where the appellant argued that existing river channel modifications should be treated as part of the "existing environment".⁸⁶
105. The Environment Court accepted this part of the appellant's argument and confirmed the "existing environment" included current physical modifications. Importantly, the Court distinguished between land use consents (granted in perpetuity) and water consents (granted for a fixed term), stating that for the latter, "the existing environment must be determined as the environment that might exist if the existing activity, to which the water consents relate, were discontinued". This is contrary to Genesis' argument that its current water takes, uses and diversions form part of the "existing environment" for re-consenting purposes.

*Rotokawa Joint Venture Limited v Waikato Regional Council*⁸⁷

106. In *Rotokawa*, the Environment Court considered Contact Energy's application to continue operating two geothermal power stations, with the key issue

⁸² [2006] NZRMA 424

⁸³ *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424 (CA) At [11]

⁸⁴ At [57]

⁸⁵ , EnvC Wellington A178/2002

⁸⁶ *Sampson* at [24] – [26]

⁸⁷ A41/2007

being how reinjection of geothermal water could mitigate subsidence risks in Taupo.⁸⁸ Although the appeal was limited to conditions and the Court could not decline the application, it still addressed how to define the “existing environment” under s 104(1)(a). Drawing on *Contact Energy v Waikato Regional Council*, the Court held that the existing environment includes consideration of past and ongoing abstraction, but must also account for how the environment would evolve if consents were not renewed, such as through natural recharging.⁸⁹

107. The Court considered the relevance of controlled activity status and found that even where consent renewal is expected, the effects assessment must consider a scenario in which consents expire and activities cease.⁹⁰

*Port Gore Marine Farms v Marlborough District Council*⁹¹

108. *Port Gore* concerned a re-consenting application for marine mussel farms within the Marlborough Sounds, in an area the Court found to be “wild and remote”,⁹² “highly natural”,⁹³ and an “outstanding natural landscape”.⁹⁴ The Court found that the farms had more than minor adverse effects on landscape values.⁹⁵ The Court concluded that, due to the expiry of the earlier permits, the environment must be assessed as if the farms were not present. The alternative of assuming the continued presence of the farms would not be logical, and would undermine the ability of affected parties to challenge the activity.⁹⁶
109. This reasoning has direct relevance to Genesis’s TPS application. The Court in *Port Gore* emphasised that including the effects of an expired activity in the “existing environment” would compromise the consent authority’s ability to properly assess and manage those effects. It is also illogical to assume the activity is already authorised when it is the Panel’s function to consider the question of authorisation.
110. In *Port Gore* the activity was discretionary. However, as in *Rotokawa*, above, the position remains the case for controlled activities, because the consent

⁸⁸ *Rotokawa Joint Venture Limited v Waikato Regional Council* Decision No. A41/2007, at [3]

⁸⁹ *Rotokawa*, at [109]

⁹⁰ *Rotokawa*, at [109]

⁹¹ [2012] NZnvc 72

⁹² *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72, at [46]

⁹³ *Port Gore* at [74]

⁹⁴ *Port Gore* at [85]

⁹⁵ *Port Gore* at 63]

⁹⁶ *Port Gore*, at [140]

authority must still consider the matters of control and determine consent conditions.

*Ngāti Rangi Trust v Manawatu-Whanganui Regional Council*⁹⁷

111. In *Ngāti Rangi*, the High Court considered the meaning of the “existing environment” in the context of re-consenting water permits for the century-old Raetihi hydro-electric scheme. The Environment Court had accepted the scheme’s ongoing operation as part of the existing environment due to its long history, controlled activity status, and policy support under the One Plan.⁹⁸ Essentially, the Environment Court adopted the interpretation of the existing environment that Genesis is now arguing for.
112. However, the High Court overturned this, finding that water permits do not carry existing use rights and that including them in the baseline for assessment would undermine the sustainable management objectives of the RMA.⁹⁹
113. Consistent with *Sampson*, above, the High Court held that expired water permits should not be treated as part of the existing environment, even if the physical infrastructure is part of the existing environment. Including existing consents as part of the existing environment on a re-consenting application “...would cut across the sustainable management objectives of the Act”, because it would “... lock in hydro-electricity water takes and flow rates for so long as the controlled activity status is retained, thereby preventing adverse effects from being avoided or mitigated”.¹⁰⁰
114. The High Court emphasised that water permits are not permanent and do not attract existing use rights, distinguishing *Rodney District Council v Eyres Eco Park*.¹⁰¹ Water permits do not confer existing use rights under section 10 of the RMA. Including them in the baseline for assessing environmental effects effectively grants them a permanence they do not legally possess undermining the purpose of re-consenting, which is to reassess whether the activity remains appropriate.¹⁰²
115. Genesis relies heavily on [65] of *Ngāti Rangi*, which references Nolan’s commentary, suggesting that effects from existing structures may be included

⁹⁷ [2016] NZHC 2948

⁹⁸ See *Ngāti Rangi* at [28]

⁹⁹ *Ngāti Rangi* at [63]

¹⁰⁰ *Ngāti Rangi* at [63]

¹⁰¹ [2007] NZRMA 1

¹⁰² *Ngāti Rangi* at [62] and [63]

as part of the existing environment where it would be “fanciful or unrealistic” to assess the existing environment as though those structures did not exist. Collins J found he was “reinforced in [his] conclusion” because it was feasible to assess the environment without the scheme by examining upstream conditions. The same applies to the TPS, as it is possible to assess the environment without the current water uses, takes and diversions of the scheme, as Ms McArthur has done.

116. Genesis’ argument that it is unrealistic to assess the environment without the physical infrastructure and therefore different possible flow regimes cannot be considered, is an oversimplification that is demonstrably wrong in the light of Ms McArthur’s evidence and is not supported by the remarks of Collins J in *Ngāti Rangi*.
117. Ultimately, the High Court’s decision reinforces the concept that the existing environment for re-consenting purposes must exclude the effects of the activity being re-consented. Where physical infrastructure may remain, the focus is still on a scenario where the water uses, takes and diversions cease.

