

BEFORE THE NORTHLAND REGIONAL COUNCIL

under: the Resource Management Act 1991

in the matter of: Resource consent applications by the
Motutangi-Waiharara Water Users Group
for new groundwater takes from the Aupouri
aquifer subzones: Houhora, Motutangi and
Waiharara

**LEGAL SUBMISSIONS ON BEHALF OF THE DIRECTOR-GENERAL
OF CONSERVATION**

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Department of Conservation
Te Papa Atawhai
P O Box 10 420
WELLINGTON
Solicitor: May Downing
Telephone: 027 564 1428
Email: mdowning@doc.govt.nz

MAY IT PLEASE THE PANEL

Introduction

- 1 These submissions cover the following matters:
 - a. The functions of the Department of Conservation;
 - b. Witnesses to be called by the Director-General of Conservation (Director-General);
 - c. Adverse effects;
 - d. Adaptive management;
 - e. Relevant planning documents; and
 - f. Part 2 of the RMA.

Summary

- 2 The Director-General of Conservation has submitted on the resource consent applications by the Motutangi-Waiharara Water Users Group for new groundwater takes from the Aupouri aquifer subzones: Houhora, Motutangi and Waiharara.
- 3 The Director-General continues to oppose the granting of resource consents. The applicant has not conclusively demonstrated that the potential adverse effects on the Kaimaumu wetland will be avoided and that the nationally significant values of the wetland will be safeguarded.
- 4 The Director-General is not satisfied that adverse effects can be properly monitored and adequately addressed via the proposed adaptive management conditions. It is inappropriate to rely on an adaptive management regime where there is insufficient baseline information (which may also reveal that consent should not be granted) and where the effects on the Kaimaumu wetland are uncertain.
- 5 The Director-General seeks that, in the absence of baseline information, the application is declined. Alternatively, it is open to the Panel to request the applicant to conduct further baseline

studies and adjourn proceedings until the results of such studies have been provided.

Witnesses to be called by the Director-General

- 6 The Director-General will be calling the following witnesses:
 - a. **Mr James Blyth**, a water resource scientist, will describe the eco-hydrological function of the Kaimuamau-Motutangi wetland, monitoring, trends in water level data, and uncertainty in the applicant's assumptions on the wetland's isolation from groundwater inputs.
 - b. **Mr Timothy Baker**, a hydrogeologist, will provide evidence on the uncertainty and lack of baseline data that exists in and around the Kaimuamau wetland and the inability of the conditions presented in the NRC Staff Report to monitor for potential changes in the hydrology of the wetland.
 - c. **Ms Shona Myers**, an ecologist, will describe the ecological, including plant and vegetation, values of the Kaimuamau wetland. She will also assess the threats to the wetland, including the potential adverse effects of the proposed groundwater takes on the ecological values, and whether there is sufficient information provided to assess ecological effects on the wetland.
 - d. **Mr Jacob Williams**, a planner employed by the Department, will identify the relevant provisions of the applicable resource management documents.

Adverse effects

- 7 Your decision on the application must be made in accordance with section 104 of the Resource Management Act 1991 (RMA). Section 104 requires you to have regards to the actual and potential effects on the environment of allowing the activity (s 104(1)(a)). "Effect" is defined broadly in section 3 of the Act:

In this Act, unless the context otherwise requires, the term effects includes-

- (a) any positive or adverse effect; and

- (b) any temporary or permanent effect; and
- (c) any past, present, or future effect; and
- (d) any cumulative effect which arises over time or in combination with other effects-

regardless of the scale, intensity, duration, or frequency of the effect, and also includes-

- (e) any potential effect of high probability; and
- (f) any potential effect of low probability which has a high potential impact.

