

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

**MEMORANDUM OF COUNSEL FOR FOREST AND BIRD
IN RESPONSE TO MINUTE 6 OF THE EXPERT PANEL**

29 September 2025

Royal Forest and Bird Protection Society of New Zealand

Solicitor Acting:

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MAY IT PLEASE THE PANEL

1. In Minute 6, the Panel seeks responses from participants to Christina Robb's report, comprising her review of the IBEP programme. Forest & Bird's response consists of this memorandum and the supplementary evidence from Dr McClellan and Mr Harding.
2. The Panel engaged Ms Robb on the basis set out in Minute 5, specifically:

... to review the proposed IBEP, including the draft Kahu Ora Strategic Plan and proposed conditions of consent, to provide advice in relation to the appropriateness of the IBEP and whether the Panel can rely on the programme to deliver ecological benefits asserted by the Applicant as compensation for the effects of the Scheme.
3. There are two separate questions contained in the Panel's instructions. The first question is whether the Genesis contribution to the IBEP provides appropriate compensation for the effects of the Tekapo Power Scheme. The second question is whether the Panel can rely on the proposed conditions of consent to deliver the ecological benefits of the IBEP that are asserted by Genesis.
4. Both questions raise the difficult issue of how to differentiate between, and then appropriately assess, the contributions of Genesis and Meridian in the context of a joint IBEP that is intended to compensate for the effects of two distinct activities.
5. Ms Robb's report states that its purpose is to assist the Panel to understand:¹
 - The success of Project River Recovery in delivering ecological gains to compensate for the effects of the Combined Waitaki Power Scheme.
 - The degree of comfort that the Panel can have that the IBEP (including its first 10-year strategic plan "Kahu Ora") approach now proposed, together with the increased level of funding, will deliver significant ecological/biodiversity improvements for the catchment.
 - Whether the proposed IBEP conditions are appropriate in terms of securing the IBEP, and providing for ongoing assessment and reporting of the outcomes of the IBEP sufficient that stakeholders can assess its efficacy as compensation for the effects of the Tekapo Power Scheme over the life of the consent (assuming 35 years duration).
6. When considering the success of Project River Recovery (PRR), it is understandable that Ms Robb would have regard to the effects of the Combined Waitaki Power Scheme (CWPS), because PRR was conceived as a management response to the effects of the CWPS.

¹ Christina Robb report at [1]

7. However, on this fast-track application, the Panel is not considering the CWPS. In the context of this application, the correct question is whether the Genesis contribution to the IBEP would deliver ecological gains to compensate for the adverse effects of the Tekapo Power Scheme.
8. A broad assessment of the success of Project River Recovery cannot answer the question of whether the Genesis contribution to the IBEP would provide appropriate compensation for the effects of the Tekapo Power Scheme.
9. The reframing of the question asked by the Panel means that Ms Robb does not address the fundamental question the Panel asked. The question of whether the IBEP is appropriate cannot be answered without considering whether the scale of compensation for the effects of the Tekapo Power Scheme is appropriate. Ms Robb does not address this critical matter.
10. As a result, Ms Robb's conclusions do not help the Panel to answer the question of whether the proposed Genesis contribution would provide appropriate compensation, taking into account the NPS-FM compensation principles incorporated into the WAP by Policy 5A.
11. Ms Robb states "the IBEP will deliver ecological and biodiversity benefits in the Waitaki catchment".² Mr Harding and Dr McClellan both agree with this assessment. However, this should come as no surprise. The total contributions of Genesis and Meridian to the IBEP are a little less than \$2.3 million.³
12. Something has gone seriously wrong if contributions of this scale will not deliver ecological and biodiversity benefits. However, this is not the correct test for the Panel to apply. As above, the Panel must ensure that the Genesis contribution adequately compensates for the effects of the Tekapo Power Scheme. In making this assessment, the Panel is required to take into account the principles for aquatic compensation set out in Appendix 7 of the NPS-FM 2020.
13. The supplementary evidence provided by Mr Harding and Dr McClellan sets out their opinion that the proposed compensation package is not commensurate with the loss of the mid catchment Pūkaki and Ōhau rivers, the major reduction in flow in the Takapō, and the ongoing loss of ecological values in the Waitaki River, the largest braided river in New Zealand.
14. Ms Robb's report does not address either the distinctive effects of the Tekapo Power Scheme, or the scale of compensation that has been offered by Genesis with respect