*Alexandra Flood Action Society Inc v Central Otago District Council*¹⁰³

118. In *Alexandra*, the Environment Court considered Contact Energy’s application to re-consent its Clutha River hydro-scheme. The Court explored three conceptual baselines for the “existing environment”: the “Armageddon” scenario (infrastructure remains but sluice gates are opened), the “Eden” scenario (restoration to a pre-dam state), and the “current state” scenario,¹⁰⁴ which was ultimately adopted. Unlike *Ngāti Rangi*, environmental flows were not under consideration. *Alexandra* focused on flooding and sedimentation caused by artificial lakes. The TPS differs significantly, as it involves a natural lake (Takapō) and raises issues about downstream environmental flows, *Ngāti Rangi* is the more relevant and higher authority.
119. The Court in *Alexandra* also clarified that defining the existing environment does not prevent the imposition of conditions to address ongoing adverse effects. It likened re-consenting to renegotiating a lease, where new conditions may be added to remedy the ongoing effects of previous lawful activities. This principle is crucial for the TPS. Even if the current uses, takes

¹⁰³ C102/2005

¹⁰⁴ *Alexandra* at [51]-[52] and [69]

and diversions are considered part of the existing environment, consent authorities may still impose conditions to address their effects.¹⁰⁵

120. Forest & Bird maintains that, consistent with *Ngāti Rangī*, the environment should exclude the activities being re-consented. Regardless of the chosen baseline for comparison, the Court retains discretion to manage environmental effects through appropriate conditions.

*Lindis Catchment Group Inc v Otago Regional Council*¹⁰⁶

121. In *Lindis*, the Environment Court considered an application for a suite of water permits to take water from the Lindis River. The *Lindis* decision is significant for Genesis' TPS application as it clarifies how sections 104(1)(a) and 104(1)(b) of the RMA interact when assessing the "existing environment". It acknowledged the approach to the "existing environment" in *Port Gore*, approved in *Ngāti Rangī*, noted that the High Court in *Ngāti Rangī* had kept the s 104(1)(a) and (b) factors separate,¹⁰⁷ and concluded that the environment excluded the deemed permits being replaced and that this must be considered independently of planning policies under s 104(1)(b).¹⁰⁸
122. In a case relating to an associated plan change,¹⁰⁹ the Court assessed the application on an environment of "naturalised flows" (which included a small take for stock water which was a permitted activity) and also the "status quo" (although the two were "close"). A distinguishing feature of the *Lindis* case was that the Court was directed by policy to consider both the naturalised flow and the status quo. The Court rejected an argument that the scheme of the NPSFM only required assessment against the current situation "especially when there is over allocation of water".¹¹⁰

Given the wording of Objective B1 of the NPSFM requiring that the life-supporting capacity ecosystem processes and indigenous species be safeguarded, we consider that at least in relation to the ecosystems which contain indigenous biodiversity, an assessment needs to be made of any indigenous species' circumstances - its current and former area of occupation and extent of occurrence and analysis of its holding ecosystem's intrinsic values which includes analysis of the ecosystem's "integrity, form,

¹⁰⁵ *Alexandra* at [67] and [69]

¹⁰⁶ [2019] NZEnvC 179 and [2019] NZEnvC 166

¹⁰⁷ *Lindis* at [55]

¹⁰⁸ *Lindis* at [56]

¹⁰⁹ *Lindis Catchment Group Inc v Otago Regional Council* [2019] NZEnvC 166.

¹¹⁰ *Lindis Catchment Group Inc v Otago Regional Council* [2019] NZEnvC 166 at [193]

functioning and resilience” all of which appear to have four-dimensional elements (i.e., involve space and time).

123. The Court also acknowledged that the evaluative process under s 104 requires consideration of both subsections. In some cases, the environment anticipated by statutory instruments under s 104(1)(b) may carry more weight than the s 104(1)(a) environment, especially where plans provide for restoration or protection of ecological values. Applied to Genesis’ TPS, this means the effects on the Takapō catchment’s rare and threatened habitats must be assessed without assuming continuation of existing water uses, takes and diversions.

*Aratiatia Livestock Limited v Southland Regional Council*¹¹¹

124. *Aratiatia* related to an appeal by Meridian Energy of an Objective that included recognition of the Manapōuri hydro-electric generation scheme’s structures as part of the existing environment. In that case, the physical structures were authorised by statute.¹¹² The hearing panel had initially found that only the hydro-scheme’s physical structures, not the ongoing water takes, formed part of the “existing environment,” prompting Meridian to appeal and argue, as Genesis is doing here, that all operations should be included.
125. Meridian argued that the “existing environment” when assessing its future consent applications should be defined as “the environment as it exists at the time replacement consents are considered, including the effects of activities undertaken pursuant to existing water and discharge permits”.¹¹³ The Court found that linking the Scheme to the “existing environment” in Objective 10 “could ... be interpreted as extending the meaning of “environment” in the administration of the [plan]” and that “If that were to happen it may have unintended or unforeseen consequences.”¹¹⁴
126. The Environment Court opted for Meridian’s alternative relief: removing the term “existing environment” from the plan entirely.¹¹⁵ If the Court had considered Meridian’s interpretation of the “existing environment” (as including its water takes) to be correct, it would have allowed the primary relief.

¹¹¹ [2019] NZEnvC 208

¹¹² Manapōuri Te Anau Development Act 1963

¹¹³ At [196]

¹¹⁴ At [207]

¹¹⁵ At [195] – [199] (footnotes omitted)

Forest & Bird's Position on the Existing Environment

127. The existing environment, which describes the reference point for assessing the effects of a proposed activity, is evaluated with reference to the specific factual context of each case. This includes the environment as it exists and includes resource consents that have been granted and are likely to be implemented. Importantly, it does not generally encompass the effects of the activity for which consent is being sought.
128. The physical infrastructure associated with the TPS forms part of both the existing environment and the permitted baseline. However, based on the case law discussed above, particularly *Ngāti Rangī*, the water takes, uses, diversions, and discharges do not. *Alexandra* can be distinguished on the basis that the effects being considered were different (flooding of private land compared to adverse ecological effects caused by dewatering a river), and the planning framework (the WAP expressly contemplates the issues of flows being considered on reconsenting).
129. The takes, uses, diversions, and discharges that are the subject of the current consent application should be assessed as proposed activities, not as part of the existing environment. The purpose of the consent process is to determine whether and how these activities should continue, including whether environmental flows should be provided in the Takapō River.
130. Both Rule 15A and 16 anticipate consideration of flows in the Takapō River. Defining the existing environment to include the existing takes, diversions and discharges risks precluding meaningful consideration under s 104(1)(a) of environmental flows, despite the WAP's intent to manage or reduce adverse effects. This would create a misalignment between the effects assessment under s 104(1)(a) and the planning evaluation under s 104(1)(b). The provisions should be read together to minimise such misalignment.
131. Genesis argues that its current operations form part of the existing environment. In addition to being wrong in law, this approach is illogical: it means that there are few, if any, discernible effects to be assessed under s 104(1)(a). This conflicts with a purposive interpretation of "environment" as it is contrary to the RMA's sustainable management purpose: it undermines the purpose of the consent process and risks accepting decades of ecological degradation without requiring remediation or mitigation.
132. This framing also excludes positive contributions, such as those relevant under the National Policy Statement for Renewable Electricity Generation (NPSREG). As Helen Marr has noted, this would render the benefits of the TPS irrelevant, which would be both illogical and contrary to the direction provided by the NPSREG.