- 8 The Director-General does not contest any suggested benefits the water takes could provide to the orchard operations described in the application.
- 9 The adverse effects highlighted by the Director-General's submission, and about which concern remains, are the effects on the Kaimaumu wetland.
- 10 The Kaimaumu wetland support an array of threatened and rare flora and fauna.¹ The evidence of Ms Myer's identifies that:²

...a reduction in water levels in the wetland, including water level reductions of 0.1m or more, could have significant and long term ecological effects on Kaimaumu. This could lead to a drying out of the wetland, a change in wetland type and function, increased spread of weed species, and changes to coastal to freshwater gradients in the wetland. It could lead to irreversible loss of threatened ecosystem types and habitats for threatened plant and animal species.

- 11 When considering the potential adverse effects, I also refer you to the evidence of Mr Baker and Mr Blyth, which questions the applicant's hydrological assessment of the potential changes the proposed water abstractions may have on the hydrology of the wetland. Mr Baker's analysis is that the results from the applicant's Radon sampling:³

actually indicate a strong potential for groundwater contribution into the drains and/or surface channels of the wetland that requires further investigation.

- 12 These effects and their associated risks are all clearly within the definition of "effect" in the RMA.

¹ Statement of Evidence of Shona Myers, at [22]-[24].

² Statement of Evidence of Shona Myers, at [43].

³ Statement of Evidence of Timothy Baker, at [56].

13 Cumulative adverse effects, in the sense of the effects of the proposed groundwater takes together with the effects of existing takes and existing threats already facing the Kaimaumau wetland, are also relevant under the RMA. This was recognised in *Kuku Mara Partnership (Admiralty Bay West) Ltd v Marlborough District Council*.⁴

if the existing activity has adverse effects, and the proposed activity has an adverse effect, even if only minor, which would add to the existing effects, then the definition requires a consideration of both. That is because the new effect will have an impact in combination with other effects even if its scale, intensity, duration or frequency is not, of itself, more than minor. That would comply with the ordinary meaning of cumulative.

14 The evidence of Ms Myers summarises the matter:⁵

The wetland has also been impacted by past drainage activities and there have been concerns raised about the further drying out of the wetland and invasion of fire resilient dryland weed species.

Adaptive management

15 The planning evidence on behalf of the applicant accepts that precaution is required in respect of the Kaimaumau wetland as set out in Policy D.2.8 of the Proposed Regional Plan.⁶

16 The applicant and NRC Staff Report advance some monitoring and mitigation conditions for your consideration. These include:

- a. Conditions requiring the applicant keep a record of daily water take (condition 5), and measurements of static water level in each production bore (condition 7). Such records are to be forwarded to the NRC's Monitoring Officer (condition 8).
- b. A Groundwater Monitoring and Contingency Plan (GMCP) must be prepared by a "suitably qualified and experienced person" and include specific details of mitigation to be initiated. The GMCP must be submitted to the NRC's Compliance Manager

⁴ (2005) 11 ELRNZ 466, at [52].

⁵ Statement of Evidence of Shona Myers, at [48].

⁶ Brief of Evidence of Martell Letica, at [8.1].

for written approval, prior to the first exercise of consent (condition 17).

- 17 These proposed conditions appear to attempt to impose a type of adaptive management where unanticipated effects relating to the groundwater take are identified to inform potential reductions in abstractions.⁷
- 18 There are clear constraints to using adaptive management. The constraints have been addressed by the Supreme Court in *Sustain Our Sounds Incorporated v The New Zealand King Salmon Company Limited*.⁸ The Supreme Court first identified a threshold question:⁹

As to the threshold question of whether an adaptive management regime can even be considered, there must be an adequate evidential foundation to have reasonable assurance that the adaptive management approach will achieve its goals of sufficiently reducing uncertainty and adequately managing any remaining risk. The threshold question is an important step and must always be considered. As Preston CJ said in *Newcastle*, adaptive management is not a “suck it and see” approach.

