MEMORANDUM

To: **Independent Hearing Commissioners**

From: **Richard Blakey**

Date: **15 April 2021**

Re: **HUIA REPLACEMENT WATER TREATMENT PLANT (BUN60339273): OFFICER RESPONSE TO EVIDENCE REGARDING PLANNING**

Introduction

1. This memorandum is to set out my reply to the evidence of the applicant and submitters presented at the hearing regarding the Huia Replacement Water Treatment Plan.

2. I prepared the s 42A report dated 13 January 2020 on behalf of the Auckland Council's Resource Consent Department, which recommended that consent be granted to the applications subject to the draft conditions that were provided as Attachment 10 to the hearing agenda. A description of my qualifications and experience was included at Attachment 11 to the hearing agenda.

3. My previous pre-hearing memorandum of 20 February 2020 detailed three corrections to the s 42A report and an update with respect to recent plan changes to the Auckland Unitary Plan (Operative in Part) ("AUP(OP)").

4. This memorandum responds to the matters raised during the hearing by topic or theme, and also acknowledge the memoranda prepared by other Council specialists and adopts their responses.

5. I also acknowledge the additional work undertaken in respect of the issue of kauri dieback and have reviewed the conclusions reached in the Joint Witness Statement for Kauri Dieback Management ("JWS") dated 29 January 2021. I have reviewed the applicant's supplementary evidence regarding the management of kauri dieback dated 7 April 2021 and the submitter statements regarding that evidence that has been presented to this Panel over the past two days.

6. I also note that the applicant has also provided additional assessments relating to:

- the National Environmental Standard for Freshwater Management 2020 ("NPS-FM") and the rules within the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 ("NES-FW");
- landscape assessment in terms of the Waitakere Ranges Heritage Area Act ("WRHAA") and landscape plans;
- an updated schedule of conditions (albeit that these have not yet been provided for the hearing).

7. By way of update, I also note that the Outline Plan of Works ("OPW") application that was submitted in December 2019 (Council reference OPW60351346). The Council's recommendations on the OPW have not yet been issued as there have been a number of matters to be addressed between the Council and Watercare in respect of it, and in terms of its overlap with the present resource consent application.

Matters noted in the s 42A report requiring clarification

8. Section 18 of my s 42A report set out a list of those matters that were unresolved, including relatively minor technical matters, and where further clarification or detail was identified and which the applicant was invited to comment on. I address these items briefly in table format at **Attachment 1**. I comment further below with respect to the cultural effects aspects noted in that list.

9. My s 42A report also advised of various plan changes that were underway at the time of preparing that report. Of relevance, a decision on Plan Change 29 regarding notable trees was made on 28 January 2021. This includes an updated map depicting Kauri tree #1836 in its correct position on the corner of Woodlands Park Road and Manuka Road. I have also reviewed more recent plan changes and have not identified any that would affect the site or the provisions of the AUP(OP) that are applicable to it.

Acquisition of Watercare land for parkland

10. Mr Loutit advised of the acquisition of Watercare-owned land in his opening submissions, and the application of covenants over those parts of the subject sites not required for the WTP or reservoirs (Hearing Plan B). I can confirm, through liaison with the Council's Parks team (both during the hearing and more recently in March 2021), that consultation with Community and Social Policy over the acquisition of the land shown in red shading on that plan is at an advanced stage, and the recommendation to the Local Board and then the Governing Body is to acquire the land. I understand that this will include the area to be occupied by Reservoir 1, and that this area will then be leased by Watercare. While this has not been formally advanced in the application as offsetting/compensation, it does provide some additional mitigation for the proposal.

11. I would, however, note that all of the subject land to be transferred is subject to Designation 9324 ('*Water Supply purposes – water treatment plants and associated structures'*), and it may therefore be appropriate for Watercare to concurrently proceed to confine the extent of the designation (via ss 181 [alteration] or 182 [removal] of the RMA).

12. In my view, there also remains a question as to why the land underneath the 1976 settling tanks will not be subject to the proposed site covenant, and it is unclear what purpose that land might be put in the future. Given Mr Loutit's undertaking that the covenants are proposed to "*preclude any future works that may be necessary to upgrade or replace water supply infrastructure on the land in the long term*"[1] it would seem to be a possible area for revegetation. Ms Baverstock also suggested that a "*covenant or encumbrance …now effectively encompasses those areas outside of the existing Huia WTP and Reservoir 2 footprint, and outside of the replacement WTP footprint*".[2]

Freshwater Management

13. Ms Baverstock on behalf of the applicant has provided an assessment with respect to the NPS-FM and the rules within the NES-FW, both of which came into force on 3 September 2020. I have reviewed Ms Baverstock's evidence in this regard and I agree that the proposal complies with the objectives and policies of the NPS-FW, including those that must be incorporated by the Council into its regional plan without using a Schedule 1 process. I also agree with Ms Baverstock that a new reason for consent is required in accordance with Regulation 45(4) of the NES-FW (the taking, use, damming, diversion, or discharge of water within, or within a 100m setback from, a natural wetland is a discretionary activity).

14. I acknowledge Dr Ussher's comments as to the need for some additional technical information in regards to this matter, but also note his expectation that such information would confirm the applicant's assessment.

Kauri Dieback

15. The hearing was adjourned on 6 March 2020 to enable expert caucusing to occur between all the witnesses with expertise in kauri dieback and such other witnesses as are required to ensure that the relevant details of the proposal are fully understood. The minute of the Commissioners dated 13 March 2020 noted that "*the matter of Kauri Dieback is a pivotal issue in determining this application for resource consent, and we consider that clear and informed evidence on this subject is essential to assist us in our decision-making task*".[3]

16. The subsequent JWS was based on the outcome of sampling of the site which confirmed that *Phytophthora agathidicida* ("Pa") "*is present to a greater or lesser extent throughout the site*".

17. The memorandum by Dr Fea, the Council's Senior Plant Pathogens Advisor, has responded to the applicant's evidence and the matters raised in the JWS. Mr Fea has advised that he remains of the view that the application should be declined, because "*the risk of the proposed activities spreading kauri dieback disease is very high, and the potential impact of that spread would be irreversible*".

[1] Opening submissions, paragraph 9.19
[2] Baverstock, Rebuttal, paragraph 4.18
[3] Memorandum, paragraph 7

18. Based on Dr Fea's assessment, this effect could be classified as an adverse effect of both "high probability" and "high potential impact",[4] and underscores my conclusions at sections 9.4.5 and 9.4.14 of the s 42A report that the adverse effects of the proposal (with respect to terrestrial ecology effects in general, and including kauri dieback) will be more than minor, and so the proposal is not considered to be able to pass the threshold test of s 104D(1)(a).

19. I note that the Dr Flynn's supplementary evidence in respect of kauri dieback does provide some counter to the potential extent of those effects:[5]

> *I consider that the case for avoiding the site posed by other experts does not adequately recognise the existing risk environment, which is that Pa is already present within the catchment beyond the Project site, and appears to be widespread; numerous controls can be implemented to ensure that the active works footprint and associated discharges can be kept to a modest size despite the overall scale of the Project; and that a new method of efficient and reliable testing for Pa will enable effective scrutiny of hygiene and containment protocols. In my opinion, these factors together offer confidence that the proposal will not increase the distribution of Pa within the catchment, or the extent of kauri infection within the catchment.*

20. However, I consider that the evidence and scientific expertise presented on behalf of submitters[6] highlights particular issues and risks with the management of Pa on this site, as well as what appears to be the direct conflict of the proposed management with s 52 of the Biosecurity Act 1993. One particular aspect of Dr Flynn's assessment and the KDMP that is unresolved is the monitoring regime. Mr Hill of Biosense advised that the time to undertake the testing regime would be in the order of 2½ - 3 weeks, and it is difficult to see how this will be incorporated on a frequent and repeated basis into a construction/earthworks programme once underway. Nor were details provided as to how washdown water would be transported, nor where it would be discharged to.

21. I also note that this aspect is also relevant to (the now operative) policy E11.3(6A)[7] of the AUP(OP), in terms of the objectives and policies threshold test of s 104D(1)(b):

> *Recognise and provide for the management and control of kauri dieback disease as a means of maintaining indigenous biodiversity.*

22. I noted in the s 42A report in this regard that the proposal appeared to be in some conflict with this policy, although this was dependent on whether the policy is read in absolute terms (i.e., avoidance of risk), or provides for control and management measures to be developed that seek to mitigate risks (to the extent that this is possible) in the context of a particular proposal. It was my assessment that any misalignment or uncertainty with respect to Policy E11.3(6A) would not result in the proposal being contrary to the above provisions related to land

[4] Per s3(e) and (f) of the RMA
[5] Flynn (Supplementary), paragraph 7.1
[6] As summarised by Mels Barton, pages 6 - 9
[7] As introduced by Plan Change 14 (22 August 2019), and which added the word "disease" to the notified version of this policy referenced in the AEE.

disturbance when considered on an overall basis, and thus the second s 104D gateway would remain open.

23. That finding becomes somewhat more strained as a result of the evidence from Mr Ashby of Te Kawerau ā Maki ("Te Kawerau"). In the s 42A report I had sought an update regarding the provision of a Cultural Impact Assessment ("CIA") by Te Kawerau (per section 9.4.10 and elsewhere), and the manner in which the applicant will address the restrictions to activities under the existing Te Kawerau ā Maki rāhui (per section 13.8). My conclusions in terms of cultural effects was that:

> *At the time of preparing this report, however, it is the writer's view that the extent of adverse effects on the cultural values identified by Te Kawerau are not clear. Accordingly it is not presently possible to confirm that these effects will be minor or more than minor, although it is acknowledged that the measures undertaken in the development of the proposal have sought to mitigate those adverse effects likely to be of concern to Te Kawerau.*

24. As noted in my summary at Attachment 1, a CIA prepared by Te Kawerau was provided by the applicant in early February 2020 and Mr Waiwai's evidence addressed this matter, as did Ms Urquhart's Supplementary Evidence (24 February 2020). While it was unclear which recommendations had not been met at this stage,[8] the analysis by Ms Urquhart indicated that the key recommendations (from a cultural effects perspective) had been appropriately responded to. However, I note Mr Ashby's evidence to the Commissioners on Wednesday which concluded:

> *7.2 Based on the current information I am not convinced that risks have been adequately contained or managed within the proposed site footprint, or even within the Waitākere rāhui area. We are opposed to any level of adverse off-site impact to the catchment that could undermine the mauri of Te Wao Nui ā Tiriwa and the purpose of the rāhui. Our concerns focus on the movement of contaminated and tapu soil and vegetation particularly outside of the rāhui area, the retention and discharge of contaminated water at levels greater than the natural baseline, and the lack of Te Kawerau ā Maki participation or tikanga within the documentation provided.*
>
> *7.3 For the reasons set out in this evidence I consider the cultural risk of proceeding with the project based on the current information to be significant and not fully or adequately mitigated or contained.*

25. In that regard I consider that adverse effects from a cultural perspective would be more than minor, and Mr Ashby's evidence would place some of the conclusions with respect to a number of objectives and policies of the AUP(OP), and B6 of the RPS, into question.

Alternative sites

26. While Mr Loutit's submissions regarding the description of alternatives is generally agreed with (and is consistent with the position expressed at section 9.4.2 of my s 42A report), legal advice

[8] Waiwai, paragraph 5.3

from the Council's solicitors has been sought to further consider this aspect, given the significance of site selection to the submissions and evidence heard during the hearing. Mr Loutit's submission in this regard was that "*[a] consent authority's consideration of an application under s 104 of the Act does not include any assessment of alternatives*".[9] The AEE said in this regard that "*Watercare has assessed alternative locations and designs (Section 5 of the AEE Report), and found the proposal is the best practicable option*".

27. However, it is my understanding that a consent authority is able to consider information provided about alternative locations in reaching its decision on the application under s 104(1)(c), provided that the alternative locations are "*relevant and reasonably necessary to determine the application*".[10] The High Court in *Meridian Energy* (refer **Attachment 2**) described the assessment about a substantial wind farm in Central Otago in its directions to the Environment Court for reconsideration as follows:[11]

> *(d) Any further evidence concerning alternative locations will form part of the Court's s104 analysis of the Meridian proposal (not part of the s 7(b) assessment). The inquiry will be whether, if the same or similar wind farm could be placed on any identified alternative site/s, it would generate less adverse effects on the environment. That consideration will, however, need to be weighed against any diminution in the benefits of the project … and any other relevant considerations such as the availability of the alternative site/s to Meridian.*
>
> *(e) As the Environment Court acknowledged, and our analysis of the other wind farm cases demonstrates, consideration of alternative sites is relatively unusual. While it will be for the Environment Court to undertake any further analysis of the evidence before it, we emphasise that consideration of alternative sites should not be pushed too far. We have rejected the proposition that Meridian must demonstrate that the Hayes site is "the best". Rather than being a search for "the best" site, consideration of alternatives sites is only part of the evaluation of the merits of the application in the context of s 104 and the focus needs to be on the merits of Meridian's proposal.*

28. While there is no obligation on an applicant for a resource consent to go beyond a description of any possible alternative locations, the High Court in *Meridian Energy* considered that - given the size of the proposal before it (a substantial wind farm) and its potential impacts on the environment - it would anticipate that a reasonably detailed description of alternative sites would be provided.[12] It would therefore seem reasonable in this regard that the level of detail in the description should be proportionate to the size of a proposal and its potential impacts on the environment. This is reinforced by the considerations necessary under Policy E26.2.2(6) (relating to infrastructure), and Policy B4.4.2(3) (relating to Natural heritage and the Waitakere Ranges Area Overlay, as noted by Mr Gray for DoC), which requires:

[9] Opening submissions, paragraph 7.2
[10] *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482, paragraphs 65, 67 and 68
[11] Ibid, paragraphs 148(d) and (e)
[12] Ibid, paragraph 148(c)

Where clearing vegetation for infrastructure is necessary, it should be undertaken only where the vegetation is of lower value and there is no practicable alternative option.

29. I also acknowledge that, in adopting the applicant's assessment of alternatives, I had not undertaken a further discussion of those alternatives. I considered in the s 42A report that the assessment of alternatives set out in the AEE[13] was generally thorough (and there had also been a focus on 'alternative designs' once the site had been selected). However, having heard the evidence of submitters, and on further review of Watercare's site selection report to its Board (May 2017), it seems apparent that aspects of the weighting attributed to different sites may not have been considered with sufficient regard to social impacts for the local community generally. I note in particular the evidence of Mr Kitson and that of other submitters (e.g., Ms Cormack) which has highlighted what appears (on the basis of that evidence) to be the late surveys that informed the assessment of social impact effects for Titirangi residents. This suggests that this assessment may not have been sufficiently robust (as separate from 'detailed') in respect of that particular effect.

30. It is also unclear why kauri dieback effects were not given a due level of weighting or relevance in the site selection process, as separate to the question of ecology generally. I also note that there was no category (in the final analysis) addressing consenting risk, including reference to particular considerations under the WRHAA, which is discussed further below. It is apparent that kauri dieback was an issue of known significance at the time of the site selection analysis, as is evidenced by inclusion of this issue within the Muddy Creeks Local Area Plan (adopted 13 February 2014). Kauri dieback appears as Key Action 1 under that plan:

Work to reduce the spread of kauri dieback and foster protection of healthy kauri in partnership with local communities, iwi and external partner organisations.

31. It is, in overall terms and on further review, not apparent that the site selection process was carried out on a first principles approach (per section 3.2 of site selection report). The final recommendation and decision in that process was based on the following:

The Preferred Option for the replacement of the Huia WTP is the Manuka Road option. Preference for Manuka Road option, has been determined through assessing the shortlisted options through the MCA process, the consideration of the costs for each and the other matters outlined in this report, in particular the designation of the sites for "water supply purposes Huia and Nihotupu water treatment plants and associated structures". The purpose of designations is to protect and facilitate the construction and operation of a public work or project. In this case, the designation has signalled to the communities that such a plant may be established on the sites at any time.

32. While the general premise under s 104 and clause 6 of Schedule 1 of the RMA are understood, I consider that, having regard to the principles set out in *Meridian Energy* (and the aforementioned policy provisions under the AUP(OP)), that there are aspects of the site

[13] I note that while background reports to the MCA analysis (*Huia Water Treatment Plant Site Selection: Long-list Option Development* report, May 2016) are referenced by way of a link from the AEE (section 5.5.5), no such documents can presently be found under that link.

selection process, or consideration of alternatives, in this case that do not appear to have taken into account one of the key issues arising from the proposal (i.e., kauri dieback). While s 104 does not directly require the Commissioners to take into account the assessment of alternatives, and while I do not consider the requirements of clause 6 to be determinative, there are certain policy provisions that are applicable in the sense of both ss 104D(1)(b) and 104(1)(b), and in this regard it is my view that this process may not have taken into account all relevant matters.

Landscape effects and the Waitakere Ranges Heritage Area Act

33. Because the site is subject to a designation, landscape effects do not generally fall within the scope of the regional consent framework. A landscape assessment has been prepared by Ms de Lambert to accompany the concurrent Outline Plan of Works ("OPW") application, and that assessment suggests that construction-related effects on landscape values (which fall within the scope of regional consents) would be likely to be screened by retained vegetation. It identifies a high level of adverse effect during construction[14] while commenting that "*[o]nce complete and operational the adverse landscape effects are assessed to be **very low** and consistent with the local landscape character and amenity of the Woodlands Park / Manuka Road landscape in this part of the Waitakere Ranges*",[15] although the period over which such landscape planting would be complete is not defined.

34. Mr Kensington has assessed this issue on behalf of the Council.

35. In reviewing this issue, I noted a preliminary issue that the construction footprint goes beyond the site and designation boundary along Woodlands Park Road. I understand that the applicant proposes to apply for a separate land use consent.[16] This additional area of clearance would affect the assessment of landscape effects associated with construction, and does not appear to be specifically considered in Ms de Lambert's recent report. I note that such a consent would need to be prepared and considered with careful regard to any consent granted for the present matter, given the identification in the Biosense maps depicting the presence of kauri dieback affecting this part of the road reserve.

36. The Council has received legal advice with respect to the application of the WHRAA in the context of the present application. I had addressed considerations of the WHRAA in my s 42A report as an "other matter" under s 104(1)(c) of the RMA, and stated:

> *Because the RMA includes no cross-reference to the WHRAA, and because it does not form one of the statutory documents that the consent authority is required to "have regard to" under s104(1)(b), I have considered this as an "other matter" under s104(1)(c), in addition to consideration of B4.4 of the RPS at section 12.4.4 earlier.*

[14] De Lambert, Report 24 August 2020, page 4
[15] Ibid, page 5
[16] The removals are not considered to be part of a "network utility" whereby Chapter E26 would be deemed not to apply (e.g., E26.4.3.1(A92)), such that removal of vegetation (to quite an extensive degree) is subject to consent under E17.4.1(A10).

37. However, I acknowledge that this is not the correct approach because the WRHAA is designed to work in conjunction with the RMA and sets out additional matters for the consent authority to consider when making a decision on the resource consent application.

38. My approach differed from the AEE which had addressed the WRHAA as standalone from various RMA sections (and prior to its 'Conclusion'), although the AEE then discounted it having regard to the Waitakere Ranges Heritage Overlay provisions of the AUP(OP). However, s 13(2) makes it clear that the requirement to have particular regard to the purpose of the WRHAA and the relevant objectives is *in addition to* the requirements in the RMA, including those requirements set out under s 104(1)(b). In short:

    (a) The WRHAA requires a consent authority to specifically and separately consider the purpose of the WRHAA and its relevant objectives (having regard to any relevant policies in the regional and district plans).

    (b) The consent authority is free to attribute such weight as it thinks fit to those matters (with weight not being a matter directed by the WRHAA).

    (c) Section 13(2) makes it clear that the requirement to have particular regard to the purpose of the WRHAA and the relevant objectives is *in addition to* the requirements in the RMA.

    (d) An assessment under ss 3, 7, 8, 13 and 14 of the WRHAA is not limited by the provisions in the AUP(OP) overlay as a matter of law.

39. In terms of the findings of this Panel, I am advised that the decision will need to record the Panel's findings under ss 104 and 104B but should include a separate reason under the WHRAA, with a further reason or decision component should the Commissioners need to deal with a weighting aspect arising from different conclusions under either statute. This is to make it clear that the WHRAA sits alongside the RMA and as stated in s 3(2)(e):

    > *provides additional matters for the Auckland Council and certain other persons to consider when making a decision, exercising a power, or carrying out a duty that relates to the heritage area.*

40. I note that although a consideration of the provisions of the WHRAA requires consideration of its provisions when assessing a matter under the RMA, while providing that, if a conflict between the two statutes arises, the RMA prevails (per s 9 WHRAA).

Significant Ecological Area Overlay

41. In considering the more general effect of the proposal on the SEA, as separate from kauri dieback, I have had regard to a recent decision of the High Court relating to the East West Link ("EWL") in Onehunga which addresses the relationship between Chapter E26 (Infrastructure) and various overlay provisions of the AUP(OP) (copy attached as **Attachment 3**). I make reference to this decision to the extent that it may assist the Commissioners consider any question of weighting as between infrastructure and the broader ecological issues under the SEA overlay.

42. The High Court comments that E26 takes a much broader view than standards under other chapters (with reference to Chapter D9 – Significant Ecological Areas), and "*specifically envisages that it will sometimes be necessary to locate infrastructure within an overlay area, notwithstanding the apparently mandatory nature of the protections contained in chapter D9*". It goes on to say:

> *E26 does this not by specifically overriding the protections contained in D9, but rather enabling a decision-maker, including the Board in this case, to consider whether particular infrastructure is required even where it would otherwise be unable to be accommodated by particular objectives and policies, including those in D9.*

43. It then highlights that "*far from precluding infrastructure in any particular area…., the relevant policies instead envisage a detailed analysis be undertaken to determine whether particular infrastructure will be appropriate in any particular location*".[17] This exercise is by way of Policy E26.2.2, which was assessed at section 10.9.2 of the s 42A report. My assessment of all the objectives and policies under E26 concluded that:

> *…the objectives and policies seek to recognise and provide for the benefits of infrastructure, while addressing and minimising potential adverse effects. Having regard to the significance of the project in addressing an identified need for future security of water supply for the north-west area of the region, and the generally acknowledged benefits associated with the biodiversity offsetting proposed in this application, it is concluded that the proposal is consistent with, and not contrary to, these provisions.*

44. I consider that this approach is consistent with the finding of the High Court in the EWL case "*that infrastructure, like the proposed EWL where the adverse effects will be more than minor, cannot be by definition contrary to the objectives and policies of the AUP for the purposes of s 104D(1)(b)*".[18]

45. I do note that one of the policies (E26.2.2(6)(d)) requires a decision-maker to consider "*whether there are any practicable alternative locations, routes or designs, which would avoid, or reduce adverse effects on the values of those places, while having regard to E26.2.2(6)(a) - (c)*". This is relevant to the issue of alternatives which I have discussed above.

Conditions of consent

General comment

46. My s 42A report included reference to, and a description of, proposed draft conditions that should be included as part of a decision should the Commissioners be minded to grant consent (Attachment 10). Amendments to those conditions were subsequently proposed by Ms Baverstock in her EIC, with key changes summarised at Attachment 1 to her Supplementary Evidence of 27 February 2020. A further set of conditions were provided the Council by Ms Baverstock on 18 March 2021, which include a general re-structure so that all the conditions are grouped together (e.g. earthworks, contaminated land, etc), as well as identifying those areas where there is agreement (grey-shaded) or where there isn't (un-shaded). I acknowledge

[17] *Royal Forest & Bird Protection Society of NZ v NZTA* [2021] NZHC 390 (3 March 2021), paragraph [65]
[18] Ibid, paragraph [69]

the work undertaken by Ms Baverstock in this regard and consider that the revised structure is a useful enhancement of the original draft. I have provided a revised version of the conditions to Ms Baverstock which identifies matters arising as a result of the specialists' further reviews, and I understand that Ms Baverstock will be providing a final marked-up version of the conditions at this re-convened hearing.

47. I also acknowledge the omission of (original) Conditions 118 - 132 proposed by Ms Johnston and Mr Turner relating to post-construction stormwater management, and those additions are confirmed as acceptable (now Conditions 115 – 124). Similarly, I also acknowledge the inclusion of clause (g) (site parking plan) to the CTMP at Condition 93.

48. The memoranda from the Council's specialists sets out the reasons for those changes that are not agreed or where further clarification may be of assistance. I make the following comments with respect to general matters (use of 'general accordance', the need for inclusion of additional documents, and the issue of 'certification' vs 'written approval').

General Accordance

49. Mr Loutit's submissions highlighted an issue in the conditions regarding the change from the requirement for the works to be carried out "*in general accordance*" with the information submitted and which is recorded in Condition 2. Having regard to the Court of Appeal authority cited in his submissions,[19] and the intent to undertake further design changes and site optimisation (as sought by Conditions 11 and 12), this change is considered acceptable for the regional consents overall.[20] Condition 5, which advises of the primacy of the conditions in the event of any conflict with the documents listed in Condition 2, also provides additional surety that the use of "*general accordance*" will not lead to a diminution of performance against the measures and standards that the applicant has put forward and/or endorsed in the conditions to date (subject to the comments below).