133. Forest & Bird also disagrees with the suggestion that environmental flows cannot be considered simply because Genesis has not applied for them. The Panel is obliged to consider whether or not to impose flows and can impose conditions on water takes, uses, diversions, and discharges to address adverse effects. Even if the Panel were to accept Genesis' description of the existing environment, this would not preclude the imposition of conditions to provide flows in the Takapō River.
134. In summary, the takes, diversions and discharges should be treated as a proposed activity. This ensures that the effects of the scheme can be properly evaluated under the WAP and the NPSFM. The Panel's assessment under s 104(1)(a) and (b) for the purpose of cl 17 will be aligned, coherent, and consistent with the purpose of the RMA.

Imposition of conditions regarding flows not dependent on the description of the existing environment

135. Before responding to the Panel's questions, it is necessary to emphasise that the way the existing environment is conceptualised does not preclude the imposition of consent conditions to address adverse effects. That is, even if the Panel, contrary to Forest & Bird's position, concluded that the existing environment for the purposes of s 104(1)(a) included the current takes, uses, diversions and discharges associated with the scheme, the Panel still has to consider whether or not to provide flows in the Takapō River as part of its assessment under s 104(1)(b). The description of the existing environment should not be applied under s 104(1)(b) in a way that would make this assessment meaningless or purposeless.
136. The High Court's statement in *Ngāti Rangī* that the One Plan "provisions are considered under s 104(1)(b) and not under s 104(1)(a)"¹¹⁶ applies equally to the WAP. The WAP anticipates that flows in the Takapō River will be considered as part of the re-consenting of the TPS. This is a separate consideration to that under s 104(1)(a). Flows can be imposed under s 104(1)(b), irrespective of the existing environment under s 104(1)(a).

Response to Questions

137. The Panel has posed a number of questions to Forest & Bird. It has proved difficult to answer these questions. This is because there appears to be a mismatch between the contents of the memorandum dated 5 December 2019, that was attached to the substantive application and which set out

¹¹⁶ *Ngāti Rangī* at [67]

Genesis and Meridian's position on the existing environment (the Genesis memorandum), and its approach to the substantive application.

138. As discussed above, the Genesis memorandum sets out a position that the existing environment includes the current operations of the TPS. However, the memorandum goes on to say that the way in which the existing environment is framed is less important than the way in which the relevant plan provisions are framed.¹¹⁷

In that regard, whether or not hydro-electricity water takes and flow rates are 'locked in' for so long as the controlled activity status is retained depends not on the way the existing environment is described, but on the nature of the control reserved through the relevant rule in the plan. The question of whether (and to what extent) conditions can be imposed to avoid or mitigate particular adverse effects also relies on the provisions in the relevant controlled activity rule(s).

139. However, Genesis' substantive application appears to take a contrary position. The substantive application has been lodged on the basis that the existing environment includes the current operations of the TPS and prevents the imposition of conditions providing for flows.

Whether there is disagreement in terms of the way in which the legal principles relating to the "existing environment" are expressed by the Applicant and/ or whether and to what extent there is disagreement in terms of the way in which the Applicant has applied those legal principles;

140. There appears to be a degree of agreement about the relevant principles.

141. There appears to be agreement that the assessment of the existing environment requires an evaluation on the facts of each case.

142. The key area of disagreement appears to relate to the notion that, if it is fanciful to consider the environment without the infrastructure required for the activity that is being consented, then all effects associated with the existing operation form part of the existing environment. This appears to be the position taken by Genesis in reliance on *Alexandra*.

143. As above, Forest & Bird says that the facts in *Alexandra* are significantly different, both in relation to the effects being considered and because the WAP expressly anticipates consideration of flows in the Takapō River. The High Court decision in *Ngāti Rangī* is the most relevant authority, dealing with the consenting of a long-standing hydro-electric scheme, where the key

¹¹⁷ Genesis memorandum, paragraph 24

issue was environmental flows downstream from the scheme. The existing environment excludes the water permits for take, use and diversion, which are the subject of the re-consenting application. This position is reinforced where an alternative approach would undermine the WAP.

144. There appears to be agreement, at least based on the Genesis memorandum, that the conceptualisation of the existing environment does not prevent the imposition of conditions to manage adverse effects.
145. In *Alexandra*, the case primarily relied on by Genesis, the conceptualisation of the existing environment did not prevent consideration of the adverse effects that were of concern.

What if any other conceptualisation of the existing environment Forest and Bird considers is more appropriate; and

146. Forest & Bird's position is that the existing environment under s 104(1)(a) and clause 17 of Schedule 5 FTAA includes the infrastructure associated with the TPS, such as the intake structure, control gates, canals and power stations. However, it excludes the associated takes, uses, diversions and discharges.
147. This is not to say that the environment after consenting will have no takes from the TPS. Adopting a reference point for assessing the effects of the TPS, which excludes the existing takes, is the same approach as taken by the High Court in *Ngāti Rangī*. It is also consistent with *Hawthorne*, *Port Gore*, *Sampson*, and *Rotokawa*.

The implications of that different conceptualisation in terms of the positive and adverse effects of the application and the conditions that the panel can and should impose in the context of this application under the FTAA.

148. Under Forest & Bird's conceptualisation the ongoing dewatering and lack of flow variability causes significant adverse effects on the Takapō River whereas under Genesis' conceptualisation there is no adverse effect because the lack of flow is part of the existing environment.
149. Under Forest & Bird's conceptualisation, conditions requiring environmental flows in the Takapō River are necessary:
 - a. To mitigate the significant adverse effect identified above.
 - b. To address the relevant objectives and policies, discussed at paragraph 147 onwards below, which require the Panel to consider adverse effects and how they can be mitigated.
150. Forest & Bird understands Genesis' position to be that:

- a. Conditions requiring environmental flows are not necessary or appropriate because there is no adverse effect because the lack of flow is part of the existing environment.
 - b. “The question of whether (and to what extent) conditions can be imposed to avoid or mitigate particular adverse effects also relies on the provisions in the relevant controlled activity rule(s).” which appears to anticipate conditions relating to environmental flows regardless of the position taken in relation to the existing environment.
151. The Panel has the power to impose conditions relating to flows into the Takapō River. Section 81(2)(d) and clause 18 of Schedule 5 FTAA enable the Panel to impose conditions that provide for environmental flows in the Takapō River, provided they comply with s 83. The appropriateness of conditions (under s 83) is affected by which conceptualisation the Panel prefers. The conditions sought by Forest & Bird comply with s 83 (discussed further below).

