

**BEFORE AN EXPERT PANEL
TEKAPO POWER SCHEME**

FTAA-2503-1035

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

**MEMORANDUM OF COUNSEL FOR FOREST & BIRD
IN RESPONSE TO MINUTE 2 OF THE EXPERT PANEL
30 July 2025**

Royal Forest and Bird Protection Society of New Zealand

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MAY IT PLEASE THE PANEL

1. This memorandum is filed on behalf of the Royal Forest and Bird Protection Society of New Zealand Incorporated (Forest & Bird) and seeks directions on the following matters.
 - a. Forest & Bird seeks clarification of the respective positions of Genesis Energy Limited (Genesis) and Canterbury Regional Council (Environment Canterbury) on environmental flows in the Takapō River. Forest & Bird considers that this clarification needs to be provided as soon as possible, to ensure that comments can be provided in an efficient and effective way. Forest & Bird seeks a direction that Genesis and Environment Canterbury advise on this matter by 8 August 2025.
 - b. Expert conferencing is sought in relation to freshwater matters, specifically appropriate environmental flows in the Takapō River. Given the short timeframes available under the Fast Track Approvals Act 2024 (FTAA), Forest & Bird seeks that expert conferencing takes place as soon as practicable after the deadline for comments.

The positions of Genesis, Forest & Bird and Environment Canterbury on flows

2. Genesis, Forest & Bird, and Environment Canterbury appear to have different views on the application of section 104(1)(a) and (b) of the RMA in this case. The differences relate to the extent to which the existing Tekapo Power Scheme (the scheme) forms part of the existing environment and whether Rule 15A of the Waitaki Catchment Water Allocation Regional Plan (WAP) requires consideration and imposition of environmental flows in the Takapō River.

Genesis

3. Genesis' evidence has been prepared on the basis that the existing environment includes both the physical infrastructure of the scheme and its current operational flow regime. Based on this interpretation, Genesis' evidence does not assess the ecological consequences of flow abstraction or diversion, as it treats these as part of the existing environment. Appropriate environmental flows are not considered.
4. This is explained in the Genesis application at *Appendix F: Existing environment approach*.
5. This approach is followed in the expert assessments contained in the appendices, as well as in draft guidance provided by Genesis for expert assessments under the FTAA, which requires expert evidence to be "in

line with the legal/rule framework and existing environment provided by the legal team”.¹

6. In its legal submissions to the Panel, dated 22 July 2025,² Genesis has asserted Environment Canterbury agrees that “... the scheme, within its current operational boundaries, is part of the existing environment”,³ and that this includes “... associated water takes, uses, diversions, damming and discharges as managed subject to the present conditions”.⁴
7. However, Genesis then states that “... this position does not exclude, in light of the existing environment above... (b) to the extent, if any, that effects can be considered adverse, the panel considering, within the matters over which the respective rules reserve control, what measures by way of mitigation, offset or compensation may be appropriate to address those effects”.
8. Forest & Bird considers this statement to be ambiguous and inconsistent. If effects cannot be considered adverse, due to the way in which the “existing environment” has been framed by Genesis, then those effects would not need to be considered by the Panel.
9. Genesis' position appears to be that conditions regarding flows in the Takapō River cannot be imposed, but that other conditions requiring mitigation, offset, or compensation can be imposed.
10. This position is untenable. If conditions can be imposed requiring mitigation, offset and compensation, then conditions requiring flows can also be imposed. This is a matter of control under Rule 15A (discussed below).
11. It would also be inconsistent with the position of Environment Canterbury (see below) that the question of environmental flows for the Takapō River does need to be considered by the Panel under Rule 15A.

Forest & Bird

12. As discussed below, Forest & Bird does not consider that the approach to the existing environment adopted by Genesis is correct.
13. In addition, Forest & Bird does not consider that Genesis’ position properly takes into account Rule 15A of the WAP, which provides:

¹ A copy of this draft guidance is attached

² Legal Submissions for Genesis Energy Limited for the Project Overview Conference, 22 July 2025.

³ At [25]

⁴ At [26(b)]

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:

- (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 Pūkaki River, the Lower Ōhau River or the Tekapo River (above the confluence with the Forks Stream), adverse effects, including effects on Ngāi 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 Ngāi 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.

Any application made under Rule 15A will be publicly notified.

14. At the risk of oversimplifying matters, Forest & Bird accepts that the infrastructure associated with the scheme forms part of the existing environment but contends that the abstraction and diversion of flows do not.

15. The purpose of this memorandum is not to provide comprehensive arguments to support Forest & Bird's position. However, the following paragraphs give a summary of Forest & Bird's position.
16. Forest & Bird relies on the Environment Court and High Court authority that activities subject to expiring consents should not be assumed to form part of the receiving environment. This case law includes *Ngāti Rangi Trust v Manawatū-Whanganui Regional Council*.⁵ The High Court held that, when considering re-consenting applications, the existing environment should be treated as excluding the consent sought.
17. Similarly, in *Port Gore Marine Farms Ltd v Marlborough District Council*,⁶ the Environment Court cautioned against assuming the continuity of consented activities where their environmental effects are required to be assessed.
18. The Environment Court decision in *Alexandra District Flood Action Society Inc. and others v Otago Regional Council*,⁷ relied upon by Genesis, can be distinguished on its facts. The environmental effects being considered by the Court in Alexandra were very different, and the "Armageddon" scenario described by the Court is not applicable to the question of environmental flows for the Takapō River.
19. Forest & Bird's position is that, relying on these and other authorities, the water-related consents are not part of the existing environment. Further, Forest & Bird considers that conditions requiring environmental flows should be imposed on the Takapō River. Even if Genesis' approach to the existing environment is correct, Forest & Bird's position is that consideration and imposition of environmental flows in the Takapō River is required under Rule 15A.