² Ms Robb report at [6] and [18]

³ \$285,000 from Genesis and \$2.01m from Meridian

to these effects. In relation to the scale of compensation, Ms Robb has not considered the Department of Conservation costing assessment of potential mitigation actions for hydro-electric activity in the Waitaki River catchment report (included in the statement of Kate McArthur as Appendix 3).

15. Ms Robb's report focuses on the Panel's second question identified above, i.e., whether the Panel can rely on the proposed conditions of consent to deliver the ecological benefits of the IBEP that are asserted by Genesis. The answer to this question turns on the effectiveness of proposed conditions relating to monitoring, reporting and the assessment of outcomes.
16. Forest & Bird supports the recommendations that are made by Ms Robb in relation to monitoring, reporting and assessment conditions, while maintaining that these recommendations do not address the more fundamental issues described above.
17. Moreover, Forest & Bird considers that further changes will also be needed to ensure that monitoring, reporting and assessment conditions relating to the IBEP are able to distinguish between the respective contributions of Genesis and Meridian. If it is not possible to differentiate the outcomes of these contributions, then it will be impossible to assess whether the Genesis contribution is effectively addressing the effects of the Tekapo Power Scheme.
18. Forest & Bird also responds to a statement made by counsel for Genesis in their response to RFI2 and Minute 5 of the Panel,⁴ which contains certain assertions about the law relating to compensation conditions. These assertions are directly relevant to the Panel's consideration of the issues raised by Ms Robb's report.
19. At paragraph 6, counsel for Genesis state:

... as the panel is aware it cannot:

(a) alter the indigenous biodiversity compensation conditions without agreement from Genesis; and/or

(b) impose a requirement for offsetting or compensation without agreement from Genesis.
20. This statement is not accurate in the context of a controlled activity rule in a plan (the WAP) which specifically provides for the management of adverse effects by compensation. Forest & Bird does not agree that any compensation conditions must be volunteered by Genesis.⁵

⁴ Memorandum of Counsel, dated 22 September 2025

⁵ As stated in Forest & Bird comments at paragraph [223]

21. As the Panel will be aware, relevant circumstances in which financial contributions may be included in consent conditions include:
- (a) under RMA s 104(1)(ab), as a measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and
 - (b) under RMA s 108, as a financial contribution.
22. The current IBEP has been proffered by Genesis, and on this basis would generally be considered under RMA s 104(1)(ab).
23. The *Augier* principle, referred to by counsel for Genesis, is concerned with the enforcement of such offers, normally in circumstances where a statutory power to impose a contribution does not exist.
24. However, the fact that a compensation package has been proffered by Genesis does not negate the Panel's jurisdiction to impose compensation conditions where a statutory power does exist.
25. In the present case, the statutory basis for imposing compensation conditions is provided by s 108(2)(a) and 108(10) of the RMA, where:
- (a) the condition is imposed in accordance with the purposes specified in the plan or proposed plan (including the purpose of ensuring positive effects on the environment to offset any adverse effect); and
 - (b) the level of contribution is determined in the manner described in the plan or proposed plan.
26. The requirement in (a) is satisfied by the combination of Rule 15A and Policy 5A.5 of the WAP. Rule 15A provides for matters of control, including (a) in respect of flows into the Tekapo River (above the confluence with the Forks Stream), adverse effects",⁶ and (b) any mitigation measures to address adverse effects.⁷ Policy 5A.5 specifies the steps according to which compensation conditions can be imposed, by applying the effects management hierarchy.
27. The requirement in s 108(10)(b) is satisfied by Policy 5A.5 of the WAP, which describes the manner in which the level of compensation should be determined:⁸

⁶ Rule 15A, matter of control (a).

