

Nature in Court

Using litigation to achieve environmental outcomes

DAM BUSTING

An overview of Forest & Bird's case law themes

by Sally Gepp

With commentary by long-time adversary

Martin Williams





Themes

1. Conservation legislation – advancing protective interpretations
2. Public input into decision-making
3. Ensuring RMA applies to all resource use, development and protection
4. Biodiversity / Protection of significant natural areas / offsetting parameters
5. Implementation of protective environmental directions in higher order instruments



Conservation legislation – advancing protective interpretations

New Zealand's public conservation land is habitat for many native species, and its protection is critical to maintain indigenous biodiversity. These places are also special to New Zealanders and help define us. Forest & Bird seeks protect public conservation land from development that is incompatible with protection of the land's natural resources.

Ruahine Forest Park revocation and exchange (Ruataniwha Dam) (SC)

- Land exchange to enable Ruataniwha Dam. Required “specially protected” conservation park status to be revoked
- Issue whether the discretion to revoke was consistent with the purpose of the Act: Broad “overall” conservation purpose vs focus on the intrinsic values of the conservation land.
- SC: no assessment of whether land's intrinsic qualities warranted special protection, decision entirely driven by net benefit to conservation from proposed exchange, and therefore unlawful.

Te Kuha coal mine (CA decision. SC hearing was on 7 May)

- Open cast coal mine on local purpose (water conservation) reserve, requires an access arrangement from Buller DC.
- Does s 60 Crown Minerals Act “have regard to any matter the landowner considers relevant” override s 24 Reserves Act “administer the land to manage and protect ... scenic, historic, archaeological, biological, or natural features”?
- CA: No. S 60(2) is a permissive provision, clarifies that the CMA does not impose constraints on the landowner's decision on access. It does not oust the application of other legislation.



Majority Decision – Ruataniwha Dam

Subject to subsection (8), the Minister, *if satisfied that the intrinsic conservation merits of the land no longer warrant being held as a conservation park, ecological area, or for any other purpose specified under s 18(1)* may, by notice in the *Gazette*, vary or revoke the purpose, or all or any of the purposes, for which any land or interest held under subsection (1) is held; and it shall thereafter be held accordingly.



Public input into decision-making

Public input enables Forest & Bird to call expert evidence on the ecological values of areas, and the effect of a development proposal on those areas. Publicly-developed policies enable public influence into decision-making even where specific proposals are not publicly notified and guards against politicised/ad hoc decisions.

“Minor effects” notification threshold

- Kaimaumu wetland judicial review: kauri resin and wax mining proposal affecting over 400 ha of Northland’s second-highest ranking wetland. Notification decision challenged based on inadequate information, wrong legal test, failure to take into account relevant considerations (eg part of site in coastal environment). Consent surrendered.
- Remarkables wetland judicial review: destruction of an alpine wetland to construct a learner ski slope escalator. Decision challenged on basis effects on conservation disregarded on basis of DOC approval, policies misinterpreted. In progress.

Binding/strict applicability of policies in Policy Statements/Management Strategies that were publicly consulted on

- Ruahine Forest Park: SC held that Minister/ delegate were bound by s 17A to exercise the power to revoke protected status in accordance with the policies in the planning instruments formally adopted under the Act.



Ensuring RMA applies to all resource use, development and protection

The RMA enables environmental outcomes to be achieved in a way that other legislation may not, through public input into planning processes and the application of relatively stringent policy documents (c.f. Fisheries Act, Crown Pastoral Land Act etc)

Forest & Bird v Waitaki District Council [2012] NZEnvC 252

- Land freeholded following tenure review under the Crown Pastoral Land Act is not exempt from indigenous vegetation clearance rules.
- EC: The question is not whether the *process* of tenure review served a purpose consistent with the RMA (argued by Federated Farmers as justifying the exemption), but whether the *outcomes* of the tenure review process achieved the plan objective – evidence is they do not.