CLAUSE 17 OF SCHEDULE 5: RMA SECTION 104(1)(b) – APPLICATION OF STATUTORY INSTRUMENTS

152. The Panel must also take into account s 104(1)(b) RMA which requires consideration of the relevant planning documents.
153. As explained above, the purpose of the FTAA does not alter the procedural requirements or substantive criteria of either the RMA or the relevant statutory instruments. If a policy requires an assessment to be carried out, then this must be done in accordance with the applicable policy framework, *before* weighing the outcomes of the assessment against the FTAA purpose.
154. The key planning documents are addressed by Ms Marr in her evidence. These submissions address key legal issues arising with respect to the WAP.

Waitaki Catchment Water Allocation Regional Plan

155. The starting point of the discussion on the Waitaki Catchment Water Allocation Regional Plan (WAP) is the Resource Management (Waitaki Catchment) Amendment Act 2004 (“the Waitaki Act”). This Act established the Waitaki Catchment Water Allocation Board (“the Board”) to develop and approve a regional plan to provide for water allocation in the Waitaki catchment, including water to sustain intrinsic values, and the management of allocated water.¹¹⁸

¹¹⁸ Waitaki Act, s 13 (b) and (d).

156. The purpose of the WAP is to assist the regional council to carry out its functions in a way that achieves the purpose of the RMA.¹¹⁹ Other regional plans must be consistent with the WAP and must not deal with the allocation of water in the Waitaki catchment.¹²⁰

157. The Board released its decision on the WAP in September 2005. The Board noted that Meridian, as the then owner and operator of the TPS, requested that the WAP specify zero minimum flows in the Takapō River. The Board found that this would not be appropriate, and that the question of environmental flows should be considered when re-consenting the TPS.¹²¹

Although the Board accepted that the costs of returning water to these rivers may outweigh and be out of proportion with the benefits, it did not consider that the starting point for replacement consents should be a dry river. Consequently, the Plan does not specify an environmental flow for these rivers, and replacement consents will be considered as a discretionary activity in terms of Rule 19.

158. Rule 19 applied to activities for which environmental flow regimes were not set by the WAP. These activities were made discretionary, and the consent authority was required to have regard, among other matters, to Policies 4, and 38.

159. Policy 4 identifies matters to be considered when setting environmental flow and level regimes. It requires decision-makers to consider a list of matters, including (*inter alia*):

a. Mauri and healthy ecosystems of indigenous species, including mahinga kai species...

e. habitats including those of invertebrates, birds and fish ... [and]

p. existing flow and level regimes, physical resources and activities.

160. Existing flow regimes and activities must be considered alongside effects on indigenous species and habitats when setting environmental flow regimes. The expectation was not that the existing flow regime for the Takapō River would be guaranteed at the reconsenting stage. Instead, the appropriate environmental flow regime would be determined at the re-consenting stage, including, among other things, consideration of the matters set out in Policy 4.

¹¹⁹ Waitaki Act, s 3

¹²⁰ Waitaki Act, s 15

¹²¹ Waitaki Catchment Water Allocation Regional Plan, Annex 1 – Decision and principal reasons for adopting the Plan provisions, September 2005 (WAP Decision), at [143]

161. Policy 38 (also unchanged by PC3) acknowledges: *“that the Tekapo, Pūkaki and Ōhau Rivers are associated with the mana of Lakes Tekapo, Pūkaki and Ōhau and that flows in these rivers could provide continuity of flow from the mountains to the sea”*.

WAP Plan Change 3 (PC3)

162. PC3, notified on 28 June 2014, proposed changes in respect of (*inter alia*) *“improved certainty of continuing operation for hydro-electricity generation by changing the activity status of applications for resource consents to replace existing consents for hydro-electricity generation”*.¹²² This included changing the activity status of replacement consents for the TPS from discretionary to controlled.¹²³
163. A major concern raised in PC3 was that changing activity status from discretionary (under Rule 19 of the original WAP) to controlled (under Rule 15A in the WAP as amended by PC3) would mean that the consenting authority would not be able to impose environmental flows because this could frustrate the grant of consent.¹²⁴
164. In a Joint Memorandum of Counsel in response to Minute 10,¹²⁵ counsel for Meridian and Genesis assured the Panel that *“a condition of consent requiring flows to be passed through the dams... in the order of the 5-year 7-day low flow would not be considered to frustrate the grant of consent in the future”*.¹²⁶
165. The Panel accepted these assurances from Meridian and Genesis, and was therefore satisfied that environmental flows for the Takapō River would be available under a controlled activity status for Rule 15A and would not frustrate the grant of consent:¹²⁷

We agree with the Council officers’ conclusion that the imposition of a minimum flow for the three named rivers by a condition of a future consent would not frustrate or negate that consent. Any environmental flow regime would likely be in the vicinity of the default minimum flow as set out in Rule 2. This provides for a minimum of the 5-year, 7-day low flow, with a flow sharing threshold at the mean low flow. We are satisfied from the data supplied that

¹²² Report and Recommendation of the Hearing Commissioners, 3 June 2016 (PC3 Decision), at [2]

¹²³ The discretionary activity status prior to PC3 was conditional on providing flows in the Takapō River below Lake George Scott in accordance with Table 3B. PC3 did not change the non-complying activity status for applications that did not provide flows below Lake George Scott.

¹²⁴ Raised by CRC and Ngāi Tahu among others, see PC3 Decision at [633] – [654]. CRC was initially opposed to controlled activity status, but changed its position based on the assurances provided by Meridian and Genesis.

¹²⁵ Joint Memorandum of Counsel in response to Minute 10, 12 November 2015 (“PC3 Joint Memo”) attached

¹²⁶ PC3 Joint Memo at [6]. See also CRC Memorandum in response to Minute 10, undated, attached at [8] – [9]

¹²⁷ PC3 Decision at [659]

any minimum flow would not be of such a proportion that it would frustrate or negate the consent.

166. It was on this basis (i.e. relying on the assurances from Meridian and Genesis) that the Panel agreed to the proposal for controlled activity status under Rule 15A. In relation to Rule 15A, the Panel stated that:¹²⁸

The first matter of control addresses the three named rivers and ensures that there is sufficient control to be able to impose an appropriate environmental flow regime and to address adverse effects.

167. This approach above is entirely consistent with the position of CRC as set out in its letter of 25 June 2025, which states that the expectation under PC3 was that environmental flows for the Takapō River would be considered through the current consent process.¹²⁹

Specifically in relation to the question of the potential provision of flows in the Takapō River, the community expectation at the time Rule 15A was put into the WAP through Plan Change 3, was that this was a matter that would be considered through the consent process when the TPS was reconsented.

