

To: Expert Panel – Tekapo Power Scheme (FTAA-2503-1035)

Attention: Daniel Sadlier; Karen Coutts; Tony Cussins; Bianca Sullivan

By email to: contact@fasttrack.govt.nz

1. We are writing on behalf of the Royal Forest and Bird Protection Society of New Zealand Inc (“Forest & Bird”) to advise you of Forest & Bird’s interest in the Genesis Fast-track application for the Tekapo Power Scheme (“the application” and “the Scheme”) and to request that you invite Forest & Bird to comment on the project under section 53(3) of the Fast Track Approvals Act 2024 (“FTAA”).
2. Forest & Bird is New Zealand’s largest and longest-serving independent conservation organisation. Its mission is to be a voice for nature. Its constitutional purpose is to “take all reasonable steps within the power of the Society for the preservation and protection of the indigenous flora and fauna and the natural features of New Zealand”. Forest & Bird’s advocacy and legal teams help to achieve that purpose by participating in consenting processes for projects that are likely to have significant adverse impacts on the natural environment.
3. Forest & Bird regularly engages expert witnesses to assist consent authorities to understand a project’s impacts on the natural environment. Its effectiveness in those processes is recognised by the Environment Court, which regularly finds Forest & Bird to be an entity with an interest greater than the public generally. The Court has commented in particular on Forest & Bird’s “well-known role in the protection of indigenous avifauna and their habitat”.
4. Under section 53(3) FTAA, you are entitled to invite comments from “any other person” you consider appropriate. Forest & Bird respectfully requests that you invite it to comment under this provision. Forest & Bird has been interested in the Scheme for decades and entered into various agreements, including with Genesis, related to the Scheme since at least 1990. Forest & Bird is also a s 274 party to the direct referral of the Meridian applications for the parts of the Scheme they operate (the “Meridian applications”). There are many common issues between the Genesis and Meridian applications, including the critical issue of the environment on which the assessment of effects is based. Forest & Bird is calling evidence on freshwater issues (Kate McArthur), terrestrial ecology (Mike Harding), avifauna (Rachel McLennan) and planning (Helen Marr).
5. This interest has given Forest & Bird important information about the extent of the Scheme’s benefits and its significant adverse impacts.
6. If invited to comment, Forest & Bird will provide expert evidence to support its view. This will come from the experts Forest & Bird has engaged on the Meridian applications. This is

particularly important as the relevant aspect of public interest that Forest & Bird represents is unlikely to be put before the Panel if Forest & Bird is not invited to comment, due to agreements Genesis has reached with parties that might otherwise represent the public interest.

7. As New Zealanders, we all share an interest in ensuring that development achieves good environmental outcomes, and in decisions being made based on the best available information. If you do not invite Forest & Bird to comment, you risk making your decision on what conditions to impose based on inadequate information.

Considerations relevant to your discretion under s 53(3)

8. The FTAA does not provide statutory criteria for determining when a Panel should consider it appropriate for a person to be invited to comment. Any discretion must be exercised in accordance with the purpose for which it was conferred. In this case, the effect of the discretion is to confer the ability to participate in the approval process, which has implications for the scope of information and perspectives before the Panel.
9. The FTAA purpose is to facilitate the delivery of infrastructure and development projects with significant regional or national benefits. This “facilitation” is achieved through an expedited process which does not involve the rights of participation and appeal that would otherwise be available.
10. The procedural principles in s 10 are also relevant, in particular the obligation to use processes that are “proportionate” to the functions being performed (where those functions include authorisation of major development projects with potentially significant adverse effects on the environment). The discretion to invite appropriate persons to comment is one of the key mechanisms to provide for natural justice and bring procedural rigour (through provision of relevant information and alternative perspectives) to that process. This indicates a broad approach should be taken when exercising the s 53(3) discretion.
11. The “fast-track” nature of the FTAA, as expressed in the short timeframes for decisions and the “timeliness” element of s 10(1), has little relevance to the s 53(3) discretion. The complexity of the application including the likelihood of contested legal or factual issues can be taken into account by the Panel Convenor in setting the timeframe for the decision, and was taken into account in this case. The opportunity to comment does not extend the processing time. While it does provide an appeal right, any alleged error of law can equally be pursued by judicial review.
12. The “cost-effective” element of s 10(1) is relevant when the Panel identifies the lack of a contradictor on an issue and is considering whether to invite comments or seek its own legal or technical advice. Where a person providing comments can act as an effective contradictor, that will be more cost-effective than the Panel commissioning advice.
13. The plain meaning of “appropriate” is “right or suitable”.¹ This is not a high bar. In other contexts, a discretion to do something that the decision-maker “considers appropriate” has been interpreted as a “broad discretion” subject to general administrative law requirements

