

**BEFORE THE INDEPENDENT COMMISSIONER
HEARING PANEL APPOINTED
BY THE OTAGO REGIONAL COUNCIL**

UNDER the Resource Management Act 1991 (“RMA”)

IN THE MATTER of an application by Dunedin City Council for a resource consent being processed with reference RM20.280

**LEGAL SUBMISSION
ON BEHALF OF THE ROYAL FOREST AND BIRD PROTECTION SOCIETY
OF NEW ZEALAND INC
19 May 2022**

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MAY IT PLEASE THE COMMISSIONERS

Introduction

1. The Royal Forest & Bird Protection Society of New Zealand Inc. (“Forest & Bird”) has concerns around the activity status the Smooth Hill Landfill Application’s (“Application”) is being processed under. The Applicant¹ and the s42A reports² concluded that under RMA, s88A protected the Application’s activity status as discretionary under the regional planning rules, despite the commencement of Resource Management (National Environment Standards for Freshwater) Regulations 2020 (“NES-FM”), regs 52 and 54. However, no analysis of RMA, s43B was undertaken by the Otago Regional Council’s (“ORC”) s42A. Section 43B sets out the relationship between standards, rules and resource consents.
2. Forest & Bird submits that s88A does not assist the Applicant in this case and once s43B(7) is analysed and applied, the Application’s most stringent activity status under the NES-FM, regs 52 and 54 is non-complying. Forest & Bird further submit that because the most stringent activity status is non-complying and the ORC’s s42A Report says the Application does not pass through either of the s104D gateway tests that the regional consents should be declined.

Discussion

3. The ORC’s s42A and the Applicant’s Legal Submissions at [20] identified that the Application requires consents under NES-FW, regs 52 and 54.³ RMA, s43B sets out the relationship between national environment standards, rules and resource consents.⁴ RMA, s43B(5), (6), (6A) and (7) relate to standards and consents, they provide:

...

- (5) A land use consent or a subdivision consent granted under the district rules before the date on which a national environmental standard is published under the Legislation Act 2019 prevails over the standard.

¹ Applicant’s Legal Submission at [25]

² DCC, S42A Report, at [49] and ORC s42A Report, Section 5

³ ORC s42A section 5; The AEE at page 53 also says that NES-FW, reg 53 (a prohibited activity) was relevant but the project was adjusted to prevent the drainage of wetlands along McLaren Gully Road see ORC s42A section 6.1.7

⁴ RMA, s43D sets out the relationship between standards and designations.

(6) The following permits and consents prevail over a national environmental standard:

- (a) a coastal, water, or discharge permit:
- (b) a land use consent granted in relation to a regional rule.

(6A) Subsection (6) applies-

- (a) if those permits or consents are granted before the date on which a relevant national environmental standard is published under the Legislation Act 2019:
- (b) until a review of the conditions of the permit or consent under section 128(1)(ba) results in some or all of the standard prevailing over the permit or consent.

(7) This subsection applies to a resource consent not covered by subsection (5) or (6). **The consent prevails over a national environmental standard if the application giving rise to the consent was the subject of a decision on whether to notify it before the date on which the standard is published under the Legislation Act 2019.** However, the consent does not prevail if the standard expressly provides otherwise.

...

(bold my emphasis)

4. Forest & Bird submits that the intent of s43B(7) is to protect a consent applicant's position so long as a notification decision was made prior to the standard's notice in the *Gazette*. Without that notification decision the applicant has no protection, and the standard has full effect. This addresses situations when a consent application has progressed so far through the process (beyond a notification decision) that it becomes impractical to introduce the consideration of standards. It provides the applicant with finality of position. Forest & Bird submit that this is consistent with the plain, ordinary meaning of s43B(7) and is firm guidance against anything to the contrary in later sections of general application.

