

**BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA**

Decision No. [2019] NZEnvC 122

IN THE MATTER of the Resource Management Act 1991
AND of appeals under clause 14 of Schedule 1 to
the Act
BETWEEN OCEANA GOLD (NEW ZEALAND)
LIMITED
(ENV-2016-CHC-103)
ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED
(ENV-2016-CHC-102)
ENVIRONMENTAL DEFENCE SOCIETY
INCORPORATED
(ENV-2016-CHC-122)
Appellants
AND OTAGO REGIONAL COUNCIL
Respondent

Court: Environment Judge J R Jackson
(sitting alone under section 279(1)(a) and (e) of the Act)

Hearing: in Chambers at Christchurch

Memoranda
lodged by: S Christensen & P Walker for Oceana Gold (New Zealand) Limited
A J Logan for the respondent
S Gepp for Royal Forest and Bird Protection Society of New Zealand
Incorporated
C Woodhouse for Environmental Defence Society Incorporated
R H Dixon for the Minister of Energy and Resources (section 274
party)

Date of Decision: 17 July 2019

Date of Issue: 17 July 2019

FINAL DECISION



A: Under clause 16 of Schedule 1 and under section 290 of the Resource Management Act 1991 the Environment Court (words added to version [2019] NZEnvC 41 in bold, words deleted are struck through):

- (1) **directs** that the Otago Regional Council amends ~~confirms~~ policy 5.4.6 of the proposed Otago Regional Policy Statement to read as follows:

Policy 5.4.6 Offsetting for indigenous biological diversity

Consider ~~the offsetting of~~ indigenous biological diversity offsetting, when:

- (a) **Residual** adverse ~~residential~~ effects of activities cannot be avoided, remedied or mitigated;
- (b) The offset achieves no net loss and preferably a net gain in indigenous biological diversity;
- (c) The offset ensures there is no loss of individuals of rare or vulnerable species as defined in reports published prior to **23 May 2015** ~~14 January 2019~~ under the New Zealand Threat Classification System ("NZTCS");
- (d) The offset is undertaken where it will result in the best ecological outcome, preferably:
 - (i) Close to the location of development; or
 - (ii) Within the same ecological district or coastal marine biogeographic region.
- (e) The offset is applied so that the ecological values being achieved are the same or similar to those being lost;
- (f) The positive ecological outcomes of the offset last at least as long as the impact of the activity, preferably in perpetuity;
- (g) The offset will achieve biological diversity outcomes beyond results that would have occurred if the offset was not proposed;
- (h) The delay between the loss of biological diversity through the proposal and the gain or maturation of the offset's biological diversity outcomes is minimised.

- (2) **directs** that the Otago Regional Council amends its proposed Otago Regional Policy Statement by adding the following policy 5.4.6A (Limits to compensation):

5.4.6A Biological Diversity Compensation

Consider the use of biological diversity compensation:

- (a) When:
 - (i) Adverse effects of activities cannot be avoided, remedied, mitigated or offset; and
 - (ii) The residual adverse effects will not result in:



- (1) The loss of an indigenous taxon (excluding freshwater fauna and flora) or of any ecosystem type from an ecological district or coastal marine biogeographic region;
 - (2) Removal or loss of viability of habitat of a threatened or at risk indigenous species of fauna or flora under the New Zealand Threat Classification System (“NZTCS”) (NZCTS);
 - (3) Removal or loss of viability of a **naturally** originally rare or uncommon ecosystem type that is associated with indigenous vegetation or habitat of indigenous fauna;
 - (4) Worsening of the NZTCS conservation status of any threatened or at risk indigenous freshwater fauna¹;
- (b) By applying the following criteria:
- (i) The compensation is proportionate to the adverse effect;
 - (ii) The compensation is undertaken where it will result in the best practicable ecological outcome, preferably:
 - (1) close to the location of development;
 - (2) within the same ecological district or coastal marine biogeographic region;
 - (iii) The compensation will achieve positive biological diversity outcomes that would not have occurred without that compensation;
 - (iv) The positive ecological outcomes of the compensation last for at least as long as the adverse effects of the activity; and
 - (v) The delay between the loss of biological diversity through the proposal and the gain or maturation of the compensation’s biological diversity outcomes is minimised.

