

**BEFORE THE ENVIRONMENT COURT  
AT AUCKLAND**

**I TE KOTI TAIAO  
TAMAKI MAKAURAU ROHE**

**IN THE MATTER** of the Resource Management Act 1991

**AND IN THE MATTER** of an appeal under section 120 of the  
Resource Management Act 1991

**BETWEEN** **ROYAL FOREST AND BIRD  
PROTECTION SOCIETY OF NEW  
ZEALAND INCORPORATED**  
Appellant

**AND** **NORTHLAND REGIONAL COUNCIL**  
Respondent

**AND** **MERIDIAN ENERGY LTD**  
Applicant

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**NOTICE OF APPEAL BY THE ROYAL FOREST AND BIRD PROTECTION  
SOCIETY OF NEW ZEALAND INCORPORATED**

**14 October 2024**

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TO: The Registrar  
Environment Court  
Auckland

**NOTICE OF APPEAL BY THE ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED**

1. The Royal Forest and Bird Protection Society of New Zealand Incorporated (Forest & Bird) appeals the decision to grant applications by Meridian Energy Limited (Meridian) for resource consents associated with a solar farm at Marsden Point, Northland.
2. Forest & Bird submitted on the applications.
3. Forest & Bird received a notice of the decision on or about 23 September 2024.
4. Commissioners appointed by the Northland Regional Council made the decision on the resource consent applications (the Commissioners and the decision).
5. Forest & Bird is not a trade competitor for the purposes of 308D of the Resource Management Act 1991 (Act).
6. Forest & Bird appeals the parts of the decision that relates to wetlands. In particular, the parts of the decision that provide for the construction of the solar farm within wetlands (the wetlands) and the associated offset and compensation package.
7. The land affected is located at Marsden Point, Northland.<sup>1</sup>

**REASONS FOR APPEAL**

8. The decision allows for constructing the solar farm within wetlands (the wetlands). This will result in the loss of the wetlands, which is a significant adverse effect.
9. To allow the solar farm to be located in wetlands does not promote the sustainable management of natural and physical resources, is inconsistent with s 6(a) and (c) of the RMA, and will not achieve integrated management or maintain indigenous biodiversity as required by s30 RMA. It is also contrary to the New Zealand Coastal

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<sup>1</sup> The application is on three Sites which are described in the decision:

Site 1: SH15/Rama Road/Marsden Point Road

Site 2: SH15/McCathie Road

Site 3: McCathie Road/Marsden Point Road

Policy Statement (NZCPS), the National Policy Statement for Freshwater Management (NPSFM), the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 the Northland Regional Policy Statement (RPS) and the proposed Regional Plan for Northland.

10. The purpose of the Act is better met by preventing the solar farm and associated infrastructure locating within wetlands.
11. The particular grounds of appeal are set out below.

### **Wetlands incorrectly described**

12. These wetlands that will be lost are described in the decision, with reference to the Applicants ecologist, Dr Flynn, as follows: <sup>2</sup>

2.07 ha of open water bodies, including 1.11 ha of significant avifauna habitat; 0.75 ha of indigenous dune swale wetland, including 0.57 ha of significant indigenous wetland; and 13.7 ha of exotic-dominated dune swale wetland.

13. There was competing evidence before the Commissioners, who described the issue as:

41. A contested matter that remained live throughout was the question as to whether the Site 1 wetland comprises essentially a dune swale wetland as maintained by Dr Flynn and Ms Cook for MEL or is a dune slack wetland as maintained by Mr Warden for Council. It was common ground that Site 1 wetland(s) are highly dynamic and subject to significant variability.

42. The significance of that distinction is twofold –

(a) In terms of the relative rarity and irreplaceability of a dune slack wetland; and

(b) In terms of the calculated extent of such for the purpose of offsetting (acknowledging that Mr Warden considered offsetting inappropriate even adopting a much higher multiplier ratio than is proposed by MEL).

14. The Commissioners summarised Mr Warden's opinion as follows:

43. In brief, it was Mr Warden's opinion that the Site 1 wetland was, structurally and hydrologically, an interconnected mosaic rather than, as MEL proposed, a series of relatively discrete wetlands. He maintained that its significance was therefore independent of its

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<sup>2</sup> Paragraph 11

current poor ecological health – noting its potential for future restoration and conservation in line with the requirements of the NPS-FM and Te Mana o te Wai hierarchy which prioritises the health and well-being of water bodies and freshwater ecosystems. It was also evident that Mr Warden had little confidence in the efficacy of offset regimes.

44. Based on his attribution of a dune slack wetland with associated vegetation, Mr Warden had estimated the true extent to be closer to 29-30 ha rather than MEL's 19 ha. In part that difference of opinion was due to a disagreement about what constituted the normal hydrological conditions for the purpose of the wetland delineation exercise (which we discuss further below).