Environment Canterbury

20. On 25 June 2025, Environment Canterbury set out its position on the Genesis application as follows:⁸
 9. While CRC agrees that the existing environment for the purposes of assessing the proposal is the current statement of the environment, it is important to record that CRC does not consider that this means that the ongoing effects associated with the operation of the TPS do not have to be considered. In relation to this the Council's position is:

⁵ [2016] NZHC 2948

⁶ [2012] NZEnvC 72

⁷ C102/2005, Environment Court decision dated 21 July 2005

⁸ A copy of this letter is attached.

- (a) As set out in the original opinion given in support of Genesis's Application, to the extent that the operation of the TPS is having ongoing adverse effects that this is a matter (to the extent that it falls within the matters of control) that does require consideration, including the extent to which measures by way of mitigation, offset or compensation are appropriate to address those effects...
 - (c) CRC does not have a position on whether there should be a flow in the Takapō River, but rather its position is that this issue needs to be considered through the consenting process. In particular, that the Panel needs to be satisfied that this matter has been taken into account in the context of the Fast Track application.
- 21. Environment Canterbury also notes (at 9(b) in the same letter) that the community expectation at the time Rule 15A was put into the WAP through Plan Change 3 was that the provision of flows would be considered through the consent process. At that time, Meridian and Genesis both indicated to the Hearing Commissioners that environmental flows based on estimates of 5-year 7-day low flows from Lakes Pūkaki and Tekapo would not frustrate the grant of consent in the future, and it was on this basis that a controlled activity status was chosen.⁹
- 22. Controlled activity status was therefore chosen on the express proviso that this would not prevent the consideration of environmental flows for the Takapō River as part of future consenting processes, and the clear expectation was that such consideration would occur.
- 23. Because of the obvious inconsistencies between the respective positions of Genesis and Environment Canterbury, together with the assertion of an (ambiguous) agreement between the two parties, Forest & Bird considers that clarification is needed on the following points:
 - a. Do Genesis and Environment Canterbury accept that the Panel must consider whether to impose environmental flows for the Takapō River under Rule 15A of the WAP? and
 - b. Do Genesis and Environment Canterbury accept that, to do so, the Panel must also consider the environmental effects on the Takapō River of the diversion of flows by the scheme?

⁹ See Joint Memorandum of Counsel in Response to Minute 10, dated 12 November 2015 (attached) at paragraphs [4] and [6].

Request for Expert Conferencing on Appropriate Environmental Flows

24. A result of Genesis' approach to the existing environment is that its evidence has not considered environmental flows in the Takapō River.
25. The effect of this is that, if the Panel considers that the water takes associated with the scheme do not form part of the existing environment or that the WAP requires consideration of environmental flows, there is insufficient evidence on which the Panel can make its decision.
26. In Meridian Energy Limited's concurrent application for re-consenting of the Waitaki Power Scheme, Forest & Bird has provided expert freshwater evidence from Kate McArthur, which addresses flows.¹⁰ Forest & Bird intends to include expert evidence from Ms McArthur in its comments.
27. Ms McArthur considers that: "Defining an environmental flow regime is a complex and inexact exercise, typically applying a sequential scientific process (Griffiths and Booker 2019)..." and that "Undertaking a process (like ELOHA) to determine the scientific recommendations for an environmental flow regime is, for a scheme as complex as the WPS, a cross-disciplinary task that, in my view, would be significantly furthered by multi-disciplinary expert conferencing e.g., hydrology, ecology, geomorphology and vegetation management".
28. Forest & Bird considers expert conferencing on these flow-related issues essential, especially to evaluate whether appropriate flows are provided in accordance with Rule 15A of the WAP. Forest & Bird considers expert conferencing is necessary to:
 - a. clarify the ecological implications and effects of flow alteration in the Takapō River;
 - b. evaluate and determine appropriate environmental flows as required by Rule 15A of the WAP;
 - c. identify methods to avoid, remedy, or mitigate adverse effects.
29. Forest & Bird also supports expert conferencing on related matters, including terrestrial ecology, avifauna and planning.

¹⁰ Kathryn McArthur – Royal Forest and Bird Protection Society – 4 July 2025. Available at <https://www.ecan.govt.nz/do-it-online/resource-consents/notifications-and-submissions/applications-being-heard/meridian-energy-limited>

Conclusion

30. If the Panel determines that the water takes associated with the scheme do not form part of the existing environment, or that the WAP requires consideration of flows, there is insufficient evidence on which the Panel can make its decision regarding whether to require conditions requiring environmental flows and what those flows might be. In these circumstances, an assessment of appropriate environmental flows is essential.
31. Conferencing provides a method of addressing this potential evidentiary gap. Forest & Bird respectfully submits that conferencing should proceed on freshwater matters and supports its extension to terrestrial ecology and planning.

Dated: 30 July 2025



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