B: Order A otherwise remains as in [2019] NZEnvC 41.

C: The error in paragraph [112] of [2019] NZEnvC 41 being a misquotation from the evidence of Dr Lloyd is corrected. The third bullet point is deleted and the following substituted:

- ecosystem representation (to maintain a full range of ecosystems). Are the full range of ecosystems in New Zealand protected somewhere?

D: Costs are reserved until the appeal to the High Court is resolved.



¹ We subsequently refer to P5.4.6A(a)(ii)(1) to (4), or earlier versions of them, as Limits 1 to 4 respectively.

REASONS

Introduction

[1] In its decision² dated 15 March 2019 the court reserved leave for any party to raise any inconsistency or error in Order A by 29 March 2019. The parties conferred and the Otago Regional Council lodged a memorandum seeking changes on 29 March 2019. The court subsequently issued two Minutes³.

Policy 5.4.6

[2] The court's original version of policy 5.4.6 pursuant to Order A(1) is as follows:

Policy 5.4.6 Offsetting for indigenous biological diversity

Consider the offsetting of indigenous biological diversity offsetting, when:

- (a) Adverse residual effects of activities cannot be avoided, remedied or mitigated;
- (b) The offset achieves no net loss and preferably a net gain in indigenous biological diversity;
- (c) The offset ensures there is no loss of individuals of rare or vulnerable species as defined in reports published prior to 14 January 2019 under the New Zealand Threat Classification System ("NZTCS");
- (d) The offset is undertaken where it will result in the best ecological outcome, preferably:
 - (i) Close to the location of development; or
 - (ii) Within the same ecological district or coastal marine biogeographic region;
- (e) The offset is applied so that the ecological values being achieved are the same or similar to those being lost;
- (f) The positive ecological outcomes of the offset last at least as long as the impact of the activity, preferably in perpetuity;
- (g) The offset will achieve biological diversity outcomes beyond results that would have occurred if the offset was not proposed;
- (h) The delay between the loss of biological diversity through the proposal and the gain or maturation of the offset's biological diversity outcomes is minimised.

[3] In relation to policy 5.4.6, the Council raised the following issues about the orders owing to their inconsistencies with the Reasons given by the court:



² [2019] NZEnvC 41.

³ Dated 11 April 2019 and 3 May 2019 respectively.

- (a) policy 5.4.6 was amended, so the court should have directed the Council to amend it, rather than merely confirming it⁴;
- (b) there is an unintended repetition of “offsetting” in the introduction⁵;
- (c) the wording of 5.4.6(a) because effects which cannot be avoided, remedied or mitigated are, by definition, residual⁶; and
- (d) the significance of the date “14 January 2019” in 5.4.6(c) is unclear, since the date of notification of the plan was 23 May 2015⁷.

Policy 5.4.6A

[4] The court’s original version of policy 5.4.6A pursuant to Order A(2) is as follows:

5.4.6A Biological Diversity Compensation

Consider the use of biological diversity compensation:

- (a) When:
 - (i) Adverse effects of activities cannot be avoided, remedied, mitigated or offset; and
 - (ii) The residual adverse effects will not result in:
 - (1) The loss of an indigenous taxon (excluding freshwater fauna and flora) or of any ecosystem type from an ecological district or coastal marine biogeographic region;
 - (2) Removal or loss of viability of habitat of a threatened or at risk indigenous species of fauna or flora under the New Zealand Threat Classification System (NZCTS);
 - (3) Removal or loss of viability of an originally rare or uncommon ecosystem type that is associated with indigenous vegetation or habitat of indigenous fauna;
 - (4) Worsening of the NZTCS conservation status of any threatened or at risk indigenous freshwater fauna.
- (b) By applying the following criteria:
 - (i) The compensation is proportionate to the adverse effect;
 - (ii) The compensation is undertaken where it will result in the best practicable ecological outcome, preferably:
 - (1) close to the location of development;
 - (2) within the same ecological district or coastal marine biogeographic region;
 - (iii) The compensation will achieve positive biological diversity outcomes that

⁴ Memorandum of the Otago Regional Council dated 29 March 2019 at [3].