168. This is reflected in Rule 15A, if flows are provided below Lake George Scott, or Rule 16 if they are not.
169. However, the approach now taken by Genesis is different from that anticipated by the WAP. The WAP anticipated flows would be considered. Genesis has not proposed flows in the Takapō River and has not addressed flows in its substantive application.

WAP and PC3 and the existing environment

170. While the context of PC3 was a plan change rather than a consent application, the way in which the PC3 Board approached the “existing environment” remains instructive. Both the WAP and PC3 decisions recognised that a reference point was needed to evaluate environmental effects and compare alternative flow regimes. The reference point adopted was the current operations.
171. What is particularly useful from those decisions is the confirmation that describing the existing environment as including current operations did not prevent an assessment of different flow scenarios or the imposition of new environmental flow conditions. The panels made clear that the reference point is a tool for comparison and does not prevent consideration of other scenarios.

¹²⁸ PC3 Decision, at [667]

¹²⁹ Letter from CRC to Genesis, dated 25 June 2025, at [9(d)], attached

[78] We have an evidential base derived from the current consented regime, so it seems to us common sense and practicable to use that existing environment to compare the scenarios that reflect the alternate flow and level regimes that we are required to consider. At the end of the day when it comes to assessing the efficiency and effectiveness of the provisions, it matters not what constitutes the reference point, so long as all scenarios are compared against the same reference point.

172. As noted in both decisions, the reference point is useful for assessing and comparing the benefits and costs of alternative options. It does not mean that the environmental effects of dewatering can be disregarded or that they do not need to be managed.
173. Genesis's acknowledgment in PC3 of flow levels that would not frustrate consent provides a clear benchmark. The application should have included an assessment of environmental flows up to this threshold. Without such an assessment, the application cannot be considered complete.

FOREST & BIRD POSITION

174. Forest & Bird does not seek the decline of consent but instead seeks that the conditions provide environmental flows. These flows are essential to restore ecological function, reconnect braided river habitat, and support indigenous biodiversity. The current regime fails to meet NPSFM requirements, particularly Te Mana o te Wai.
175. Forest & Bird also seeks improvements to the conditions governing the compensation package, which currently lack transparency, enforceability, and ecological rigour. The quantum has not been justified through an effects-based assessment and appears to reflect negotiated agreement rather than ecological necessity.
176. Forest & Bird submits that the conditions must be amended to ensure the compensation reflects the scale of residual effects, and that the IBEP is subject to independent review, measurable outcomes, and binding timeframes. Without these changes, the package risks being symbolic and fails to meet the NPSFM and the effects management hierarchy

Environmental Flows

177. The Takapō River has undergone significant ecological degradation as a result of the takes and diversions from the TPS. The reduction in water volume has diminished the extent and quality of braided river habitat, severing

connections with floodplains and leading to a loss of morphological diversity, habitat heterogeneity, and natural ecological disturbance regimes.¹³⁰

178. Approximately 6.6 km of riverbed has been completely dewatered, resulting in the total loss of habitat and a measurable decline in biomass of macroinvertebrates and fish. There are also impacts on birds and terrestrial ecosystems.¹³¹
179. Sediment transport has been severely disrupted, starving the river of fine sediment and producing armoured beds, simplified channels, and degraded substrate conditions. These geomorphic changes have impaired the river's ability to support healthy benthic communities and maintain ecological resilience¹³² The loss of dynamic sediment processes has also diminished the formation of ephemeral wetlands, gravel bars, and riparian margins. These are key habitats for ground-nesting birds such as banded dotterels and black-fronted terns. As a result, nesting success has declined due to reduced habitat availability and increased predation pressure in fragmented landscapes.¹³³
180. Adjacent terrestrial ecosystems have been affected by altered moisture regimes and vegetation succession, with Harding noting a shift away from native riparian assemblages toward drought-tolerant or invasive species, further eroding ecological integrity and connectivity.¹³⁴
181. The presence of didymo, exacerbated by low and manipulated flows, has further degraded benthic habitat and disrupted ecological balance.¹³⁵
182. Eels are now largely absent. Any remaining breeding-age individuals face near-total mortality during downstream migration, as diverted flows pass through power station turbines rather than natural channels.¹³⁶
183. These significant adverse effects are contrary to the NPSFM, which provides clear direction that the health and well-being of freshwater bodies and ecosystems must be maintained or improved. Policy 5 requires this outcome and Policy 7 mandates that loss of river extent and values be avoided to the extent practicable, applying the effects management hierarchy.¹³⁷

¹³⁰ Evidence of Kate McArthur, paragraphs 21-23 and Evidence of Mike Harding, paragraphs 17-10

¹³¹ Evidence of Kate McArthur, paragraphs 20-21, Evidence of Mike Harding, paragraphs 17, and Evidence of Rachel McLellan, paragraphs 22-23.

¹³² Evidence of Kate McArthur, paragraphs 24-26 and Evidence of Mike Harding paragraphs 18-19

¹³³ Evidence of Rachel McLellan, paragraph 22-23.

¹³⁴ Evidence of Mike Harding, paragraphs 19, and Evidence of Rachel McLellan, paragraphs 23.

¹³⁵ Evidence of Kate McArthur , paragraphs 25-26.

¹³⁶ Evidence of Kate McArthur , paragraphs 27-28.

¹³⁷ Evidence of Kate McArthur, paragraphs 29-30 and Evidence of Helen Marr, paragraphs 18-21.