- 19 The Supreme Court identified further factors as being appropriate to assess the issue:¹⁰
- (a) There will be good baseline information about the receiving environment;
 - (b) The conditions provide for effective monitoring of adverse effects, using appropriate indicators;
 - (c) Thresholds are set to trigger remedial action before the effects become overly damaging; and
 - (d) Effects that might arise can be remedied before they become irreversible.

- 20 The evidence of Ms Myers, Mr Blyth, and Mr Baker shows that the required “evidential foundation” is not present for the adaptive management regime proposed in this case. There is a paucity of

⁷ Northland Regional Council Staff Report REQ-581172, at [171].

⁸ *Sustain our Sounds Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 40.

⁹ *Sustain our Sounds Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 40, at [125].

¹⁰ *Sustain our Sounds Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 40, at [132].

baseline data¹¹ – with respect to existing water levels, the ecology of the wetland, and the hydrology of the wetland and its connection to the aquifer.¹² A reduction in water levels of 0.1m or more, could have significant and long-term ecological effects on Kaimaumau.¹³ There is simply not an adequate foundation for you to be reasonably assured that the conditions as set out in the application and NRC Staff Report would effectively manage adverse effects on the nationally significant Kaimaumau wetland.

- 21 The evidence of Mr Baker, Mr Blyth, and Ms Myers highlight concerns about the proposed adaptive management, which touch on some of the factors set out in *Sustain our Sounds*. They include:
- a. There is no reliable baseline data against which to compare the effects of the proposed abstractions.¹⁴
 - b. There is little to no actual mapping of the extent and nature of iron pans (thought to impede water flow), both beneath and in proximity to the wetland.¹⁵
 - c. The baseline data that does exist is limited (on borehole logs, groundwater water level, surface water flow measurements, and water quality information);¹⁶ The information presented is insufficient to assess effects.¹⁷
 - d. There has been little to no work in quantifying the inflows and outflows from the wetland's five sub-catchments. As a result, the current understanding of the wetland's hydrological behaviour is largely conceptual and based on anecdotal evidence.¹⁸

¹¹ Statement of Evidence of Timothy Baker, at [11].

¹² Statement of Evidence of Shona Myers, [47] and [51].

¹³ Statement of Evidence of Shona Myers, at [43].

¹⁴ Statement of Evidence of Timothy Baker, at [33].

¹⁵ Statement of Evidence of Timothy Baker, at [46].

¹⁶ Statement Evidence of Tim Baker, at [11].

¹⁷ Statement of Evidence of Shona Myers, at [42].

¹⁸ Statement of Evidence of Timothy Baker, at [32].

- e. Radon sampling to date has not sufficiently addressed potential groundwater sources to the Kaimaumu wetland due to inadequate sampling within the wetland.¹⁹
- 22 To summarise, Mr Baker, and Mr Blyth have found that the applicants have not robustly or comprehensively assessed the connection between groundwater and the Kaimaumu wetland. These findings are also supported by Ms Myers, who observes that an assessment on species, habitat, and water quality is absent.²⁰
- 23 The proposed conditions in the application and NRC Staff Report do not address the concerns outlined. There are no specific requirements for any baseline planning, monitoring, or surveys to be undertaken prior to water abstraction.
- 24 Condition 17 as proposed in the NRC Staff Report suggests the GCMP will address “specific triggers for groundwater level and/or groundwater quality”. This does not remove the need for good baseline information.
- 25 As Mr Williams notes, the adaptive management proposed will not enable adverse effects to be identified effectively.²¹ The effectiveness of any “mitigation to be initiated in the event of a trigger level exceedance” set out in condition 17 will only be as good as the data that informs it. Without any baseline data, including data on the hydraulic connectivity between the groundwater and the wetland, it seems difficult if not impossible for adverse effects caused by the abstractions to be remedied before they become irreversible. The conditions do not currently include metrics to assess degradation to the wetland. The triggers still need an adequate baseline for any deviations from baseline to be identified and triggers levels appropriately set.