⁵ Ibid at [4.1].

⁶ Ibid at [4.2].

⁷ Ibid at [4.3]; memorandum of counsel for Oceana dated 26 April 2019 at [5].



would not have occurred without that compensation;

- (iv) The positive ecological outcomes of the compensation last for at least as long as the adverse effects of the activity; and
- (v) The delay between the loss of biological diversity through the proposal and the gain or maturation of the compensation's biological diversity outcomes is minimised.

(footnotes omitted)

[5] In relation to this policy parties have raised the following inconsistencies:

- (a) policy 5.4.6A(a)(ii)(1): it was suggested during the hearing that the word "indigenous" could be placed before ecosystem to avoid confusion. The court did not address this issue⁸;
- (b) policy 5.4.6A(a)(ii)(2): the incorrect acronym for the New Zealand Threat Classification System was used⁹;
- (c) in contrast to policy 5.4.6(c) for biodiversity offsetting, no relevant date for the NZTCS reports is included. This appears to be inconsistent; and
- (d) policy 5.4.6A(a)(ii)(3): the proposed wording the court seemed to endorse was "naturally rare or uncommon" rather than "originally rare or uncommon" (referring to [136] and [146] of the decision). The Council notes that Schedule 4 of the PORPS Criteria of identification of areas of significant indigenous vegetation and habitat of indigenous fauna, uses the words "originally rare ecosystems". It suggests there may be an error and perhaps the words "originally rare or uncommon" should be substituted by "naturally rare or uncommon"¹⁰.

[6] The Royal Forest and Bird Protection Society of New Zealand Incorporated ("Forest and Bird") also noted an error¹¹ in paragraph [48] where there is reference to an "over-ride of Objective 3.2" and submits this should read "over-ride of the policies under Objective 3.2."



⁸ Memorandum of the Otago Regional Council dated 29 March 2019 at [6.1].

⁹ Ibid at [6.2].

¹⁰ Ibid at [6.4].

¹¹ Ibid at [5].

Consideration

Unopposed changes

[7] Various changes to Order A in the first decision are not opposed and come within the court's reservation, so the court will have no difficulty making those. However, three matters are disputed and I now turn to those. There are also a few other matters which may be attended to.

Disputed changes

Use of "residual" in 5.4.6(a)

[8] The Council submits¹² the use of residual is "tautologous as effects which cannot be avoided, remedied or mitigated are, by definition, residual." The Council suggests that 5.4.6(a) should read "the adverse effects of activities cannot be avoided, remedied or mitigated." Oceana does not object¹³ to the changes sought by the Council. While the Minister agrees¹⁴ with Mr Logan's point, counsel considers the text in 5.4.6(a) reflects the court's choice of language at paragraph [95] of the decision.

[9] The use of the word "residual" was intentional¹⁵. This is one of those situations where a word may be logically seen as tautological but seems to make the wording clearer especially if "residual" is placed before "adverse" rather than after. So the word "residual" should be retained, albeit in a slightly different position.

Addition of "indigenous" before "ecosystem" in 5.4.6A(a)(ii)(1)

[10] Oceana¹⁶ challenges the addition of "indigenous" on the grounds there is no error or inconsistency which needs to be corrected. Technically Ms Walker is correct. Further, the Minister submits¹⁷ this a matter of substance and goes beyond the jurisdiction the

¹² Memorandum of the Otago Regional Council dated 29 March 2019 at [4.2].

¹³ Memorandum of counsel for Oceana dated 26 April 2019 at [3].

¹⁴ Submissions on behalf of the Minister of Energy and Resources dated 26 April 2019 at [12].

¹⁵ [2019] NZEnvC 41 at [95].

¹⁶ Memorandum of counsel for Oceana dated 26 April 2019 at [7].

¹⁷ Submissions on behalf of the Minister of Energy and Resources dated 26 April 2019 at [15].



court has now.

[11] I consider there is no jurisdiction to make this change. In case it is of some comfort to the Council I doubt whether the omitted word will cause much difficulty in practice.