184. Regional planning instruments reinforce this obligation. Objective 1 of the Waitaki Allocation Plan (WAP) requires safeguarding the life-supporting capacity and ecological integrity of the braided river system.
185. Against this background, Forest & Bird asked Ms McArthur to consider what an appropriate flow regime would be for the Takapō River. Ms McArthur has identified four options:
- Option 1: Restoration of flows to the Takapō River based on natural [simulated] flows, with a residual/minimum flow of 26 cumecs below Gate 16 and Lake George Scott weir, and regular flushing flows of ~200 cumecs or greater that can achieve periphyton cover of $\leq 30\%$.
- Option 2: Restoration of natural low flows with a residual/minimum flow below gate 16 and Lake George Scott weir of 26 cumecs and the existing spill regime (i.e., no specified flushing flow)
- Option 3: Provide some physical habitat and improve ecosystem health upstream of Fork Stream by adding a residual/minimum flow of 5.8 cumecs below Lake George Scott weir and implement regular flushing flows of at least 6 times the existing median flow (18.6 cumecs at the Fork Stream confluence and 60 cumecs at the Mary Burn confluence) that can achieve periphyton cover of $\leq 30\%$.
- Option 4: Maintain the existing flow regime with no residual/minimum flow from gate 16 or Lake George Scott weir and implement regular flushing flows of at least 6 times the existing median flow (18.6 cumecs at the Fork Stream confluence and 60 cumecs at the Mary Burn confluence) that can achieve periphyton cover of $\leq 30\%$.
186. Forest & Bird supports Option 1. This option is necessary to restore flows to the Takapō River in a manner that, out of the suggested options, most closely reflects its natural hydrology. It includes both a residual flow of 26 m³/s that reflects the WAP, and regular flushing flows capable of removing nuisance periphyton.
187. This approach directly addresses the degradation outlined above and offers a credible pathway to restoring some of the extent of braided river habitat, improving benthic conditions, and supporting the life-supporting capacity of the river system in accordance with the NPSFM and WAP. Compensation of some residual effects is still appropriate.
188. Option 2 is also supported, though to a lesser extent. It retains the same residual flow as Option 1 but does not include specified flushing flows. Importantly, Genesis has previously acknowledged that this level of flow would not frustrate the grant of consent when the controlled activity status was introduced. This concession reinforces the feasibility of Option 2 and its compatibility with the planning framework. While it does not achieve all of the ecological outcomes of Option 1, it still represents a substantial

improvement over the status quo and would contribute meaningfully to the restoration of river values.

189. Options 3 and 4 are less preferred. They offer partial ecological benefits but fall short of what is required to address the scale of degradation caused by the TPS, resulting in substantial residual adverse effects, which require compensation. Nonetheless, both options would still deliver measurable improvements in habitat quality and ecosystem function, particularly through the implementation of regular flushing flows.
190. Forest & Bird reiterates its position, as set out in its earlier memorandum, that expert conferencing is appropriate as a method of advancing the question of environmental flows. As Ms McArthur notes, determining the scientific recommendations for an environmental flow regime is a task that would be significantly furthered by multi-disciplinary expert conferencing.
191. Forest & Bird's experts are available for conferencing if the Panel considers it appropriate.

Compensation

192. Genesis proposed conditions include a compensation package to address the adverse effects of the TPS. The relevant conditions provide:

ENVIRONMENTAL COMPENSATION

23. The consent holder must ensure an integrated Indigenous Biodiversity Enhancement Programme ("IBEP") is undertaken from the commencement of resource consents replacing existing Combined Waitaki Power Scheme resource consents. The objective of the IBEP is to improve the:
- Condition;
 - Resilience;
 - Indigenous biodiversity;
 - Ecological processes; and
 - Other values of:
 - The braided rivers including their braid plains and margins;
 - Lake margins and deltas; and
 - Wetland and springs associated with lakes and braided rivers within the Waitaki Catchment.
193. The proposed conditions provide that Genesis will contribute \$287,500 per year to the IBEP, which can be undertaken with Meridian.

194. The conditions do not explicitly require that this funding be directed to the DOC administered Project River Recovery (PRR). PRR has long served as a mitigation programme for the ecological impacts of hydroelectric development in the Upper Waitaki Basin, focusing on braided river restoration, predator control, and wetland enhancement.
195. However, it is understood that the Genesis contribution will be used alongside funding from Meridian Energy to continue supporting PRR initiatives.

Assessment of the compensation package against NPSFM

196. The compensation package fails to meet the requirements of the NPSFM. There is a lack of transparency, with no evidence linking residual ecological effects to the compensation. The amount of the compensation is the amount that was agreed upon between Genesis, Meridian, and DOC. As discussed below, there is no ecological justification for this amount, it is simply what Genesis would agree to.
197. Forest & Bird's position is that the effects management hierarchy has not been correctly applied, residual adverse effects have not been appropriately identified and quantified, and the proposed compensation measures have not been properly assessed.
198. One of the key concerns is that the compensation package lacks transparency and evidence to demonstrate that adequate and enduring compensation will be achieved. In particular, there is a lack of evidence linking the residual effects of the TPS to the stated ecological intentions and the proposed actions in the IBEP.
199. Forest & Bird asked Ms McArthur to consider the compensation package, including based on information provided by DOC. Ms McArthur concluded that the compensation package was not consistent with good practice or NPSFM principles.¹³⁸

Having reviewed this material, I remain of the opinion that the development of the IBEP and Kahu Ora has fitted values, sites and actions to a budget envelope, rather than compensating residual effects on defined values to meet specific conservation outcomes. Detailed information on values, effects and costings was available but was not carried through to the final IBEP or Kahu Ora and this appears to have led the IBEP away from good practice and NPSFM principles.

200. Forest & Bird agrees with this opinion for reasons outlined below.

¹³⁸ Evidence of Kate McArthur, paragraph 150

The compensation figure is a negotiated outcome, not based on principles of compensation

201. DOC commissioned an internal report to assess the ecological effects and associated compensation for the Combined WPS. The report was titled *Project River Recovery Mitigation Work Report: A costing assessment of potential mitigation actions for hydro-electric activity in the Waitaki River Catchment* by Lewis and Maloney (2020) (the Maloney Report). This is the only attempt to directly identify the ecological effects and appropriate compensation of the Combined Waitaki Power Scheme (CWPS), including the TPS.
202. The Maloney Report does this by adopting a structured framework for costing compensation for the WPS. The scale of adverse impacts is quantified and translated into actionable and financially modelled compensation scenarios.
203. The Maloney report was prepared to inform funding negotiations in anticipation of the reconsenting of the CWPS.
204. There is no equivalent report by Genesis.
205. The Maloney Report developed five scenarios to illustrate the range of potential ecological interventions. Each scenario represents a different level of intensity in restoration and protection efforts, with corresponding annual cost estimates:

	Description	Estimated cost
A.	Full management of all biodiversity values at all locations	\$18.8 million
B.	Majority of values managed at most locations (70–75% of total cost)	\$13.6 million
C.	Most values managed at selected locations (50–60% of total cost); excludes lower priority rivers	\$11 million
D.	Most values managed at a few key locations; reduced site coverage	\$5.7 million
E.	Minimal intervention; key values managed at limited locations only	\$2.2 million

