IN THE ENVIRONMENT COURT
CHRISTCHURCH REGISTRY

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

ENV

Under	the Resource Management Act 1991
In the matter	of an appeal under section 120 of the Act
Between	**A.W AND K.F SIMPSON** Appellant
And	**MACKENZIE DISTRICT COUNCIL AND CANTERBURY REGIONAL COUNCIL** Respondents

NOTICE OF APPEAL TO ENVIRONMENT COURT AGAINST DECISION TO DECLINE RESOURCE CONSENT FOR A SOLAR ARRAY AT 397 BRAEMAR ROAD, TEKAPO

29 November 2023

Duncan Cotterill
Solicitor acting: Katherine Forward
PO Box 5, Christchurch 8140

s 9(2)(a)

To: The Registrar
Environment Court
Christchurch

1 A.W and K.F Simpson (**Appellant**) appeal a decision declining a suite of applications for resource consent to authorise a solar array at 397 Braemar Road, Tekapo (**the Decision**).

2 In summary, the following applications to Mackenzie District Council and Canterbury Regional Council were declined:

Mackenzie District Council		
Rule	**Activity**	**Status**
Section 7: Rural		
4.3.1	The volume of earthworks will exceed 300m^3 and result in more than 1000m^2 of exposed soil. Earthworks will occur on land within 50m of a wetland and will exceed 20m^3 (volume) per hectare in any continuous 5-year period, and 50m^2 (area) per hectare in any continuous 5-year period.	Discretionary.
15.1.1.j Power Generation Facilities.	Construction, commissioning and operation of power generation facilities outputting up to 25 kilowatts outside the areas scheduled under Rule 13 above.	Discretionary.
Section 16: Utilities		
1.5 a	Utility buildings (including the PV array modules) and buildings that are ancillary to utilities that exceed 50m^2 Gross Floor Area and are located within 50m of a wetland.	Discretionary.
1.5 e	The solar array as a generation facility is not specifically provided for in the Utility section.	Discretionary.
Section 19: Ecosystem and Indigenous Biodiversity		
1.3.2.1	Clearance of vegetation within an area of significant indigenous vegetation or significant habitat of indigenous fauna	Non-Complying.

Canterbury Regional Council		
Rule	**Activity**	**Status**
5.176 of the Canterbury Land and Water Plan	Undertake earthworks that exceed 100m^3 within 50m of a wetland. Undertake earthworks that may not be more than 1m above highest groundwater level.	Restricted Discretionary.
Rule 5.97 of the Canterbury Land and Water Plan	Discharge of operational stormwater from a solar array.	Discretionary

3 The Appellant received notice of the Decision on 8 November 2023.

4 The Decision was made under delegated authority by Independent Hearing Commissioners Sharon McGarry, Meg Justice and Darryl Millar appointed by the Mackenzie District Council (**MDC**) and the Canterbury Regional Council (**ECan**).

5 The Appellant is not a trade competitor for the purposes of section 308D of the Resource Management Act 1991 (**RMA**).

6 The Appellant appeals the Decision in its entirety.

7 The reasons for the appeal are as follows:

Application of objectives and policies

7.1 The Decision fails to adequately balance and afford appropriate weight to enabling and directive renewable energy polices as contained in the National Policy Statement for Renewable Electricity Generation 2011 (**NPS-REG**), the Canterbury Regional Policy Statement (**CRPS**) and the Mackenzie District Plan (**MDP**)[1]. The Decision incorrectly finds that the MDP has been prepared with no consideration of the possibility of solar farms[2], despite the development of renewable energy activities

[1] Relevantly, the NPS-REG Policy A, Policy B(c) and Policy C, the CRPS Objective 5.3.2, Policy 5.3.9, Objective 16.2.2, Policies 16.3.3 and 16.3.5, and the MDP Utilities chapter Objective 1 and Policy 8, and Indigenous Biodiversity chapter Policy 5.
[2] The Decision at [203] and [204].

being a requirement of the NPS-REG[3], under which the CRPS, and Plan Changes 13 (Rural zone) and 18 (Ecosystems and Indigenous Biodiversity) to the MDP have been prepared. Of note, the first instance decision on Plan Change 18 was issued in 2021. There can be no question that PC18 was developed with solar renewable energy activities in the frame of reference.