50. Ms France does however advise of a concern with respect to the use of "*general accordance*" in respect of the groundwater diversion conditions (from Condition 138). This is because:

> *the [Council's] Water Allocation team as a rule have not historically accepted the use of "general" here.*
>
> *The assessment of effects, in most instances will be directly tied to the assumed methodology and design, and so it is considered that use of the term general here could restrict Council's ability to query/review changes that could be significant for effects at a later date.*

51. I adopt Ms France's reasoning in this regard and recommend that Condition 138 retains the introductory phrase "in accordance with".

[19] Opening submissions, paragraph 9.4
[20] Also acknowledging the use of "general accordance" by the Environment Court in its first instance decision for the AC36 development.

Additional documents

52. I note that the additional plans presented for the hearing should be added to the range of documents included in Condition 2 (reference "Hearing Plans A – H", prepared by Boffa Miskell Ltd, dated 21 February 2020). For Hearing Plan B I note that the black line should be clarified as between stream diversion and stormwater channel.

Certification v Written Approval

53. A further issue that arises with the conditions is in respect of the whether final management plans are 'certified' or 'approved' by the Council. These terms were shown in un-shaded format in the updated conditions, as not agreed (in most instances) between Council specialists and applicant.

54. The applicant has sought certification in respect of all its proposed management plans. In a general sense I consider that 'certification' would be appropriate when draft management plans are at an advanced stage. If the Council's specialists do not agree that the management plans are at such a stage, then I consider that those should be subject to a written approval process. It should be noted that the AC36 first instance decision of the Environment Court[21] adopted 'certification' for all management plans because they were largely complete, and many experts had reviewed more than one version of them as part of the consent process to ensure they were satisfied with their content.

55. Nevertheless, certification may be appropriate for some topics, where the relevant management plan has evolved to a more developed and refined stage through the processing and hearing stage. This applies to the CCP, CTMP and the CNVMP (although not to any ASCNVMP's which would sit within a certified or approved CNVMP).[22] Others are however considered to be at an early stage:

    (a) For kauri dieback, given the advances in technology and the fact that Dr Fea still has concerns with respect to the adequacy of the proposed KDMP, I consider it should be a stand-alone document and should be for written approval.

    (b) In respect of the draft Ecological Management Plan (EMP), Dr Bergquist comments that she disagrees with the use of 'certification' because:

> *although a draft EMP has been provided, there are some changes to this draft required. For example, the requirement for a separate Kauri Dieback Management Plan, timing of weed and pest control of the area outside the works footprint to enhance release/refuge areas for relocated lizards before any vegetation clearance, and further protocols for bat survey, rescue and care that need to be reviewed. There is also the requirement to refer to relevant specialist ecologists and to consult with DOC and Forest and Bird. Consequently, there may be a*

[21] *Panuku Development Auckland v Auckland Council*, [2018] NZEnvC 179
[22] Memorandum of Andrew Gordon, paragraph 4.17

number of changes to the draft EMP that should be reviewed for approval by Council.

(c) Mr Tutt has advised that on the basis that plans shall be in "general accordance" with those submitted, and final plans will be designed by the appointed earthwork contractor, certification of the Erosion and Sediment Control plans is not supported (Condition 20).

(d) Ms France advises that she disagrees with the use of 'certification for the final GSMCP (Conditions 147 and 148), noting that in her experience:

> *"certification" can be used if a comprehensive draft GSMCP has been provided and little change is expected. As I described above the draft GSMCP includes a number of caveats around the need for change. With these changes in mind, the Applicants advice that further detailed design is inevitable, the need for additional investigations, and, the need for a building risk assessment, in my view there could be significant changes from the draft GSMCP provided and so "approval" is more appropriate in this instance.*

(e) Dr Ussher also comments in respect of the Waima Biodiversity Management Plan (WBMP) as follows:

> *30. In Condition 98, the Applicant has sought certification of the WBMP. While the draft WBMP is at an advanced stage of development, there may be changes that need to be made to the document at the time that the works commence. If the works commence several years in the future, changes to approach and methods applied within the management area may be required, and may be beneficial to the programme.*
>
> *31. Therefore, my preference is for Council to retain the ability to engage further on reviews and possible updates of this document as the ecological compensation programme is finalised. In my view, this would be best achieved by requiring (at Condition 98) 'written approval' from Council, rather than 'certification'.*

56. A further relevant consideration in my view is the period of time that is likely to elapse between the present formulation of draft management plans and their finalisation some years hence. It is likely to be necessary for the management plans to take into account both changes that may occur in the receiving environment over that time, as well as changes or improvements in terms of 'best industry practice' with respect to any particular condition topic.

Advice notes

57. I understand that advice note regarding the Biosecurity Act as recommended by Dr Fea is not supported by the applicant. In my view it should be included.

Summary

58. The issues associated with the management of kauri dieback risk is a significant area of disagreement between the applicant and the Council's and submitters' respective experts. The Council's adviser Dr Fea (and Dr Waipara and Mr Havell for submitters), as set out in the JWS considers that the proposal will contravene "*every principle of [kauri dieback] management*". Dr Fea's advice (as set out in his subsequent memorandum) indicates that this is an adverse effect that appears likely to be difficult to appropriately mitigate, and this has been further commented upon by submitters during this reconvened hearing, and also appears to be a significant area of concern for Te Kawerau.

59. To some extent, the conclusion that I reached in my s 42A report remains applicable, insofar as the adverse effects remain to be defined as more than minor (and that is not in contention), but that the proposal was not considered to be contrary, in overall terms, to the objectives and policies of the AUP(OP).

60. As noted, kauri dieback considerations within the objectives and policies assessment are very limited, and thus it was my finding It was my overall view that, on balance, the proposal could be consented, subject to conditions. The recent evidence in respect of kauri dieback does not notably change the conclusion with respect to Policy E11.3(6A). The evidence of Mr Ashby does suggest however that some tensions with other objectives and policies will arise in respect of Mana Whenua considerations (e.g., Objective D9.2(3) relating to "*the relationship of Mana Whenua and their customs and traditions with indigenous vegetation and fauna is recognised and provided for"*).

61. On the basis that the proposal may nevertheless be able to pass the s 104D(1)(b) gateway, I consider that the adverse effects associated with kauri dieback are potentially very significant, and extend beyond the project footprint into the surrounding catchment, in a manner in direct contravention of the Biosecurity Act. Thus, while I remain highly cognisant of the requirement for the project as a necessary item of infrastructure for Auckland, an overall evaluation of the proposal under s 104, and in particular having regard to s 104(1)(a), leads me to change the recommendation set out in my s 42A report from a grant subject to conditions, to decline.

62. Should the Commissioners find that consent may be granted, I consider that the conditions as sighted to date will assist to minimise adverse effects, subject to the changes recommended by the Council's specialists, and my comments above.

ATTACHMENT 1

Matters for clarification (section 18 of s 42A report)

Matters for clarification	***Information received***
(a) Provision of a draft EMP and SVP, including riparian management plan (per section 9.4.5(b)) [of the s42A report];	This was responded to through the draft EMP provided with Dr Flynn's evidence and the draft SVP attached to Mr Boothroyd's evidence.
(b) Provision of further detailed assessments of: • *potential adverse effects on individual trees in close proximity to and with root zones within the Project site, including a major stand of kauri near Reservoir 1 and individual kauri near the proposed treatment plant footprint; and* • *the extent of encroachment into the riparian margins and measures to mitigate effects on the Armstrong-Manuka stream south of Woodlands Park Road, which may be addressed by way of a full EMP and SVP noted in (a) above (per section 9.4.5(b))*	These matters were addressed by Mr Scarlett, and subsequently through the Joint Witness Statement.
(c) Provision of proposed kauri dieback protocols and a draft KDMP (per section 9.4.5(d));	This matter has been addressed by Mr Scarlett and Dr Flynn, noting that the KDMP forms part of the EMP rather than a standalone document, and more fully through the JWS.
(d) Provision of details of further surveys of taxa identified by Dr Bergquist at 6.4 of her technical memorandum (per section 9.4.5(e));	This was responded to (briefly) by Dr Flynn at section 9.4 of her EIC.

(e) Provision of a draft GSMCP (per section 9.4.8);	This has been provided by Mr Hind, who's evidence includes a draft Groundwater Settlement Contingency Management Plan. This has been reviewed by Ms France and is addressed in her memorandum.
(f) Clarification as to whether green roofs are proposed (per section 9.4.9);	The evidence of Ms de Lambert (8.11 and 8.13) indicates that green roof is proposed for Reservoir 2.
(g) Update regarding the provision of a CVA by Te Kawerau (per section 9.4.10 and elsewhere), and the manner in which the applicant will address the restrictions to activities under the existing Te Kawerau ā Maki rāhui (per section 13.8);	A CIA prepared by Te Kawerau a Maki was provided by the applicant in early February 2020 and Mr Waiwai's evidence addressed this matter, as does Ms Urquhart's Supplementary Evidence (24 February 2020). Refer paragraphs 23/24 above.
(h) Comment on proposed restrictions in the CTMP conditions relating to the restriction on use of Woodlands Park Road, Atkinson Road and Golf Road (per section 9.4.11);	This was responded to by Mr Phillips.
(i) Provision of a draft CNVMP and clarification as to the expected duration of noise effects (per section 9.4.12);	A draft CNVMP was prepared by Mr Cottle and included with his evidence (as Appendix F). Mr Gordon considers this plan to be of appropriate detail, and comments in respect of the expected duration of the noise effects (of 4 months, with actual infringements being a fraction of that time) that: *In my view this issue is not significant. When council certifies the Final CNVMP (and ASCNVMP) we can require the duration to be included – this should not be an issue as contactors, construction methods and machinery to be used would have been confirmed.* In terms of the draft CNVMP, I would suggest the following amendments: a. That the CNVMP include a copy of the relevant noise and vibration -related conditions, for ease of reference by the relevant contractor(s).

	b. The CNVMP appeared too conservative in terms of the range of properties to be identified, at a recommended 350m radius (presumed to be measured from work area boundaries). This has been acknowledged by Mr Cottle in his Supplementary Evidence of 26 February 2020, where he has recommended a boundary of approximately half this size, depicted on his Attachment A. This identifies specific sites which I agree provides for more certainty.
(j) Comment on the applicant's approach to addressing the Council's climate change declaration through its future infrastructure programme planning (per section 13.11); and	This has been responded to in the evidence of Mr Bourne at paragraphs 13.5 – 13.19.
(k) The s123 duration for the groundwater diversion and discharge (per section 14.2.3).	This has been responded to by Ms Baverstock at paragraph 12.5 of her EIC, where the applicant seeks a 15 year timeframe for the duration of the groundwater discharge consent, and a 15 year lapse date for the land disturbance works. These dates are set out in Condition 1 of the proposed conditions.

ATTACHMENT 2

High Court decision re East West Link

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CIV 2009 412 000980

IN THE MATTER OF the Resource Management Act 1991
AND IN THE MATTER OF an appeal under section 299 of the Act

BETWEEN	MERIDIAN ENERGY LIMITED Appellant
AND	CENTRAL OTAGO DISTRICT COUNCIL First Respondent
AND	OTAGO REGIONAL COUNCIL Second Respondent
AND	MANIOTOTO ENVIRONMENTAL SOCIETY INCORPORATED Third Respondent
AND	UPLAND LANDSCAPE PROTECTION SOCIETY INC (IN LIQUIDATION) Fourth Respondent
AND	J, S AND A DOUGLAS Fifth Respondents
AND	E AND C LAURENSON AND THE ERIC AND CATE LAURENSON FAMILY TRUST Sixth Respondents
AND	I & S MANSON AND RIVERVIEW SETTLEMENT TRUST Seventh Respondents
AND	GAELLE SOGUEL DIT-PIQUARD Eighth Respondent
AND	E R CARR Ninth Respondent
AND	R P SULLIVAN Tenth Respondent

Hearing: 21, 22, 23, and 24 June 2010

Court: Chisholm J
Fogarty J

Appearances: H B Rennie QC, AJL Beatson and H J Tapper for Appellant
A J Logan for Central Otago District Council and Otago Regional Council
JBM Smith, M C Holm and M J Slyfield for Maniototo Environmental Society Inc, Upland Landscape Protection Society Inc, J S and A Douglas, G S Dit-Piquard and E R Carr
M J Fisher and K S Muston for R P Sullivan

Judgment: 16 August 2010

JUDGMENT OF THE COURT

A. Meridian appeal allowed.

B. Remitted back to the Environment Court for reconsideration in accordance with the directions in [144] – [149].

C. Mr Sullivan's cross-appeal dismissed.

D. Costs to be resolved in terms of [167].

REASONS

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Introduction

[1] Meridian Energy Limited, a state owned enterprise and major energy company, applied to the Central Otago District Council (CODC) and Otago Regional Council (ORC) for resource consents to establish and operate a substantial wind farm for the generation of electricity in Central Otago. Consents were granted. The third to tenth respondents appealed to the Environment Court. Although Meridian cross-appealed about some conditions, its cross-appeal is irrelevant in the present context.

[2] By a majority (Judge Jackson and Commissioners McConachy and Fletcher) the Environment Court decided that the project was inappropriate, being in an outstanding natural landscape under consideration, and that it did not achieve sustainable management in terms of s 5 of the Resource Management Act 1991 (RMA). This was principally because the nationally important positive factor of providing a very large quantity of renewable energy was outweighed by adverse considerations including the substantial impact on the outstanding natural

landscape.[1] The appeals were allowed and the resource consents were cancelled. Commissioner Sutherland, who dissented, would have upheld the consents.

[3] Meridian appeals to this Court on points of law pursuant to s 299 of the RMA. It alleges that the Environment Court erred in law by:

(i) Applying a "new test" for consent applicants where s 6 of the RMA is involved which requires an applicant to demonstrate to the satisfaction of the Court that the project is "the best" in net benefit terms.

(ii) Requiring a comprehensive and explicit cost benefit analysis of the proposal.

(iii) Requiring consideration of alternatives to the Meridian site.

(iv) Denying Meridian a fair hearing by virtue of the process it adopted when reaching its decision.

(v) Arrving at conclusions when there was no evidence to support those conclusions and/or disregarding evidence that conflicted with those conclusions.

(vi) Failing to take into account the Court's ability to impose conditions to avoid, remedy or mitigate certain effects.

An order setting aside the Environment Court decision and granting the consents is sought. Alternatively Meridian seeks to have the matter referred back to the Environment Court for reconsideration, preferably by a different division of that Court.

[4] CODC and ORC support Meridian's appeal. It is opposed by the third to ninth respondents. Mr Sullivan, the tenth respondent, has cross-appealed in relation

[1] *Maniototo Environmental Society Incorporated & Ors v Meridian Energy Limited & Ors* C103/2009, 6 November 2009 at [757].

to the Environment Court's approach to climate change. His argument before us was limited to that issue.

Background

[5] The Meridian site (which is also referred to as the Hayes site and Hayes Project) is approximately 70 kms to the north west of Dunedin, 40 kms to the south of Ranfurly and 15 kms west of Middlemarch. It comprises the uplands section of five high country stations (of which one is now owned by Meridian). The site is generally more than 900 m above sea level. In total the site envelope of the proposed wind farm is about 135 km^2. This land is zoned rural under the operative District Plan and is used for low level sheep and cattle grazing.

[6] Meridian's proposed wind farm would have up to 176 wind turbines which, depending on the type of turbine finally selected, would be capable of generating up to 630 megawatts of electricity. This would be sufficient to supply power for 280,000 average homes. Each turbine would have a maximum height of 160 metres to the tip of the rotor. Five sub stations would be required to connect the wind turbines to the transmission grid. Electricity produced by the wind farm would be fed into the existing transmission line that runs across the southern end of the site. The estimated cost of the project is $2 billion.

[7] On 12 July 2006 Meridian applied to CODC for land use consents to construct and operate a wind farm of up to 176 turbines and related infrastructure on the Meridian site. This was the company's fourth application for development of a wind farm in New Zealand. It had already commissioned a wind farm in Manawatu, obtained consent for another project in Southland, and had made application for a further project near Wellington.

[8] At the time the application was made the CODC Proposed District Plan had passed the stage where it could be subject to submissions or references. Thus it was regarded as the primary district planning instrument. The Proposed Plan became operative on 1 April 2008 (shortly before the Environment Court hearing began). Under that Plan the proposed activity is an unrestricted discretionary activity.

[9] Outstanding landscapes are identified in the Plan that became operative on 1 April 2008. It is common ground that the Meridian site does not come within the landscapes identified in the Plan.

[10] During the hearing before the Environment Court Plan Change 5 was notified by CODC. This proposed Plan Change did not alter the status (discretionary) of the wind farm. However, it adds to the description of features and landscapes in the District Plan by identifying a number of landscapes which are areas of "extreme or high sensitivity". These constitute outstanding natural landscapes in terms of s 6(b) of the RMA. The Meridian site does not come within these areas.

[11] Plan Change 5 also identified landscapes of "significant sensitivity". Under the proposed Plan Change these landscapes are protected from the adverse effects of inappropriate subdivision, use and development. The Lammermoor range, which includes the Meridian site, is a landscape of significant sensitivity in terms of this Plan Change.

[12] On 1 November 2006 Meridian sought consents from ORC pursuant to the Regional Council's Water Plan which had become operative on 1 January 2004. In broad terms these consents related to construction activities that were capable of affecting water bodies. Land use consents, discharge permits, and water permits to take and divert water were sought. These proposed activities fell to be considered (depending on the particular activity) as controlled activities, restricted discretionary activities or unrestricted discretionary activities.

[13] We pause to note that after these applications had been lodged, and before they were considered, TrustPower (a competitor of Meridian) lodged an application with the Clutha District Council and ORC for consent to establish a wind farm (the Mahinerangi wind farm) at the southern end of the Lammermoor Range. At its closest point the Mahinerangi site is 15 kms from the Meridian site. It was proposed that the Mahinerangi wind farm would have up to 100 turbines. A District Council decision granting consent for that wind farm was released about a month before the District Council decision granting consent for the Meridian wind farm.

Subsequently the Mahinerangi consents were confirmed by the Environment Court (not the same division that heard the Meridian appeal).

[14] Returning to the Meridian applications, the two consent authorities appointed five Commissioners to hear and determine the applications. The applications were supported by an "all of Government" submission by the Minister for the Environment and opposed by the third to tenth respondents. On 30 October 2007 the Commissioners released their decision granting the consents, subject to conditions. The chairman, Mr J G Matthews, dissented. He would have refused consent primarily because of the effect of the activity on the landscape.

[15] The third to tenth respondents then appealed to the Environment Court. In addition several parties, including the Minister for the Environment, gave notice pursuant to s 274 of the RMA that they intended to appear.

[16] Parties to the appeal were required to specify the issues they wished to pursue on appeal and those issues were recorded in a Minute issued by Judge Jackson on 31 January 2008. A further Minute issued on 10 April 2008 required each party to lodge a memorandum finalising its list of experts and the issues on which they were to give evidence. On 8 August 2008 (part way through the hearing) leave was granted for further evidence to be called, following which there was an exchange between Counsel for Meridian and Judge Jackson as what evidence the Court was seeking in relation to efficiency in terms of s 7(b). We mention these matters because they are relevant to Meridian's fourth ground of appeal alleging that it was denied a fair hearing.

[17] The hearing before the Environment Court commenced on 19 May 2008. It occupied three blocks of time totalling more than seven weeks and concluded on 17 February 2009. Site inspections were also undertaken. Numerous witnesses, many of them expert, were called.

Environment Court decision

[18] The Environment Court's decision was delivered on 6 November 2009. Except for [34] below, we confine this summary to the judgment of the majority which occupies 348 pages divided into eight chapters.

[19] After providing an introductory background and description of the facts in the first two chapters, the Court addresses "The Law" in Chapter 3. Obviously this chapter is particularly relevant. Having addressed s 104(1) of the RMA, provisions of the District Plan, and various other matters, the Court focused on Part 2 of the Act, especially s 6(b) - the protection of outstanding features and landscapes - and s 7(b) - the efficient use and development of natural and physical resources.

[20] The Court was critical of earlier Environment Court decisions which had reasoned that because wind energy is presently an untapped resource, use of that resource to produce electricity by a non polluting process is an efficient use of the resource in terms of s 7(b). Having indicated[2] that it was uncomfortable with "a cherry-picking approach to efficiency", the Court said that it preferred to follow *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council*[3] in which it was stated:

> [196] ... efficiency in section 7(b) of the RMA requires a consent authority to consider the use of all the relevant resources and, preferably, their benefits and costs. It is nearly meaningless to consider the benefits of only some of the resources involved in the proceeding because the artificial weighting created by sections 5 to 8 of the Act will not be kept within the statutory proportions if the only matters given the 'particular regard to' multiplier (see *Baker Boys Limited v Christchurch City Council*) in section 7(b) are those which are not identified elsewhere in section 7. Further, it is very helpful if the benefits and costs can be quantified because otherwise the section 7(b) analysis merely repeats the qualitative analysis carried out elsewhere in respect of sections 5 to 8 of the Act.

Then the Court focussed on two matters: first, how efficiency in terms of s 7(b) is to be determined; secondly, whether alternative locations are relevant.

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[2] At [226]

[3] Decision C380/2009. This decision was issued by the Environment Court on 24 September 2008 after the Meridian hearing had concluded. Judge Jackson also presided in the *Lower Waitaki* case.

[21] As to the first matter the Court said that for economic reasons the "specific costs and benefits of a proposal should be examined and if possible quantified", especially where a matter of national importance is raised under s 6.[4] It concluded:

> [230] While in an engineering sense efficiency means the ratio of outputs to inputs, in economic terms it is not an absolute but a relative concept. We hold that under section 7(b) of the Act there are two questions to answer when determining the efficiency of the use of resources:
>
> (1) is the value achieved from the resources utilised the greatest benefit that could be achieved from those resources?
>
> (2) could that same benefit be produced utilising resources of lower value if they were organised differently, or if a different set of resources was used?
>
> The first point is about maximising the benefits achieved from the resources being utilised; and the second is about minimising the resource costs of achieving a given benefit. ...

This analysis, coupled with [242], which is mentioned in the next paragraph, has given rise to the first ground of appeal alleging that the Court adopted a "new test" requiring an applicant to demonstrate that its project is "the best" in net benefit terms.

[22] Then the Court considered the second point - whether alternative locations are relevant. After discussing relevant case law the Environment Court summarised its conclusions:

> [242] ... section 7(b) requires a comprehensive and explicit cost-benefit analysis of the proposal. In that analysis:
>
> (a) where market valuations are not available, non-market techniques maybe used; and
>
> (b) where the values of the market are different from those of society, alternative societal values may be applied.
>
> The idea behind the cost-benefit analysis is to assess, firstly, whether the proposal has a positive net benefit, and then whether there are credible alternative uses of the resources, or credible alternative resources that could produce the desired output, which have a greater net benefit. In doing so, we need to have regard for whether (environmental) compensation is being given, and the adequacy of that

[4] At [229]

> compensation. The outcome of this assessment of efficiency is then one matter in the overall assessment under section 5. We hold that alternatives can be considered where section 6 matters are concerned. It is possible, but we do not decide, that alternatives should also be considered in other cases where there are significant environmental effects.

The statement that s 7(b) requires a comprehensive and explicit cost benefit analysis gives rise to the second ground of appeal. And the conclusion reached later in the judgment that in this case alternatives should have been considered by Meridian has triggered the third ground of appeal.

[23] Chapter 4 is devoted to a detailed analysis of landscape issues. As already mentioned, the District Plan specifically identified outstanding landscapes within its district and it is common ground that the Meridian site does not fall within the areas so identified. Nevertheless the Environment Court decided that it was not bound by the categorisations in the District Plan and concluded that the site was part of an outstanding natural landscape for the purposes of s 6(b) of the RMA. In that respect the Court's decision is consistent with the decision of this Court in *Unison Networks Limited v Hastings District Council*[5]. Meridian accepts this finding, and does not seek to challenge it in this appeal.