¹⁹ Statement of Evidence of James Blyth, at [56].

²⁰ Statement of Evidence of Shona Myers, at [46].

²¹ Statement of Evidence of Jacob Williams, at [26].

- 26 The adaptive management proposed is inadequate to respond to uncertainties, gaps in data cannot be filled by setting generic monitoring conditions.
- 27 It is noted that the ecological values of the Kaimaumau wetland have been recognised as significant. The opinion of Ms Myers, Mr Blyth, and Mr Baker is that there is a high degree of uncertainty in current information, and there is no certainty that the proposed adaptive management will adequately diminish the risk.
- 28 As noted by Mr Blyth, if abstractions reduce groundwater recharge to the wetland then the impacts would be over a wide area and may lead to significant, degrading changes in ecological values.²² This finding is reinforced by the expert opinion of Ms Myers, who states that reductions in water levels from the Kaimaumau wetland may have significant and irreversible impact on the wetland ecosystem, including on both freshwater and saline inputs.²³ Given that wetlands are a diminishing resource in New Zealand, a trial and error approach seems even more unsuitable where possible effects may have irreversible impacts on the wetland.
- 29 Conditions imposing adaptive management regimes must also meet the requirements for conditions generally. Conditions must be certain and cannot delegate the making of substantial decisions.²⁴ Contrary to this, the suggestion that the GCMP be prepared by a “suitably qualified and experienced person” provides no certainty and does not even require preparation by an independent third party.
- 30 It has been recommended that the GCMP (containing all the detail about trigger levels, mitigation, and monitoring) is prepared after the consent is granted and approved by the Council. In *Crest Energy Kaipara Limited v Northland Regional Council*²⁵ the Court directed

²² Statement of Evidence of James Blyth, at [55].

²³ Statement of Evidence of Shona Myers, at [40].

²⁴ *Royal Forest and Bird Protection Society Inc v Gisborne District Council* [2013] NZRMA 336 at [88].

²⁵ Env C Auckland A132/09, 22 December 2009.

that the adaptive plan be prepared and approved by the Court and not delegated.²⁶

- 31 The conditions do not meet the relevant legal criteria. Irrespective of the conditions advanced, the evidence traversed above has also demonstrated that there is insufficient information upon which the Panel can properly determine the application, which cannot be avoided with generic monitoring conditions. Therefore, there is jurisdiction under section 104(6) of the RMA to decline the application. Alternatively, section 41C(3) of the RMA provides the Panel the power to request the applicant to provide further information, including further baseline studies. The Panel can request or receive the further information it needs and adjourn the hearing to allow that information to be gathered for whatever length of time it considers reasonably necessary in the circumstances.

Relevant planning documents

- 32 Under s104(1)(b), you must, subject to Part 2 of the RMA, have regard to “any relevant provisions of any applicable planning documents, including regional policy statements and plans”.
- 33 The High Court in *R J Davidson Family Trust v Marlborough District Council*²⁷ has considered the application of Part 2 in section 104 of the RMA and followed the Supreme Court’s decision in *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited*.²⁸ As the Panel will be aware, the Supreme Court in *King Salmon* found that RMA planning documents, in that case the NZCPS, give effect or substance to Part 2 of the RMA.²⁹
- 34 The High Court in *R J Davidson* found that there is no need to look at most of Part 2 of the RMA in the context of a decision of a resource consent because the relevant provisions of the planning

²⁶ Env C Auckland A132/09, 22 December 2009, at [222].

²⁷ *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52.

²⁸ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38.

²⁹ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38, at [85].

documents, including the NZCPS, have already given substance to the principles in Part 2.³⁰ Only where there has been “invalidity, incomplete coverage or uncertainty of meaning within the planning documents, resort to Part 2 should then occur.”