7.2 The Decision undermines the policy direction of the NPS-REG, together with national efforts to decarbonize Aotearoa and reduce greenhouse gas emissions, where it concludes that despite the application not being contrary to key planning provisions and satisfying the s104D(1)(b) criteria[4], consent cannot be granted without evidence demonstrating there will be no net loss of significant indigenous biodiversity values[5]. In reaching this conclusion, the Decision inappropriately elevates the 'protection of significant indigenous vegetation' policies over the competing 'enabling renewable energy' policies within the CRPS and the NPS-REG. The CRPS is clear that if there is a perceived conflict between competing policies, the provisions of all the applicable chapters are to be evaluated and applied on a case-by-case basis[6].

7.3 Further, the Decision incorrectly "reads down" the weight to be given to Policy 5 of the MDP, due to it being under appeal[7]. However, this is the only relevant policy in the MDP (the operative provisions having been struck through on notification of PC18) which addresses renewable energy and indigenous biodiversity. Finally, despite concluding that the CRPS and the MDP are the appropriate criteria to use for assessing Part 2 RMA matters[8], and there is no need to go beyond the relevant provisions and specifically assess Part 2 in making a decision[9], the Decision regularly references s6(c) matters

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[3] 'Solar' is included within the definition of 'renewable electricity generation' and is specifically listed within NPS-REG Policy E1: *"Regional policy statements and regional and district plans shall include objectives, policies and methods (including rules within plans) to provide for the development, operation, maintenance, and upgrading of new and existing renewable electricity generation activities using solar, biomass, tidal, wave and ocean current energy resources to the extent applicable to the region or district."*
[4] Note 1, at [222].
[5] Note 1, at [229].
[6] CRPS, Chapter 1 – Introduction, page 20.
[7] Note 1, at [205].
[8] Note 1, at [130].
[9] Note 1, at [223].

and erroneously affords greater weight to their protection, over and above renewable energy generation.

Findings on ecological matters and effects

7.4 The Decision is unclear when it considers the ecological effects of the proposal. On the one hand, the Decision finds[10] the effects of the proposal are potentially significant (adverse) and will likely result in the "permanent loss" of Threatened and At Risk plant species from the application site. On the other hand, the Decision concludes that "there is a high level of uncertainty regarding the scale and magnitude of adverse effects on dryland indigenous vegetation". The Decision does not justify how a finding can be made on permanent loss of indigenous vegetation, in the face of what is also found to be a high level of uncertainty.

7.5 The Decision appears to decline partly on the basis of insufficient baseline evidence under s104(6) (although this is not explicitly noted as a reason for decline). In particular, we consider the decision makers were incorrect in finding that:

7.5.1 An invertebrate baseline was required, particularly as this conclusion is based on submitter evidence which speculated as to the 'likely' presence of Threatened and At Risk invertebrates only. The speculation of invertebrate presence was based on a lack of site appraisal, in contrast to the habitat assessment of the Appellant's ecological expert concluding that their presence was unlikely;

7.5.2 A targeted avifauna study was required, particularly as bird survey was completed as part of two other ecological surveys, as well as desktop assessment and the consideration of solar arrays on bird life in other solar farms; and

7.5.3 That the compensation package could not be assessed in the absence of the above evidence.

[10] Note 1, at [151], [164], 188] and [228].

7.6 The decision makers held delegated authority from both relevant Councils. The Council officer for both Councils made no request for further information pursuant to s92 in relation to the above surveys, nor did he seek further information on what the decision makers found to be a "relatively low level of survey effort for the size of the site [which] is likely to have under recorded the extent and presence of additional Threatened and At Risk plant species"[11]. If the level and adequacy of the survey work was in question by the Councils (or any person(s) with delegated authority from the Councils), it would have been appropriate for a further information request to have been made in advance of or at the hearing. Alternatively, the decision makers could have adjourned the hearing to provide for further information pursuant to s41C.

7.7 The decision makers disregarded all expert evidence that was based on the EIANZ guidelines and conclude that overall, the significance criteria in relation to ecological context are met. [12]. This is inappropriate and resulted in the Decision preferring the evidence of experts[13] who had not physically assessed the site, rather than the Appellant's ecological expert who had completed detailed 'on-the-ground' surveys. The Decision erred where it places significant weight on the 'likely' presence of Threatened and At Risk invertebrate species and allowed this assumption to inform an assessment against ecological context criteria.