[24] The next chapter addresses potential effects (both positive and negative) of the proposed wind farm. Positive effects in terms of meeting the demand for more electricity, placing downward pressure on electricity prices, reducing carbon emissions, complementing hydro-power, and providing employment (during the construction phase) were accepted. On the negative side the Court saw the effect of the proposed wind farm on the landscape as "[p]ossibly the most important single question in these proceedings".[6] It considered that the wind farm "is so large that it will have the effect of creating a new, not unattractive, wind farm landscape of much less naturalness than the larger landscape ..."[7] and that the wind farm could not be absorbed into the landscape.[8] The Court also considered that the visual effects on the amenities of the users of the landscape would be major and that the proposed

[5] HC WN CIV 2007-485-896 11 December 2007, Potter J
[6] At [424]
[7] At [492]
[8] At [493] – [500]

wind farm would have a significant negative impact on the heritage surrounding or associated with the area.[9]

[25] In chapter 6 the Environment Court attempts to quantify the potential costs and benefits of the Meridian proposal. The Court summarised the "measured net benefit" of the wind farm:[10]

> - A regional benefit from construction activity with a medium likelihood of being about $800m (one-off), and a very likely regional benefit of about $13m/year from on-going operation, although these have no net benefit at a national level.
>
> - A one-off cost to the economy of upgrading the electricity grid in the lower South Island very likely to be about $100m.
>
> - A benefit to the economy very likely to be about $107m/year from the generation of electricity, and from reduced CO_2 emissions with a medium likelihood of being about $20m/year, for the 30 year life of the wind farm.
>
> - A cost to the economy with a medium likelihood of about $16m/year to accommodate the variability of wind energy.

Against those measured benefits, the Court said it had to put "the very real, but unmeasured, costs in terms of landscape, heritage and recreation and tourism that will not be remedied or mitigated".[11] Although the Court accepted that there was a net benefit, it considered that the unmeasured costs were significant and that the net benefit was not nearly as substantial as the numbers might indicate.

[26] The next chapter (Chapter 7) is also important to most, if not all, the grounds of appeal. It addressed the issue: "Should the power generation facility be approved under the operative district plan?"

[27] After a detailed discussion of the objectives and policies of the District Plan, the Regional Policy Statement, the decision of the hearing Commissioners, and "other matters" under s 104(1)(c) of the Act, the judgment provides a summary to that point:

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[9] At [507] and [532]
[10] At [649]
[11] At [650]

> [693] If the matters in the previous sections of this chapter were all we had to consider we would agree with the planner called by the District Council ... that we should grant consent to Meridian ...

But the Court then found it necessary to further assess the proposal under ss 5-8 of the Act (the purpose and principles in Part 2). It did so under three heads: whether the proposal would be an efficient use of resources in terms of s 7(b); "other matters" that the Court was required to have particular regard to under s 7; and, finally, a weighing of all relevant matters.

[28] As to whether the proposal would be an efficient use of resources in terms of s 7(b), the Court found[12] that the evidence on the benefits and costs to recreation "was inadequate" and for tourism was "minimal"; there was an absence of evidence "quantifying the value of the landscape ... or of the costs of the project to the heritage values of the Old Dunstan Road"; there were "large gaps" in the Court's cost benefit analysis; it was extraordinary that in a $2 billion project more effort had not been made by Meridian and the two government departments "to value more of the costs and benefits much more thoroughly"; and given the scale of the project the Court would have expected proportionate evidence "on what were clearly always going to be key issues – the potential adverse effects on heritage and, especially, landscape values".

[29] Then the Court discussed[13] whether it should consider alternatives when assessing efficiency in terms of s 7(b). It concluded that alternatives needed to be considered in this case because costs in terms of landscape and heritage values had not been "internalised" to Meridian, there was no "competitive market" and "an outstanding natural landscape and historic heritage" constituted "matters of national importance" which the Court was obliged to "recognise and provide for".

[30] Having reached that conclusion the Court then considered whether alternatives existed. It decided that realistic alternatives to Meridian's wind farm "do exist and should have been considered" and that failure to do so would be taken into account later in the judgment.[14] The Court noted that New Zealand is a "wind

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[12] At [697] and [701]
[13] At [702] - [704]
[14] At [706]

rich country" with "many 'untapped' wind resources of specific places" as shown on a plan attached to the judgment.[15] Given that the proposal affected matters of national importance under s 6(b) and the concept of stewardship under s 7(aa), the Court considered that the Meridian proposal should be "put on hold until other wind resources with lesser potential effects on landscape and heritage have been considered" and that the "failure to consider alternatives properly is a factor going towards turning the proposal down".[16] The Court commented that on the evidence before it the question "is the proposal an efficient use of resources?" could not be answered.[17]

[31] Several s 7 matters were then addressed by the Court:[18] stewardship under s 7(aa); maintenance and enhancement of amenity values under s 7(c); intrinsic values of eco-systems under s 7(d); maintenance and enhancement of the quality of the environment under s 7(f); any finite characteristics of natural and physical resources under s 7(g); and the effects of climate change and the benefits of renewal energy under s 7(i) and (j). The weight attached to each factor was indicated. The evaluation by the Court was truncated in part by the fact that some of these criteria had already been incorporated in its s 7(b) analysis.[19]

[32] Then the Court concluded its analysis by weighing all matters. It found that the Meridian proposal achieved the District Plan policy for development of power generation facilities.[20] However, it did not meet a District Plan policy seeking to reduce the environmental impact of power generation.[21] Proposed Plan Change 5 was seen as neutral, as were the provisions of the Otago Regional Policy Statement.[22] Although substantial weight was given to the likely contribution to the national grid, it was "not as much as we would if we had been given a thorough cost

[15] At [707]
[16] At [709]
[17] At [710]
[18] At [711] – [722]
[19] At [717] – s 7(c), [720] – s 7(f), [722] – s 7(i) and (j)
[20] At [653] and [725]
[21] At [654] and [725]
[22] At [728] – [729]

benefit analysis".[23] Other positive effects were given weight according to their net contribution.[24]

[33] On the negative side, effects on the landscape in terms of s 6(b) were a "very large factor against the proposal" and were given "very substantial weight".[25] This reflected the Court's assessment that the Lammermoor was "nearly unique"[26] within New Zealand and "worthy of protection".[27] The need to protect heritage values under s 6(f) was also taken into account on the negative side, albeit to "a much lesser extent".[28]

[34] Those considerations led the majority to the conclusion that the scales came down on the side of refusing consent.[29] While the dissenting member of the Court agreed with the majority that Meridian's s 7(b) analysis was inadequate, his overall assessment favoured granting the application "by a small margin".[30]

[35] We only need to make brief reference to chapter 8 at this stage. It records the conclusion of the majority that the Meridian project was inappropriate in the outstanding natural landscape and did not achieve sustainable management in terms of s 5.[31] That reflected the majority's view that the positive benefit of supplying a very large quantity of renewable energy was outweighed by five adverse consequences: substantial impact on the outstanding natural landscape; uniqueness of the landscape; possibility of alternative sites not located in outstanding natural landscapes; the site is nearly surrounded by public land; and failure to put full evidence before the Court in respect of the efficient use of all the natural and physical resources and the likely benefits and costs of "reasonable" alternatives.[32]

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[23] At [732]
[24] At [732]
[25] At [734]
[26] At [739]
[27] At [746]
[28] At [744]
[29] At [750]
[30] At [763]
[31] At [757]
[32] At [757]

The Meridian appeal

[36] As set out in paragraph [3] of this judgment, Meridian has advanced six grounds of appeal. Oral argument was dominated by grounds (ii) and (iii), centering on the Environment Court's conclusion in paragraph [242] of its decision which is quoted at [22] above. This is the Court's finding that s 7(b) requires a comprehensive and explicit cost benefit analysis of the proposal and that alternatives can be considered where s 6 matters are involved. Ground (i) arises from that paragraph and paragraph [230] which is set out in at [21] above. In relation to that ground Meridian claims that it was required to demonstrate to the satisfaction of the Court that its project was "the best" in net benefit terms.

[37] The second, but lesser, part of the oral argument focussed on the contention that Meridian was denied a fair hearing. This was in three respects. First, no opponent raised the issue of alternatives in its appeal or notice of issues. Secondly, the Court applied the efficiency test developed in the *Lower Waitaki* case even though that decision was delivered after the Meridian hearing had concluded and without Meridian being warned that the Court intended to adopt the *Lower Waitaki* approach. Thirdly, the way the Environment Court applied the consent granted for the Mahinerangi wind farm.

[38] There was little to no argument on the fifth and sixth grounds of appeal.

First three grounds of appeal

[39] We have grouped these grounds because they are interwoven. But we find it convenient to alter the order. After considering a number of preliminary matters we will address the issue of alternatives (ground (iii)), then consider the issue of the cost benefit analysis (ground (ii)), and conclude by considering Meridian's allegation that it was required to demonstrate that its project was "the best" (ground (i)).

Respondents' primary arguments in relation to all three grounds

[40] The third to ninth respondents' principal argument is that it should not be the role of the High Court in an appeal on points of law to revisit issues which are primarily contested factual matters upon which the Environment Court has made findings. They argue that the Meridian appeal does not identify specific points of law. Rather, Meridian's argument is essentially a complaint about losing consents that Meridian believes it should have secured. The respondents argue that in reality the case was decided on factual landscape issues.

[41] Inasmuch as there might be any legal errors in the application of the efficiency consideration in s 7(b), the respondents' overarching case is that the errors do not matter. They say the Environment Court found the Hayes landscape to be such an outstanding landscape, and the proposed "huge" wind farm to be so adverse to that landscape, that the landscape was worthy of protection on its own merits. Their submission is that even if this Court found that Meridian was not obliged to provide a more thorough net benefit analysis or to have canvassed alternatives, that conclusion would not be material because the Court's evaluation was driven by the need to protect this landscape.

[42] With specific reference to the issue of alternative sites, the respondents contend that the Environment Court did not find that alternatives must, as a matter of law, be considered. Rather it found that they *could* be considered. Although the Court received some evidence about other sites that Meridian had investigated, in the end the Court was unable to test possible alternatives meaningfully because Meridian elected not to provide any contestable evidence about the portfolio of sites it had evaluated.

[43] As to the cost benefit analysis, the respondents claim that Meridian has misconstrued what the Court actually did. They say that the Court properly weighed the landscape matters against other positive factors. Sustainable management, rather than efficiency, ultimately guided the Court's decision. Rather than laying down any hard and fast approach, the Court was indicating a preferred approach. And in the circumstances of Project Hayes there was no reason in law why a cost benefit

approach could not be utilised under s 7(b) to ensure that the "negative" side of the ledger was properly weighed.

[44] Finally, the respondents deny that the Environment Court required Meridian to demonstrate that its site was "the best". They say that nowhere in its judgment did the Court enunciate or apply that test.

The Environment Court's summation

[45] In support of their argument the respondents rely on the Environment Court's summation in paragraph [757] of its decision:

> [757] After weighing all the relevant matters identified in earlier chapters, we judge that the Meridian project is inappropriate in the outstanding natural landscape of the Eastern Central Otago Upland Landscape and does not achieve sustainable management of the Lammermoor's resources in terms of section 5 of the Act. That is principally because the nationally important positive factors of enabling economic and social welfare by providing a very large quantity of renewable energy are outweighed by the most important adverse consequences, that:
>
> (1) a wind farm with a site envelope of about 135 km^2 with 176 turbines each up to 160 metres high spread over a length of over 20 kilometres must on most objective measures have a substantial impact on the outstanding natural landscape of the Lammermoor and the heritage surroundings of the Old Dunstan Road across it. We have found it is likely to create its own wind farm landscape, which will be within 17 kilometres of, and sometimes visible with, another (approved) wind farm (Mahinerangi);
>
> (2) the Eastern Central Otago Upland Landscape is one of the very few places in New Zealand where citizens can experience a wide, high peneplain under a big sky (a relatively common experience in Australia and on other continents) in a highly natural and near endemic environment that also contains a heritage trail;
>
> (3) wind farms are in their comparative youth in New Zealand and there may still be many potential sites which are not located in outstanding natural landscapes. We consider that it would be preferable for current wellbeing and for future generations and would give effect to the RPS if other sites were to be investigated more fully first. In the regional context it would also be preferable for the communities of Otago if sites which have a resource consent and do not affect section 6 values were implemented first – especially the Mahinerangi site;

(4) the Meridian site is nearly surrounded by the public land we identified in Chapter 2.0, especially the Rock and Pillar Conservation Park and its recent extensions, the Logan Burn Reservoir, Te Papanui and the various Taieri River reserves, so the effect of the wind farm on landscape and amenities is even more important than it would have been if surrounded by private land;

(5) As we have analysed in detail Meridian, the Central Otago District Council, and the Crown failed to put full evidence before the Court in respect of the efficient use of all the relevant natural and physical resources of the Lammermoor. Such an examination not only of all the benefits of the proposal (which we did receive) but also of all the costs would have further increased the objectivity of this decision, as would have an analysis of the likely benefits and costs of reasonable alternatives to the Meridian proposal.

Is Meridian's appeal simply revisiting issues of fact?

[46] For a number of reasons it is appropriate to deal with this, one of the respondents' key arguments, at the outset. First, it is potentially determinative of the appeal, for there is a longstanding policy not to set aside decisions for errors of law which are not material. Secondly, it is the principal argument in opposition to the appeal. It reflects, we think, an implicit acknowledgment that the Environment Court's approach to the s 7(b) efficiency criterion was novel and potentially in error of law. Finally, whether or not that approach is in error of law is in itself a question of considerable complexity and importance. Such an issue should not be examined and pronounced on by this Court if it is essentially a moot point because of immateriality. Rather, in that situation such issues should await a day when they are clearly going to be central to the determination of the appeal.

[47] We are left with no doubt that paragraph [757] accurately summarises the reasons behind the Environment Court's decision that the various consents and permits should be cancelled. We infer that points (1) and (2) listed by the Court are at the forefront of its summary because for it they loomed largest. We therefore accept the respondents' underlying argument that the case was primarily decided upon landscape issues, which were factual and evaluative.

[48] That said, we think that the third conclusion that there might be other potential sites was of considerable importance to the Environment Court's final determination. Moreover, on the face of that Court's decision this issue assumed such importance that on appeal this Court could not responsibly conclude that it was an immaterial consideration. As the Court said in its decision,[33] alternatives properly was a factor going towards turning the proposal down. If errors of law are embedded in a significant aspect of the Court's reasoning they must be addressed. And if they are upheld they will provide grounds for at least sending the case back to the Environment Court for further consideration.

[49] Point (4) effectively supports the first and second points and does not warrant any further comment. On the other hand, the fifth point reflects the many criticisms recorded earlier in the Court's decision about the failure of Meridian to provide a comprehensive cost benefit analysis, including an analysis of alternative sites. It is not just an afterthought. Indeed, the topic of alternative sites/cost benefit analysis occupies a significant part of the 348 pages of reasoning. Again, it cannot be dismissed as immaterial to the decision.

Was it an error of law for the Environment Court to call for a consideration of alternative locations?

[50] We turn then to the contentions of legal error, starting with whether or not the Environment Court erred in law by severely criticising Meridian for not providing evidence about alternative locations. (As a separate issue, we will later consider Meridian's subordinate argument that, if it was obliged to consider alternative locations, there was a breach of natural justice because the Court did not adequately inform Meridian, before the Court reached its decision, that this was considered to be a requirement.)

[51] Section 104(1) of the RMA sets out the matters that consent authorities are obliged to have regard to when considering applications for resource consents:

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[33] At [709]

104 Consideration of applications

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to-

(a) any actual and potential effects on the environment of allowing the activity; and

(b) any relevant provisions of-

(i) a national environmental standard:

(ii) other regulations:

(iii) a national policy statement:

(iv) a New Zealand coastal policy statement:

(v) a regional policy statement or proposed regional policy statement

(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application. ...

This section does not require a consent authority to have regard to alternatives to the proposed activity. However, s 104(1)(c) enables a consent authority to have regard to any other matter that it considers relevant and reasonably necessary to determine the application.

[52] Before a consent authority can consider any application for a resource consent under s 104, the application must comply with the requirements of s 88 which relevantly provides:

88 Making an application

…

(2) An application must—

…

(b) include, in accordance with Schedule 4, an assessment of environmental effects in such detail as corresponds with the scale and significance of the effects that the activity may have on the environment.

…

From this point in the judgment we will refer to the assessment of environmental effects as the "AEE".

[53] In the present context cl 1(b) of Schedule 4 has particular significance. It provides:

> **1 Matters that should be included in an assessment of effects on the environment**
>
> Subject to the provisions of any policy statement or plan, an assessment of effects on the environment for the purposes of section 88 should include -
>
> …
>
> (b) Where it is likely that an activity will result in any significant adverse effect on the environment, a description of any possible alternative locations or methods for undertaking the activity:

We note the imperative is "should", in the sense of imposing an obligation. The sub-paragraph contains within it a judgment as to whether "it is likely" that the activity will result in "any significant adverse effect on the environment". If so, a description of any possible alternative locations or methods for undertaking the activity should be included.

[54] Section 92 of the RMA enables the consent authority to request further information (in addition to that supplied with the application for a resource consent):

> **92 Further information, or agreement, may be requested**
>
> (1) A consent authority may, at any reasonable time before the hearing of an application for a resource consent or before the decision to grant or refuse the application (if there is no hearing), by written notice, request the applicant for the consent to provide further information relating to the application.

Subsection (3) of that section requires the consent authority to notify the applicant in writing of the reasons for its request. Unless the applicant refuses to provide the information, subs (3A) requires the information to be provided no later than 10 days before the hearing.

[55] An applicant is permitted by s 92A(1)(c) to refuse a request for further information:

> **92A Responses to request**
>
> (1) An applicant who receives a request under section 92(1) must, within 15 working days of the date of the request, take 1 of the following options:
>
> …

> (c) tell the consent authority in a written notice that the applicant refuses to provide the information.
>
> …

Even if the applicant refuses to provide the information sought, the consent authority is nevertheless obliged to consider the application: subs (3).

[56] With the benefit of that summary of the statutory background we turn to the requests for further information in this case.

[57] In the AEE accompanying its application Meridian made three key points with reference to alternatives (as summarised to us by its counsel):

> (a) In terms of site selection, the most important factor is high and consistent wind speeds, which at the Hayes site are exceptionally good even by world standards. Over time, Meridian has collected extensive wind meteorological monitoring mast data throughout New Zealand. This data indicates that there are few (if any) alternative sites available to any applicant to match Project Hayes in terms of wind speed, duration and scale.
>
> (b) Wind speed is not the only criterion that is applicable to the development of a viable wind farm. Other factors include: a smooth laminar air flow (low turbulence); proximity to the local electricity grid; site accessibility; proximity to load centre; availability of privately-owned, cleared, freehold land with supportive landowners; national landscape classifications; and elevation.
>
> (c) Once these factors are considered in total, the Project Hayes site is one of the few areas within the Otago region which is appropriate for development and in Meridian's assessment (not contradicted in evidence) the best.

After considering Meridian's application and the accompanying AEE, CODC made two s 92 requests for further information.

[58] The first request noted that alternatives were only briefly discussed in the AEE and asked Meridian to address alternative methods for renewable energy generation and alternative locations for wind farms "elsewhere in New Zealand". Meridian responded, stating (relevantly):

Response

Meridian advises pursuant to section 92A(1)(a) and (c) that it refuses to provide this information to the extent it is not provided below.

Comment

Meridian, as above, cannot see how this request is relevant to undertaking an assessment of this proposal. The RMA envisages that an applicant may seek consent for any particular proposal. That proposal must then be considered by a consent authority. A comparative assessment of hypothetical alternatives that are not being pursued by the applicant is of no assistance, nor are the details of such "alternatives" known to the consent applicant or Council. In the abstract it is impossible to provide a meaningful assessment of the effects of such hypothetical alternatives.

In addition, Meridian considers it is incorrect to describe other locations as "alternatives" to the present proposal. There is a substantial and increasing demand for electricity in New Zealand, including the South Island and there needs to be generation of electricity from many renewable energy sources.

Where a potential wind farm site has all of the necessary attributes for consenting it is able to be progressed through the consent process. Where another site has attributes that also make it suitable for consenting it cannot be described as "an alternative" site – it is in fact "another" potential site.

This response led to the second request. It asked Meridian to provide an explanation of its process of evaluation and site selection, and to give the reason why the Hayes site was preferred to others.

[59] In its response to the second request Meridian emphasised three points:

(a) Meridian would provide further elaboration of the process it followed to identify potential sites and how those sites are selected and shaped for development;

(b) Meridian would include an outline of the key factors in the selection and development of Project Hayes; and

(c) There was no obligation on an applicant to provide a consent authority with alternatives.

Several attachments were forwarded with this response. Attachment 1 relates to the consideration of alternative locations and the suitability of the Project Hayes site. This was presented in the form of a short report (the Report).

[60] The Report provided an overview, outlining the following key points:

(a) Over 17 years of investigating and evaluating the potential for wind generation in New Zealand, Meridian has investigated over 100 sites and holds data from 90 historic wind monitoring masts and approximately 30 existing masts throughout New Zealand.

(b) Meridian is currently carrying out detailed analysis on approximately 25 sites with the best generation potential known to Meridian. Some or all of these will be progressively advanced through to consent based on a detailed assessment of their performance against a range of parameters including constructability, commercial viability and consentability. The decision to advance Project Hayes was made against this background of knowledge arising from all sites known to Meridian over New Zealand;

(c) Proposals were advanced based on the results of that analysis coupled with further assessments of the environmental and factors associated with each site. Meridian advanced the sites that were expected to perform most highly across this range of environmental, social and economic factors; and

(d) Project Hayes had a number of characteristics (quality of wind resource, proximity to transmission and scale) that in combination made it the best site Meridian is aware of in the South Island for wind energy generation.

These points were supplemented by a history of studies involving the Project Hayes site and reference to a number of additional parameters that led Meridian to conclude that the Project Hayes site was “exceptional” in the South Island.

[61] However, at no time did Meridian specifically provide information about alternative locations. In this respect Meridian effectively refused the first request by CODC for further information. Arguably, however, Meridian complied with the second request.

[62] The failure to provide information about alternative locations was not significantly addressed by Meridian's evidence in the Environment Court. Mr Muldoon, the wind development manager of Meridian whose role included the evaluation of other locations, acknowledged that an evaluation of the other locations was not referred to in his brief of evidence. Nor was this information included in the evidence of other witnesses called by Meridian, or, for that matter, by opponents of the application.

[63] Having concluded[34] that alternatives could be considered, the Environment Court ultimately decided[35] that they should have been considered in this case and that failure to do so was a factor going towards turning down the application. Was the Environment Court entitled to call for consideration of alternative locations in this case?

[64] Meridian contends that if an applicant refuses to provide further information pursuant to s 92A then its application will stand or fall on the evidence before the consent authority. It says that in this case there was evidence that Meridian had considered alternative locations before deciding on the Hayes site and that its application should have been determined on the strength of that evidence. That approach, which Mr Smith described as a "trust us" approach, was challenged by the respondents. They contend that the Environment Court was entitled to test the validity of Meridian's assessment of alternative locations and that it could only do so by obtaining further information about the alternative locations.

[65] In our view the critical issue is whether, in terms of s 104(1)(c), consideration of alternative locations was "relevant and reasonably necessary to determine the application". Given the history and circumstances of the Meridian application,

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[34] At [242]
[35] At [702] – [704]

including the size of the project, we are satisfied that the issue of alternative locations came within those words. We will now explain how we have arrived at that conclusion.

[66] Upon receiving Meridian's application CODC was entitled to proceed on the basis that for the purposes of cl 1(b) of the Fourth Schedule it was likely that the wind farm would result in a significant adverse effect on the environment and that under those circumstances the AEE should have included a description of any possible alternative locations for undertaking the activity. Thus it was entitled to make a s 92 request for the applicant to supply "a description of any possible alternative locations ... for undertaking the activity".[36] Even though this request was effectively refused by Meridian, CODC was nevertheless required by s 92A(3) to consider Meridian's application under s 104, and it did so.

[67] Once the matter was appealed to it, the Environment Court had the same powers and discretions as CODC: s 290(1). Consequently it was entitled to revisit the alternative locations issue. Having done so, it was open to the Court to conclude that the Meridian application triggered cl 1(b) of the Fourth Schedule and that under those circumstances the Court could seek a description of any alternative locations under s 92(1). Given that context further information about alternative locations was both relevant and reasonably necessary to determine the application in terms of s 104(1)(c).

[68] We are therefore satisfied that, subject to a qualification we are about to mention, the Environment Court did not err in law when it called for consideration of alternative locations. A qualification is that as a creature of statute the Court was confined to the powers conferred by the RMA. With reference to alternative locations, cl 1(b) of Schedule 4 (in conjunction with s 104(1)(c)) only permitted the Court to seek from Meridian *a description* of any possible alternative locations. We will have more to say about this later in the judgment.

[36] For reasons that will we will give later at [93] we believe that CODC overstepped the mark when it asked for alternative locations "elsewhere in New Zealand", but that is of no immediate moment.

[69] However, the point of law raised by Meridian in relation to alternatives has a different focus. It challenges the Court's approach to alternatives *in the context of s 7(b)*.

Was it an error of law for the Environment Court to call for an analysis of alternative locations as part of its examination of the efficiency criterion in s 7(b)?

[70] Meridian's argument challenges the underlying purpose behind the Environment Court seeking an assessment of alternatives, namely, for use as part of a cost benefit analysis under s 7(b). We should explain at the outset why we accept that the Court was seeking the information for the purpose of applying s 7(b) notwithstanding the references it had made to s 6.