5. Chronology of enactment of NES-FW and the lodgement and notification of the Application is as follows:

- a. On 5 August 2020, pursuant to the Legislation Act 2012, notice was given in the *Gazette* of the making of the NES-FW under the RMA;⁵
- b. On 27 August 2020, the s88 Application for the landfill was lodged with the ORC;
- c. On 3 September 2020, the NES-FW commenced;⁶

⁵ NES-FW, Gazette Information; NZ Gazette, Notice Number 2020-dl3500, date of enactment 3/8/20

⁶ NES-FW, reg 2

- d. On 13 September 2020, a decision was made by the ORC to publicly notify the Application;⁷ and
 - e. On 18 September 2020, the Application was publicly notified.⁸
6. The chronology above demonstrates that s43B(7) prevails because the decision to notify the Application came after the NES-FW was published on 5 August 2020. Since the NES-FW prevails, regs 52 and 54 have full force and the most stringent activity status for the Application is non-complying.⁹
7. Forest & Bird submits s88A does not assist in making the activity status for the application less stringent than that set out in the NES-FW. Section 88A provides
- (1) Subsection (1A) applies if –
 - a) an application for a resource consent has been made under section 88 or 145; and
 - b) the type of activity (being controlled, restricted, discretionary, or non-complying) for which the application was made, or that the application was treated as being made under section 87B, is altered after the application was first lodged as a result of-
 - i. a proposed plan being notified; or
 - ii. a decision being made under clause 10(1) of Schedule 1; or
 - iii. otherwise.
 - (2) The application continues to be processed, considered, and decided as an application for the type of activity that it was for, or was treated as being for, at the time the application was first lodged.
8. Section 88A only protects an application from a change in activity status against a proposed plan being notified, a decision under clause 10(1) of Schedule 1, or an ‘otherwise’ situation. Arguably, only the ‘otherwise’ situation would protect an application’s activity status from the notification of a standard. However, to accept this interpretation would require the complete dismissal of s43B(7). Forest & Bird submits that the more specific provision, s43B(7), relating to implementation of

⁷ Decision on Notification, attached to the bottom of the ORC Notification Recommendation Report RM20.280, 13 September

⁸ ORC s42A, at section 2.1

⁹ This interpretation is supported by *Auckland Unitary Plan Practice and Guidance note National Instruments for Freshwater Management - Resource Consents Guidance* section 5.3; and by Ministry for Primary Industries *The NES-PF – existing consents and existing use rights* section 1.2

standards takes precedence over the more general application of s88A relating to the 'otherwise' situation.

9. Section 88A also presumes that the application did have a different activity status prior to intervention of a 'proposed plan being notified, a decision being made under clause 10(1), or otherwise' situation. In this case the Application was lodged after the NES-FW was notified in the *Gazette*. For s88A to assist at all, the Application was required to be lodged and have a decision on notification before 5 August 2020. In this case the Application was lodged after 5 August 2020, making it impossible to have a decision on notification before 5 August 2020. Forest & Bird submits that the Application's most stringent activity status has been non-complying under RMA, s43B(7) and NES-FW, regs 52 and 54 since the date the Application was lodged and should have been notified as such.
10. Forest & Bird submits that because the Application's most stringent activity status is non-complying it must pass through one of the two gateways set out in RMA, s104D. These gateways are:
 - a. The adverse effects of the activity on the environment will be minor; or
 - b. The application is for an activity that will not be contrary to the objectives and policies of the relevant planning documents.
11. Importantly, the ORC's s42A concluded in Section 7 that:

... In this case, the proposal does not satisfy the threshold test of s104D because I am not satisfied that the adverse effects on the environment will be minor, and the proposal is contrary to policies contained in the NPS-FS, the PORPS, RPWaste, RPW and NRMP as described above ...¹⁰
12. Forest & Bird submits that because the ORC's s42A concludes that the Application does not pass through either s104D gateway test the Application should be declined as it currently stands.

¹⁰ ORC s42A Report, section 7, said that its conclusion on s104D was not determinative and that it was only a relevant consideration because the activity status was discretionary under s88A

Conclusion

13. The ORC's s42A and the Legal Submissions for the Applicant identified that the activity is to be treated overall as a discretionary activity under the relevant regional planning documents. Both the ORC's s42A and the Applicant's legal submissions confirmed that NES-FM, regs 52 and 54 applied to the Application but because the Application was lodged with the ORC before the NES-FM commenced that s88A protected the activity status under the regional planning documents which was discretionary. Forest & Bird submits that the analysis undertaken to reach this conclusion was incomplete and should have included an analysis of s43B(7). Once s43B(7) is analysed and applied the most stringent activity status is non-complying under the NES-FW. According to the ORC's s42A the Application does not pass through s104D. Forest & Bird submits that as the Application stands it should not be granted.

Dated 19 May 2022



William Jennings
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