¹ Collins New Zealand Dictionary, Harper Collins 2017

and other constraints relevant to the context. For example, “appropriate” consent conditions must be imposed for a planning purpose, have a logical connection to activities, and not be unreasonable.²

14. The issue of which persons should be given the opportunity to comment was traversed in detail in Minute 3 of the Expert Panel on the Bledisloe Wharf application,³ which identified the following matters as relevant to the decision whether to invite comment under s 53(3):
 - a. Whether the project involves novel or contentious legal matters or disputed facts;
 - b. Whether the project includes activities that would otherwise be prohibited;
 - c. The comprehensiveness and quality of the application and how the applicant has addressed consultation;
 - d. Whether the specified entities invited to comment are sufficient to ensure all relevant information is before the Panel; and
 - e. Whether there are exceptional circumstances beyond public interest that warrant wider input – for example, parties significantly affected or critical gaps in information.
15. Forest & Bird disagrees that this is an exclusive list of considerations, or that all the above tests are appropriate in every case. Forest & Bird agrees that considerations a and b are likely to be relevant to the discretion, but disagrees that c, d, and e are appropriate:
 - c. All applications that are accepted as complete by the EPA are likely to be comprehensive and high quality. That does not mean that they will present all relevant information. With respect to consultation, it cannot be that an Applicant can consult certain parties that are likely to be supportive, and this increases the likelihood that those consulted parties will be allowed to comment, while unsupportive parties are less likely to be invited to comment because the Applicant did not consult them.
 - d. Forest & Bird disagrees with this factor as assessed in Bledisloe. The factor anticipates that the Panel will be able to assess whether it has sufficient information from the parties that it is going to ask to comment. However, a panel can't properly assess whether those invited to comment will provide sufficient information before it has received the comments from those parties. This factor requires speculation that the invited parties will comment and, if they do, what that comment might say.

The difficulty can be seen in this case. The panel might invite the Director General of Conservation and Fish and Game to comment. However, in this case, both these parties have reached an agreement with Genesis, which means that they may not provide any further information to the Panel. In the direct referral of the Meridian applications for the Waitaki Power Scheme to the Environment Court, the Director General has not called any evidence. This factor would be more appropriately expressed as “whether there are any circumstances indicating that the quality of the Panel’s decision making is likely to benefit from information provided by persons other than the specified entities”.

² *Cable Bay Wine Ltd v Auckland Council* [2021] NZHC 2596 at [36], referencing s 108(1)

³ Bledisloe North Wharf and Fergusson North Berth Extension [FTAA-2503-1028]

- e. The requirement for “exceptional circumstances beyond public interest” sets too high a bar for the opportunity to comment. The term “appropriate”, interpreted in light of the FTAA’s purpose and context as set out in paragraphs 7 – 11 above, does not require “exceptional circumstances” for a person to be invited to comment.

16. However, for present purposes, the factors set out in Bledisloe Wharf are now assessed.

Whether the project involves novel or contentious legal matters or disputed facts

- 17. The project raises a highly contentious and novel issue regarding the “environment” against which adverse effects, policy consistency, and consent conditions are considered. The issue is the extent to which the Scheme forms part of the environment, which is a mixed question of fact and law.⁴ This is fundamental to the application.
- 18. Genesis has proceeded on the basis that the Scheme as currently operated is part of the environment and has prepared its application accordingly. Critically, considering the whole Scheme as part of the environment means that water uses and diversions associated with the Scheme already form part of the environment. The Takapō River currently lacks environmental flows and is effectively dewatered. If the Scheme is part of the environment, this loss of the Takapō River is already part of the environment and not an effect of this application. Genesis is not proposing any environmental flows in the Takapō River.
- 19. The Genesis approach is novel, and contrary to the accepted position that resource consents of limited duration do not form part of the environment when new approvals are sought.⁵
- 20. If, as Forest & Bird contends, the Genesis approach is incorrect, it would fundamentally change how the application must be assessed, including whether an environmental flow needs to be provided for the Takapō River and whether the compensation proposed is adequate.

Whether the project includes activities that would otherwise be prohibited

- 21. The application does not include activities that would otherwise be prohibited.