[71] The Environment Court started with the proposition at both [234][37] and [242][38] that "alternatives can be considered where s 6 matters are concerned".[39] Later this was interpreted by the Court on two occasions. First, at [696] the Court referred to "the requirement we identified in chapter 3.0 to look at alternative sites under s 7(b)" and at [702] it said "in chapter 3.0 (The law) we decided that in certain circumstances s 7(b) leads to a requirement to consider alternatives". Thus it is clear that by the time the Court came to applying s 7(b) it did so on the basis that in the circumstances of this case it was *required* to consider alternatives, the existence of a s 6 matter (outstanding natural landscape) having been one of the triggers for that requirement.

[72] Thus we are brought squarely to Meridian's principal complaint, that the Environment Court fell into error of law in the way it sought to apply the efficiency criterion contained in s 7(b), which provides:

> **7 Other matters**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

[37] which we quote at [75]
[38] which we quoted at [22]
[39] At [242]

…

(b) The efficient use and development of natural and physical resources:

While that alleged error of law has two interwoven dimensions (cost benefit analysis and alternative locations), the discussion that follows will be confined to the issue of alternative locations.

[73] We begin our discussions by examining the Court's reasoning.

[74] Under the sub-heading "Are alternative locations relevant?", the Court explained its starting point:

> [234] We note what the Environment Court recently stated in *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council*[40]:
>
> > Economic efficiency generally requires that all credible alternatives to a proposal should be identified and included within a cost-benefit analysis[41] to reduce the risk of choosing projects ahead of alternatives that contribute more to society. Not only should the benefits of a project be greater than the costs, but the least cost way of producing those benefits should be implemented[42]. However, there is a real issue as to whether that is required by the RMA.
>
> The Court then went on to find that the RMA does require consideration of alternatives in certain circumstances. It concluded[43]:
>
> > … it is not usually necessary to consider alternative uses of the resources in question, or the use of alternative resources to obtain a similar benefit. However, there are at least three exceptions:
> >
> > (1) where the costs cannot be fully internalised to the consent holder;
> >
> > (2) where there is no competitive market (e.g., in congestion on roads where the relevant resource is the land near those roads; we also note there is a very limited market in water permits); or
> >
> > (3) where there is a matter of national importance in Part 2 of the Act involved and the cost benefit analysis requires comparing measured and unmeasured benefits and costs (as is usually the case) so that the consent authority has to rely principally on its qualitative assessment, e.g. *TV 3 Network Services Limited v Waikato District Counci*l.

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[40] *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council* Decision C80/2009 at para [197].

[41] Kahn, James R. The Economic Approach to Environmental & Natural Resources, 3rd ed. Thompson South-Western, Ohio, USA. (2005) p. 155.

[42] Kahn, James R. (2005) pp 154-155.

[43] *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council* Decision C80/2009 at para [201].

> We take that as a starting point, but in these proceedings we heard rather more legal argument on the issue. So we now turn to consider the case law.

Although the *Lower Waitaki* case was described as the starting point, it effectively became the finishing point as well.

[75] The next paragraph of the decision under appeal refers to cl 1(b) of Schedule 4 and then goes on to cite *TV3 Network Services Limited v Waikato District Council*[44] to support the proposition that where matters of national importance are raised, the question whether there are viable alternative sites for the prospective activity can be relevant. After discussing some other decisions the Environment Court commented "if an alternative site does not raise any matter of national importance then a fine grained analysis may not be necessary",[45] which suggests that the Court was looking for a "fine grained" analysis on this occasion. Later Meridian was criticised for not providing such an analysis. Ultimately the Court concluded[46] that Meridian should have provided an analysis of "the likely benefits and costs of reasonable alternatives to the Meridian proposal".

[76] We find it significant that the Environment Court approached the issue of alternatives on the basis that if any of the three situations described in *Lower Waitaki* arise, s 7(b) imposes *a requirement* to consider alternatives. Thus the Environment Court has superimposed on s 7(b) an imperative that alternatives *must* be considered if any of the three situations arise. For the following reasons we consider that this interpretation of s 7(b) is erroneous in law.

[77] First, it seems to us that the Environment Court's approach is incompatible with the approach to alternatives expressly adopted by the RMA. We consider that by imposing a requirement to consider alternatives in terms of *Lower Waitaki*, the Environment Court has not paid sufficient regard to the scheme of the Act. On each occasion the RMA has imposed an obligation on a consent authority to consider alternative locations or methods, that obligation has been carefully spelled out in the Act. We will now make brief reference to those occasions.

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[44] *TV 3 Network Services Limited v Waikato District Council* [1997] NZRMA 539: [1998] 1 NZLR 360 (HC).
[45] At [241]
[46] At [757] which we quoted at [45] above.

[78] We have already quoted cl 1(b) of Schedule 4[47] which states that an AEE should include a description of any possible alternative locations or methods for undertaking the activity when it is likely that the activity will result in any significant adverse effect on the environment. This is a very precise statement of the circumstances triggering the requirement (where it is likely that an activity will result in *any significant adverse effect on the environment*) and what is required (*a description* of any possible alternative locations or methods for undertaking the activity). That can be contrasted with the three triggers adopted by the Environment Court in *Lower Waitaki* (and in this case) and the requirement for a "fine grained" analysis of the likely benefits and costs of reasonable alternatives.

[79] Another example is s 105(1)(c) which requires that in the case of discharge or coastal permits the consent authority must, in addition to the matters in s 104(1), have regard to:

> (c) Any possible alternative methods of discharge, including discharge into any other receiving environment

Once again there is a very precise description of the circumstances triggering the obligation (an application for a discharge or coastal permit) which can be contrasted with the triggers used by the Environment Court. We also find it significant that the legislature has spelled out that this requirement is in addition to the matters in s 104.

[80] Section 107A provides a further example. It imposes restrictions on the granting of resource consents that will, or are likely to, have a significant adverse effect on a recognised customary activity. Under s 107A(2)(f) the consent authority must consider whether an alternative location or method would avoid, remedy or mitigate any significant adverse effects. Again we note the precise description of the circumstances where the obligation arises and the matters are to be considered.

[81] Next we have ss 168A(3) and 171(1)(b) concerning designations. These are mirror provisions and it will suffice if we quote the relevant parts of s 171(1)(b):

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[47] See [53] above

> **171 Recommendation by territorial authority**
>
> ...
>
> (1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—
>
> …
>
> (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—
>
> (i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or
>
> (ii) it is likely that the work will have a significant adverse effect on the environment; and ...

Over time the Courts have taken a relatively narrow approach to this provision. If the Environment Court is called upon to review the decision of the territorial authority, it is required to consider whether alternatives have been properly considered rather than whether all possible alternatives have been excluded or the best alternative has been chosen. See, for example, the decision of this Court in *Friends and Community of Ngawha Inc v Minister of Corrections*.[48]

[82] Finally, there is s 32 which carries the heading "Consideration of alternatives, benefits, and costs". We will discuss that section in greater detail with reference to the requirement for a cost benefit analysis.

[83] The second matter that counts against the Environment Court's interpretation is the wording of s 7(b) itself. The section requires particular regard to be had to "the efficient use and development *of natural and physical resources*" (our emphasis) which are defined in s 2:

> **Natural and physical resources** includes land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures

[48] [2002] NZRMA 401 at [20]

While the definition is not exhaustive, it clearly focuses on *tangibles.* Thus the issue is whether there will be an efficient use of the (tangible) natural and physical resources involved in the application, namely, the wind and land.

[84] This analysis can be contrasted with what we perceive to be the Environment Court's approach. When criticising Meridian for failing to provide an analysis of the likely benefits and costs of reasonable alternatives, landscape values (which the Environment Court saw as possibly the most important single question in the proceeding)[49] were clearly at the forefront of the Court's thinking. We infer that the Court was expecting an analysis that would include a comparison of intangible landscape values. In our view this misconstrues the intended focus of s 7(b).

[85] The third matter concerns earlier Court decisions. We were not referred to any decisions supporting the proposition that s 7(b) requires consideration of alternative locations in the circumstances envisaged by the Environment Court. Clearly the Environment Court's approach on this occasion is novel.

[86] Of the decisions cited, *TV3 Network Services* probably offers the greatest support for the Environment Court's approach. In that case Hammond J accepted that as "a matter of commonsense" consideration of alternatives "strikes me" as a fundamental planning concern.[50] He went on to say:

> I can understand Mr Brabant's practical concern that an applicant for a resource consent should not have to clear off all the possible alternatives. But I do not think that that is what the Court was suggesting. It is simply that, when an objection is raised as to a matter being of "national importance" on one site, the question of whether there are other viable alternative sites for the prospective activity is of relevance.[51]

Those observations did not reflect any analysis of the RMA and in our view they fall well short of supporting the proposition that a consent authority is *obliged* to consider alternative locations as part of its efficiency analysis under s 7(b) in the circumstances envisaged by the Environment Court. Indeed, s 7(b) was not in issue. We will have more to say about the *TV3 Network Services* decision later.

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[49] At [424]
[50] At 373
[51] At 373

[87] A decision of the Court of Appeal, *McLaurin v Hexton Holdings Ltd*,[52] was used by the Environment Court[53] to support the proposition that the Court of Appeal appeared to be comfortable with alternatives being looked at in RMA proceedings. We make two observations. First, that case involved questions of access to landlocked land and can have little, if any, relevance to the situation under consideration. Secondly, at best that case supports the proposition that alternatives *can* be looked at in some situations, not that they *must* be used as part of the s 7(b) analysis if any of the three situations described in *Lower Waitaki* arise.

[88] On the other side of the ledger, and at odds with the Environment Court's approach, are the other Environment Court decisions concerning wind farms.[54] We make the following observations about those decisions. First, none interpreted s 7(b) in the way that it was interpreted in the Meridian appeal. Secondly, there were no less than five different Environment Court Judges involved in those cases. Thirdly, in most of the cases there were landscape issues. Fourthly, on the occasions that s 7(b) has been specifically addressed, efficiency was considered with reference to the otherwise wasted wind resource, and on some occasions with reference to the underlying use of the land. So the s 7(b) efficiency criterion came down to a relatively straightforward exercise in all of those cases.

[89] The question of alternative locations was only considered in three of the wind farm cases. In *Genesis Power* the Court considered that the issue of alternatives was "not really an important issue in the present case".[55] The Court accepted that Meridian had "clearly explored" alternative locations in *Meridian Energy Limited*[56] and did not seek to examine that aspect any further. A similar approach was adopted

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[52] [2008] NZCA 570
[53] At [239]
[54] *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 541 (EnvC), Judge Whiting; *Unison Networks Limited v Hastings District Council ("Unison Stage One")* W058/2006 (EnvC), Judge C J Thompson; *Outstanding Landscape Protection Society Inc v Hastings District Council ("Unison Stage Two")* [2008] NZRMA 8 (EnvC), Judge C J Thompson; *Meridian Energy Limited v Wellington City Council* W31/2007 (EnvC), Judges Kenderdine and Thompson; *Motorimu Wind Farm Limited v Palmerston North City Council* W067/2008 (EnvC), Judge B P Dwyer; *Upland Landscape Protection Society Incorporated v Clutha District Council ("Mahinerangi")* C85/2008 (EnvC), Judge J A Smith; *Unison Networks Ltd v Hastings District Council* W011/2009 (EnvC), Judge R J Bollard; and *Rangitikei Guardians Society Inc v Manawatu-Wanganui Regional Council ("Central Wind")* [2010] NZEnvC 14 (EnvC), Judge B P Dwyer
[55] At [211]
[56] At [341]

in *Unison Networks Limited* with the Court accepting the evidence of the Unison chief executive that the company had "duly investigated possible alternatives to the present site".[57] It should be added that alternatives were not considered as part of the s 7(b) analysis in any of those cases.

[90] Supporting those wind farm cases is the decision of this Court in *The Dome Valley District Residents Society Incorporated v Rodney District Council*.[58] In that case Priestley J said that he was not aware of any authority suggesting that "as part and parcel of the consideration of a resource consent application, alternative sites have to be considered or cleared out".[59] And when refusing leave to appeal[60] he repeated that both he and the Environment Court rejected the proposition that there was any obligation on Skywork (the applicant for a resource consent in that case) to search for and clear out alternative sites.[61]

[91] Our fourth matter arises from the observations of Greig J in *NZ Rail Ltd v Marlborough District Council*.[62] With reference to Part 2 of the RMA his Honour stated at 86:

> This Part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way.

It is difficult to reconcile the Environment Court's approach of superimposing an alternative location factor on s 7(b) with the approach to Part 2 matters described by Greig J.

[92] Finally, we are troubled by the wider implications of the Environment Court's approach. It seems that the analysis of "reasonable" alternatives the Court was expecting would not be restricted to the CODC district. The Court said:

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[57] W011/2009 at [70]
[58] [2008] NZRMA 534.
[59] At [98]
[60] At HC Auckland CIV 2008 404 587, 8 December 2008
[61] At [33]
[62] [1994] NZRMA 70

> [671] The Commissioners concluded that if a wind farm was not allowed on this site '…[we] find it hard to see where in Central Otago a wind farm' might locate. That is despite having as evidence a report from the Planner for the CODC – Mr Whitney – in which he wrote that he considered there were potentially suitable sites "elsewhere in the Central Otago District **and elsewhere in Otago** including in locations south and west of the Clutha River" ... (Our emphasis)

Later[63] the Court concluded that realistic alternatives to the Meridian wind farm did exist and should have been considered. It then went on to say that "New Zealand is a wind rich country and that there are still many untapped wind resources of specific places as shown on attachment 'B'".[64] That attachment is a wind resources study for the whole of the South Island.

[93] Given that the functions of territorial authorities listed in s 31 are "for the purpose of giving effect to this Act *in its district*" (our emphasis) we do not think that Parliament intended that applicants could be called upon to describe alternative sites beyond the relevant district. We should also add that while we doubt that the Environment Court had in mind that alternatives throughout the country would have to be considered, if that was in fact the intention there would be further problems. For a company like Meridian seeking a major wind farm site *in the South Island* (because the bulk of its customers are located in that island) a comparison of alternative sites in the North Island would be largely meaningless.

[94] We therefore conclude that the Environment Court erred in law when it decided that in this case s 7(b) required alternatives to be considered. In our view no such requirement can be lawfully superimposed on that provision. Now we turn to the other component of Merdian's argument based on s 7(b).

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[63] At [706] and [707]
[64] At [707]

Was it an error of law for the Environment Court to call for a comprehensive and explicit cost benefit analysis of the proposal as part of its examination of the efficiency criterion in s 7(b)?

[95] Building on the formulation in *Lower Waitaki* that economic efficiency generally requires all credible alternatives to a proposal to be identified and included within a cost benefit analysis, the Court decided:

> [242] ... section 7(b) requires a comprehensive and explicit cost-benefit analysis of the proposal. In that analysis:
>
> (a) where market valuations are not available, non-market techniques may be used; and
>
> (b) where the values of the market are different from those of society, alternative societal values may be applied.
>
> The idea behind the cost-benefit analysis is to assess, firstly, whether the proposal has a positive net benefit, and then whether there are credible alternative uses of the resources, or credible alternative resources that could produce the desired output, which have a greater net benefit. …

According to Meridian that interpretation of s 7(b) is not only novel, it is also wrong in law.

[96] It is not, of course, an error of law to adopt a novel approach. It can take many years for a statute to be fully understood. While the approach adopted by the Environment Court in this case can be described as novel, we are also aware that divisions of the Environment Court chaired by Judge Jackson have been pursuing the underlying theme for some time, but with less specificity. Evolution of this thinking can be traced back to *Baker Boys Ltd v Christchurch City Council*.[65]

[97] The fact that other divisions of the Environment Court have not endorsed that approach does not mean, or demonstrate, that the Meridian decision involves an error of law. Indeed, counsel for Meridian could not point to any cases examining and despatching this approach as an error of law. So we need to examine whether the Environment Court's proposition that s 7(b) requires a comprehensive and explicit cost benefit analysis is in conformity with the Act.

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[65] [1998] NZRMA 433

[98] A theme of seeking to maximise the *quantification* of values through s 7(b) can be traced through the Environment Court's decision. The Court explained:

> [226] We are uncomfortable with a cherry-picking approach to efficiency. We prefer to follow the decision of the Court (slightly differently composed) in *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council*[66]:
>
> > We consider that efficiency in section 7(b) of the RMA requires a consent authority to consider the use of all the relevant resources and, preferably, their benefits and costs. It is nearly meaningless to consider the benefits of only some of the resources involved in the proceeding because the artificial weighting created by sections 5 to 8 of the Act will not be kept within the statutory proportions if the only matters given the 'particular regard to' multiplier (see *Baker Boys Limited v Christchurch City Council*[67]) in section 7(b) are those which are not identified elsewhere in section 7. **Further, it is very helpful if the benefits and costs can be quantified because otherwise the section 7(b) analysis merely repeats the qualitative analysis carried out elsewhere in respect of sections 5 to 8 of the Act** (Emphasis added).

In the *Lower Waitaki* case the Court had gone on to say in the next paragraph that "the potential power of s 7(b) is in giving a relatively more objective measure of the efficiency of the proposal."[68]

[99] Later in its judgment in this case[69] the Environment Court recorded an acknowledgment by Dr Layton (a Meridian expert witness) that the impact of the wind farm on recreational activities and the loss of flora, fauna, heritage sites and landscape values would not be revealed by markets and that the value of these impacts could only be inferred indirectly by non-market techniques. Dr Layton had described such techniques. The Court also noted that Dr Layton had stated such techniques are "complex and often contentious" and that he had not made any attempt to utilise the non-market techniques he had identified.

[100] Then the Court went on to lament the lack of quantitative evidence, including: "... in the absence of any quantitative assessment of the costs to recreation, tourism and the environment in general we can only make a qualitative

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[66] *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council* Decision C80/2009 at [196].
[67] *Baker Boys Limited v Christchurch City Council* [1998] 433 at para [98].
[68] At [197]
[69] At [623]

assessment ...";[70] "The qualitative assessments by Meridian's experts should have been supported by the quantitative assessments of the costs through the methods that Dr Layton identified are available";[71] "There are significant costs that we have not been able to quantitatively assess due to lack of appropriate evidence (costs in terms of recreation and tourism) and others that are less amenable to quantitative assessment (heritage and intrinsic landscape costs)";[72] and "We neither read evidence in chief nor heard further evidence quantifying the value of the landscape in which the proposed wind farm is to be placed, or of the costs of the project to heritage values …".[73]

[101] Finally, when deciding whether the wind farm should be approved under the operative District Plan the Court said:

> [745] The most objective way of testing whether the wind farm would be sustainable management of the Lammermoor's resources is whether it would be an efficient use of those resources under section 7(b) of the Act. On the evidence that has been presented, we find that the use of the wind resource is efficient, but consider it of at least medium likelihood that addressing the evidential deficiencies identified would lead us to conclude that a wind farm on the Lammermoor was not an efficient use and development of natural and physical resources. Further, Meridian has also failed in the backup to that, in that it has not sufficiently analysed relevant alternatives.

The application was refused. In part this reflected the Court's view that Meridian, CODC and the Crown had failed to put full evidence before the Court about all the costs of the proposal which "would have further increased the objectivity of this decision".[74]

[102] The Environment Court's comments at [745] provide considerable insight into the Court's thinking. Clearly its desire for quantification and objectivity had significantly influenced its approach to the s 7(b) efficiency criterion (and to the ultimate issue of sustainable management). On the evidence actually presented the Court would have found that the use of the Lammermoor wind resource *was efficient*. Nevertheless the Court decided that if the evidential deficiencies (which

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[70] At [625]
[71] At [639]
[72] At [649]
[73] At [697]
[74] At [757] (5)

we interpret as the lack of evidence applying the non-market techniques and alternative societal values mentioned by Dr Layton) had been remedied there was at least a "medium likelihood" the Court would have concluded that the wind farm was *not efficient*.

[103] This reasoning prompts us to look at Dr Layton's evidence more closely. In his supplementary evidence Dr Layton told the Environment Court:

> 8.24 Because the displacement of recreational activities or other environmental impacts, such as on flora or fauna, are intangible and not traded in markets, the value of such impacts is not revealed in market prices and can only be inferred indirectly through other means. Non-market valuation techniques include:
>
> (a) Cost-based valuation – for example, valuing environmental attributies at the cost of preventing or repairing damage to them;
>
> (b) Revealed preference methods – for example, inferring the value of parks, views or other desirable environmental attributes by identifying a premium in nearby house prices or by analysing the travel costs people incur in visiting a park; and
>
> (c) Stated preference methods – for example, direct questioning of a sample of respondents on how much they would pay to secure a given outcome, as if it could be secured through market transactions.
>
> 8.25 Non-market valuation techniques are complex and often contentious. Where there are no such valuations available, the weighting of market and non-market impacts is undertaken by consent authorities as part of their broad overall judgement of applications under Part II of the RMA. My understanding is that the relevant experts providing evidence for Meridian Energy have assessed the environmental effects of the wind farm as having an acceptable impact.

No doubt this is the source of the Court's statement at [242][75] that the comprehensive and explicit cost benefit analysis it had in mind should use non-market techniques where market values are not available and that alternative societal values could be applied when the values of the market differ from those of society.

[104] As the Environment Court noted, Dr Layton had not carried out a cost benefit analysis utilising non-market techniques. Nor had any other expert witness. When

[75] Quoted at [22] above

Judge Jackson questioned Dr Layton about paragraph 8.24 of his evidence with reference to recreational and landscape values Dr Layton said:

> DR LAYTON: The answer in this particular method and you will notice I have not pursued them because they all end up contentious.
>
> HIS HONOUR: Yes.
>
> DR LAYTON: Are complex and often contentious what I describe them as, because people will say, "well, is that really the value?"

Given that the Environment Court appears to have been relying on Dr Layton to justify its call for a cost benefit analysis utilising non-market valuation techniques, Dr Layton's answers (coupled with paragraph 8.25 of his supplementary evidence) must call into question the potential utility of such evidence, had it been presented.

[105] On the evidence before it, the Court had extensive *qualitative* evidence from various experts about the potential adverse effects of the wind farm. But it did not have the *quantitative* evidence that it would have liked. Obviously this counted heavily against Meridian when the Court came to apply the s 7(b) efficiency criterion. In our view this approach to s 7(b) was not in conformity with the RMA, as we will now explain.

[106] Section 32 of the Act is the only section expressly requiring a cost benefit evaluation (of proposed policies or other methods before a decision is made on a plan or plan change). Subsections(3) and (4) of s 32 are of particular relevance:

> **32 Consideration of alternatives, benefits, and costs**
>
> …
>
> (3) An evaluation must examine—
>
> (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
>
> (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.
>
> ...

(4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account -

(a) the benefits and costs of policies, rules, or other methods; and

(b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

…

(Emphasis added)

Section 32(4)(a) does not carry any mandatory requirement for all the benefits and costs to be quantified in economic terms, and no such requirement can be reasonably inferred.

[107] The issue whether s 32 requires a strict economic theory of efficiency or a more holistic approach was raised before Woodhouse J in *Contact Energy Limited v Waikato Regional Council*.[76] He declined to interfere with the Environment Court's conclusion that while economic evidence can be useful, a s 32 analysis requires a wider exercise of judgment. This reflects that it is simply not possible to express some benefits or costs in dollar or economic terms. For example, the loss of an ecosystem such as a wetland hosting a large bird population which is going to be overwhelmed by land reclamation may not be capable of expression in dollar terms.

[108] Likewise it would be difficult, if not impossible, to express some of the criteria within Part 2 of the Act (ss 5 – 8) in terms of quantitative values. We take by way of example the following paragraphs in s 7:

(c) The maintenance and enhancement of amenity values:

(d) Intrinsic values of ecosystems:

(f) Maintenance and enhancement of the quality of the environment:

If any of these matters are relevant, the consent authority "shall have particular regard to" them even if they are only capable of expression in *qualitative,* as opposed to *quantitative,* terms. As Dr Layton said, in this situation it is necessary for the

consent authority to weigh market and non-market impacts as part of its broad overall judgment under Part 2 of the RMA. We have not been referred to any provision stating that this process should be exercised or expressed in dollar terms or by some other economic formula.

[109] While it is true that resource consent decisions under the RMA might be described as subjective, that is inherent in the statutory process. In this respect we note that in *Canterbury Regional Council v Banks Peninsula District Council*[77] the Court of Appeal said:[78]

> ... the Act provides what may be described as a hierarchy of instruments, to the extent that regional policy statements must not be inconsistent with national policy statements and certain other instruments (s 62(2)), and district plans must not be inconsistent with national policy statements and the other instruments, nor with a regional policy statement or regional plan (s 75(2)). It does not follow, however, that there can be no overlap between the functions of regional authorities and territorial authorities. The functions of the latter are set out in section 31, and there is no need to read that section in any restricted way. To the extent that matters have been dealt with by an instrument of higher authority, the territorial authority's plan must not be inconsistent with the instrument. Beyond that, the territorial authority has full authority in respect of the matters set out in section 31. …

Decisions relating to resource consents are within the "full authority" vested in territorial authorities.

