

**Titiroa tidegates application APP-2021135 – s42A reporting officer final review**

- 1 My recommendation is still that the application should be declined.
- 2 I consider that the proposal has not overcome all the policy conflicts, and that the expert conferencing has not resulted in agreement or acceptance of the activity as a whole. That said, I feel that the issues have narrowed, and that case law does provide guidance regarding some of the apparent policy barriers.
3. My recommendation to decline is because:

***I – Effects Management Hierarchy and All River Values***

- 3.1 I do not consider that the applicant has adequately applied the effects management hierarchy to all river values affected by the proposal, particularly effects on cultural spiritual values.
- 3.2 The mitigations and offsets are designed to address effects on fish passage and inanga spawning habitat. However the submission and evidence provided by Te Ao Marama Inc identified that the tide gates:
  - i. are within a significant cultural landscape to Ngāi Tahu because of historical and contemporary associations
  - ii. are within an area known for mahinga kai
  - iii. are detrimental to the mauri, the health and well-being of the Titiroa Stream and its ecosystem
  - iv. adversely impact threatened indigenous species and their habitats that are taonga
- 3.3 For example, kanakana is discussed in the Joint Witness Statement on Ecology. Kanakana (lamprey) is shown as a threatened species on the New Zealand Threat Classification System, and is recognised as a taonga species in Appendix M of the proposed Southland Water & Land Plan. I also note that the ecology experts did not reach agreement on whether the proposed letterbox opening would increase the ability of kanakana to migrate past the gates when closed.
- 3.4 Therefore it is unclear that all fish passage effects will be avoided, or minimised and offset, or that cultural and spiritual effect, which to some extent may be associated with fish passage, have been addressed through the effects management hierarchy.
- 3.5 As a result, the proposal conflicts with Policy 5.6.5 of the Regional Coastal Plan and Policy 28A of the proposed Southland Water & Land Plan (pSWLP). It should also conflict with a policy in the Coastal Plan that is similar to Policy 28A.

***Policy 5.6.5***

*It is a national priority to protect:*

- a *characteristics of traditional spiritual, historical or cultural significance to Māori identified in accordance with tikaka Māori; and*

- b significant places or areas of historic or cultural significance, which in themselves or in combination, are essential or important elements of the natural character of the coastal marine area.*

*Policy 28A (1) The loss of river extent and values is avoided, unless the council is satisfied that:*

- (a) there is a functional need for the activity in that location; and  
(b) the effects of the activity are managed by applying the effects management hierarchy.*

3.6 The tidegates are within the coastal marine area, so are subject to the objectives, policies and rules of the Regional Coastal Plan. Upstream activities, such as within the diversion channel north of the gates, would fall under the pSWLP.

3.7 However, Clause 1.5 of the National Policy Statement for Freshwater Management (NPSFM) states that:

*'This National Policy Statement applies to all freshwater (including groundwater) and, to the extent they are affected by freshwater, to receiving environments (which may include estuaries and the wider coastal marine area).'*

3.8 Therefore the NPSFM applies across the coastal marine area boundary, and the policy required to be inserted in the regional plan under clause 3.24 of the NPSFM should also have been inserted into the Regional Coastal Plan. In other words, the Coastal Plan should contain a similar policy to 28A. In circumstances such as this, our usual practice is to consider the policy as if it had been inserted, as that insertion is compulsory.

3.9 But even in the absence of that policy, regard can be had to Policy 7 of the NPSFM:

*Policy 7 The loss of river extent and values is avoided to the extent practicable.*

3.10 It then becomes a matter of judgement whether the loss of river values has truly been avoided to the extent practicable.

## **II – Policy 11 of the NZCPS**

4.1 While I accept that (from the joint witness statement on ecological effects) the effects on inanga spawning habitat have been sufficiently addressed to satisfy the effects management hierarchy of the National Policy Statement for Freshwater Management (NPSFM), I consider that Policy 11 of the New Zealand Coastal Policy Statement (NZCPS) is more specific to adverse effects on threatened or at risk indigenous taxa, and requires that they are avoided.

4.2 Policy 11 of the New Zealand Coastal Policy Statement (NZCPS) is:

*To protect indigenous biological diversity in the coastal environment:*

- (a) **avoid** adverse effects of activities on:
- (i) indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;
- (ii) .....