7.8 The Decision also fails to acknowledge[14] the modification in vegetation cover that will occur dependent on when within a cycle of pasture management practices an area is surveyed. The Decision erroneously concludes that it is reasonable to assume that that the remaining indigenous species will continue to persist into the future under similar land use intensity, as the farming activities (top dressing and oversowing) have occurred over many years.

[11] Note 1, at [143].
[12] Note 1, at [139].
[13] Note 1, at [129].
[14] Note 1, at [151].

7.9 The decision incorrectly concludes that the proposal would result in the permanent loss of 94 hectares of significant ecological values[15]. This is factually incorrect as it does not recognise:

7.9.1 That only 1.2% of the site is subject to direct vegetation clearance, some of which can be attributed to the permitted baseline, which the decision makers elected not to apply;

7.9.2 That the site meets the definition of "improved pasture", despite also containing significant vegetation;

7.9.3 Noting that some residual effects will remain, the proposed condition suite volunteered by the Appellant that avoids, remedies and mitigates effects on Threatened and At Risk plant species and compensates where these cannot be avoided, remedied or mitigated";

7.9.4 The potential for change in significant ecological values is provided for by the oversowing and top dressing regime that can continue pursuant to existing use rights and which the Decision accepts comprises part of the existing environment[16]; and

7.9.5 That the Decision elsewhere concluded that impacts from shading are unknown, so it is not possible to definitively conclude that the proposal will result in permanent loss over that entire area.

Consideration of the compensation proposal

7.10 The Decision incorrectly states that the compensation proposal as provided by the Appellant was only to address the "minor" residual effects on indigenous biodiversity[17]. At paragraph 184 the Decision correctly summarises the legal submission that the "compensation package is of a much greater scale than required to compensate for residual minor adverse effects". However, this position is not considered by the decision makers. This incorrect starting point is

[15] note 1, at [174]
[16] Note 1, at [
[17] See paragraph 175, and 228.

fundamental to what the Decision concludes in relation to the appropriateness and adequacy of the compensation package. The compensation package is disregarded as it is not considered to address the level of adverse effects (**potentially** significant) that the Decision finds would arise at the site. As is clear in the information that was before the Panel, the compensation proposal was developed to address a finding of 'significant loss', despite the Appellant considering such a level of compensation was not necessary based on the evidence of its technical experts.

7.11 The Decision also incorrectly finds that there was "no evidence" that could assist in assessing the compensation proposal[18], despite acknowledging the supplementary statement of evidence of Dr Morris, which "addressed adherence of the proposed DPA *[dryland protection area]* with the biodiversity compensation principles, changes to DPA boundaries and known ecological values of the DPA". Dr Lloyd, the ecological expert for the Councils, also addressed the limits to the compensation package and found it to be acceptable in his supplementary comments.

7.12 The Decision fails to appropriately apply the planning framework as it relates to a compensation proposal, and instead applies the criteria for off setting instead[19]. For example:

7.12.1 CRPS Policy 9.3.6 is identified in the Decision as setting out the "limitations for biodiversity offsets"[20]. This policy also introduces the concept of "no net loss". The Decision incorrectly attributes weight to Policy 9.3.6 for two reasons:

(a) The CRPS deals only with offsets. The proposal before the decision makers was for a compensation, to which the CRPS provides limited guidance. The Decision appears to confuse compensation and offset, stating that "in this context, the term offset, when on a separate site, aligns with the concept of compensation"[21]. The NPS-REG is clear that offset or

[18] Note 1, at [176] and [208].
[19] Note 1, at [177].
[20] Note 1, at [207]
[21] Ibid

compensation is available to an applicant. There is no requirement to choose one over the other, and they are clearly not interchangeable. This differs from the effects management hierarchy introduced by the NPS-Indigenous Biodiversity, which has no application to the development, operation, maintenance or upgrade of renewable electricity generation assets and activities[22]. The Decision is wrong to equate the compensation proposal with an offset, and to impose the obligations that go with that alternate option.

(b) The CRPS is given effect to by the MDP. There was no need to refer back "up the chain" to the CRPS.