[110] Such decisions involve an evaluation of the merits by committees of elected councillors, or a panel of commissioners (as here), and, if there is an appeal, by the Environment Court. A degree, even a relatively high degree, of subjectivity is virtually inevitable. It needs to be kept in mind that the scheme of the RMA is that decisions are made by a number of persons acting together. Persons on the Regional or District Council, or Committee, or panel of the Environment Court, discuss these "subjective" evaluations and reach a consensus. The outcome is not one person's evaluation, except in simple cases of delegation to a single commissioner.

[111] Parliament has not mandated that the decisions of consent authorities should be "objectified" by some kind of quantification process. Nor does it disparage, as a

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[76] (2007)14 ELRNZ 128 at [47] – [51] and [88] – [92]
[77] [1995] 3 NZLR 189

lesser means of decision making, the need for duly authorised decision makers to reach decisions which are ultimately an evaluation of the merits of the proposal against relevant provisions of policy statements and plans and the criteria arrayed in Part 2. That process cannot be criticised as "subjective". It is not inferior to a cost benefit analysis. Consent authorities, be they councillors, commissioners or the Environment Court, and upon appeal the High Court Judges, have to respect that reality and approach decision making in accordance with the process mandated by the statute. It is not a good or bad process, it simply is the statutory process.

[112] Before leaving this cost benefit issue we should briefly comment on the Environment Court's approach to internalising costs. The Court found[79] that costs in terms of landscape and various other matters had not been internalised to Meridian.

[113] With this concept of internalisation comes the notion that external costs arising from the private use of natural and physical resources should be internalised and reflected in the cost and benefit analysis. Externalities are those consequences, both beneficial and adverse, which flow from the use of the resources. Regulatory statutes controlling private use of land developed from the common law of nuisance, which has long understood and responded to the fact that private use of land can cause a nuisance to the neighbourhood. Reforms culminating in the RMA are discussed in this Court's decision *Wilson v Selwyn District Council*.[80]

[114] The underlying purpose of internalising these externalities is to enable all the benefits and costs to be quantified so that a net benefit or net loss, as the case may be, can be calculated. The problem is that where all the benefits and costs are not the subject of market transactions there is no readily quantifiable financial sum reflecting the demand or price to be paid for such benefits or the imposition of detriments. To put dollars on them requires some sort of imputing of demand. Sometimes this can be achieved by way of surveys: "*How much would you pay to visit a national park*?" Sometimes it is not possible to put dollar terms on them.

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[78] At 194
[79] At [703]
[80] [2005] NZRMA 76 at [66] to [68]

[115] But it is all very controversial, as Dr Layton confirmed. We cannot accept that it was within the contemplation of the RMA that failure to fully internalise costs would carry the consequences that the Environment Court contemplated.

[116] While we can understand the Environment Court's desire to maximise objectivity in the decision making process, it is our view that the Court went too far when it decided that s 7(b) required a comprehensive and explicit cost benefit analysis in this case. We believe this resulted in s 7(b) being overplayed. Rather than dominating any other relevant Part 2 criteria, s 7(b) was intended to be weighed and balanced alongside them. In particular Parliament did not intend other criteria in s 7 to receive a truncated evaluation because the subject matter had already been evaluated in the s 7(b) analysis.

Did the Environment Court require Meridian to demonstrate that its project was "the best" in net benefit terms, and if so was this an error of law?

[117] When discussing alternatives the Environment Court said:

> [230] While in an engineering sense efficiency means the ratio of outputs to inputs, in economic terms it is not an absolute but a relative concept. We hold that under section 7(b) of the Act there are two questions to answer when determining the efficiency of the use of resources:
>
> (1) is the value achieved from the resources utilised the greatest benefit that could be achieved from those resources?
>
> (2) could that same benefit be produced utilising resources of lower value if they were organised differently, or if a different set of resources was used?
>
> The first point is about maximising the benefits achieved from the resources being utilised; and the second is about minimising the resource costs of achieving a given benefit.

As we have already said, Meridian contends that this concept was applied in a way that required it to demonstrate that its project was "the best" in net benefit terms and that this was wrong in law.

[118] The RMA is a regulatory statute restraining full rights of private property ownership and freedom of contract. Amongst other things the Act limits the exercise

of those rights by requiring certain conduct to have resource consents. But it would be extremely surprising if the statute granted to agencies, be they elected councils or the Courts, the power to impose upon owners of resources and parties to contracts some duty to make *the best use* of the subject resources, as construed by a council or Court.

[119] We think the correct interpretation of the RMA is that it is up to individuals and groups of individuals to decide what they want to do with their resources (where those resources are in private hands). However, that right is tempered by the fact that private use of resources can impose adverse effects on neighbours and upon the wider community. Hence the justification for the national, regional and district planning instruments, and the associated concept of resource consents, all of which lie at the heart of the RMA.

[120] In addition to those matters are the principles and purposes in Part 2 of the Act, including s 7(b). However, we do not think s 7(b) (or Part 2 generally) was intended to give to decision makers under the RMA the power to make judgments about whether the value achieved from the resources that are being utilised is the greatest benefit that could be achieved from those resources or whether greater benefits could be achieved by utilising resources of lower value or a different set of resources. To go that far would be to assert a planning function beyond the scope of the RMA. The Act effectively represents a compromise between values of planning and respect for private developments.

[121] Having concluded that as a matter of statutory interpretation it was not open to the Environment Court to require Meridian to demonstrate that its project was "the best" in net benefit terms, we have to decide whether the Environment Court actually imposed that requirement on Meridian. We agree with the respondents that this ground has not been made out. Nowhere in the judgment has the Court stated in explicit terms that it expected Meridian to demonstrate that the Hayes site was the best. Nor can this be safely inferred from the judgment as a whole. While the question of alternative sites loomed large in the Court's reasoning, we do not believe the Court has gone as far as Meridian contends.

[122] This ground has not been made out.

Summary

[123] In the circumstances of this case the Environment Court was, subject to the qualifications mentioned in this judgment, authorised to call for a description of alternative sites as part of its s 104 analysis. But it erred in law when it went further and proceeded on the basis that s 7(b) required consideration of alternative locations and an explicit and comprehensive cost benefit analysis. These errors led the Court to apply s 7(b) in a way that was not intended by Parliament. This resulted in the Court not analysing the merits of the application in the way intended by Parliament. The issue of relief will be addressed shortly.

Fourth ground

[124] As already mentioned, this ground of appeal alleges that the Environment Court denied Meridian a fair hearing by virtue of three matters: the issue of alternatives was not raised by opponents; there was no forewarning that the Court intended to apply *Lower Waitaki*; and the Court took into account the Mahinerangi wind farm consent. Given that the first matter is effectively a component of the second, we will go straight to the second matter.

Did the Court's application of Lower Waitaki impose an obligation to hear further from Meridian?

[125] It was in the *Lower Waitaki* decision that the Environment Court first specifically advanced the proposition that s 7(b) might require a cost benefit analysis. That proposition was then utilised in the case under appeal, with the Court reasoning:

> [702] In Chapter 3.0 (The law) we decided that in certain circumstances section 7(b) leads to a requirement to consider alternatives. After considering the submissions and cases, we held that we should follow the

recent Waitaki North Bank Tunnel Concept decision[81] where the Court concluded[82]:

> … that the consideration of alternative uses of resources, or the use of alternative resources to achieve the same or similar benefit, is not usually required under the RMA, and, secondly that there are at least three exceptional situations where considerations of efficiency under section 7 (b) may require consideration of alternatives. These situations are:
>
> 1. where the costs cannot be fully internalised to the consent holder;
>
> 2. where there is no competitive market for the relevant resources; or
>
> 3. where there are matters of national importance in Part 2 of the Act involved and the cost benefit analysis requires comparing measured and unmeasured benefits and costs, such that the consent authority has to rely principally on a qualitative assessment.

Although the consideration of alternatives may be required, this does not necessarily mean that alternatives should be considered in all cases. The Waitaki NBTC decision stated[83] that whether and which alternatives should be considered can only be decided in the context of the specific facts of each case.

[703] Considering the extent to which the situations 1-3 above apply to a Lammermoor wind farm we find:

1. The costs in terms of landscape, heritage in respect of the Old Dunstan Road and the heritage surroundings in which it sits, and recreation and tourism have not been internalised to the consent holder. There may be some possible remedy or mitigation in respect of recreation and tourism, although none has been proposed to us. The evidence before us was that the landscape and the Old Dunstan Road heritage costs could not be remedied or mitigated. Therefore they have not been (and in respect of landscape and the heritage of the Old Dunstan Road, cannot be) internalised to the consent holder.

2. There is no competitive market for the landscape or heritage resources. The 'market' for recreation or tourism resources has not been adequately explored by the applicant. The issue of alternative recreational opportunities was mentioned in evidence and discussed (briefly) in cross-examination. The issue of tourism was barely mentioned.

3. There are two matters of national importance involved: an outstanding natural landscape[84] and historic heritage[85] –

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[81] *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council* Decision C80/2009.
[82] *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council* Decision C80/2009 para [201].
[83] Decision C80/2009 para [548]
[84] Section 6(b) of the Act.
[85] Section 6(f) of the Act.

> which we must recognise and provide for their protection from inappropriate use and development.
>
> We have considered whether in the interests of fairness we should hear from the parties further on the issue of categories 2 and 3 since the *Lower Waitaki* decision has only recently been issued. However, we have decided that there is no need to do so because *TV3 Network* applies – matters of national importance are raised – and we heard argument about that.

We do not accept that the decision of the High Court in *TV3 Networks Services* put Meridian on notice that the test deployed in *Lower Waitaki* would be utilised in the decision under appeal. This reflects the particular issues in *TV3 Network Services* and the way they were addressed by this Court.

[126] TV3 wanted to install a television translator on a hill on the west side of Raglan Harbour. Its application for a resource consent was granted by the District Council. An opponent, Tainui, then appealed to the Environment Court on the grounds that the hill was sacred to Maori and the presence of the translator would offend Maori heritage and waahi tapu. The Environment Court reversed the Council's decision on the basis that granting the consent would not respond to the strong direction in s 6(c) to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands and waahi tapu. On the question of alternative sites the Environment Court considered that "other possible translator sites may be nearly as effective even though they may involve greater costs".[86]

[127] An appeal to this Court followed.[87] In support of TV3's appeal Mr Brabant argued that the Environment Court had erred by considering whether the proposed activity might be undertaken on another site where it would not offend a matter of national importance. He argued that the Act is "effects based" and that s 92(1) and Schedule 4 identify when alternative sites can be considered (where it is likely that an activity will result in a significant adverse effect on the environment). Thus, Mr Brabant submitted, it was wrong in law to consider alternative sites when the Court had not found that there were any adverse effects.

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[86] [1998] 1 NZLR 360 at 367
[87] [1998] 1 NZLR 360

[128] Hammond J did not directly respond to Mr Brabant's argument. Rather he proceeded on the basis that the Environment Court was not requiring the applicant for resource consent to clear off all possible alternatives:

> But I do not think that is what the Court was suggesting. It is simply that, when an objection is raised as to a matter being of "national importance" on one site, the question of whether there are other viable alternative sites of the prospective activity is of relevance.[88]

On our reading of the *TV3 Network Services* decision there was nothing in it to alert Meridian to the possibility that the Environment Court would interpret and apply s 7(b) in the way that it did.

[129] Nor had the previous history of the Meridian proceeding foreshadowed that possibility. The issue of alternatives had not been included in the list of issues provided by any of the parties in response to the pre-hearing directions issued by the Court on 31 January 2008 and 10 April 2008. While it is true that there was some cross-examination on the issue of alternatives, we do not consider that this should have alerted Meridian to the s 7(b) test that the Court ultimately adopted.

[130] On 8 August (well into the hearing which had started on 19 May) the Maniototo Environmental Society sought to call further evidence, first, on the cumulative effects of the Mahinerangi wind farm and Project Hayes and, secondly, on efficiency issues. Maniototo's application had been made after another division of the Environment Court released its decision upholding planning consent for the windfarm at Mahinerangi.

[131] When granting the adjournment,[89] the Environment Court concluded with these comments:

> [16] … To the extent that this proceeding is about efficiency, it is about the overall efficiency in terms of section 7(b) and section 7(ba) of the Resource Management Act of Project Hayes, and we ask that the evidence reflects that, …

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[88] At 373
[89] Decision C89/2008, 8 August 2008

Later the following exchange took place between Judge Jackson, and Mr Beatson, counsel for Meridian:

> HIS HONOUR: Mr Beatson, what are your thoughts on the way forward please?
>
> [discussion about how to proceed with aspects of the case not affected by the request to call new evidence]
>
> HIS HONOUR: Thank you. And a timetable?
>
> MR BEATSON: I have not thought about specific dates but I would request a simultaneous exchange giving time for rebuttal rather than a three stage timeframe.
>
> I would seek some further guidance from the Court about the question of efficiency that it is interested in.
>
> HIS HONOUR: Well, we need help from you on that.
>
> MR BEATSON: Well, we have outlined the benefits of the project from a broader perspective and we have signalled that, from Meridian's perspective, it is the next best option available to it. We have had an explanation from the Crown about how the market works and that it is competitive and it is up to generators to make commercially sensible decisions about where they locate next.
>
> And we have talked about the benefits to, or we will be talking about, the benefits to the individual landowners and the benefits to the system as a whole and we have deliberately indicated we think the viability question is one for Meridian but we are saying that there is checks and balances on that as well.
>
> I think there is no (sic) much more than can really be said about transmission either.
>
> HIS HONOUR: Fine, well, if there is no more to be said you do not have to say it, do you?
>
> MR BEATSON: No, but I am seeking some guidance about what it is that that Court is ---
>
> HIS HONOUR: Well, we have said what we have said, I am not going to elaborate.
>
> All right, so you want simultaneous exchange?
>
> MR BEATSON: Yes.
>
> HIS HONOUR: All right, thank you.
>
> …

We do not know how advanced Judge Jackson's thinking on the efficiency test was when that exchange took place.

[132] Had Mr Beatson known about the *Lower Waitaki* decision at this time he would have been alerted to the possibility that the Court might apply that decision. In that event it is likely that Meridian would have responded by providing more evidence about alternative sites and/or legal argument about the scope of s 7(b). As matters developed, however, there was nothing at that stage to alert Meridian to the possibility that the Court would adopt the novel approach to s 7(b) that it did.

[133] We accept that as a matter of fairness the Court should have heard further from the parties after the *Lower Waitaki* decision was delivered. If further information about alternatives was required, the Environment Court should have then provided a reasonable opportunity for further evidence to be presented. Thus we are satisfied that this ground has also been made out. We will shortly address the consequences of this conclusion.

The Mahinerangi issue

[134] For the Environment Court the relevance of the wind farm consent at Mahinerangi was one of cumulative effects:

> [482] We have described how the hearing was further adjourned so that the Court could hear evidence about any impact of a wind farm at Mahinerangi on this proposal. At the 2009 resumption of the hearing Meridian produced some new photosimulations[90] of the area. These included those views in which both a Meridian wind farm and a Mahinerangi wind farm, 15 kilometres apart at the closest points and with some 28 kilometres between their centroids, could both be seen.
>
> [483] There is some doubt as to whether Mahinerangi will proceed. Mr Gleadow said in answer to Mr Todd that TrustPower had been quoted in the media as stating that "… under the present policy settings [it] may well not construct Mahinerangi". That is of course hearsay, and we do not know what current settings are of concern to them. Further, it has taken us so long to finalise this decision that more recent media reports suggest that Mahinerangi is likely to proceed. We make no finding either way: as we stated (in Chapter 3.0) if Mahinerangi proceeds then the Meridian project

[90] Mr C G Coggan, part of his evidence-in-chief [Environment Court document 49].

> may cause accumulative effects, and if it does not then the Mahinerangi site may be an alternative which we should consider.
>
> …
>
> [490] In our view the likely strength of the cumulative effects is somewhere between Mr Rough's and Ms Steven's views. We consider that the addition of the Meridian wind farm to a Mahinerangi wind farm will have a moderate adverse extra effect on the natural qualities of the landscape. Having said that, it is clearly the placement of the huge Meridian wind farm in the landscape which generates the major effects to be considered.

[135] Later the Court returned to Mahinerangi in the context of a permitted baseline analysis:

> [674] In relation to the existing environment there are various suggestions[91] that Meridian may have been disadvantaged because (a different division of) the Court heard and decided the smaller Mahinerangi application by TrustPower Limited first (see *Upland Landscape Protection Society v Clutha District Council*[92]), even though TrustPower's application was lodged with the relevant local authorities later than Meridian's. We consider there is no disadvantage. First, we hope it is unnecessary to point out that this is not a "priority of hearing" case under the principle (first in time, first in right) in *Fleetwing Farms Limited v Marlborough District Council*[93]. From a procedural point of view this case involves different resources within two different districts. Secondly, we consider the point is irrelevant. The possibility of generating energy from wind at Mahinerangi is, for the reasons we stated in Chapter 3.0, relevant as:
>
> - either a part of the existing environment as it falls within the definition allowed by *Queenstown Lakes District Council v Hawthorn Estate Limited*[94] (or as an accumulative effect); or
>
> - an alternative.
>
> [675] We hold that the existing environment must include the potential effects of a wind farm above Lake Mahinerangi. We consider the accumulative effects of adding a wind farm on the Lammermoor to those effects will be at least moderate on the heritage surroundings about the Old Dunstan Road even on the scale of the two landscapes being considered.

With particular reference to paragraphs [674] and [675] Meridian submits that the Environment Court was wrong in law when it declined to apply the *Fleetwing* principle and that it should not have taken the Mahinerangi wind farm into account.

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[91] For example, Mr Todd, submissions 16 February 2009, [Environment Court document 85].
[92] *Upland Landscape Protection Society v Clutha District Council* Decision C85/2008.
[93] *Fleetwing Farms Limited v Marlborough District Council* [1997] 3 NZLR 257; 3 ELRNZ 249; [1997] NZRMA 385.
[94] *Queenstown Lakes District Council v Hawthorn Estates Limited* [2006] NZRMA 424.

[136] The *Fleetwing* principle is that where there are competing applications for a resource the priority of the hearings will be determined in favour of the first applicant to file a complete application. Once the priority of hearings has been determined the application having priority is decided on its merits and without having regard to the other application/s.

[137] The Court of Appeal developed the *Fleetwing* principle on the basis that the members of the Court thought it implicit:

> …[T]hat if another applicant applies for a similar resource consent while the first application remains undecided, that does not justify comparing one against the other and failing to give a timely decision on the first application on its merits and without regard to the other.[95]

Then the Court identified five possible policies which might reflect that implicit policy and concluded that on its reading of the RMA Parliament had used the approach of "first come first served".[96]

[138] As far as we aware the *Fleetwing* principle has never been applied so as to require a consent authority to disregard *an existing* resource consent for the reason that the application resulting in the existing consent was not completed until after the application under consideration. Nor has it been applied as part of a baseline analysis where there are effectively different resources (the Meridian site is 15 kms from the Mahinerangi site).

[139] Currently there is considerable uncertainty surrounding the future of the *Fleetwing* principle. It has been challenged in *Central Plains Water Trust v Ngai Tahu Properties Ltd* [97] and *Central Plains Water Trust v Synlait Ltd*[98] both of which involved competing claims for the same water resource. The Supreme Court granted leave for both decisions to be appealed to it. In *Ngai Tahu Properties* the Supreme Court invited a reconsideration of *Fleetwing* and appointed an amicus curiae. The case then settled. Although leave to appeal *Central Plains Water Trust* was granted,

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[95] [1997] 3 NZLR 257 at 264
[96] [1997] 3 NZLR 257 at 265
[97] [2008] NZCA 71
[98] [2009] NZCA 609

it also settled. There can be little doubt that the Supreme Court wished to hear argument about whether the *Fleetwing* principle is sound.

[140] Under those circumstances we do not think this Court could responsibly extend the ratio of *Fleetwing* in the way sought by Meridian, especially in a novel situation like this. We therefore reject Meridian's proposition that the Environment Court erred in law when it declined to apply *Fleetwing* vis-à-vis the Mahinerangi windfarm consent.

[141] It follows that the Mahinerangi windfarm was potentially a relevant consideration in the baseline analysis. Meridian criticised the Environment Court for relying on post hearing media reports suggesting that the Mahinerangi project might go ahead.[99] We will take that matter up when considering the relief that should be granted.

Grounds 5 and 6

[142] Given the conclusions that we have already reached in relation to grounds (ii), (iii) and (iv) and the directions that will follow in the next section of our judgment, we find it unnecessary to comment further on these grounds.

Relief

[143] Meridian not only seeks to have the Environment Court decision quashed, it also wants the consents and permits originally granted by the Councils to be reinstated by this Court without any further consideration by the Environment Court. We are unaware of this step ever having been taken previously.

[144] Meridian relies on two findings in its favour which, it contends, demonstrate that the benefits of the project outweigh the costs and that the project is worthy of consent:

> [650] Against these measured benefits must be put the very real, but unmeasured, costs in terms of landscape, heritage and recreation and tourism

[99] See [483] already quoted at [134] above

> that will not be remedied or mitigated. We note that the large regional benefits will be at the expense of some other region that does not gain, at this time, a large electricity construction project if Lammermoor goes ahead. The landscape, heritage and tourism costs of the project will be both national and regional. Although our cost benefit analysis is on a national basis, the regional effects are a part of this. **On balance we conclude that there is a net benefit arising from the Lammermoor wind farm**. However, we consider that the unmeasured costs are significant and that the size of the net benefit is not nearly as substantial as the numbers above might indicate.
>
> ...
>
> [693] **If the matters in the previous sections of this chapter were all we had to consider we would agree with the planner[100] called by the District Council, Mr D R Anderson, that we should grant consent to Meridian**. However, section 104(1) of the RMA begins:
>
> > When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to –
> >
> > …
>
> We now consider whether we should look at Part 2 of the Act. (Our emphasis).

For the respondents Mr Smith claims that these paragraphs cannot be construed as a finding in favour of Meridian justifying reinstatement of the consents/permits by this Court.

[145] We agree with Mr Smith. Paragraphs [650] and [693] cannot be read in isolation. In our view it is too simplistic to say that because the benefits of the project outweigh its costs, the project must therefore be worthy of consent. While that might be a very significant step towards gaining consent, a wider assessment is required. On its wider assessment of the Meridian application the Environment Court concluded that the project did not achieve sustainable management in terms of s 5 of the Act. Under those circumstances the proper course is for the Court to reconsider that conclusion in light of the errors of law that we have identified.

[146] Meridian's alternative submission was that if the case is to be referred back to the Environment Court, it should be referred to a different division of that Court. This suggestion was opposed by the third to ninth respondents. The Councils

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100 Mr D R Anderson, evidence-in-chief [Environment Court document 62].

adopted a relatively neutral stance. We accept that this option would again be most unusual, and that it would impose a considerable burden on the parties opposing the Meridian application. It is our judgment that the appropriate course is to follow normal practice and refer the case back to the same division of the Court that heard the application, with specific directions.

[147] The principal direction must, of course, be to reconsider the matter in the light of our findings as to error of law in the decision. But that is insufficient on its own. It is important that the corollaries to our findings are also taken into account on the reconsideration.

[148] We will therefore set out specific directions for the Environment Court's reconsideration of the matter:

(a) Meridian is to be given a reasonable opportunity to present further evidence on the question of alternative locations. The respondents are also to be given a reasonable opportunity to call evidence in response to Meridian's evidence.

(b) Once any further evidence has been presented all parties are to be given a reasonable opportunity to present further submissions about the evidence referred to in (a) as well as the overall implications of this decision for the findings and conclusions reached by the Environment Court.

(c) Meridian is not obliged to go beyond *a description* of any possible alternative locations for undertaking the proposed wind farm (in terms of cl 1(b) of Schedule 4). As indicated in [93] these locations will need to be within the CODC district. Given the size of the Meridian proposal and its potential impact on the environment, we anticipate that a reasonably detailed description of alternative sites would be provided by Meridian.

(d) Any further evidence concerning alternative locations will form part of the Court's s 104 analysis of the Meridian proposal (not part of the s 7(b) assessment). The inquiry will be whether, if the same or a similar wind farm could be placed on any identified alternative site/s, it would generate less adverse effects on the environment. That consideration will, however, need to be weighed against any diminution in the benefits of the project (e.g. poorer quality of mean wind velocity, distance from the grid etc), and any other relevant considerations such as the availability of the alternative site/s to Meridian.

(e) As the Environment Court acknowledged, and our analysis of the other wind farm cases demonstrates, consideration of alternative sites is relatively unusual. While it will be for the Environment Court to undertake any further analysis of the evidence before it, we emphasise that consideration of alternative sites should not be pushed too far. We have rejected the proposition that Meridian must demonstrate that the Hayes site is "the best". Rather than being a search for "the best" site, consideration of alternative sites is only part of the evaluation of the merits of the application in the context of s 104 and the focus needs to be on the merits of *Meridian's proposal*.