⁷ Rule 15A, matter of control (b).

⁸ The reference to Policy 2A.4 appears to be a typographical error. Policy 5A.5 should instead refer to Policy 5A.4 (this is clear from the wording of the NPSFM 2020), which in turn refers to activities which would result in

Policy 5A.5

Resource consents for activities set out in Policy 2A.4 subclauses (a)-(b), that would result in the loss of extent or values of a river will not be granted unless:

- a. the council is satisfied that:
 - i. the applicant has demonstrated how each step in the effects management hierarchy will be applied to any loss of extent or values of the river (including cumulative effects and loss of potential value), particularly (without limitation) in relation to the values of: ecosystem health, indigenous biodiversity, hydrological functioning, Māori freshwater values, and amenity; and
 - ii. if aquatic offsetting or aquatic compensation is applied, the applicant has complied with principles 1 to 6 in Appendix 6 and 7 of the National Policy Statement for Freshwater Management 2020, and has had regard to the remaining principles in Appendix 6 and 7, as appropriate; and
 - iii. there are methods or measures that will ensure that the offsetting or compensation will be maintained and managed over time to achieve the conservation outcomes; and
- b. any consent granted is subject to:
 - i. conditions that apply the effects management hierarchy; and
 - ii. conditions that specify how the requirements in (a)(iii) will be achieved.⁸

- 28. Forest & Bird therefore maintains that the Panel has the authority, and indeed the responsibility, to require adequate compensation where residual effects remain unaddressed. Such compensation must be imposed and assessed in accordance with the WAP.
- 29. Forest & Bird also maintains that the Panel lacks the jurisdiction to impose the conditions volunteered by Genesis. While s 104(ab) requires the Panel to consider any measure proposed or agreed to by the applicant to offset or compensate for adverse environmental effects, this provision is expressly limited by s 108(10). Where the proposed measure involves a financial contribution, it must be assessed in accordance with the relevant plan.
- 30. The IBEP-related conditions offered by Genesis contravene s 108(10). The proposed \$285,000 contribution has not been determined in the manner described in the WAP. As set out in paragraphs 175 – 176 and 201 – 228 of our comments, the \$285,000 reflects a negotiated figure rather than an assessment in accordance with Policy 5A.5 of the WAP and Appendix 7 of the NPS-FM 2020.
- 31. Forest & Bird also maintains that the Panel’s assessment of compensation conditions should not be influenced by the purpose of the Fast-track Approvals Act. Our primary submission is that “the delivery of infrastructure and development projects” does not include the re-consenting of water permits in circumstances where the infrastructure associated with the Tekapo Power Scheme has already been delivered.

the loss of river extent and values, where there is a functional need for the activity in that location and the effects of the activity are managed by applying the effects management hierarchy.

32. However, even if the Panel does not agree with this submission, in terms of compensation the purpose of the FTAA cannot be engaged unless the compensation conditions would impede “the delivery” of the Tekapo Power Scheme. Forest & Bird acknowledges that, as a controlled activity under Rule 15A of the WAP, replacement water permits to enable the continued operation of the Tekapo Power Scheme do need to be granted and that conditions must not frustrate the grant of consent. Under the FTAA, the relevant provision is s 83, which states that “the panel must not set a condition that is more onerous than necessary to address the reason for which it is set”.

Dated: 29 September 2025

A handwritten signature in blue ink, appearing to be 'P Anderson / T Williams', written over a light blue grid background.

P Anderson / T Williams

Counsel for the Royal Forest and Bird Protection Society of New Zealand Incorporated