206. The report is transparent in its methodology and clearly articulates the relationship between ecological outcomes and funding levels.
207. Armed with the Maloney Report, DOC then entered negotiations with Genesis and Meridian.¹³⁹ The outcome was an agreed package that was closest to Scenario E: Minimal intervention; key values managed at limited locations only.
208. The authors of the Maloney report caution that Scenario E—the lowest level of intervention—represents a “hold the line” approach that is unlikely to sustain functioning river ecosystems over the next 35 years, particularly in light of climate change.
209. Forest & Bird made an official information request to DOC for material associated with the negotiations. This information shows that the basis for the compensatory figure was negotiation between DOC, Meridian, and Genesis. There are two critical documents that explain the DOC approach. These are the:¹⁴⁰
- a. Minutes from the workshop “Waitaki Bottom Line Workshop” of 2 June 2022
 - b. Memorandum from Dr Hughey to the Deputy Director General Operations (Mr Slater).
210. Dr Hughey led the negotiations for DOC.
211. There was an expectation, at least by some in DOC, that DOC had some leverage in the negotiation in that it could seek flows in the affected rivers, including the Takapō, if agreement was not reached. On 15 June 2022, Karina Morrow, a DOC employee involved in the process noted:
- If negotiations are not favourable (based on the new packages Richard has designed) we would be in a good position to suggest to the Generators that through the consent process we would be arguing for flows in the Ohau, Pukaki and Lower Tekapo to support habitat (for which we have good evidence around). This would obviously impact on generating ability for the Generators (we feel like this is a strong negotiation point).
212. However, two elements of the approach taken by Dr Hughey meant this was never a realistic option. The first was the “getting to yes” approach adopted by Dr Hughey.¹⁴¹

¹³⁹ Genesis and Meridian are sometimes collectively referred to as the generators in the information released by DOC under the OIA.

¹⁴⁰ These documents are attached to the evidence of Kate McArthur.

¹⁴¹ Memorandum from Dr Hughey to Mr Slater of 23 June 2022, Section 2

We essentially led the negotiations and used a ‘getting to yes’ approach based on defining and seeking agreement about the desired biodiversity outcomes to be sought via mitigation – to help achieve this we built a set of agreed negotiating principles that were supported also by Governance.

213. The second is that “walking away is not an option”.¹⁴²

214. Once the “getting to yes” approach had been adopted in negotiations where DOC would not walk away, the outcome was whatever Genesis and Meridian would agree to. The inevitable reduction in the quantum of DOC funding requests can be seen in Dr Hughey’s memorandum to Mr Slater.¹⁴³

In terms of the actual negotiation process, and as noted above, we developed and presented three scenarios across four zones (We described this using an initial metaphor of a house and rooms, and options within). This approach resonated and enabled our TAG to present their ‘ideal’ (scenario 1) and lesser regarded scenarios. Perhaps not surprisingly, the generators, while accepting the approach, and understanding and supporting the ideal faced a number of reality tests, including resourcing. They thus counter offered, against this context, but at a level no one in our teams supported. This situation created some healthy tension which we responded to by building two ‘lesser’ packages (within the context of our scenario 3).

215. The final agreed figure was below DOC’s bottom line.

216. DOC considered several factors that are not relevant to the assessment of compensation under the NPSFM. The negotiations were based on a set of negotiating principles that were agreed with the generators. These contain matters that are not relevant to the NPSFM assessment approach.¹⁴⁴

The task is for DOC to work with the applicants to come up with an agreement that is better than what could be achieved through the processes described above. We have been working with them over the last couple of months to get to a crucial space on key topics, against a set of negotiating principles that we have agreed with the generators, e.g.,

- Giving effect to s4 obligations
- Achieving realistic ecological outcomes
- Acknowledging renewable energy principles.

¹⁴² Minutes from the workshop “Waitaki Bottom Line Workshop” of 2 June 2022, under heading Bottom Lines

¹⁴³ Memorandum from Dr Hughey to Mr Slater of 23 June 2022, Section 2

¹⁴⁴ Minutes from the workshop “Waitaki Bottom Line Workshop” of 2 June 2022, under heading Reflection of context and purpose

217. It is unsurprising that, having negotiated such a good deal with DOC, Genesis now seeks to rely on the agreed figure as its sole compensation obligation. However, this reliance is misplaced. The agreement is simply an agreement between Genesis and DOC. Nothing more and nothing less. Genesis' contribution does not represent appropriate compensation in terms of the NPSFM for the dewatering of the Takapō River.
218. The proposed compensation package must be assessed against the requirements of the NPSFM, which sets out clear expectations for managing adverse effects on freshwater ecosystems. Compensation must be demonstrably linked to residual impacts that cannot otherwise be addressed.
219. The package, as currently proposed, fails to meet the requirements of the NPSFM as discussed by Ms McArthur. There is a fundamental lack of transparency in how the compensation amount was derived. No ecological rationale or effects-based assessment has been provided to justify the quantum. Instead, the amount reflects what was agreed between Genesis, Meridian, and the DOC—without independent scrutiny or evidence demonstrating that it is adequate to offset the residual ecological harm caused by the TPS. This undermines the credibility and integrity of the package.
220. The effects management hierarchy has not been correctly applied. Residual adverse effects have not been properly identified, quantified, or assessed. The proposed compensation measures are the result of negotiation rather than ecological evaluation. The absence of an assessment of the nature and scale of the residual effects means that it is not possible to determine whether the proposed compensation is appropriate or sufficient.
221. A further concern is the absence of evidence linking the residual effects of the TPS to the proposed actions in the IBEP. The IBEP lacks specificity and measurable outcomes, and there is no assurance that the proposed actions will deliver enduring ecological benefits. The package does not demonstrate how compensation will be targeted to address the actual ecological losses, such as the degradation of braided river habitat, loss of indigenous species, and disruption of natural flow regimes.
222. In light of the deficiencies outlined above, conditions should be imposed requiring a compensation package that properly addresses the adverse ecological effects of the TPS. It is compulsory to apply the effects management hierarchy, including compensation for residual adverse effects that cannot be avoided, remedied, or mitigated.
223. The obligation to compensate arises from the NPSFM itself and does not depend on whether compensation is voluntarily proffered by the applicant.

The Panel has the authority, and indeed the responsibility, to require compensation where residual effects remain unaddressed.

224. If the Panel determines that conditions requiring ecological flows in the Takapō and other affected rivers are not to be imposed, then the need for compensation becomes even more important. In such circumstances, the adverse effects of dewatering and flow alteration will persist, and the only remaining mechanism to address those effects is through compensation. The Panel must therefore ensure that any compensation package is not only imposed as a condition of consent but is also independently assessed, transparently justified, and aligned with the ecological outcomes required under the NPSFM.
225. The Panel should not accept the negotiated figure as a *fait accompli*. The agreement between Genesis, Meridian, and DOC does not bind the Panel nor satisfy the statutory requirements of the NPSFM. In order to satisfy these requirements the Panel should exercise its independent judgment and impose conditions that ensure compensation is commensurate with the scale and nature of the residual ecological harm.
226. Genesis has not provided adequate information on which to make this assessment.
227. The Panel should exercise its powers, including directing expert conferencing if appropriate. The purpose would be to understand the nature and extent of the residual ecological harm, identify appropriate compensatory actions, and ensure that any conditions imposed are specific, measurable, and enforceable. The purpose is to ensure that the appropriate compensatory measures are undertaken.
228. The Panel cannot currently be satisfied that the compensation is adequate. The consequence of an inadequate compensation package is that the need to impose flows is even more acute.