(f) The Court is also to reconsider the application of the efficiency criterion on the basis that s 7(b) requires an assessment of the efficient use and development of the natural and physical resources involved in the application, namely, the wind and the land. In other words, the Environment Court is to apply the s 7(b) test utilised in the other wind farm cases in which s 7(b) has featured.

(g) Given the opportunity that is now available for the Court to receive further evidence about whether the Mahinerangi wind farm project is likely to proceed, the parties will also be entitled to present further evidence to the Environment Court on that topic.

(h) Nothing that we have said is intended to indicate that the Environment Court is precluded from utilising the cost benefit findings that it reached as part of its s 104 evaluation. However, that evaluation is not to penalise Meridian for failing to provide non market valuation evidence in relation to landscape or heritage values.

(i) The parties will also be entitled to make submissions about any conditions that might be lawfully imposed by the Environment Court to avoid, remedy, or mitigate adverse effects on the environment if the application is granted. The Court will also have power to impose such conditions.

[149] We will take the precaution of reserving leave for the parties to seek clarification of any of these directions. Any such request, containing a description of the clarification sought, must however, be filed and served within 28 days of the date of this judgment.

Mr Sullivan's cross-appeal – climate change

[150] In 2004 s 7 of the RMA was amended by requiring all persons exercising functions and powers under the Act to have particular regard to –

...

(i) the effects of climate change;

(j) the benefits to be derived from the use and development of renewable energy;

These amendments were made by the Resource Management (Energy and Climate Change) Amendment Act 2004 (the amendment Act).

[151] Additional definitions were included in the RMA by the amendment Act. At the heart of the cross-appeal is the definition of "climate change":

> **climate change** means a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods

A definition of "renewable energy" was also added by the amendment Act. Energy produced from wind comes within that definition.

Environment Court decision with reference to climate change

[152] When analysing its role in relation to climate change, the Court proceeded on the basis that Parliament had directed persons exercising functions and powers under the Act to assume there is climate change attributable to human causes "and to move on from there".[101] This reflected the Court's analysis of the definition of climate change and its assumption that Parliament intended scientific discussion about the existence and extent of anthropogenic changes (from human activities) was to be avoided.[102]

[153] Then the Court considered whether there was evidence indicating changes to the site envelope and the surrounding area as a result of climate change. It concluded that there was none. On the other hand, the Court accepted that anthropogenic induced increases in carbon dioxide concentrations in the atmosphere contribute to climate change and that using wind generation rather than carbon emitting generation would reduce climate change and its effects. This led the Court to conclude that Meridian's proposal would contribute to reducing the effects of climate change as defined in the Act.[103] Reduction in CO_2 emissions was later factored into the Court's cost benefit analysis.[104]

Mr Sullivan's cross-appeal

[154] Two grounds of appeal were advanced by Mr Sullivan:

> 1. the Environment Court erred in its interpretation of section 7 of the Resource Management Act by determining that section 7 requires the

[101] At [351]
[102] At [221]
[103] At [354]
[104] At [641]

> decision maker to exclude from its consideration and evaluation of the effects of climate change a consideration of the causes of climate change;
>
> 2. the Environment Court erred by ignoring the uncontested evidence of Dr Kesten Green when evaluating the integrity of the IPCC's Climate Models.

His cross-appeal is advanced on the basis that if Meridian's appeal succeeds and the matter is remitted for a rehearing, then at the rehearing the Environment Court should be directed to reconsider the climate change issues "in accordance with the law".

First ground of cross-appeal

[155] For Mr Sullivan, Mr Fisher argued that before a consent authority can have particular regard to the effects of climate change, as required by s 7(i):

> ... it must first determine that it is satisfied in terms of the definition of "climate change" that a party has *reasonably attributed* human activity to alterations in the composition of the global atmosphere that is in addition to natural climate variability observed over comparable periods;

Having failed to take that step, submitted Mr Fisher, the Environment Court had no jurisdiction to take into account the effects of climate change or to include the benefits arising from the savings in CO_2 emissions in its cost benefit analysis.

[156] We are satisfied that the Environment Court did not err in law and that this ground of appeal is untenable. This reflects a number of matters.

[157] First, the definition of climate change. Like the Environment Court we find it significant that Parliament has used the word "attributed" rather than "caused by". We consider that the definition has been framed in this way to reflect the statutory assumption that climate change is occurring. We also agree with the Environment Court's comment[105] that climate change is an extremely complex subject and that in the absence of a clear direction from Parliament the Court should not enter into a discussion of its causes, directions and magnitude.

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[105] At [351]

[158] Secondly, it is significant that the definition of "climate change" comes from the 1992 United Nations Framework Convention on Climate Change (to which New Zealand is a signatory). That Convention is incorporated in the Climate Change Response Act 2002: see the First Schedule to that Act. In that Convention it is abundantly clear that climate change *as defined* is assumed to exist. For example, clause 1 of Article 3 states that "... developed country Parties should take the lead in combating climate change and the adverse effects thereof", and clause 3 of the same Article states that the Parties to the Convention "... should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects". The commitments entered into by the parties under Article 4 includes taking steps "to mitigate climate change".[106] There are numerous other examples.

[159] Thirdly, the stated purpose of the amendment Act is only explicable on the basis that climate change exists:

> **3 Purpose**
>
> The purpose of this Act is to amend the principal Act-
>
> (a) to make explicit provision for all persons exercising functions and powers under the principal Act to have particular regard to-
>
> ...
>
> (ii) the effects of climate change;
>
> ...
>
> (b) to require local authorities-
>
> (i) to plan for the effects of climate change;
>
> ...

[106] Article 1(b)

Similarly the new paragraph 7(i) requiring those exercising functions and powers under the RMA to have particular regard to the effects of climate change only makes sense if the underlying premise is that climate change exists.

[160] Fourthly, we see major practical difficulties with the interpretation advanced on behalf of Mr Sullivan. It would mean that scientific evidence would have to be adduced on the complex issue of climate change every time persons exercising functions and powers under the RMA were obliged to have particular regard to s 7(i). In the context of resource consents an impossible burden would be imposed on applicants. Climate change issues would be endlessly relitigated and inconsistencies would be virtually inevitable. And if a consent authority (or the Environment Court) found that there was insufficient evidence to enable it to have particular regard to effects of climate change, how would it discharge its obligation under s 7(i)?

[161] Finally, Mr Sullivan's argument is not supported by *Genesis Power Ltd v Greenpeace New Zealand Inc*[107] in which William Young P stated when delivering the judgment of the Court:

> [37] Section 7(i) anticipates that there will be climate change and requires regional councils to take into account, in exercising their functions under the Act, the effects of climate change. ...

While that appeal involved a discharge permit and s 7(i) was not directly in issue, the observation of the Court justifies considerable weight.

[162] This ground of cross-appeal fails.

Second ground of cross-appeal

[163] The allegation that the Environment Court overlooked Dr Green's evidence arises from the following paragraph of the Environment Court's decision:

> [133] Evidence on climate change was presented principally by Dr D S Wratt for Meridian and Professor R M Carter for the appellant Mr Sullivan. Others who

[107] [2008] 1 NZLR 803 (CA)

> addressed climate change were Professor C R de Freitas for Mr Sullivan and Mr P F Gurnsey for the Crown.

Given that Dr Green is not mentioned in that paragraph or, as far as we can see, elsewhere it is certainly possible that his evidence was overlooked. In this regard we were told from the Bar that Dr Green's statement of evidence on behalf of Mr Sullivan was admitted by consent and Dr Green did not appear in person.

[164] Dr Green gave scientific evidence about whether forecasts of dangerous manmade global warming are valid. He concluded that they were not valid and there is currently no more reason to believe that temperatures will increase over the coming century than there is to believe that they will decrease. However, even if his evidence has been overlooked, our conclusions in relation to the first ground of appeal means that it could not have materially affected the outcome.

[165] Under those circumstances this ground of cross-appeal must also fail.

Result

[166] Meridian's appeal is allowed. The matter is referred to the Environment Court for reconsideration in accordance with the directions at [148]. The cross-appeal by Mr Sullivan is dismissed.

[167] If agreement cannot be reached as to costs counsel should file and serve memoranda so that that issue can be determined by the Court.

Solicitors:
Bell Gully, Wellington, for Appellant
Macalister Todd Phillips, Queenstown for Central Otago District Council
Ross Dowling Marquet Griffin, Dunedin, for Otago Regional Council, Laurenson Family Trust and Manson and Riverview Settlement Trust
Atkins Holm Joseph Majurey, Auckland, for Maniototo Environmental Society Inc, Central Otago Environmental Society and Upland Landscape Protection Society Inc

ATTACHMENT 3

High Court decision in *Meridian Energy*

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-234
CIV-2018-404-236
[2021] NZHC 390

IN THE MATTER	Of an appeal under s 149V of the Resource Management Act 1991 (RMA)
AND IN THE MATTER	Of the East West Link Proposal
BETWEEN	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Appellant
	NGĀTI WHĀTUA ŌRĀKEI WHAI MAIA LTD Appellant
AND	NEW ZEALAND TRANSPORT AGENCY Respondent
	CONTINUED OVERLEAF

Hearing: 15 – 18 June 2020

Appearances: S Gepp and P Anderson for Royal Forest and Bird Protection Society of New Zealand Incorporated
R Enright for Ngāti Whātua Ōrākei Whai Maia Ltd and Te Kawerau Iwi Tribunal
P H Mulligan, V S Evitt and J W E Parker for the New Zealand Transport Authority
G C Lanning and O M C Zambuto for Auckland Council
K Ketu for Ngāti Maru Runanga Trust, Te Ākitai Waiohu Waka Trust and Ngāti Tamaoho Trust

Judgment: 5 March 2021

JUDGMENT OF POWELL J

AND	AUCKLAND COUNCIL
	NGĀTI MARU RUNANGA
	TE ĀKITAI WAIOHUA WAKA TAUA INCORPORATED
	TE KAWERAU IWI TRIBAL AUTHORITY
	NGĀI TAI KI TĀMAKI TRUST
	NGĀTI TAMAOHO TRUST
	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED
	NGĀTI WHĀTUA ORĀKEI WHAIA MAIA LIMITED
	Section 301 parties

This judgment was delivered by me on 5 March 2021 at 4 pm pursuant to R 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

[1] The East West Link is a proposal from the New Zealand Transport Agency ("NZTA") for the construction, operation, and maintenance of a new four-lane arterial road and associated works to connect State Highway 20 in Onehunga with State Highway 1 in Penrose/Mt Wellington ("the proposed EWL").[1]

[2] The proposed EWL is intended to run from Māngere Bridge in the west, along the northern shore of the Manukau harbour (through an area known as the Māngere Inlet), before altering course in a north easterly direction to meet up with State Highway 1 and the existing Auckland motorway network at Penrose. The design of the road also incorporates stormwater treatment for an adjacent 611 hectares of developed urban catchment in the Onehunga-Penrose area, as well as leachate management from adjacent landfills.[2]

[3] To achieve this outcome the following works are required:[3]

(a) A new four-lane arterial road between the existing SH20 Neilson Street Interchange in Onehunga and SH1 at Mt Wellington; and connection of the new arterial road to SH1 via two new ramps south of Mt Wellington Interchange;

(b) The widening of SH1 and an upgrade of the Princes Street Interchange;

(c) Reconfiguration of the Neilson Street Interchange and surrounding roads including a trench on the southern side of the Interchange, with a local bridge connecting Onehunga Harbour Road to Onehunga Wharf;

(d) New commuter and recreational cycle paths along the EWL connecting into the local Onehunga, Penrose and Sylvia Park communities; and a new pedestrian and cycle connection across Ōtāhuhu Creek;

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1 *Final Report and Decision of the Board of Inquiry into the East West Link Proposal* (21 December 2017) ("Board Decision") at [5].
2 Board Decision at [9].
3 Board Decision at [6].

(e) New local road connections to and from the EWL Main Alignment; and local road improvements including extensions to Galway Street, Captain Springs Road and Hugo Johnston Drive;

(f) A new grade-separated intersection at Great South Road / Sylvia Park Road;

(g) Reclamation of a total of 18.3 hectares within the Coastal Marine Area along the northern foreshore of Māngere Inlet to construct parts of the EWL Main Alignment, and to construct stormwater treatment areas, headlands to form a naturalised coastal edge, and recreational space.

[4] Although the northern shore of the Manukau has already been heavily modified both the Māngere inlet and the adjacent land subject to the proposed EWL nonetheless remain ecologically significant, particularly as a habitat for sea birds, and are recognised as such in the Auckland Unitary Plan ("AUP") by way of overlay classifications.[4] As a result, and given the extensive reclamation required by the proposal, from the outset the proposed EWL has been controversial.

[5] As the Ministers for the Environment and Conservation noted, the proposed EWL:[5]

> (a) Involves significant use of natural and physical resources (including approximately 18.3 hectares of reclamation of the Māngere Inlet), to construct much of the proposed four-lane arterial road linking State Highways 1 and 20.
>
> (b) Is likely to result in and contribute to irreversible changes to the environment, in particular the loss of bird feeding areas in the Māngere Inlet; changes to coastal processes by re-contouring, and addressing legacy groundwater contamination issues by effectively 'bunding' the northern shoreline of the Māngere Inlet.
>
> (c) Includes relocating regionally and nationally important infrastructure, including electricity, gas, and crossing over bulk water supply.
>
> (d) Has, and is likely to continue to, aroused widespread public concern or interest regarding actual or likely effects on the environment.

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4 See [16] below.
5 Board Decision at [43].

(e) Relates to an area that may be of national interest to Māori and a number of sites in and around the proposal area are classified as outstanding natural features within the Auckland Unitary Plan.

(f) Would assist the Crown in fulfilling its public health, welfare, security and safety obligations or functions.

(g) Relates to a network utility operation (the State Highway network) that when viewed in its wider geographic context extends to more than one district or region.

[6] The Ministers established a board of inquiry ("the Board") to consider the proposal pursuant to s 149J of the Resource Management Act 1991 ("the RMA"), and in particular to determine the 24 applications for resource consent[6] together with the two notices of requirement ("NoR")[7] necessary for the project to proceed.

[7] The proposed EWL was formally notified in February 2017. Some 685 submissions were received of which 582 (85 per cent) opposed the proposal either in full or in part, with 94 in support and nine neutral.[8] The Board commenced substantive hearings in June 2017. After some 49 sitting days the hearings concluded in September 2017, with the Board issuing its Final Report and Decision on 21 December 2017 ("Board Decision").

[8] In broad terms the Board approved the resource consent applications and NoR sought by the NZTA, thereby enabling the proposed EWL to proceed. Overall, the Board concluded:

(a) While the proposed EWL was not able to comply with a number of specific policies and its effects on the environment were clearly more than minor,

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6 One land use consent for activities on new land created by the proposed reclamations under s 89 of the RMA; seven land use consents relating to works on contaminated soils, earthworks, vegetation alteration and removal, new network infrastructure and construction of new impervious surfaces for roads; one further land use consent for the operation of a temporary concrete batching plant during the construction of the proposed East West Link; four coastal permits for the road construction activities plus related construction activities including reclamations, deposition of material in the coastal marine area ("CMA"), disposal of waste and other matter in the CMA and temporary and permanent occupation of the CMA by structures; six water permits for works in water courses and associated drainage and diversion activities and five discharge permits for discharge of contaminants into air or on to land or water, both during construction and subsequently: Board Decision at [31].

7 One NoR was for the construction, operation and maintenance of a state Highway, while the other altered the present designation as it relates to State Highway 1: Board Decision at [30].

8 Board Decision at [57].

the proposal was not contrary to the objectives and policies of the AUP, and therefore met the threshold for non-complying activities set out in s 104D(1)(b) of the RMA.

(b) Assessing the merits of the proposal pursuant to ss 104 (in relation to the resource consent applications) and 171 (with regard to the NoR) of the RMA, the Board concluded that while the proposed EWL would create adverse effects both during construction and in operation, these could be avoided, remedied or mitigated.[9] As a result, the Board unanimously concluded that the NoR should be confirmed and the various consent applications granted with the exception of the coastal permit for dredging, which was granted in part.[10]

[9] The Royal Forest and Bird Protection Society of New Zealand Incorporated ("Forest and Bird") and Ngāti Whātua Ōrākei Whai Maia Limited ("Ngāti Whātua") have both, with the support of Te Kawerau Iwi Tribal Authority ("Te Kawerau"), appealed the Board Decision pursuant to s 149V of the RMA. This section does not permit any general right of appeal against the Board's decision but limits the right of appeal to questions of law.[11] Two questions of law are the subjects of this judgment:

(a) Forest and Bird argues that the Board had no jurisdiction to consider the merits of the proposed EWL because the particular policies it could not comply with meant it was contrary to the objectives and policies of the AUP and therefore did not meet the threshold test in s 104D(1)(b) of the RMA.

(b) In the alternative, and if Forest and Bird was unsuccessful in its primary argument it, along with Ngāti Whātua and Te Kawerau, argue that the Board, in any event, failed to have regard/particular regard to the New Zealand Coastal Policy Statement ("NZCPS") as required by ss 104 and

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9 Board Decision at [1391].
10 At [1398].
11 Resource Management Act 1991, s 149V(1).

171 of the RMA when it considered the resource consent applications and NoR.

[10] There is no dispute as to the approach to be taken on these appeals. As helpfully summarised by Mr Mulligan on behalf of the NZTA:

(a) The High Court will interfere with the Board's decision only if it is satisfied that the Board committed one (or more) of the following errors of law (identified by the full High Court bench in *Countdown Properties (Northlands) Ltd v Dunedin City Council*):[12]

(i) applied a wrong legal test; or

(ii) came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or

(iii) took into account matters which it should not have taken into account; or

(iv) failed to take into account matters which it should have taken into account.

(b) The weight to be afforded to relevant considerations is a question for the Board and is not a matter available for reconsideration by the High Court as a question of law;[13]

(c) The High Court will not engage in a re-examination of the merits of the case under the guise of a question of law;[14] and

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12 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153. There are multiple cases referring to these principles including, for example, the Supreme Court in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [50] – [55] and *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24] – [28].

13 *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC) at 438, noting that the High Court was referring to a decision of the Environment Court.

14 This principle has been noted in a number of cases. Examples include *Sean Investments Pty Ltd v Mackellar* (1981) 38 ALR 363; *Murphy v Takapuna County Council* HC Auckland M456/88; 7 August 1989 and *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [28].

(d) The High Court will not grant relief where there has been an error of law unless it has been established that the error materially affected the result of the Decision.[15]

The s 104D issue

[11] As noted, the primary issue raised by Forest and Bird is that the Board erred in reaching the conclusion that the proposed EWL was not contrary to the objectives and policies of the AUP for the purposes of s 104D(1)(b) of the RMA.

[12] There is no dispute that the proposal was appropriately categorised as a non-complying activity under the RMA.[16] As such, and because it was accepted by all parties that the environmental effects of the proposed EWL would be more than minor, before the Board could consider the merits of the proposed EWL it had to be satisfied in terms of s 104D that the EWL was not contrary to the objectives and policies of the relevant plan, in this case the AUP.[17]

[13] Therefore, it was only if the Board was satisfied that the proposal met the s 104D(1) threshold that it was then required to consider the merits of the proposal in terms of:

(a) section 104 of the RMA (in relation to the resource consents); and

(b) section 171 of the RMA (in considering the NoR).

[14] The Board's overall approach to the analysis required by s 104D(1)(b) was set out in the following terms:[18]

> [T]he Board focuses its initial s 104D(1)(b) assessment on the provisions most relevant to the non-complying coastal activities, … They comprise

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15 *Countdown* at 153, citing *Royal Forest and Bird Protection Society Inc v WA Habgood Ltd* (1987) 12 NZTPA 76 (HC) at 81-82. See also *BP Oil NZ Ltd v Waitakere City Council* [1996] NZRMA 67 (HC) at [69].

16 Board Decision at [32].

17 Resource Management Act 1991, s 104D(1)(b). It is noted that at the time the Board considered the proposed EWL there were parts of the then Auckland Regional Plan: Coastal remaining operative. The Board placed limited weight on these provisions in its analysis and the AUP is now for the purposes of the appeal, fully operative.

18 Board Decision at [618].

> infringements under Chapter F2 of the [AUP] associated with the formation of reclamations and structures within the SEA-M1 and SEA-M2, ONFs and Historic Heritage Extent of Place overlays within the Māngere Inlet, including associated vegetation removal, damming or impounding water, and other construction activities. The Board considers that that approach will provide the most conservative assessment, minimising the risk of artificially weighting any conclusion with supportive provisions in favour of the Proposal.
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> (citations omitted)

[15] Chapter F2 of the AUP referred to by the Board is the Coastal – General Coastal Marine Zone of the AUP ("General Coastal Marine Zone"). The initial focus of the Board was on F2.2 of that chapter, headed "Drainage, reclamation and declamation", which sets out the policies for drainage, reclamation and declamation activities within the General Coastal Marine Zone. With the exception of F2.2.3(2), the Board concluded that the policies were consistent with the proposed EWL, achieved or were otherwise not relevant.[19] With regard to F2.2.3(2), the Board noted that this policy required "consideration of the overlay policies that are relevant to the area of the proposed reclamation".[20] It therefore proceeded to analyse what it described as the relevant provisions of chapters D9 (Significant Ecological Areas Overlay), D10 (Outstanding Natural Features Overlay and Outstanding Natural Landscapes Overlay) and D17 (Historic Heritage Overlay), of which only D9 is relevant for the purposes of the present appeal.

[16] Specifically, chapter D9 sets out the objectives and policies for the Significant Ecological Areas Overlay. The different types of significant ecological area ("SEA") are defined in D9.1, being those applying on land (SEA-T), the "T" denoting terrestrial,[21] and those located in the coastal marine area (SEA-M).[22] The SEA-M are further sub-divided into M1 (being the SEA that are most vulnerable) and M2 (where the habitat is more robust). A "W" after the M1 and M2 signifies that the habitats are important to wading birds. Within the area directly affected by the proposed EWL are

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19 At [620], [628] and [630]-[641].
20 At [629].
21 D9.1.1.
22 D9.1.2.

areas of SEA-T,[23] SEA-M1[24] and SEA-M2,[25] all specifically identified in the schedules to the AUP.

[17] Working its way through the D9 policies, the Board commenced its analysis by considering D9.3(1)(a), which directs avoidance of adverse effects on indigenous biodiversity in the coastal environment to the extent stated in policies D9.3(9) and (10).[26] It then turned its attention to D9.3(9) and (10). It noted actual or potential inconsistencies between the proposed EWL and policies D9.3(9)(a)(ii), (iii) and (iv)[27] and D9.3(9)(b) and (c),[28] before concluding that the proposed EWL was "consistent in part, and not contrary to Policy D9.3(10)."[29]

[18] Overall, with regard to the D9 policies the Board noted:[30]

> Careful consideration has been given to all other relevant coastal policies of Chapter F2 (and the extent that it engages the biodiversity provisions in D9) of the [AUP]. On the basis of the Board's finding that there is no "practicable alternative" to the proposed alignment, and that the [proposed EWL] will not result in significant adverse effects on populations or ecosystems, the Board finds that the [proposed EWL] is not contrary to those other provisions. Nor is the [proposed EWL] contrary to the broadly worded objectives F2.2.2(1), (2) and (3).

[19] The Board then briefly analysed the remaining policies in the General Coastal Marine Zone contained in chapter F2 that it considered relevant to the proposed EWL, in particular:

(a) F 2.3 (Depositing and Disposal of Material);[31]

(b) F 2.4 (Dredging);[32]

(c) F 2.5 (Disturbance of the Foreshore and Seabed);[33]

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23 See AUP, Schedule 3.
24 Schedule 4
25 Schedule 4.
26 Board Decision at [643].
27 At [647].
28 At [645]-[646].
29 At [649].
30 At [654].
31 At [655].
32 At [656].
33 At [657].

(d) F 2.7 (Mangrove removal);[34]

(e) F 2.10 (Damming and impounding water);[35]

(f) F 2.11 (Discharges);[36]

(g) F 2.14 (Structures, public amenities, artwork and associated use and occupation);[37]

[20] From there, the Board set out its overall approach to and conclusions in relation to the s 104D issue:[38]

> The Board is persuaded by Mr Mulligan's submission that the approach taken by the Environment Court in *Akaroa Civic Trust v Christchurch City Council* is appropriate to adopt. Further discussion about the relevance and force of *Akaroa* is contained in chapter 12.5 of this Report. In some consent applications a provision may be so central to a proposal that it sways the s104D decision, but generally the s104D assessment will be made across the objectives and policies of the plan as a whole and not determined by individual provisions. The Board finds that the latter applies in this case, notwithstanding that there are indeed some inconsistencies between the NZTA Proposal and relevant objectives and policies, particularly in the areas of reclamation and biodiversity. In doing so, the Board has given measured weight to the word "avoid", which is clearly not a direction to be ignored.
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> On balance, the Board finds that the Proposal is not contrary to the objectives and policies of the [AUP] when considered as a whole. Its consideration has given particular focus to the provisions most directly relevant to the activities with non-complying status but has also recognised the broader planning assessments of Ms Rickard and Mr Gouge. The Board is left in no doubt that its conclusion would be strengthened if it were to look in detail at every relevant objective and policy (of which there are many), rather than those provisions of most relevance, as it has done.
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> While the Proposal is concluded to be contrary to a small number of policies or subclauses of policies, the Board does not consider those individually or cumulatively as reason to conclude that the[EWL] is repugnant to the policy direction of the [AUP] with respect to the resource consents sought. The Board's conclusion is that where the [EWL] infringes policies, neither individually nor cumulatively do those infringements tilt the balance for s 104D purposes against the Proposal as a whole.
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> (citations omitted)

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34 At [658].
35 At [658].
36 At [658].
37 At [658].
38 At [662]-[664].