No relevant date for NZTCS reports included in 5.4.6A

[12] The Council queried the fact that, in contrast to policy 5.4.6(c) for biodiversity offsetting, no relevant date for the NZTCS reports is included in 5.4.6A and that this appeared to be inconsistent¹⁸. Oceana disagreed submitting that¹⁹, while it might be consistent to include a date for the reports, the need to do so in association with the two policies was not discussed in the decision. Paragraph [94] of the decision specifically referred to the offset policy, therefore it is not inconsistent with the decision to not refer to a date for the reports. The Minister also disagreed submitting²⁰ that it goes beyond a “correction” and therefore is not within the court’s jurisdiction.

[13] I agree that amending this is outside the court’s jurisdiction. As Oceana highlights, the date in relation to the offset policy was specifically discussed whereas for 5.4.6A it was not.

Other matters

Over-ride of objective 3.2

[14] An issue was raised in relation to the body of the decision: at paragraph [48] there is a reference to an “over-ride of Objective 3.2”. Forest and Bird submits this should read “over-ride of the policies under Objective 3.2”. It seeks that the court amend this by way of a slip rule. Counsel submits that section 278 RMA provides Environment Judges have the same powers that the District Court has in the exercise of its jurisdiction. Then rule 11.10 District Court Rules 2014 specifies (relevantly) that a judgment may be corrected by the court if it contains a clerical mistake or an error arising from accidental slip or omission. The Environmental Defence Society supports²¹ Forest and Bird’s submission.

¹⁸ Memorandum of the Otago Regional Council dated 29 March 2019 at [6.3].

¹⁹ Memorandum of counsel for Oceana dated 26 April 2019 at [8].

²⁰ Submissions on behalf of the Minister of Energy and Resources dated 26 April 2019 at [17].

²¹ Memorandum of counsel for EDS dated 10 May 2019 at [5] and [6].



[15] However I accept, as submitted by counsel for both Oceana²² and the Minister²³, that change would both go beyond the scope of the leave reserved and beyond the scope of the slip rule, so the court has no further function in respect of those matters. Having said that I consider paragraph [48] of the decision should be read in the light of the earlier reference²⁴ to "... over-ride the policies implementing Objective 3 and similar references in paragraph [47] and indeed in paragraph [48] itself."

Updating threatened species status

[16] There is one other matter not raised by the parties which I consider worth mentioning. In the decision the court recommended²⁵ that the PORPS be updated (by change) every few years to refer to updated reports of the expert panels set up under the NZTCS. However, when considering the detail the court failed to recall the wider environmental management framework within New Zealand. The public and local authorities now have the benefit of the reports required from the Ministry for the Environment ("MFE") and Statistics New Zealand ("Stats NZ") under the Environmental Reporting Act 2015 ("ERA").

[17] In particular MFE/Stats NZ must²⁶ now provide a three-yearly report. The first was published recently as *Environment Aotearoa 2019*²⁷. This contains three "Indicator" reports summarising the current status of New Zealand's plant and animal species:

- *Conservation status of indigenous freshwater species*²⁸;
- *Conservation status of indigenous land species*²⁹; and
- *Conservation status of indigenous marine species*³⁰.

[18] It seems to me the PORPS could usefully adopt these reports globally by way of a triennial change to the PORPS as part of a more consistent (and economic) way of

²² Memorandum of counsel for Oceana dated 26 April 2019 at [6].

²³ Submissions on behalf of the Minister of Energy and Resources dated 26 April 2019 at [14].

²⁴ [2019] NZEnvC 41 at [45].

²⁵ [2019] NZEnvC 41 at [94].

²⁶ Section 7 ERA 2015.

²⁷ MFE/Stats NZ *Environment Aotearoa 2019* (2019) ME 1416.

²⁸ Available from www.stats.govt.nz/topics/environment

²⁹ Available from www.stats.govt.nz/topics/environment

³⁰ Available from www.stats.govt.nz/topics/environment



updating current threats to biota.

Erratum

[19] The court takes the opportunity to correct the important quotation from the evidence of Dr K M Lloyd in paragraph [112] of [2019] NZEnvC 41.



J R Jackson
Environment Judge