The comprehensiveness and quality of the application and how the applicant has addressed consultation

- 22. We have assessed this factor, despite the reservations set out above.

Quality of the application

- 23. The application is materially deficient in its treatment of the Scheme as part of the environment. This deficiency compromises the effects assessment and the alignment with relevant statutory and policy frameworks, including the Resource Management Act 1991, the National Policy Statement for Freshwater Management 2020 (NPSFM), and the National Policy Statement for Renewable Energy Generation (NPSREG).

⁴ As discussed in *Queenstown Lakes District Council v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299 (CA) and subsequent authorities.

⁵ *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948

24. By incorporating the Scheme into the environment, the application omits consideration of effects associated with the Scheme's ongoing operation. As a result, the analysis does not adequately address considerations relating to the NPSFM, including Te Mana o te Wai and ecological integrity, nor does it apply appropriate thresholds for mitigation or offsetting. This is a fundamental error.

Consultation

25. Forest & Bird was consulted on the Scheme. The consultation was jointly conducted with Meridian and related to the entire Combined Waitaki Power Scheme. This consultation was consistent with agreements relating to the Scheme that Forest & Bird had entered into with Meridian and Genesis and their predecessor, the Electricity Corporation of New Zealand, dating back to 1990. While the agreements do not specifically provide for consultation on the current application, they do anticipate regular meetings and good faith consultation with Forest & Bird on changes to consents held by Genesis for the Waitaki Power Scheme.
26. This consultation undertaken by Meridian and Genesis was flawed. In January 2019, Forest & Bird met with Genesis to discuss the re-consenting timeline. At this meeting, Forest & Bird was asked to consider potential compensation actions. Several ideas were discussed informally and received enthusiastically by Genesis.
27. In December 2020, and through its contact with the Genesis/DOC Whio Forever Project, Forest & Bird provided some initial areas where it considered compensation actions could be usefully undertaken with regard to the Takapō Scheme re-consenting process. It is unclear whether this information was conveyed to Genesis Canterbury-based staff, who had initiated the conversation with Forest & Bird.
28. Then on 1 March 2021, Genesis provided Forest Bird with a detailed presentation of the science being undertaken to assess the effects of the scheme for the reconsenting process. Receiving this detailed information, Forest & Bird indicated that it would like some time to consider the information and put some further thought into the compensation areas that it had previously discussed. After the meeting the Genesis staff member indicated they would come back to Forest & Bird with next steps.
29. Forest & Bird did not have any further communications with Genesis nor receive any response to their initial comments. The apparent reason for this may have been that the relevant Genesis staff member was on parental leave.
30. Forest & Bird heard nothing more until July 2023, when it was invited to a meeting with representatives from the Department of Conservation, Meridian, and Genesis. At that meeting, Forest & Bird were advised on the outcome of the consultation. The Forest & Bird staff member present asked whether there had been any consideration of the matters that had been raised on Forest & Bird's behalf and inquired if there was still an opportunity to do so. The staff member was advised that no such consideration had been given and there was no longer an opportunity to do so.
31. Forest & Bird raised its concerns that its views had not been considered and received an apology from the staff member who had previously been on parental leave. However, it was clear that final decisions had been made and no further discussion would be entertained.

32. Shortly after that meeting, on 27 July 2023, the Director General of Conservation announced that an agreement had been reached with Meridian and Genesis. This agreement forms part of the compensation package.
33. While the consultation may have started as genuine, it went off the rails. This background supports inviting Forest & Bird to comment.

Whether the specified entities invited to comment are sufficient to ensure all relevant information is before the Panel

34. We have also assessed this factor, despite the reservations set out above.
35. If Forest & Bird is not invited to participate, the Panel will not have all relevant information in front of it regarding the effects of this project on the “environment” (properly determined) or the adequacy of compensation when it makes its decision. Forest & Bird will provide comments (submissions and evidence) that support its position that the current water uses and diversions of the Scheme do not form part of the environment and that the proffered compensation is inadequate.