The s 104D issue - the case for Forest and Bird

[21] Forest and Bird argues that the Board erred in concluding the proposed EWL was not contrary to the objectives and policies of the AUP in terms of s 104D(1)(b). Forest and Bird relies upon the mandatory nature of chapter D9, and in particular policies D9.3(9) and (10), which require avoidance of the type of adverse effects within the overlay zone the Board acknowledged that the proposed EWL would have if it was permitted to proceed. More broadly, Forest and Bird submitted that the Board:

(a) failed to consider the D9 objective;

(b) failed to consider policy D9.3(11);

(c) incorrectly interpreted Policy F2.2.3(2); and

(d) otherwise erred in its approach to s 104D(1)(b).

[22] Ms Gepp, as counsel for Forest and Bird, submitted that when the provisions of the AUP are properly reconciled in the manner required by the Supreme Court decision in *Environmental Defence Society Incorporated v New Zealand King Salmon Ltd* ("*King Salmon*"),[39] the overlay policies, including those set out in D9.3(9) and (10) in particular, trump not only the reclamation policies in F2.2 but all other objectives and policies in the AUP relevant to the proposed EWL. In Ms Gepp's submission, as the overlay policies were the result of a long and prescriptive planning process, any non-complying activity that was unable to avoid adverse effects in the significant ecological areas that were the subject of D9.3 was, by definition, contrary to the objectives and policies of the AUP and the merits of the proposed EWL could not therefore be considered. Put another way, in Forest and Bird's submission the D9 overlay policies, and D9.3(9) and (10) in particular, created "environmental bottom lines" which by their mandatory nature meant that the Board was not able to conclude other than that the proposed EWL was contrary to the objectives and policies of the AUP for the purposes of s 104D(1)(b). In Ms Gepp's submission, to conclude

[39] *Environmental Defence Society Incorporated v New Zealand King Salmon Limited* [2014] NZSC 38, [2014] 1 NZLR 593.

otherwise would convert those environmental bottom lines into no more than "meaningless platitudes".

[23] It followed that if Ms Gepp was correct in her interpretation of the relevant plan provisions, the Board had no choice but to conclude the proposed EWL did not meet the threshold for non-complying activities under s 104D(1)(b). As a result, this meant consent could not be granted for the proposed EWL notwithstanding no full evaluation of the proposal pursuant to ss 104 and 171 of the RMA had occurred.

The approach to the s 104D issue

[24] I begin my analysis by considering the approach the Board was required to take in considering whether the EWL was contrary to the objectives and policies of the AUP in terms of s 104D(1)(b). First, there is no dispute that to be "contrary" for the purposes of s 104D(1)(b) means that it must be "…opposed in nature, different to or opposite … repugnant and antagonistic" in terms of *New Zealand Rail v Marlborough District Council*.[40]

[25] As to what must be considered, as both Mr Mulligan for the NZTA and Mr Lanning for the Auckland Council have pointed out, the principles were discussed at length in two related decisions of the Court of Appeal: *Arrigato Investments Ltd v Auckland Regional Council*[41] and *Dye v Auckland Regional Council*.[42] In *Dye*, the Court discussed the appropriate approach to be taken in relation to the precursor to s 104D(1)(b):[43]

> In summary, the Environment Court was fully mindful of the basic thrust of the relevant objectives and policies which was to confine rural residential activities to the designated areas. The Court considered that the objectives and policies allowed for the possibility, albeit limited, that such activities might nevertheless appropriately be allowed to occur outside the designated areas and in the general rural part of the district. Whether a particular application which would necessarily be for a non-complying activity was appropriate, would obviously depend on its particular combination of circumstances. It is implicit in its approach that the Environment Court did not see the relevant objectives and policies as precluding altogether developments not falling within a designated area. The objectives and policies themselves recognised that some wider

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40 *New Zealand Rail v Marlborough District Council* [1994] NZRMA 70 (HC) at [11].
41 *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA).
42 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA).
43 At [25].

> development might be appropriate. If the Court found a particular proposal to be appropriate, it could not be said to be contrary to the objectives and policies on the basis that it was outside the particular controls which were designed to implement them. We are unable to conclude that in approaching the matter in that way the Environment Court misunderstood or misinterpreted the objectives and policies. **The view which the Court took was open to it on a fair appraisal of the objectives and policies read as a whole and, in reaching its view, the Court committed no error of law**.
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> (emphasis added)

[26] Although this approach has been applied in numerous subsequent cases,[44] as Ms Gepp noted, the Supreme Court in *King Salmon* recently warned against what it described as the "danger of the 'overall judgment' approach". The Court observed in particular "that decision makers may conclude too readily that there is a conflict between particular policies and prefer one over another, rather than making a thorough going attempt to find a way to reconcile them".[45]

[27] As however both NZTA and Auckland Council submitted in the present case, the Supreme Court's observations were made in the context of a plan change, and there is no suggestion that the Court was intending to change the overall approach set out in *Dye,* but rather to ensure that the analysis undertaken was thorough.

[28] This was in fact the conclusion reached by the Court of Appeal in *R J Davidson Family Trust v Marlborough District Council*, a decision post-dating *King Salmon.*[46] In that case, the Court noted the particular context of the Supreme Court's decision in *King Salmon*.[47] It confirmed that when a consent authority is required to assess the merits of an application against the relevant objectives and policies in a plan:[48]

> What is required is what Tipping J referred to [in *Dye*] as "a fair appraisal of the objectives and policies read as a whole".

[29] Having considered the relevant authorities, I agree with Mr Lanning's submission on behalf of the Auckland Council that it is difficult to see that there is in

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44 See for example *Auckland Council v Auckland Council* [2020] NZEnvC 70 and *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196; (2019) 21 ELRNZ 539.

45 *King Salmon* at [131].

46 *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.

47 At [66].

48 At [73].

fact any substantive difference in approach required as a result of the *King Salmon* decision, or more broadly between the approach identified in *Dye* and that contended for by Ms Gepp. As Mr Lanning noted in his submissions:

> It is not clear what the difference is between an analysis that 'considers' and 'reconciles' relevant plan provisions; and the 'holistic' or 'thrust' approach. The latter approach requires the relevant plan provisions to be considered and reconciled, to the extent possible, where those provisions pull in different directions.

[30] It follows that in order to reach a conclusion as to whether the proposed EWL is not contrary (in the sense of not being repugnant) to the objectives and policies of the AUP for the purposes of s 104D(1)(b) of the RMA, the relevant plan provisions must all be considered comprehensively and, where possible, appropriately reconciled. This is necessary in order to ascertain whether the conclusion reached by the Board was open to it, or whether, as Mr Gepp submitted, there was in fact no other conclusion available to the Board than to find the proposed EWL was contrary to the objectives and policies of the AUP.

Chapter D9

[31] As noted, the critical part of the AUP from the perspective of Forest and Bird is chapter D9. I begin with the objectives set out in D9.2, which as Ms Gepp noted was not mentioned by the Board in its analysis. D9.2(1) sets the following objective:[49]

> Areas of significant indigenous biodiversity value in terrestrial, freshwater, and coastal marine areas are protected from the adverse effects of subdivision, use and development.

[32] The principal policy for giving effect to this objective is D9.3(1)(a) which requires the effects of activities on the SEA to be managed by:

> Avoiding adverse effects on indigenous biodiversity in the coastal environment to the extent stated in Policies D9.3(9) and (10) …

[33] D9.3(9) and (10) in turn state:

> (9) Avoid activities in the coastal environment where they will result in any of the following:

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[49] D9.2(1).

(a) non-transitory or more than minor adverse effects on:

(i) threatened or at risk indigenous species (including Maui's Dolphin and Bryde's Whale);

(ii) the habitats of indigenous species that are at the limit of their natural range or which are naturally rare;

(iii) threatened or rare indigenous ecosystems and vegetation types, including naturally rare ecosystems and vegetation types;

(iv) areas containing nationally significant examples of indigenous ecosystems or indigenous community types; or

(v) areas set aside for full or partial protection of indigenous biodiversity under other legislation, including the West Coast North Island Marine Mammal Sanctuary.

(b) any regular or sustained disturbance of migratory bird roosting, nesting and feeding areas that is likely to noticeably reduce the level of use of an area for these purposes; or

(c) the deposition of material at levels which would adversely affect the natural ecological functioning of the area.

(10) Avoid (while giving effect to Policy D9.3(9) above) activities in the coastal environment which result in significant adverse effects, and avoid, remedy or mitigate other adverse effects of activities, on:

(a) areas of predominantly indigenous vegetation;

(b) habitats that are important during the vulnerable life stages of indigenous species;

(c) indigenous ecosystems and habitats that are found only in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;

(d) habitats of indigenous species that are important for recreational, commercial, traditional or cultural purposes including fish spawning, pupping and nursery areas;

(e) habitats, including areas and routes, important to migratory species;

(f) ecological corridors, and areas important for linking or maintaining biological values; or

(g) water quality such that the natural ecological functioning of the area is adversely affected.

[34] It is the injunction to avoid the specific types of adverse effects identified in D9.3(9) that lies at the heart of the case for Forest and Bird. The types of adverse effects contemplated in D9.3(1) and D9.3(9) and (10) are detailed in D9.3(2) and make it clear that those effects are extraordinarily broad.[50] Likewise, there can be no doubt that a requirement to avoid is intended to stop something from happening.[51]

[35] Moreover, in this case, the Board concluded that the proposed EWL was actually or potentially inconsistent with:

(a) D9.3(9)(a)(ii) - the Board finding that the proposed EWL would have "non-transitory and more than minor effects on areas of habitat utilised by some rare species".[52]

(b) D9.3(9)(a)(iii) and (iv) - the Board found the "placement of the road across Anns Creek is not consistent with the policy directive".[53]

(c) D9.3(9)(b) - The Board found "displacement of the birds from areas directly affected by the reclamations will be permanent, … and ongoing disturbance may result from people utilising the proposed coastal walkways, which will extend further into the inlet than the current walkway. Thus, the [proposed EWL] can be considered inconsistent with D9.3(9)(b)".[54]

(d) D9.3(9)(c) - The proposed EWL "will result in deposition of material at levels that would adversely affect the natural ecological functioning of the area of deposition".[55]

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50 Adverse effects include (but are not limited to) fragmentation of, or reduction in the size and extent of, indigenous ecosystems and the habitats of indigenous species; loss of ecosystem services; downstream effects on wetlands, rivers, streams and lakes from hydrological changes further up the catchment; the destruction of, or significant reduction in, educational, scientific, amenity, historical, cultural, landscape, or natural character values; and reduction in the historical, cultural, and spiritual association held by Mana Whenua or the wider community.

51 *King Salmon* at [96] and [126].

52 Board Decision at [645].

53 Although the Board subsequently noted that "the efforts made to avoid the relevant effects to the greatest practicable [sic] suggest that the [proposed EWL] is not contrary to those policies": Board Decision at [646].

54 At [647].

55 At [648].

[36] In addition to these identified inconsistencies, I also accept the submissions of both Forest and Bird and the Auckland Council that the Board erred in concluding it was "contestable whether the [proposed EWL] will have non-transitory or more than minor adverse effects or threatened at risk species" for the purposes of D9.3(9)(a)(i).[56]

[37] The Board based its conclusion on evidence that the proposed EWL "would not adversely affect the populations of those species and that the shorebirds would opportunistically feed elsewhere on the Māngere Inlet, Manukau harbour or Tāmaki River".[57] However as Mr Lanning pointed out, such a finding cannot be sustained in light of the Board's findings elsewhere in its report that "there will be permanent loss of feeding and roosting areas for shore birds, including threatened and at-risk species. Such effects must be considered significant."[58] Given D9.3(9) does not impose a significant threshold before activities are required to be avoided, but simply requires the identification of non-transitory or more than minor adverse effects, it follows that the Board should have also concluded that the proposed EWL could not avoid such effects on threatened or at risk species in terms of D9.3(9)(a)(i), as well as the other parts of D9.3(9) identified in its decision.

[38] Although the Board appeared to have limited its detailed consideration to D9.3(1), (9) and (10), it is clear that other policies in D9.3 reinforce the wording contained in those policies. For example, although D9.3(3)-(5) provide for the enhancement or enabling of activities, the wording of those policies does not permit derogation from the direction to avoid the activities identified in D9.3(9) and (10).

[39] On the contrary, the thrust of the remaining provisions in D9.3 is either to avoid a range of specific activities entirely or to provide specific guidance on particular issues while applying D9.3(9) and (10). Relevant provisions include:

(a) avoiding removal of vegetation and loss of biodiversity in the course of construction activities (D9.3(6));

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56 At [645].
57 At [645].
58 At [471].

(b) avoiding subdivision use and development where it results in permanent use and occupation (D9.3(11));

(c) taking into account additional matters and managing adverse effects of use and development on the values of SEA-M (D9.3(12));

(d) avoiding structures in SEA-M1 (except where a structure is necessary for particular purposes) (D9.3(13)); and

(e) additional policies to avoid the extension to or alteration of any existing lawful structures in SEA-M1 unless particular matters can be demonstrated (D9.3(14)).

[40] Of particular note is D9.3(11), to which the Board also did not refer. This adds a further level to the protections contained in D9.3(9) and (10), stating:

> In addition to Policies D9.3(9) and (10), avoid subdivision, use and development in the coastal environment where it will result in any of the following:
>
> (a) the permanent use or occupation of the foreshore and seabed to the extent that the values, function or processes associated with any Significant Ecological Area – Marine is significantly reduced;
>
> (b) any change to physical processes that would destroy, modify, or damage any natural feature or values identified for a Significant Ecological Area – Marine in more than a minor way; or
>
> (c) fragmentation of the values of a Significant Ecological Area – Marine to the extent that its physical integrity is lost.

[41] As Ms Gepp submitted, there is nothing within chapter D9 that remotely contemplates a project on the scale of the proposed EWL within an overlay area. Indeed the only mention of providing for infrastructure in chapter D9 is contained in policy D9.3(8), which provides:

> Manage the adverse effects from the use, maintenance, upgrade and development of infrastructure in accordance with the policies above, recognising that it is not always practicable to locate and design infrastructure to avoid significant ecological areas.

[42] Although D9.3(8) recognises that infrastructure may not be able to avoid SEA and is situated before D9.3(9) and (10), the reference to "managing in accordance with the policies above" clearly incorporates D9.3(9) and (10) through D9.3(1)(a). As a result, nothing in D9.3(8) can be relied upon to authorise infrastructure where adverse effects will occur of the type prescribed in D9.3(9) and (10).

[43] The fact that the Board failed to consider the relevant objectives (D9.2), and a number of other relevant policies noted above, does not however give rise to an error for the purposes of the appeal. The ultimate issue is not whether the proposed EWL was inconsistent with any particular objective or policy but whether it was contrary to the objectives and policies of the AUP. The Board's conclusion the proposed EWL was unable to comply with the various specific D9 policies noted above could be argued to provide a sufficient basis to conclude that the proposed EWL is contrary to the objectives and policies of the AUP. This can however be so only in the event that I accept Ms Gepp's submission that D9 is in effect paramount to the other relevant parts of the AUP for the purposes of the proposed EWL, such that it makes the proposed EWL repugnant to the objectives and policies of the AUP. As the Board noted, simply because the proposed EWL is inconsistent with discrete parts of the AUP, including D9, does not necessarily mean that it is contrary to the objectives and policies of the AUP for the purposes of s 104D(1)(b) of the RMA. Whether the fact that the proposed EWL is inconsistent with chapter D9 means that the proposed EWL is by definition contrary to the objectives and policies of the AUP can only be finally determined after all relevant provisions have been properly reconciled in the manner discussed above.

Relationship of D9 with other chapters

[44] I therefore turn to consider the relationship between D9 and the following chapters of the AUP which the parties identified in argument as the relevant chapters of the AUP in this case:

(a) Chapter F2 - General Coastal Marine Zone

(b) Chapter E15 - Vegetation management and biodiversity

(c) Chapter A - Introduction

(d) Chapter E26 - Infrastructure

[45] I begin with chapter F2, given it was through consideration of the relevant provisions of the General Coastal Marine Zone that the Board turned its attention to chapter D9.[59] As noted above, the detailed analysis undertaken by the Board for the purposes of s 104D(1)(b) was largely limited to an analysis of the Drainage, reclamation and declamation section of F2,[60] and the connection between those policies and the overlay policies contained in D9.3.

[46] The Board's focus on the Drainage, reclamation and declamation section of F2 (F2.2) was not just because of the scale of the reclamation contemplated by the proposed EWL but because of the specific requirements in F2.2.3(2) to "consider the relevant provisions of chapter D9" when reclamation or drainage is proposed where it affects an overlay.[61] This provision had been inserted into the AUP by way of a consent decision of this Court[62] after Forest and Bird raised concerns that the NZCPS had not appropriately been given effect in the AUP as it was then drafted. In inserting F2.2.3(2), the Court does not appear to have been made aware of the broader provisions contained in F2.1. In defining the area subject to the objectives, policies and rules in the General Coastal Marine Zone, F2.1 specified:

> If an overlay applies to the area where an activity is proposed, the provisions of the overlay will also apply, including any overlay rule that applies to the activity.

[47] It is thus clear that the Board overlooked that the D9 overlay provisions applied not only to the Drainage, reclamation and declamation section of the General Coastal Marine Zone , but also to all of the other sections identified by the Board as being relevant to the proposed EWL, and specifically:

(a) F2.3 (Depositing and Disposal of Material);[63]

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59 Board Decision at [620]-[642].
60 F2.2.
61 At [642].
62 *Royal Forest and Bird Protection Society Incorporated v Auckland Council* [2017] NZHC 980.
63 Board Decision at [655].

(b) F2.4 (Dredging);[64]

(c) F2.5 (Disturbance of the Foreshore and Seabed);[65]

(d) F2.7 (Mangrove removal);[66]

(e) F2.10 (Damming and impounding water);[67]

(f) F2.11 (Discharges); and[68]

(g) F2.14 (Structures, public amenities, artwork and associated use and occupation).[69]

[48] As a result the relevant provisions in chapter F2 are entirely subject to chapter D9 where there is a relevant overlay. Therefore, to the extent that the proposed EWL was contrary to D9 for the purposes of F2, it was equally contrary to the other relevant parts of F2 for the same reasons the Board had identified in relation to F2.2. There is accordingly nothing in chapter F2 that purports to authorise a project on the scale of the proposed EWL where that is contrary to the policies in chapter D9.

[49] There is equally nothing in chapter E15 – (Vegetation management and biodiversity) which diminishes the protections contained in chapter D9, and indeed did not form a specific part of the Board's s 104D analysis.[70] On the contrary, in the context of this case, chapter E15 is essentially complimentary to chapter D9. E15.1 provides:[71]

> The objectives and policies in this chapter apply to the management of terrestrial and coastal vegetation and biodiversity values outside of scheduled significant ecological areas.

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64 At [656].
65 At [657].
66 At [658].
67 At [658].
68 At [658].
69 At [658].
70 The Board does mention E15 at [210] and [704]-[705] but outside the s 104D analysis. At footnote 85 the Board noted that the biodiversity policies in D9 and E15 are essentially worded the same.
71 It is noted E15.1 also provides that the rules for SEA-T (not relevant to the s 104D analysis) are contained within chapter E15.

[50] The objectives set out in E15.2 apply slightly less prescriptively than the equivalent objectives in D9 (D9.2(1)) but nevertheless provide for a high level of protection. Objective E15.2(1) states:

> Ecosystem services and indigenous biological diversity values, particularly in sensitive environments, and areas of contiguous indigenous vegetation cover, are maintained or enhanced while providing for appropriate subdivision, use and development.

[51] The policies set out in E15.3 likewise appear to provide for alternatives other than outright avoidance, as E15.3(1)-(4) details:

> (1) Protect areas of contiguous indigenous vegetation cover and vegetation in sensitive environments including the coastal environment, riparian margins, wetlands, and areas prone to natural hazards.
>
> (2) Manage the effects of activities to avoid significant adverse effects on biodiversity values as far as practicable, minimise significant adverse effects where avoidance is not practicable, and avoid, remedy or mitigate any other adverse effects on indigenous biological diversity and ecosystem services, including soil conservation, water quality and quantity management, and the mitigation of natural hazards.
>
> (3) Encourage the offsetting of any significant residual adverse effects on indigenous vegetation and biodiversity values that cannot be avoided, remedied or mitigated, through protection, restoration and enhancement measures, having regard to Policy E15.3(4) below and Appendix 8 Biodiversity offsetting.
>
> (4) Protect, restore, and enhance biodiversity when undertaking new use and development through any of the following:
>
> (a) using transferable rural site subdivision to protect areas in Schedule 3 Significant Ecological Areas -Terrestrial Schedule;
>
> (b) requiring legal protection, ecological restoration and active management techniques in areas set aside for the purposes of mitigating or offsetting adverse effects on indigenous biodiversity; or
>
> (c) linking biodiversity outcomes to other aspects of the development such as the provision of infrastructure and open space.

[52] At the same time, E15.3(7) requires the development of infrastructure to be carried out in accordance with the policies in E15.3, "recognising that it is not always practicable to locate or design infrastructure to avoid areas with indigenous biodiversity value".

[53] Within the coastal environment, the prescriptive language used in D9.3(9) and (10) is essentially replicated in E15(9) and (10), which provide:

> (9) Avoid activities in the coastal environment where they will result in any of the following:
>
> (a) non-transitory or more than minor adverse effects on:
>
> (i) threatened or at risk indigenous species (including Maui's Dolphin and Bryde's Whale);
>
> (ii) the habitats of indigenous species that are at the limit of their natural range or which are naturally rare;
>
> (iii) threatened or rare indigenous ecosystems and vegetation types, including naturally rare ecosystems and vegetation types;
>
> (iv) areas containing nationally significant examples of indigenous ecosystems or indigenous community types; or
>
> (v) areas set aside for full or partial protection of indigenous biodiversity under other legislation, including the West Coast North Island Marine Mammal Sanctuary.
>
> (b) any regular or sustained disturbance of migratory bird roosting, nesting and feeding areas that is likely to noticeably reduce the level of use of an area for these purposes;
>
> (c) the deposition of material at levels which would adversely affect the natural ecological functioning of the area; or
>
> (d) fragmentation of the values of the area to the extent that its physical integrity is lost.
>
> (10) Avoid (while giving effect to Policy E15(9) above) activities in the coastal environment which result in significant adverse effects, and avoid, remedy or mitigate other adverse effects of activities, on:
>
> (a) areas of predominantly indigenous vegetation;
>
> (b) habitats that are important during the vulnerable life stages of indigenous species;
>
> (c) indigenous ecosystems and habitats that are found only in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;
>
> (d) habitats of indigenous species that are important for recreational, commercial, traditional or cultural purposes including fish spawning, pupping and nursery areas;

(e) habitats, including areas and routes, important to migratory species;

(f) ecological corridors, and areas important for linking or maintaining biological values; or

(g) water quality such that the natural ecological functioning of the area is adversely affected.

[54] Despite the apparent clarity of the relevant provisions of chapters D9, F2 and E15 those chapters must still however be read in their wider context. That context is provided by Chapter A (Introduction), and Chapter E26 (Infrastructure), and is of particular importance in this case.

[55] Chapter A is one of only three chapters that applies across the entire AUP and plays a significant role in reconciling the plan as a whole. Section A1.1 begins by setting out the statutory purposes of the AUP, before explaining the key roles of the plan of which the following are directly relevant in the present case:[72]

(1) it describes how the people and communities of the Auckland region will manage Auckland's natural and physical resources while enabling growth and development and protecting the things people and communities value;

(2) it provides the regulatory framework to help make Auckland a quality place to live, attractive to people and businesses and a place where environmental standards are respected and upheld;

[56] As Mr Mulligan and Mr Lanning both submitted, a tension is immediately obvious in the identified roles; in particular, the requirement to provide for growth, development **and** protection.

[57] Chapter A goes on to explain the structure of the plan in some detail and, in particular, the relationship between the different chapters. For example, because the AUP is a combined plan incorporating the coastal plan for the Auckland region:[73]

> Any provision of the [AUP] which applies to activities or natural or physical resources in the coastal marine area is a provision of the Auckland regional coastal plan.

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72 A1.
73 A1.5.