7.13 The Decision acknowledges[23] that the NPS-IB contains a "carve out" for renewable energy generation. Despite this "carve out", the decision makers consider that the compensation proposal fails when considered against Appendix 4 of the NPS-IB[24]. When assessing the failure of the proposal against Appendix 4, no reference is made to the evidence of Dr Morris or Dr Lloyd, who provided detailed evidence addressing the principles of biodiversity compensation. This included outlining when biodiversity compensation is not appropriate, and why the proposed compensation proposal passes those tests. The Decision relies on no evidence where it assesses the principles set out in Appendix 4[25].

Consideration of the ECan consents

7.14 The Decision fails to appropriately assess the applications made to Environment Canterbury (**ECan**) for earthworks and operational phase stormwater. The decision makers agree that the two sets of consents (two consents from ECan, and one from the MDC) should not be bundled together[26]. The Decision outlines that the construction

[22] National Policy Statement for Indigenous Biodiversity, at 1.3(3).
[23] Note 1, at [194].
[24] Note 1, at [186].
[25] Note 1, at [187].
[26] Note 1, at [87].

impacts and stormwater discharge would be appropriately managed via a range of management plans and consent conditions offered[27].

7.15 Notwithstanding the above, the Decision declines the ECan consents, citing that "the nature and scale of adverse ecological impacts are equally applicable to the earthworks and stormwater discharge activities"[28]. The ECan consents have different assessment criteria, and address different non-compliances, as compared to the MDC consent. This outcome is inappropriate, particularly given the bundling of assessment findings.

8 The Appellant seeks the following relief:

8.1 That resource consent be granted subject to conditions;

8.2 Such consequential or related relief as may be necessary to give effect to its concerns; and

8.3 Costs.

Mediation

9 The Appellant supports referring this appeal to mediation with an Environment Commissioner presiding.

10 Copies of the following documents are attached to this notice:

10.1 A copy of the Decision.

10.2 A list of names and addresses of persons to be served with a copy of this notice (**Appendix A**).

Dated 29 November 2023

K E Forward / J A Robinson
Solicitor for the Appellants

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[27] Note 1, at [126].
[28] Note 1, at [230].

This document is filed by Katherine Forward of Duncan Cotterill, solicitor for the Appellants.

The address for service of the Appellants is:

Duncan Cotterill
Level 2, Duncan Cotterill Plaza
148 Victoria Street
Christchurch 8013

Documents for service on the Appellants may be:

- Left at the address for service.
- Posted to the solicitor at PO Box 5, Christchurch 8140
- Emailed to the solicitor at s 9(2)(a)

Please direct enquiries to:

Katherine Forward
Duncan Cotterill
Tel s 9(2)(a)
Email s 9(2)(a)

ADVICE TO RECIPIENTS OF COPY OF NOTICE OF APPEAL

How to become a party to proceedings

If you wish to be a party to the appeal, you must lodge a notice in form 33 with the Environment Court within 15 working days after the period for lodging a notice of appeal ends.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing requirements (see form 38).

Your right to be a party to the proceedings in the Court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

Advice

If you have any questions about this notice, contact the Environment Court in Auckland, Wellington, or Christchurch.

Appendix A

Parties to be served notice of this appeal, and address for service. Service has been by way of email in the first instance.

Submitter	Postal Address	Email
Martin Kane	s 9(2)(a)	s 9(2)(a)
Wilfred Walsh	s 9(2)(a)	s 9(2)(a)
South Canterbury Chamber of Commerce..	s 9(2)(a)	s 9(2)(a)
Mackenzie Guardians Incorporated	s 9(2)(a)	s 9(2)(a)
Federated Farmers Of New Zealand Inc, Wellington	s 9(2)(a)	s 9(2)(a)
Fire Emergency New Zealand	Attn To: Lydia Shirley s 9(2)(a)	s 9(2)(a)
New Zealand Defence Force	Attn To: Lucy Edwards s 9(2)(a)	s 9(2)(a)
Glenmore Station Limited	s 9(2)(a)	s 9(2)(a)
Kevin Dunn	s 9(2)(a)	s 9(2)(a)
Electricity Ashburton Limited	s 9(2)(a)	s 9(2)(a)

Royal Forest & Bird Protection Society of NZ Incorporated	s 9(2)(a)	s 9(2)(a) z
Environmental Defence Society Incorporated	Attn To: Shay Schlaepfer s 9(2)(a)	s 9(2)(a)
Department of Conservation	Attn To: Herb Familton s 9(2)(a)	s 9(2)(a)
Annette & Michael Hamblett	s 9(2)(a)	s 9(2)(a)