Attorney-General v Trustees of the Motiti Rohe Moana Trust [2017] NZHC 1429

- HC: the Fisheries Act does not purport to address, let alone control, all the effects of fishing on the wider environment (including people and communities). Sustainability more broadly defined in RMA. The Acts envisage parallel, complementary and overlapping management of fishing and the effects of fishing. A regional council may not control fishing to manage *the utilisation of fisheries resources* but can exercise functions *to maintain indigenous biodiversity* and in respect of *matters Māori*, provided they are not inconsistent with the special provision made for *Māori interests under the Fisheries Act*



Biodiversity / Protection of significant natural areas / offsetting parameters

This topic encompasses interpretation of key terms (protection, wetland, indigenous vegetation), implementation of section 6(c) and section 30/31 maintenance of indigenous biodiversity provisions

Sections 6(a) and (c): Identification of SNA, wetlands is separate to management implications

- *Friends of Shearer Swamp v West Coast Regional Council* [2010] NZEnvC 345; [2012] NZRMA 45 etc – Court declined to “filter” wetlands (eg top 20%). Significance is not relative in that way.
- *Forest & Bird v Auckland Council* [2018] NZHC 1069: decision not to include areas meeting SEA criteria in Auckland Unitary Plan due to “other planning imperatives” was error of law.

Identification and protection of SNAs

Royal Forest and Bird Protection Society of New Zealand Inc v New Plymouth District Council [2015] NZEnvC 219: Declaration regarding Council failure to identify SNAs in plan. EC: Councils might conceivably meet s 6(c) and 31(1)(b)(iii) duties through methods other than identification and rules, but in the circumstances, the non-regulatory methods relied on by NPDC were insufficient to provide protection.



Biodiversity / Protection of significant natural areas / offsetting parameters continued.

Offsetting and compensation

- *Forest & Bird v Buller DC and West Coast RC* [2013] NZHC 1346 (Denniston coal mine case): [122]... the RMA keeps separate the relevant consideration of mitigation of adverse effects caused by the activity for which resource consent is being sought, from the relevant consideration of the positive effects offered by the applicant as offsets to adverse effects caused by the proposed activity. (unsuccessful on other points of appeal)
- *Oceana Gold Ltd v Otago RC* [2019] NZEnvC 41 (Otago RPS) policies placing limits around what constitutes biodiversity offset and biodiversity compensation (appealed to HC by Oceana Gold)

Indigenous vegetation clearance rules

- Eg Whakatane DP (commercial firewood harvest within SNAs), Waitaki DP (no tenure review exemption), Invercargill CC (definition of indigenous vegetation)
- *Forest & Bird v Waitaki DC* [2012] NZHC 2096 (certificate of compliance judicial review): Council required to positively determine whether activities permitted in terms of indigenous vegetation clearance rule, rather than relying on assurances from applicant. Also outlined information requirements to support COC application.



Implementation of protective environmental directions in higher order instruments

New Zealand Coastal Policy Statement

- *Forest & Bird v Bay of Plenty Regional Council* [2017] NZHC 3080: infrastructure/biodiversity, landscape policies
- *Port Otago Ltd v Otago RC* [2018] NZEnvC 183 ports/biodiversity, landscape policies
- *Li v Auckland Council* [2018] NZEnvC 87 (Okura zoning): subdivision and urban development/biodiversity, landscape policies
- HC appeal of Board of Inquiry decision on East West Link: biodiversity policies in a resource consent/designation context (yet to be heard)

National Policy Statement for Freshwater Management

- *Hawke's Bay Fish & Game Council v HBRC* [2014] NZHC 3191 (Tukituki Plan Change 6 and Ruataniwha Water Storage Scheme): rule "deeming" compliance with in-stream limit did not achieve NPSFM
- Various appeals re Canterbury Regional Resource Management Plan: over-allocation, in-stream limits and loads, rule framework

RPS

- Declaration concerning Hutt City Council decision not to identify SNAs despite RPS requirement to do so (yet to be heard)