35 On the approach in *R J Davidson*, the enquiry in this application is relatively focused. This is not a case where resort to Part 2 is required. The relevant provisions of the applicable resource management documents are discussed in the evidence of Mr Williams. There is a clear direction in the statutory documents:

- a. In the coastal environment, a precautionary approach is undertaken and adverse effects on the wetland are avoided (NZCPS, Policies 3 and 11);
- b. Outside the coastal environment, there may be no more than minor adverse effects, and where effects *may* be irreversible, then they are likely to be more than minor (Northland RPS, Policy 4.4.1(3));
- c. Objective B4 of the National Policy Statement for Freshwater Management also directs that significant values of wetlands are protected.

36 The higher-order documents establish a clear message in relation to the wetland: precaution is adopted and adverse effects, including effects which may be irreversible, are to be avoided.

37 There is arguably contrasting Environment Court authority as to whether an overall broad judgement involving recourse to Part 2 still applies in consideration of resource consent applications.³¹ Regardless, it is submitted that the same outcome is reached if Part 2 is considered and an overall judgement applied, as evaluated below.

³⁰ *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52, at [76].

³¹ In *Envirofume Limited v Bay of Plenty Regional Council v Bay of Plenty Regional Council* [2017] NZEnvC 12 at [143], The Environment Court found that Part 2 is still relevant “as an overview or check that the purpose of the Act and that Part 2 issues are properly covered and clear”. In *Skyline Enterprises Ltd v Queenstown Lakes District Council* [2017] NZEnvC at [17]-[18], the Environment Court indicated that where there is a proposed plan that has not been fully tested by reference to part 2, part 2 should be considered, acknowledging existing plan provisions.

Part 2 of the RMA

- 38 The relevant section 6 matters of national importance must be recognised and provided for in your evaluation of the proposed water takes in terms of the Act's purpose. Section 6(a), which requires that you recognise and provide for "the preservation of the natural character of the wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use and development", is also relevant.
- 39 In respect of the proposed water takes on the Kaimaumu wetland, section 6(c) "the protection of areas of significant vegetation and significant habitats of indigenous fauna" is of particular importance. The Kaimaumu wetland fall squarely within section 6(c). As Ms Myers states, the wetland supports "possibly the largest assemblage of rare and threatened plants of any wetlands in New Zealand, including species that are endemic to Kaimaumu"³² and also provides an important habitat for threatened and at risk fauna species.³³
- 40 Section 6(c) is not a trump. However, it is a nationally important matter to which considerable weight must be given.
- 41 Section 7 requires that you have particular regard to a range of identified "other matters", relevantly:
- a. The intrinsic values of ecosystems (section 7(d)); and
 - b. Any finite characteristics of natural and physical resources (section 7(g)).
- 42 On an overall approach, taking appropriate account of the relevant statutory instruments, the Act's purpose would not be served by allowing groundwater takes on the terms advanced in the application and Staff Report. Adverse effects will not be appropriately avoided (section 5(2)(c) of the RMA) and life-

³² Statement of Evidence of Shona Myers, at [22].

³³ Statement of Evidence of Shona Myers, at [23].

supporting capacity of the Kaimaumu wetland in respect of its habitat significance will not be assured (section 5(2)(b)).

Conclusion

- 43 This is a case whereby there is inadequate information to make a determination. The Director-General's position is that there is insufficient information, particularly in relation to baseline data, to respond to existing uncertainties. Further work to assess the impact of water abstractions is required. If the applicant's wish to assess effects on the wetland and gather sufficient information, the Department is happy to be involved in further discussions on how this could be achieved.
- 44 In the absence of adequate baseline information and monitoring, the application should be declined. Alternatively, it is open to the Panel to request the applicant to conduct further baseline studies and adjourn proceedings until the results of such studies have been provided.
- 45 If the Panel is minded to approve the application, conclusive information on adverse effects on the wetland is required, and the proposed adaptive management conditions require further input and refinement. Again, the Department is happy to be involved in discussions in respect of conditions.