Evaluation of conditions sought against decision making criteria in FTAA

229. As discussed above, the correct approach under Clause 17 of Schedule 5 of the FTAA is to assess the application in accordance with RMA provisions that direct decision-making, including the relevant planning instruments and Part 2, without bringing the FTAA purpose into that analysis. Once that is done, consideration of the FTAA purpose is required both in respect of the decision to grant or decline, and in deciding on conditions. Any conditions imposed must be no more onerous than necessary to address the reason for which it is set.

230. The conditions sought by Forest & Bird, relating to environmental flows in the Takapō River and the compensation package, are routine and would be appropriate conditions under the RMA.
231. Clause 17 requires the panel consider Part 2 of the RMA when making its decision, including on whether to impose conditions providing for flows in the Takapō River. Part 2 does not support the application without the provision of flows in the Takapō River. In terms of section 5, without flows, the life-supporting capacity of the Takapō River and associated ecosystems is not safeguarded. Adverse effects are not avoided, remedied or mitigated.
232. In terms of matters of national importance that have to be recognised and provided for under section 6 matters. Section 6(a) requires the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development, Water is fundamental to rivers. The Takapō River without water is a significant reduction in natural character. In addition, Mr Harding identifies terrestrial ecosystems near the Takapō River that are as significant and requiring protection under s 6(c).
233. In terms of matters that must be had regard to under section 7, the provision of flows in the Takapō River is supported by section 7(d) relating to the intrinsic values of ecosystems and 7(f), regarding the maintenance and enhancement of the quality of the environment. The application does obtain support from s7(h), which provides the effects of climate change, and must be had regard to.
234. The question arises as to how the purpose of the FTAA influences the conditions sought by Forest & Bird.
235. In the context of conditions relating to environmental flows and compensation, the purpose of the FTAA is not relevant. The purpose of the FTAA is *“to facilitate the delivery of infrastructure and development projects with significant regional or national benefits.”*
236. The purpose of the FTAA is irrelevant to the conditions sought providing for environmental flows and compensation for two reasons. Firstly, the infrastructure of the TPS has already been delivered. Infrastructure is defined under the FTAA with reference to the RMA and includes:
- facilities for the generation of electricity, lines used or intended to be used to convey electricity, and support structures for lines used or intended to be used to convey electricity, excluding facilities, lines, and support structures if a person—

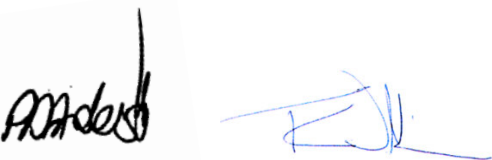
- (i) uses them in connection with the generation of electricity for the person's use; and
- (ii) does not use them to generate any electricity for supply to any other person:

237. The infrastructure of the TPS has already been delivered. The intake structures, control gates, canals, and power stations are long-established and operational. There is no delivery to facilitate.
238. Secondly, the conditions sought by Forest & Bird relate to takes, diversions and discharges, which are not infrastructure. The purpose of the FTAA, which relates to infrastructure, is not relevant to conditions unrelated to infrastructure. The TPS could not be considered a development project for similar reasons. The development associated with the TPS has already occurred and there is nothing to develop.
239. There is an additional reason why the purpose of the FTAA is not relevant to the compensation conditions sought by Forest & Bird. This is because the compensation conditions do not relate to the national or regional benefits of the TPS. The national or regional benefits of the TPS, which relate to the amount of renewable energy the TPS generates, will not change regardless of the compensation conditions.
240. The purpose of the FTAA, which relates to national and regional benefits, cannot be called in aid to water down or dilute conditions that do not relate to those national and regional benefits. In relation to conditions relating to compensation for an existing operation, there is no link between the compensation, which is a cost to Genesis, and the regional or national benefits of the operation that engage the purpose of the FTAA.
241. Even if the Panel considers that the FTAA purpose is relevant, providing for the regional or national benefits of this project does not require that the Takapō River is sacrificed. It is possible to provide for those regional and national benefits, without frustrating the grant of consent, while also providing environmental flows and compensating for residual adverse effects.
242. The final issue is that s 83 provides that the conditions imposed by the Panel can be no more onerous than necessary to address the reason for which they are set. Setting a condition for flows would address the adverse ecological effects that would otherwise arise from the activities for which approval is sought. A condition requiring flows is not more onerous than what is required to deal with those adverse effects.

CONCLUSION

243. The TPS has caused significant and enduring ecological harm to the Takapō River. The dewatering of 6.6 km of riverbed has resulted in the near-total loss of aquatic habitat, disrupted sediment transport, and degraded the ecological integrity of an important braided river system. The absence of environmental flows has compromised macroinvertebrate communities, effectively eliminated longfin eels from the catchment, and had a serious impact on both terrestrial ecology and birds.
244. Forest & Bird does not seek the decline of consent, but it does seek conditions that restore ecological function and uphold statutory obligations, including the NPSFM and the WAP. Environmental flows (minimum and flushing flows) should be included to address the adverse effects of the TPS and to safeguard the river's life-supporting capacity. Consideration of environmental flows is required irrespective of how the existing environment is conceptualised.
245. The proposed compensation package reflects a negotiated agreement between DOC and Genesis, shaped by DOC's "getting to yes" approach and its unwillingness to walk away. As a result, the deal prioritises Genesis' budgetary considerations and fails to meet the requirements of the NPSFM.
246. The compensation package should include enforceable requirements to undertake specific actions that directly reflect the nature and scale of ecological harm, ensuring compensation reflects, as far as possible, lost values and functions, and is transparently justified, independently assessed, and proportionate to the residual effects.
247. The purpose of the FTAA is neutral with respect to the takes, diversions and discharges. The purpose is to facilitate the delivery of infrastructure projects or development project with national and regional benefits. The infrastructure is already delivered, and the takes, diversions, and discharges are not infrastructure. The TPS is not a development project as it has already been developed.

Dated: 25 August 2025



The image shows two handwritten signatures in blue ink. The signature on the left is 'P Anderson' and the signature on the right is 'T Williams'. They are positioned above a horizontal line.

P Anderson / T Williams
Counsel for Royal Forest and Bird Protection Society of New Zealand Inc