#### 4.3 Threatened or at risk indigenous taxa?

Information provided in the application documents<sup>1</sup> and evidence provided at the hearing identified the presence of the following fish species that are classed as either threatened or at risk:

- inanga (*Galaxias maculatus*)
- giant kōkopu (*Galaxias argenteus*)
- longfin eel (*Anguilla dieffenbachia*)
- kanakana (*Geotria australis*)

#### 4.4 Policy 11 of the NZCPS

The NZCPS is a high level document and would not normally have direct effect at the resource consent level. However, the Regional Coastal Plan pre-dates, and does not give effect to, the NZCPS. The Regional Policy Statement (RPS) is more recent, and Policy BIO.3 of the RPS directs us up to Policy 11 of the NZCPS. Therefore, following the logic of the hierarchy of documents, Policy 11 of the NZCPS is relevant to the consideration of the application.

- 4.5 That then brings us to the word ‘avoid’. Paragraph 96 of the Supreme Court’s decision in ***Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd, SC82/2013*** includes the statement:

‘Our concern is with the interpretation of “avoid” as it is used in s 5(2)(c) and in relevant provisions of the NZCPS. In that context, we consider that “avoid” has its ordinary meaning of “not allow” or “prevent the occurrence of”.’

- 4.6 Policies 99-111 of ***Royal Forest & Bird Protection Society of New Zealand Inc v New Zealand Transport Agency, SC25/2021 [2024] NZSC*** further discussed how the NZCSP ‘avoid’ policies apply to resource consent considerations.

- 4.7 Regarding the phrase ‘have regard to’ in s104, the Court noted in paragraph 108:

‘...we take the view that the “have regard/particular regard” standards in ss 104 and 171 cannot be invoked to produce outcomes that subvert applicable NZCPS policies..... .....Taking a purposive approach, the careful and strong language of the objectives and policies matter as much as the softer form of direction employed in ss 104 and 171.....’

- 4.8 Paragraphs 109-111 then go on to explain exceptions to Policy 11:

[Para 109]

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<sup>1</sup> Particularly Table 3 of the ‘Titiroa Tide Gate – Mitigation Options’ report dated November 2022 by PDP Ltd

... But, relevantly for the purposes of this discussion, there is a corollary to Cooper J's rejection of the proposition that "have regard to" and Part 2 could authorise consent authorities to subvert relevant policies in their decision-making. The corollary is that a genuine, on-the-merits exception, by its nature, will not *subvert* a general policy, even a directive one. On the contrary, true exceptions can protect the integrity of the subject policy from the corrosive effect of anomalous or unintended outcomes. There is a fundamental difference between allowing consent authorities to routinely undermine important policy choices in the NZCPS (as rejected in RJ Davidson), and permitting true exceptions that will not subvert them. Of course, the more precise and sharp-edged the policy, the less room there will be for outcomes that can fairly be considered so anomalous or unintended that an exception is justified. Policies 19, 21– 23 and 29 may be seen to fall into that kind of category. But Policy 11 does not.'

[Para 110]

'That is why the broad subject matter of Policy 11 admits of exceptions. A certain level of flexibility will assist in achieving its purpose and avoiding unintended outcomes at the margin that are inconsistent with Part 2 and the terms of Policy 11 itself. To put it another way, Policy 11 has a powerful shaping effect on all lower order decision-making, but "avoid" does not exclude a margin for necessary exceptions where, in the factual context, relevant policies are not subverted and sustainable management clearly demands it.'

[Para 111]

'Whether the EWL is such an exception requires an assessment of the whole proposal, including its benefits and adverse effects and its remedial or mitigatory aspects, bearing in mind that, as with any exception to the application of a strong policy, the case to be made out is a difficult one.'

#### 4.9 The decision provided further comment on its application of the word 'avoid:

[Para 121]

'... the Court in King Salmon acknowledged that the prescriptive power of a policy will depend not only on the directive verb it employs, but also on the level of abstraction and generality of its subject matter. In other words, the fact that Policy 11 uses "avoid" is not solely determinative of its prescriptive power. Second, it must be kept in mind that the issue in King Salmon was whether, in the context of a "give effect to" duty, the use of "avoid" should control the outcome or just be one mandatory relevant factor among many. There was no consideration of, nor any need to consider, the more difficult cases in the area between these extremes...''