[58] Likewise, chapter A provides guidance with regard to the hierarchy between different elements of the plan, including in particular the relationship between the overlay provisions (as contained in chapter D9) and Auckland-wide provisions (for example, chapter E26 (Infrastructure)). The somewhat elastic nature of the relationship is explained as follows:[74]

> **A1.6.2. Overlays**
>
> Overlays manage the protection, maintenance or enhancement of particular values associated with an area or resource. Overlays can apply across zones and precincts and overlay boundaries do not follow zone or precinct boundaries. Overlays also manage specific planning issues such as addressing reverse sensitivity effects between different land uses.
>
> Overlays generally apply more restrictive rules than the Auckland-wide, zone or precinct provisions that apply to a site, but in some cases they can be more enabling. Overlay rules apply to all activities on the part of the site to which the overlay applies unless the overlay rule expressly states otherwise.
>
> …
>
> **A1.6.3. Auckland-wide provisions**
>
> Auckland-wide provisions apply to the use and development of natural and physical resources across Auckland regardless of the zone in which they occur.
>
> Auckland-wide provisions are located in Chapter E of the Plan and cover natural resources, Mana Whenua, the built environment, infrastructure, environmental risk, subdivision and temporary activity matters. Auckland-wide provisions generally apply more restrictive rules than the zone or precinct provisions that apply to a site, but in some cases they can be more enabling.
>
> …

[59] Finally, the chapter explains the differences between the type of activities provided for in the plan. Again, of particular relevance in the context of the present case, the explanation given for non-complying activities provides:[75]

> Resource consent is required for a non-complying activity. As threshold matters, the proposal must be assessed to determine whether its adverse effects on the environment will be no more than minor or whether it will not be contrary to the objectives and policies of the Plan. If the proposal is found not to breach one or other of those thresholds, then its merits may be considered on a broadly discretionary basis and consent may be granted (with or without conditions) or refused. If it is found to breach both thresholds, then consent must be refused.

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74 A1.6.2.
75 A1.7.5.

> Activities are classed as non-complying where greater scrutiny is required for some reason. This may include:
>
> - where they are not anticipated to occur; or
> - where they are likely to have significant adverse effects on the existing environment; or
> - where the existing environment is regarded as delicate or vulnerable; or
> - otherwise where they are considered less likely to be appropriate.

[60] It is within the context established by chapter A that chapter E26 is set. While it is clear that the proposed EWL cannot meet the standards prescribed by the policies in chapter D9 and, as a result, chapter F2, E26 takes a much broader view. It specifically envisages that it will sometimes be necessary to locate infrastructure within an overlay area, notwithstanding the apparently mandatory nature of the protections contained in chapter D9.

[61] E26 does this not by specifically overriding the protections contained in D9, but rather enabling a decision-maker, including the Board in this case, to consider whether particular infrastructure is required even where it would otherwise be unable to be accommodated by particular objectives and policies, including those in D9.

[62] Specifically, chapter E26 begins by noting in E26.1.1:

> Infrastructure is critical to the social, economic, and cultural well-being of people and communities and the quality of the environment. This section provides a framework for the development, operation, use, maintenance, repair, upgrading and removal of infrastructure.

[63] The same section of E26 makes it clear that a wide range of issues must be balanced before a decision on the appropriateness of infrastructure in any given location can be determined:

> As well as benefits infrastructure can have a range of adverse effects on the environment, visual amenity of an area, and public health and safety. The sensitivity of adjacent activities, particularly residential, to these effects can lead to complaints and ultimately constraints on the operation of infrastructure. Managing these reverse sensitivity effects is essential. Equally in some circumstances other activities and development need to be managed in a way that does not impede the operation of infrastructure.

[64] With this approach in mind, the objectives set out in E26.2.1 relevantly provide:

> (1) The benefits of infrastructure are recognised.
>
> (2) The value of investment in infrastructure is recognised.
>
> (3) Safe, efficient and secure infrastructure is enabled, to service the needs of existing and authorised proposed subdivision, use and development.
>
> (4) Development, operation, maintenance, repair, replacement, renewal, upgrading and removal of infrastructure is enabled.
>
> (5) The resilience of infrastructure is improved and continuity of service is enabled.
>
> …
>
> (9) The adverse effects of infrastructure are avoided, remedied or mitigated.

[65] The policies to give effect to these objectives are set out in E26.2.2. Far from precluding infrastructure in any particular area, including the General Coastal Marine Zone and/or overlay areas, the relevant policies instead envisage a detailed analysis be undertaken to determine whether particular infrastructure will be appropriate in any particular location so as to:

> (1) Recognise the social, economic, cultural and environmental benefits that infrastructure provides, including:
>
> (a) enabling enhancement of the quality of life and standard of living for people and communities;
>
> (b) providing for public health and safety;
>
> (c) enabling the functioning of businesses;
>
> (d) enabling economic growth;
>
> (e) enabling growth and development;
>
> (f) protecting and enhancing the environment;
>
> (g) enabling the transportation of freight, goods, people; and
>
> (h) enabling interaction and communication.

(2) Provide for the development, operation, maintenance, repair, upgrade and removal of infrastructure throughout Auckland by recognising:

(a) functional and operational needs;

(b) location, route and design needs and constraints;

(c) the complexity and interconnectedness of infrastructure services;

(d) the benefits of infrastructure to communities within Auckland and beyond;

(e) the need to quickly restore disrupted services; and

(f) its role in servicing existing, consented and planned development.

…

(4) Require the development, operation, maintenance, repair, upgrading and removal of infrastructure to avoid, remedy or mitigate adverse effects, including, on the:

(a) health, well-being and safety of people and communities, including nuisance from noise, vibration, dust and odour emissions and light spill;

(b) safe and efficient operation of other infrastructure;

(c) amenity values of the streetscape and adjoining properties;

(d) environment from temporary and ongoing discharges; and

(e) values for which a site has been scheduled or incorporated in an overlay.

(5) Consider the following matters when assessing the effects of infrastructure:

(a) the degree to which the environment has already been modified;

(b) the nature, duration, timing and frequency of the adverse effects;

(c) the impact on the network and levels of service if the work is not undertaken;

(d) the need for the infrastructure in the context of the wider network; and

(e) the benefits provided by the infrastructure to the communities within Auckland and beyond.

(6) Consider the following matters where new infrastructure or major upgrades to infrastructure are proposed within areas that have been scheduled in the Plan in relation to natural heritage, Mana Whenua, natural resources, coastal environment, historic heritage and special character:

(a) the economic, cultural and social benefits derived from infrastructure and the adverse effects of not providing the infrastructure;

(b) whether the infrastructure has a functional or operational need to be located in or traverse the proposed location;

(c) the need for utility connections across or through such areas to enable an effective and efficient network;

(d) whether there are any practicable alternative locations, routes or designs, which would avoid, or reduce adverse effects on the values of those places, while having regard to E26.2.2(6)(a) - (c);

(e) the extent of existing adverse effects and potential cumulative adverse effects;

(f) how the proposed infrastructure contributes to the strategic form or function, or enables the planned growth and intensification, of Auckland;

(g) the type, scale and extent of adverse effects on the identified values of the area or feature, taking into account:

(i) scheduled sites and places of significance and value to Mana Whenua;

(ii) significant public open space areas, including harbours;

(iii) hilltops and high points that are publicly accessible scenic lookouts;

(iv) high-use recreation areas;

(v) natural ecosystems and habitats; and

(vi) the extent to which the proposed infrastructure or upgrade can avoid adverse effects on the values of the area, and where these adverse effects cannot practicably be avoided, then the extent to which adverse effects on the values of the area can be appropriately remedied or mitigated.

(h) whether adverse effects on the identified values of the area or feature must be avoided pursuant to any national policy statement, national environmental standard, or regional policy statement.

…

[66] Given the specified importance of infrastructure within the AUP, it is clear that both the objectives and policies in chapter E26 envisage a careful and balanced look at the merits of a particular infrastructure proposal in order to determine whether it should proceed, whether or not such a proposal may be contrary to or inconsistent with any particular provision in the AUP.[76]

[67] As a result, far from confirming that the development of infrastructure such as the proposed EWL is contrary to the AUP for the purposes of s 104D(1)(b), chapter E26 retains a discretion to approve such development if it is found to be appropriate following the type of comprehensive analysis required by the policies contained in E26.2.2 set out above. The nature of the enquiry envisaged requires a comprehensive assessment of the merits of the proposed infrastructure against all relevant provisions in the relevant planning documents, and not just the objectives and policies of the relevant plan required by the threshold test in s 104D(1)(b).

[68] As both Mr Mulligan and Mr Lanning submitted, when the relevant objectives and policies of the AUP are properly reconciled it is apparent that the AUP provides a specific, albeit narrow, framework for the consideration of infrastructure proposals rather than automatically excluding them at the s 104D stage. Instead, the AUP, through chapter E26 in particular, specifically contemplates the approval of significant infrastructure when other non-complying activities giving rise to more than minor adverse effects would be precluded as contrary to the objectives and policies of the AUP. Given this position, I conclude that when the relevant chapters are properly construed the AUP was never intended to categorically block infrastructure projects such as the proposed EWL at the s 104D stage as to do so would preclude the very analysis envisaged in chapter E26.

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[76] Unless, of course, it is a prohibited activity.

Conclusion on the s 104D issue

[69] I therefore conclude the effect of chapter E26 is that infrastructure, like the proposed EWL where the adverse effects will be more than minor, cannot be by definition contrary to the objectives and policies of the AUP for the purposes of s 104D(1)(b). The Board did not err in reaching this conclusion notwithstanding:

(a) the apparent mandatory nature of the protective provisions in chapter D9 (and in particular D9.3(9), (10) and (11)) and the associated protective provisions discussed above; and

(b) despite those provisions being clearly intended to take precedence over the general provisions in chapter F2.

[70] The s 104D limb of the Forest and Bird appeal is dismissed.

The s 104/171 issue

[71] As I have found the Board was correct in concluding consideration of the merits of the proposed EWL was not precluded by s 104D(1)(b), the focus turns to the Board's assessment of the merits of the proposal. This is both in terms of the resource consent applications (pursuant to s 104 of the RMA) and the NoR (pursuant to s 171).

[72] Although the Board's task in determining those matters naturally involved a much broader enquiry, the limited ability to challenge the decision on appeal means that the appeals by Ngāti Whātua and Forest and Bird against the s 104/171 analysis undertaken by the Board is limited to whether the Board properly considered the NZCPS.

[73] In particular, Mr Enright for Ngāti Whātua and Te Kawerau, who took the lead for the appellants on this limb of the appeals, submitted that the Board erred in law in its analysis of NZCPS. While Mr Enright accepted that the Board had specifically turned its attention to the NZCPS, he submitted it had applied the wrong legal test by incorrectly fettering its assessment of the relevant policies within the NZCPS through adopting what he described as a "particularisation" approach. By this Mr Enright

contended that the Board had failed to independently assess the proposed EWL against the relevant provisions of the NZCPS but rather:

> The Board wrongly limited its assessment to confirming consistency between the NZCPS and the [AUP]. The Board decided that it was not necessary to undertake a cross checking or "loop back" to the NZCPS objectives and policies. Instead, it was only necessary to confirm that the [AUP] 'particularised' the NZCPS provisions. This was a truncated (and erroneous) assessment. … It was arguably a methodology error, but it could also be described as wrong legal test or misinterpretation.

[74] In support of his submission Mr Enright pointed in particular to the Board's explanation of its approach, where it stated:[77]

> Turning to the NZCPS, on the question of whether to focus the Board's attention on the provisions of the [AUP], which as Mr Mulligan reinforced has been prepared in full recognition of *King Salmon*, or whether to loop back up to higher order instruments such as the NZCPS received much attention at the Hearing.
>
> In principle, the Board agrees that the RMA anticipates that in giving effect to the higher order NZCPS, regional coastal plans will be refined to reflect the specifics of the region. Otherwise the RMA would have required plans to "adopt" the NZCPS, rather than "give effect to" it. As noted in chapter 12 of this Report, the Board also accepts the general assertion that referring in detail to the higher order planning instruments may be limited to instances of invalidity, incomplete coverage or uncertainty of meaning in the lower order documents.
>
> However, in order to be satisfied that there is consistency (or otherwise), the Board must be cognizant of the higher order documents, in this case the NZCPS, and s104(1)(b)(iv) requires the Board to have specific regard to the NZCPS. Having had such regard, the Board is satisfied that there is no specific incongruity between the NZCPS and [AUP]. Any key differences are an anticipated and appropriate particularisation between the national and regional level documents. Therefore, the substantive discussion on coastal objectives and policies herein is made against the [AUP] provisions. The NZCPS assessment is limited to confirming the consistency between the two documents, with particular attention to reclamation and biodiversity provisions. In taking this approach, the Board acknowledges and considers the emphasis placed on the NZCPS by Mr Brown and Ms Coombes in particular, and takes account of their evidence throughout the following assessment.
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> (citations omitted)

[75] Mr Enright argued that the Board's approach was inconsistent with the approach taken in *King Salmon*. He submitted the Board erred in relying instead on an Environment Court decision in *Appealing Wanaka Incorporated v Queenstown Lakes*

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[77] Board Decision at [678]-[680].

District Council[78] and the decision of the High Court in *R J Davidson Family Trust v Marlborough District Council*.[79] Mr Enright submitted that, although a plan change case, the correct approach was set out by Wylie J in *Royal Forest and Bird Protection Society of New Zealand Incorporated v Bay of Plenty Regional Council* ("*Forest and Bird BOP decision*") and in particular the following comments:[80]

> There is nothing in the majority's observation in *King Salmon* which suggests that a decision-maker can confine his, her or its attention to unchallenged parts of the planning document in issue or to the planning document immediately above the document under consideration, and ignore or gloss over higher order planning documents.
>
> …
>
> Counsel also referred me to *Appealing Wanaka Inc v Queenstown Lakes District Council Inc*, where the Environment Court held as follows: [81]
>
> > The recent decision of the Supreme Court in *EDS v NZ King Salmon* sets out an amended — and simpler — approach to assessing plan changes … The principle in *EDS v NZ King Salmon* is that if higher order documents in the statutory hierarchy existed when the plan was prepared then each of those statutory documents is particularised in the lower document. It appears that there is, in effect, a rebuttable presumption that each higher document has been given effect to or had regard to (or whatever the relevant requirement is). Thus there is no necessity to refer back to any higher document when determining a plan change provided that the plan is sufficiently certain, and neither incomplete nor invalid. This seems to have been accepted by the High Court in a recent decision — *Thumb Point Station Ltd v Auckland City Council*. …
> >
> > We respectfully agree provided that the reference to giving effect to the "purposes and principles" of the Act includes giving effect to the higher order statutory instruments, and indeed to the consideration of the other statutory documents referred to in sections 74 and 75 of the RMA.
>
> As I have already noted, the Environment Court in the case before the Court did not refer to the *Appealing Wanaka* decision, but it appears to have adopted the same approach.
>
> I have reservations about the approach taken by the Environment Court in *Appealing Wanaka*. First, I do not consider that it accurately records what was said in *King Salmon* or by this Court in *Thumb Point*. Secondly, and perhaps more importantly, in my view there is a distinct risk that the intent and effect of

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78 *Appealing Wanaka Incorporated v Queenstown Lakes District Council* [2015] NZEnvC 139.

79 *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52, [2017] NZRMA 227.

80 *Royal Forest and Bird Protection Society of New Zealand Incorporated v Bay of Plenty Regional Council* [2017] NZHC 3080, [2019] NZRMA 1 at [84] and [86]-[88].

81 *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139, at [43].

> higher order plans can be diluted, or even lost, in the provisions of plans lower in the planning hierarchy. Put colloquially, the story can be lost in the re-telling. Indeed, a similar point was noted in *Appealing Wanaka*, where the Court sounded a warning in the following terms:[82]
>
> …While the simplicity of that process may sometimes be more theoretical than real, since in practice plans may be uncertain, incomplete or even partly invalid, it is easier than the exhaustive and repetitive process followed before the Supreme Court decided *EDS v NZ King Salmon*.
>
> In my judgment, there are dangers in the truncated approach taken in *Appealing Wanaka* and by the Environment Court in this case.
>
> (citations included).

[76] As a result, Mr Enright submitted in adopting a particularisation approach, the Board failed to acknowledge or address differences between the wording of, in particular, policies 2, 10 and 11 of the NZCPS and the corresponding wording within the AUP including in chapters F2 and D9 and with regard to the Regional Policy Statement, including in particular chapter B6 (Mana whenua). Mr Enright submitted this error in approach was material and should therefore be remitted back to the Board to be considered afresh.

Discussion – the s 104/171 issue

[77] There is no dispute that the NZCPS was a mandatory relevant consideration for the Board as it considered the applications for resource consent and NoR. Having considered carefully the Board's approach as set out in the Board Decision, I am however unable to see any error in the approach that was taken.

[78] Contrary to the cases advanced by the appellants, I do not consider the Board in any way incorrectly fettered its approach, or otherwise failed to consider the relevant parts of the NZCPS as it was required to do. On the contrary, it is clear that far from simply relying upon the way in which the NZCPS had been reflected in the AUP, the Board had in fact satisfied itself that the NZCPS was appropriately reflected in the AUP, with a particular reference to the planning evidence adduced by both the Auckland Council and Ngāti Whātua, and at no stage had it simply assumed that the AUP was consistent to the NZCPS.

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82 At [47].

[79] First, in an earlier section of its decision the Board confirmed it understood where the NZCPS fitted into its analysis, noting:[83]

> The New Zealand Coastal Policy Statement is a national policy statement under the RMA. The purpose of the NZCPS is to state policies in order to achieve the purpose of the RMA in relation to New Zealand's coastal environment.
>
> The Board is required to "have regard" or "particular regard" to the relevant provisions of the NZCPS. The Board has already noted that it must do so in the context of all of the relevant considerations provided for in ss104 and 171 while attributing the appropriate weight to those provisions, particularly in light of the *King Salmon* decision. In that regard, various aspects of the NZCPS are relevant, particularly to the proposed reclamations of the Māngere Inlet that traverse the coastal environment and to the discharges to the CMA that will result from the construction and operation of the Proposal.

[80] The Board went on to set out carefully what the Supreme Court had said in *King Salmon*:[84]

> The Supreme Court in *King Salmon* was considering plan changes to facilitate the development of a marine farm in an area of outstanding natural character and outstanding natural landscape. The Court was, therefore, required to address the provisions of the NZCPS relating to those aspects of the coastal environment, namely Policies 13(1)(a) and 15(a). A key issue was whether those policies established "environmental bottom lines" that needed to be strictly applied or whether an "overall broad judgment" in accordance with hitherto accepted practice needed to be exercised. The Court concluded that the policies in question require the avoidance of adverse effects on areas of the coastal environment that have outstanding natural character, outstanding natural features and outstanding natural landscapes. In those circumstances, where the regional coastal plan was required to "give effect to" the NZCPS, strict adherence to directive policies contained in the NZCPS was required. It was not appropriate for decision-makers on plan changes to make an "overall broad judgment" in terms of Part 2 of the RMA.
>
> Of particular importance, the majority considered the use and relevance of the verb "avoid" in relation to Policies 13(1)(a) and (b) and 15(a) and (b) of the NZCPS:
>
> > "[96] … We consider that 'avoid' has its ordinary meaning of 'not allow' or 'prevent the occurrence of'. In the sequence of 'avoiding, remedying, or mitigating any adverse effects of activities on the environment' in s 5(2)(c), for example, it is difficult to see that 'avoid' could sensibly bear any other meaning. Similarly in relation to policies 13(1)(a) and (b) and 15(a) and (b), which also juxtaposed the words 'avoid', 'remedy' and 'mitigate'. This interpretation with objective two of the NZCPS which is, in part, '[t]o preserve the natural character of the coastal environment and protect natural features and landscape values through … identifying

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83 Board Decision at [171]-[172].
84 Board Decision at [173]-[174].

> those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities'.
>
> …
>
> [97] However, taking that meaning [of avoid] may not advance matters greatly: whether 'avoid' (in the sense of 'not allow' or 'prevent the occurrence of') bites depends on whether the 'overall judgment' approach or the 'environmental bottom line' approach is adopted under the 'overall judgment' approach, a policy direction to 'avoid' adverse effect is simply one of a number of relevant factors to be considered by the decision maker, albeit that it may be entitled to greater weight; under the 'environmental bottom line' approach, it has greater force."

[81] As the Board went on to note however:[85]

> The Board has given careful consideration to these dicta relating to NZCPS by New Zealand's final appellate court. It is clear from the Supreme Court decision that the NZCPS, particularly the directive policies such as Policies 13(1)(a) and 15(a), are clearly entitled to very significant weight. The Board has accorded those policies such weight in deference to the Supreme Court's decision. However, as already noted, the Board is required by s104 to "have regard to" and s171 "to have particular regard" only (not to "give effect to") the NZCPS. It is required to consider that instrument alongside other factors made relevant by those sections in making a balanced judgment taking account of all such factors. That is the approach it has adopted, as will be apparent from its specific consideration of this issue in the context of the applications before the Board. As discussed later, it is the [AUP] that has given effect to the NZCPS. The overlap and duplication is considerable and highly relevant.

[82] It is this latter point that establishes clearly that different considerations are required as between plan change cases and those determining applications for resource consent and/or NoR. As Mr Enright responsibly acknowledged at the hearing, the Board was not required to give effect to the NZCPS as were the decision-makers involved in formulating new plans such as in *King Salmon* and the *Forest and Bird BOP decision* but rather in determining applications for resource consent and NoR necessary for the proposed EWL was required simply to have regard[86] or particular regard[87] to the NZCPS respectively.

[83] In the context of applications for resource consent and NoR as in the present case, and as Mr Lanning submitted, the Board was required to "give genuine attention

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85 At [175].
86 Resource Management Act, s 104.
87 Section 171.

and thought to the matters set out in s 104 and 171 [including the NZCPS] but they must not necessarily be accepted".[88]

[84] Given that context and far from disclosing an error, paragraphs [678]-[680] of the Board's decision set out at [74] above, together with the other specific references to the Board Decision criticised by the appellants, make it clear that the Board did not just assume that the AUP had given effect to the NZCPS. It instead considered the relevant parts of the NZCPS and the corresponding provisions of the AUP, and to the extent that there were differences preferred the formulation contained in the AUP as it was entitled to do.

[85] The extent of the analysis undertaken by the Board is in fact made clear in a number of different sections of the Board Decision. The Board confirmed that it had specifically considered the relevant parts of the policies put at issue by the appellants, including the planning witness called on behalf of Ngāti Whātua, and in the course of its analysis specifically considered Policy 2,[89] 10,[90] and 11[91] of the NZCPS. In that regard the Board specifically considered and rejected the arguments raised by Ngāti Whātua that the NZCPS itself did not favour the construction of roads within the coastal marine area,[92] and that with regard to the Mana Whenua section of the AUP:[93]

> Consistent with the NZCPS, under Policy 2 the Board accepts that in taking account of the principles of the Treaty of Waitangi, NZTA have incorporated mātauranga Māori (Policy 2(c)) through the consultation and engagement process, recognising the importance of culturally significant sites such as (but not limited to) Mutukāroa, Te Tō Waka and Te Apunga o Tainui. They have clearly provided opportunities for Māori involvement in decision-making (Policy 2(d)) and, as set out later in this Report, NZTA has taken into account relevant iwi resource management plans. The Board accepts that each of these requirements has been met as part of the consultation and engagement process that occurred.

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88 See for example *Foodstuffs [South Island] Limited v Christchurch City Council* [1999] NZRMA 481 (HC) and the Environment Court's discussion of that case in *Unison Networks Limited v Hastings District Council* [2011] NZRMA 394 at [69]-[70], and see discussion in *R J Davidson v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 at [71]-[73].

89 Board Decision at [689] and [773]. The Board considered 2(a) and (c) and Mr Enright's suggestion that Policy 2(f) was also relevant, but this is clearly a direction for those developing relevant plans and had no relevance to a resource consent application in the nature of the proposed EWL.

90 At [682]-[685].

91 At [686]-[688].

92 At [698]-[700].

93 At [773].

(citations omitted)

Conclusion on the s 104/171 issue

[86] By any measure, I am satisfied that the Board has had as it was required to do regard/particular regard to the NZCPS in the course of its consideration of the proposed EWL. Having done so it was therefore entirely open to the Board to reject, as it did, the submission made on behalf of Ngāti Whātua and Forest and Bird that the specific wording of the NZCPS somehow trumped the provisions of the AUP, and, likewise, for the Board to instead prefer the relevant provisions of the AUP to the extent that these differed from the NZCPS.

[87] Having concluded there was no error in approach by the Board to its consideration of the NZCPS, there is no basis upon which the second limb of the appeal can succeed. The appeals on the s 104/171 issue are accordingly dismissed.

Decision

[88] The appeals are dismissed. Should the respondents seek costs, memoranda are to be filed within one month of the issue of this judgment. The parties from whom costs are sought will have one further month to respond, following which I will determine the issue on the papers.

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Powell J