

Before the Board of Inquiry
Waterview Connection Project

in the matter of: the Resource Management Act 1991

and

in the matter of: A Board of Inquiry appointed under s 149J of the Resource Management Act 1991 to decide notices of requirement and resource consents applications by the NZ Transport Agency in relation to the Waterview Connection Project

Comment on Draft Decision

Royal Forest and Bird Protection Society Inc

William L (Bill) McNatty

Dated: 22 June 2011

Hearing Date Start: 7 February 2011

William (Bill) L McNatty (bill@mcnatty.net)

McNatty Consulting and Contracting
99 Mill Rd, Helensville 0800 mob 021 0320423

Comment on Draft Decision of the Waterview Board of Inquiry

1. The Royal Forest and Bird Protection Society of New Zealand Inc. submits comment on the Draft Decision of the Waterview Board of Inquiry on the matters of compensation for adverse effects and historical compensation in relation to the coastal processes matters addressed in the hearings. The Society submits that the draft report and draft conditions contain oversights and errors in law.
2. In the Board's Draft Decision para 450¹, the case cited ***JF Investments Ltd v Queenstown-Lakes District Council***² includes a definition of "remedy" where the Board indicates that the matter raised of remedying historical adverse effects by the Society (FBMMRG) is not relevant to the Waterview embayment historical siltation.
3. The Board invited a specific response on the "sins of the father". The Society made a detailed submission response on that matter. The Society's submission response appears to have been substantially overlooked.
4. With due respect to the Board of Inquiry, the decision cited ***JF Investments Ltd v Queenstown-Lakes District Council*** is in the context of environmental compensation. The clause cited (21) draws on the definition of remedy from the Oxford Dictionary and then makes a conclusion in the context of environmental compensation.

[21] A 'remedy' is defined (relevantly) as [The New Zealand Oxford Dictionary OUP 2005].:

. 2 a means of counteracting or removing anything undesirable. 3 redress; legal or other reparation.

So the use of the word 'remedy' in section 5(2)(c) means that adverse effects of an activity may be allowed to occur as part of sustainable management if redress or reparation for those effects is later given. In fact, remedial work is directed less often than avoidance or mitigation. One of the few cases we can think of in which adverse effects were contemplated as possibly occurring and then required to be remedied is Alexandra District Flood Action Society

¹Waterview Connection Proposal Draft Decision para 450

² JF Investments Ltd v Queenstown-Lakes District Council Decision C28/2006

*Incorporated v Otago Regional Council*¹²⁸. There the Environment Court suggested rules whereby if (when) Alexandra is flooded by the Clutha River as a result of the Roxburgh Dam - for which consents were being sought - then the consent holder will compensate homeowners and other occupiers for the costs of flood damage and inconvenience. [Emphasis added]

5. The Society submits that the draft conditions still do not address the significant adverse effects of stormwater contamination to the CMA and any "redress or reparation for those effects".
6. Further in clause 23 of the **JF Investments** decision, it specifically includes historical adverse effects:

[23] The final part of section 5(2)(c) should also be read in a broad way. First, the remedying of adverse effects of 'activities on the environment' in section 5(2)(c) does not only refer to effects caused by the activity for which a resource consent is sought. We hold that the phrase refers also to adverse effects of other, including past, activities on the site and offsite on neighbouring parts of the relevant environment, area or landscape.

7. The Society considers that the Board should have directed that NZTA advance Mr McNatty's "suggestion" and confirmed that direction as a matter of law citing the **JF Investments** case, in relation to the historical contamination of the Coastal Marine Area along the path of the motorway. Mr Moores' evidence (NZTA) documented a significant discharge of zinc, copper and other contaminants into the CMA and the marine reserve that was and will be derived from the motorway and how this would continue even with the best methods for reducing those contaminants. Dr de Luca's evidence also confirmed the historical contamination of Waterview Bay (the CMA impounded by the motorway causeway) particularly adjacent to the motorway.
8. The Society submitted on these matters.
9. In addition, in the cross-examination of Mr Burn, Mr McNatty questioned whether NZTA (and its predecessors) had any consents for the discharge of contaminated stormwater from State Highway 16 into the Coastal Marine Area, and specifically the

Motu Manawa Marine Reserve. Mr Burn responded that he was not aware of any discharge consents for the motorway, other than those referred to in the AAE around the Patiki Rd off-ramps, the bus lanes, and Great North Rd. The witnesses for NZTA could not establish that Transit NZ and latterly NZTA had any consents (nor application for) for the period from 2001 to the present for this activity, although that is required by the Regional Land, Air and Water Plan. Neither could the Auckland Council confirm that any consents existed.

10. This apparent unconsented discharge makes the need for appropriate additional conditions to the coastal processes consents, addressing historical adverse effects all the more relevant and important.

11. We draw the Board's attention to draft decision para 449

We are not persuaded that the single survey proposed by Dr Bell and required by proposed condition C.15 will remedy or mitigate the adverse effects of concern, but shall not direct that the condition be deleted. Its findings may assist future management of the estuary in some small way. Rather, we consider that Mr McNatty's "suggestion" was more apposite to the extent that it contemplates an integrated suite of investigations as the basis for a remediation programme sometime in the future. However, that is not something we find it appropriate to charge NZTA with in the context of the present application.³ (Emphasis added)

12. The Society concurs with the Board's comment that a single survey is unlikely to achieve much in terms of addressing the historical and potentially on-going contamination of the CMA and Marine Reserve from State Highway 16/20.

13. In order to correct the oversight in terms of the pertinent matters in the **JF Investments** decision in Para 450, and a potential remedy or compensation which is alluded to in Para 449 (underlined), then the Society seeks the consideration of the additional condition proposed by Mr McNatty:

"An appropriately funded and managed programme that will ensure the reduction of contaminant levels within sediments of the Motu Manawa - Pollen Island Marine Reserve."

³ Waterview Connection Proposal Draft Decision para 449

14. But for that condition to be consistent with the ***JF Investments*** decision, then an expansion of the above clause or an additional condition is required to clarify a course of action should the reduction of contaminant levels in the Marine Reserve be unachievable. The Society submits that the Board insert the following additional clauses in the Coastal Processes section:

“NZTA fund and manage appropriately a programme that will ensure the reduction of contaminant levels within sediments of the Motu Manawa - Pollen Island Marine Reserve.

The proposed programme will be reviewed after 5 years from the start of this consent as to its practicability;, and should the reduction in contaminant levels be unachievable, then on the agreement of the NZTA, Auckland Council, Department of Conservation and the Royal Forest & Bird Protection Society a compensation programme to address the adverse effects on the marine reserve be submitted to the Court. ”

The Society thanks the Board for consideration of the above comments.

Dated 22 June 2011

Auckland

William L (Bill) McNatty

A handwritten signature in black ink, appearing to read 'William L McNatty', written in a cursive style.

Advocate

Royal Forest and Bird Protection Society Inc