15. The Commissioners erred when they preferred the evidence of Dr Flynn over that of Mr Warden.

16. The wetlands are more valuable and larger than the Commissioners concluded.

#### **No functional need to locate in wetlands**

17. The solar farm does not have a functional need to be located within the wetlands.

18. The Commissioners correctly noted that a key matter for determination was “*whether the application satisfies the minimum requirements for consideration of a grant of consent, being the four conjunctive tests of cl.3.22(1)(b) of the NPS-FM*”, including whether there is a functional need for the specified infrastructure in that location.<sup>3</sup>

19. Clause 45(6) of the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 provides a requirement for “functional need for the specified infrastructure in that location” before the discretionary consent required by Clause 45(1) can be granted<sup>4</sup>.

20. The Commissioners correctly identified the relevant definition as set out in Clause 3.21 of the NPS-FM:

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<sup>3</sup> Paragraph 64

<sup>4</sup> At paragraph 18 of the decision, the panel identified that discretionary consent was required under Clause 45(1),

means the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment; and

21. The High Court in *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* described the words “can only occur” as establishing a high threshold,<sup>5</sup> and the focus in the definition is the need for an activity to locate in a “particular environment,” rather than a particular location.<sup>6</sup>

22. The definition of “functional need” does not include consideration of “technical, logistical or operational characteristics” found in the definition of “operational need” under the National Planning Standards 2019:

**Operational need** means the need for a proposal or activity to traverse, locate or operate in a particular environment because of technical, logistical or operational characteristics or constraints.

23. The Commissioners considered that the availability of an existing grid substation was an important consideration that got the application “*over the functional need line*”:

72. The Panel questioned this matter closely and have concluded in agreement with Ms Appleyard. Whilst we accept that the additional cost to a project from the requirement to construct significant new and additional infrastructure such as a substation may not, itself, get a project over the functional need line, in this instance the availability of an existing grid substation facility clearly represents both efficient use of infrastructure and avoids the effects that might be created by establishing such elsewhere.

24. The Commissioners erred. These matters go to operational not functional need.

25. The Commissioners also found that caselaw requires a strict interpretation of functional need is not required:

73. That finding is consistent with caselaw which, in short, establishes that a strict interpretation of the phrase is not required, any more than it is required to demonstrate that the specific location is the only conceivable location.

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<sup>5</sup> *Poutama Kaitiaki Charitable Trust and D & T Pascoe v Taranaki Regional Council* [2022] NZHC 629, at [48]

<sup>6</sup> *Poutama Kaitiaki Charitable Trust and D & T Pascoe v Taranaki Regional Council* [2022] NZHC 629, at [53]

26. The Commissioners did not refer to the caselaw they were relying on. The Commissioners erred. The caselaw provides that functional need is a high threshold.
27. The solar farm does not have a functional need to locate within the wetlands and therefore should be prevented from doing so.

### **Wetlands in the coastal environment**

28. The wetlands are outside the mapped area of the coastal environment as set out in the Northland Regional Policy Statement. However, the wetlands are within the coastal environment when Policy 1 of the NZCPS is properly applied.
29. The mapping within the RPS is not definitive of the boundary of the coastal environment. In *Burgoyne v Northland Regional Council*,<sup>7</sup> the Environment Court applied the NZCPS to the Kaimaumau-Motutangi Wetland in Northland. This was the case despite parts of the wetland in question being outside the mapped area of the coastal environment in the Northland Regional Policy Statement.
30. The application is contrary to NZCPS, including Policies 1, 3, 11, and 13.

### **RELIEF SOUGHT**

31. Forest & Bird seeks the following relief:
- a. That conditions are imposed, or the consent otherwise declined or amended to prevent the solar farm from locating within the wetlands.
  - b. Costs.

### **ATTACHMENTS**

32. The following documents are attached to this notice of appeal:
- a. A copy of the decision;
  - b. A list of names and addresses of persons to be served with a copy of this notice; and
  - c. A copy of Forest & Bird's original submission.

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<sup>7</sup> [2019] NZEnvC 28 at [17]-[23]

Dated 14 October 2024

A handwritten signature in black ink, appearing to read 'Anderson', is centered within a light gray rectangular box.

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## **Advice to recipients of copy of notice**

How to become party to proceedings

You may be a party to the appeal if, -

- (a) within 15 working days after the period for lodging a notice of appeal ends, you lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court and serve copies of your notice on the relevant local authority and the appellant; and
- (b) within 20 working days after the period for lodging a notice of appeal ends, you serve copies of your notice on all other parties.

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.

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).

How to obtain copies of documents relating appeal

The copy of this notice served on you does not attach a copy of the relevant application and relevant decision. These documents may be obtained, on request, from the appellant.

Advice

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