[Para 125]

'...our concern is that interpreting avoid policies as imposing a no-exceptions ban on infrastructure in the CMA brings with it a risk of undermining the RMA's purpose. It is impossible to predict every circumstance to which a generally framed avoid policy will be applied. For example, if an avoid policy were interpreted and applied in a manner that exposed a coastal community

to inundation or erosion, there would have to be a question about whether that interpretation is consistent with sustainable management. These are the difficult cases. It seems unlikely that those who promulgated the NZCPS chose environmental protection over, say, the safety of an existing settlement by using avoid language—and that this choice would be the embodiment of sustainable management. Potential exceptions like this will be truly rare, but there can be no doubt that it is necessary to construe avoid policies so as to allow for them.’

- 4.10 In its decision, the Court in ***Royal Forest & Bird Protection Society of New Zealand Inc v New Zealand Transport Agency*** also discussed the use of offsets to satisfy ‘avoid’ policies in paragraphs 173-176.

[Para 175-176]

‘The appellant argues that offsets are not capable of satisfying avoid policies. Waka Kotahi argues that they can.’

‘In our view, this is a question of fact and degree measured against the terms of the relevant avoid policy. For example, an activity that would otherwise have more than transitory effects on the vulnerable habitat of a threatened species may nonetheless not breach NZCPS Policy 11(a) if those adverse effects are offset in net terms. Whether the impact of the offset must be in situ or can be deployed elsewhere will be very much context specific. It will, we imagine, depend on the environmental element or value that must be protected and the nature of the adverse effect that is to be offset. Unlike Glazebrook J, who largely treats these as questions of construction, we consider that they are matters of evidence, and probably largely expert evidence, to be carefully assessed by the fact finder. The relevant question is not how to define an offset or what kinds of offsets can satisfy avoid policies; it is whether the relevant adverse effect can be avoided in fact. If the contention in the evidence is that adverse effects at the level identified in the relevant policy (locality, population, ecosystem and so forth) can be avoided through offsets applied elsewhere, that will be a matter to be assessed by the fact finder.’

- 4.11 In this case the applicant is proposed to offset effects on inanga spawning habitat. For that specific effect I consider that the proposal complies with Policy 11 of the NZCPS, although there is likely to be some transitory effect as the habitat enhancement is developed. I believe that gap is acceptable given the policies recognising the structure as critical infrastructure and regionally significant infrastructure, and the support provided by Policy COAST.4 of the RPS.
- 4.12 However, fish passage for other species appears only to be mitigated with the ‘letterbox’ opening and the boulder refuge proposals. I also note that the joint witness statement on freshwater ecology referred to uncertainties around the fish passage provided for some species, particularly kanakana. Therefore I don’t believe that there is sufficient evidence that the proposal complies with Policy 11 with regard to threatened or at risk indigenous fish species, with the exception of inanga.

- 4.13 That said, there may be scope for the commissioner to consider that, because the activity occurs in an area of overlap between the provisions of the NZCPS and the NPSFM, and because the NPSFM is more recent, the application of the effects management hierarchy is sufficient to fulfil the 'avoid' requirement of Policy 11.

### ***III – Opposing submissions***

- 5.1 I note that Te Ao Marama Inc and the Department of Conservation have confirmed that they do not wish to be heard further. While both agencies have been involved in the expert witnessing conferencing, the parties only provided clarification of specific points. The decision not to be heard further does not amount to acceptance of the proposal, or a retraction of their previous submissions. Similarly, the written submission from Fish & Game New Zealand has not, as far as I am aware, been withdrawn.
- 5.2 These three agencies made strong submissions opposing the application and only some of the issues they raised have been addressed, or have been addressed in a manner that is only partly agreed.
- 6.1 I also acknowledge that there are reasons to approve the application:
- A. The tidegates are recognised in the policy documents as a strategic facility and are therefore regionally significant infrastructure.
  - B. There are policies that are supportive, in terms of positive effects on social and economic well-being.
  - C. The applicant provided further information at the hearing on the positive effects of the activity.
  - D. I also recognise that declining the application, and the eventual removal of the tide gates, would cause hardship to the lease holders and landowners of properties that are currently protected by the structure.
  - E. There may be scope, as discussed above, to determine that the use of the effects management hierarchy to address effects on inanga spawning and, to some extent, fish passage, was sufficient to address Policy 11 of the NSZCPS.
7. If the application is approved, I would support a short consent duration to allow time for implementation of appropriate mitigations, offsetting and monitoring.



25 November 2024

Stephen West  
**Principal Consents Officer**  
**Environment Southland**