Existing Environment

36. This is a particular issue in this case because Genesis has entered into agreements with key stakeholders who might otherwise be expected to advance opposing views. This includes the Department of Conservation, the Waitaki Rūnanga of Te Rūnanga o Ngāi Tahu, and Fish & Game. The effect of these arrangements is that there is no remaining party likely to contest the applicant’s proposition that the Waitaki Power Scheme forms part of the existing environment.
37. Genesis also reached an agreement with Environment Canterbury that the Scheme formed part of the existing environment.⁶ However, ECan recently indicated that it is having second thoughts about its earlier position that the water permits associated with the Scheme form part of the existing environment.⁷ It has been criticised by Genesis for “unravelling” the previous agreement.⁸
38. ECan’s position on the existing environment is compromised by its prior agreement with Genesis. It cannot be relied on to put forward the alternative argument.
39. In those circumstances, there is no effective contradictor. In the context of the FTAA, this is a powerful indicator that wider comments should be invited. While the Panel could choose to seek its own legal advice on this issue, it would be more consistent with the “cost-effective” element of s 10 FTAA to enable a true contradictor with deep knowledge of this project and its legal implications to act as contradictor.

⁶ Letter from Marie Dysart (solicitor for Ecan) dated 28 February 2020

⁷ In its letter of 10 June 2025 ECan said under paragraph [3] “while CRC agree in principle that the structures forming the WPS are part of the existing environment, CRC questions the extent to which the entire consented operation should form part of the existing environment. In particular the CRC notes that the relevant plans provide for controlled activity status with the matters of control contemplating the need consider flow regimes for the Takapō River as well as other potential effects.”

⁸ Panel Convenor conference – 13 June 2025

Compensation

40. Forest & Bird considers that the compensation offered by Genesis is inadequate. This is also an issue on which the Panel is likely to benefit from Forest & Bird's comments. This is for similar reasons to the existing environment. Genesis has reached an agreement with other parties, notably the Department of Conservation and the Waitaki Rūnanga. This means that no party other than Forest & Bird is likely to offer an alternative view to that provided by Genesis. The exception to this is ECan, which has identified the quantum of compensation as an issue, but not given any indication of its position regarding the compensation proposed.

Whether there are exceptional circumstances beyond public interest that warrant wider input – for example, parties significantly affected or critical gaps in information

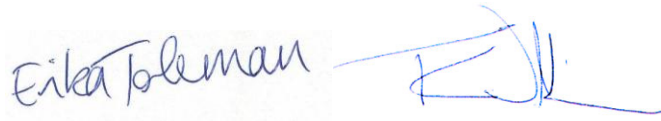
41. As set out above, this consideration sets the bar too high. However, in this case, there are clearly exceptional circumstances that justify inviting Forest & Bird to comment, particularly, Forest & Bird's involvement in the Meridian applications. It would be highly undesirable if the Panel did not have the benefit of the evidence from Forest & Bird, which addresses the common issues, including the assessment of the environment in which the application is assessed. This would mean that there could be markedly different outcomes for the Genesis and Meridian applications, when the applications should be treated similarly.
42. An example of this is that Forest & Bird intends to argue that the environment on which the assessment of effects is based does not include the water takes associated with the Scheme. If Forest & Bird is not invited to comment, the panel may reach a different view from that of the Environment Court, which will hear argument from Forest & Bird on the issue. This is a situation that should be avoided if possible, and the risk of it occurring is reduced if Forest & Bird is allowed to comment.

Conclusion

43. Forest & Bird considers the application has significant adverse effects. The most significant of these is that the Scheme dewateres the Takapō River. Forest & Bird also considers the compensation offered to be inadequate. Whether these effects can be considered depends on the interpretation of the existing environment.
44. Forest & Bird has been extensively involved in the Combined Waitaki Power Scheme since the 1990 Agreement with Electricity Corporation New Zealand Limited. As a result of this involvement, Forest & Bird was consulted on the Scheme. Unfortunately, the consultation went awry, and Forest & Bird's views were not taken into consideration.
45. Part of the reason Forest & Bird was sidelined was that Genesis was negotiating, and subsequently reached an agreement, with several parties. The effect of these agreements is that no party other than Forest & Bird is likely to contest Genesis' view of the environment. The position of ECan is that it had earlier agreed that the current water uses and diversions were part of the existing environment but has recently indicated that it may no longer hold this view.

46. In these circumstances, Forest & Bird will be able to ensure that the panel has the best available information before it on which to make a decision. It should be allowed to comment.

Yours sincerely,

The image shows two handwritten signatures in blue ink. On the left is the signature of Erika Toleman, which is written in a cursive, flowing style. On the right is the signature of Tim Williams, which is more stylized and angular.

Erika Toleman
General Counsel

Tim Williams
Senior Environmental Lawyer

[Redacted]

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Royal Forest and Bird Protection Society of New Zealand Inc.